Simon's First-tier Tax Decisions/Simon's First-tier Tax Decisions 2010/Flaxmode Ltd v Revenue and Customs Commissioners - [2010] SFTD 498

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Flaxmode Ltd v Revenue and Customs Commissioners

[2010] UKFTT 28 (TC)

FIRST-TIER TRIBUNAL (TAX)

JUDGE TILDESLEY

6 NOVEMBER 2009, 13 JANUARY 2010

Penalty – Notice – Failure to comply with notice to produce documents – Taxpayer failing to produce documents and information specified in notice – Officer imposing penalty at daily rate – Whether decision to impose penalties a 'criminal charge' – Taxes Management Act 1970, ss 19A, 97AA(1)(b) – Human Rights Act 1998, Sch 1, Pt I, art 6.

The taxpayer was a partnership and appealed against penalties issued by **the Revenue** in respect of its failure to comply with notices issued under s 19A(2)[a] of the Taxes Management Act 1970 requiring the provision of specified documents and particulars with regard to its tax returns for tax years 2003–04, 2004–05 and 2005–06. The penalties were daily penalties issued under s 97AA(1)(b)[b] of the 1970 Act. The taxpayer did not appeal against the issue of the s 19A(2) notices. The dispute concerned, inter alia, the issue whether the penalty determinations under s 97AA(1)(b) of the 1970 Act were criminal charges within the meaning of case law on art 6[c] of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Pt I of Sch 1 to the Human Rights Act 1998). The taxpayer argued that the judgment in *Pipe v Revenue and Customs Comrs* [**2008**] **STC** 1911 could be applied and that a s 97AA(1)(b) penalty constituted a criminal offence which engaged art 6(3) of the Convention: the penalty had a distinct and substantial punitive and deterrent element; the amount imposed could become substantial over a relatively short period of time; **the Revenue** had discretion on the amount of the penalty levied; and a positive decision was required on behalf of **the Revenue** to impose the penalty. **The Revenue** contended that the Convention did not apply to daily penalties under s 97AA(1)(b): the ruling in *Pipe* on the applicability of the Convention to daily penalties under s 93 was obiter and the facts of this case could be distinguished; the proceedings were classified as civil for domestic purposes; the nature of the contravention under a s 19A notice did not involve proof of any qualitative misconduct on the part of the taxpayer; and the penalties imposed under s 97AA(1)(b) were not tax-geared but based on a daily rate.

Held – The concept of a criminal charge under art 6 had an autonomous Convention meaning. The starting point was to examine the contravention under s 97AA(1)(b) against the three cumulative criteria for determining a criminal charge within the meaning of the Convention: (a) the classification of the proceedings in domestic law; (b) the nature of the offence; and (c) the

[a] Section 19A is set out at [8], below.

[b] Section 97AA is set out at [7], below.

[c] Article 6, so far as material, is set out at [41], below.

nature and degree of severity of the penalty that the person concerned risked incurring. A daily penalty under s 97AA(1)(b) TMA 1970 was classified as civil in United Kingdom legislation and the contravention giving rise to it comprised a failure to produce with no overtones of criminal or negligent misconduct. Further, the penalty's primary objective was to remedy the default rather than to punish and deter, and the quantum was modest. The requirement of a positive decision before the imposition of the penalty was not unique to criminal cases. It followed that a daily penalty under s 97AA(1)(b) was not a criminal charge within the meaning of art 6 of the Convention. The appeal would therefore be dismissed (see [29], [39], [68], below).

Customs and Excise *Comrs v Han* [2001] **STC** 1188 at [26] applied. *Pipe v Revenue and Customs Comrs* [**2008**] **STC** 1911 and *Sharkey v Revenue and Customs Comrs* [2006] **STC** 2026 considered.

Notes

For penalties for failure to produce documents, see Simon's Taxes A4.509.

For article 6 in relation to tax cases, see Simon's Taxes A2.311, A2.312.

For the Taxes Management Act 1970, ss 19A, 97AA, as they were at the material time, see the Yellow Tax Handbook 2005–06, part 1a, pp 57, 137. Sections 19A and 97AA were repealed with effect from 1 April 2009 by the Finance Act **2008**, s 113.

For the Human Rights Act 1998, Sch 1, Pt I, art 6, see the Yellow Tax Handbook 2009–10, part 1a, p 2406.

Cases referred to in decision

AP, MP and TP v Switzerland (1997) 26 EHRR 541, ECt HR.

Brozicek v Italy (1989) 12 EHRR 371, ECt HR.

Craven (Inspector of Taxes) v White; IRC v Bowater Property Developments Ltd; Baylis (Inspector of Taxes) v Gregory [1987] **STC** 297, [1989] AC 398, [1987] 3 All ER 27, 62 TC 1, CA; *affd* [1988] **STC** 476, [1989] AC 398, [1988] 3 All ER 495, 62 TC 1, HL.

Engel v Netherlands (No 1) (Applications 5100/71, 5101/71, 5102/71) (1976) 1 EHRR 647, ECt HR.

Fleming (Inspector of Taxes) v London Produce Co Ltd [1968] 1 WLR 1013, [1968] 2 All ER 975, 44 TC 582.

Customs and Excise *Comrs v Han* [2001] EWCA Civ 1040, [2001] **STC** 1188, [2001] 1 WLR 2253, [2001] 4 All ER 687, 3 ITLR 873.

King v Walden (Inspector of Taxes) [2001] **STC** 822, 74 TC 45, 3 ITLR 682, [2001] BPIR 1012.

Lauko v Slovakia (1998) 33 EHRR 994, ECt HR.

Pipe v Revenue and Customs Comrs [**2008**] EWHC 646 (Ch), [**2008**] **STC** 1911.

Sharkey v Revenue and Customs Comrs [2006] EWHC 300 (Ch), [2006] **STC** 2026, 77 TC 484.

Szott-Medynska v Poland (9 October 2003, unreported), ECt HR.

Roger Bibby, of WestTax Taxation Consultants, for the taxpayers.

Adam Tolley (instructed by the *Solicitor for Revenue and Customs*) for **the Revenue**.

13 January 2010. The following decision was released.

Judge Tildesley.

The appeal

[1] The appellant was a partnership. It was appealing against 16 penalties issued by **HMRC** in respect of its failure to comply with various notices issued under s 19A(2) of the Taxes Management Act 1970 ('TMA 1970') requiring the provision of specified documents and particulars with regard to its tax returns.

[2] The penalties concerned three different tax years, 2003–04, 2004–05 and 2005–06. Fourteen penalties related to daily penalties issued under s 97AA(1)(b) of TMA 1970. The remaining two penalties concerned the fixed penalty of £50 issued under s 97AA(1)(a) of TMA 1970. The appellant indicated at the hearing that it was no longer appealing against the two penalties under s 97AA(1)(a).

[3] The appellant has already appealed against earlier daily penalties under s 97AA(1)(b) of TMA 1970 in respect of tax years 2003–04 and 2004–05. The appeal was dismissed by Special Commissioner Charles Hellier on 15 January **2008** (see [**2008**] **STC** (**SCD**) **666**).

[4] These appeals related to different penalties albeit some were issued in respect of the same tax years considered by Special Commissioner Hellier. The appellant was, however, raising new issues in this appeal from those heard on 15 January **2008**. The principal new issue arose from the High Court decision in *Pipe v Revenue and Customs Comrs* [**2008**] EWHC 646 (Ch), [**2008**] **STC** 1911 concerning the application of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ('ECHR') (as set out in the Human Rights Act 1998, Sch 1, Pt I) to daily penalties, which was not considered by Special Commissioner Hellier, whose decision was released before the publication of *Pipe.*

[5] The appellant has not appealed against the issue of the s 19A(2) notices. Further the appellant accepted that it had not supplied the information sought by the relevant s 19A notice at the time the penalties were notified.

The dispute

[6] The dispute concerned four separate issues which were:

(1) Were the penalty determinations under s 97AA(1)(b) of TMA 1970 *criminal charges* within the meaning of Strasbourg case law?

(2) If *criminal charges*, did the penalty determinations comply with art 6(3)(a) of the ECHR (minimum rights for criminal charges)?

(3) Did the penalty determinations meet the requirements of s 100(1) of TMA 1970?

(4) Did the appellant have a reasonable excuse in respect of the penalties dated 26 March **2008** and 25 April **2008**?

Legislation

[7] Section 97AA of TMA 1970 provides as follows so far as was relevant to the appeal:

> **'97AA Failure to produce documents under section 19A**
>
> (1) Where a person fails to comply with a notice or requirement under section 19A(2) … of this Act … he shall be liable, subject to subsection (4) below—
>
> (a) to a penalty which shall be £50, and
>
> (b) if the failure continues after a penalty is imposed under paragraph (a) above, to a further penalty or penalties not exceeding the

> relevant amount for each day on which the failure continues after the day on which the penalty under that paragraph was imposed (but excluding any day for which a penalty under this paragraph has already been imposed).
>
> (2) In subsection (1)(b) above "the relevant amount" means—
>
> (a) in the case of a determination of a penalty by an officer of the Board under section 100 of this Act, £30;

(b) in the case of a determination of a penalty by the Commissioners under section 100C of this Act, £150.

(3) An officer of the Board authorised by the Board for the purposes of section 100C of this Act may commence proceedings under that section for any penalty under subsection (1)(b) above, notwithstanding that it is not a penalty to which subsection (1) of section 100 of this Act does not apply by virtue of subsection (2) of that section.

(4) No penalty shall be imposed under subsection (1) above in respect of a failure within that subsection at any time after the failure has been remedied.'

[8] Section 19A of TMA 1970 provides:

'19A Power to call for documents for purposes of certain enquiries

(1) This section applies where an officer of the Board gives notice of enquiry under section 9A(1) or 12AC(1) of this Act to a person ("the taxpayer").

(2) For the purpose of the enquiry, the officer may at the same or any subsequent time by notice in writing require the taxpayer, within such time (which shall not be less than 30 days) as may be specified in the notice—

(a) to produce to the officer such documents as are in the taxpayer's possession or power and as the officer may reasonably require for the purpose of determining whether and, if so, the extent to which—

(i) the return is incorrect or incomplete, or

(ii) in the case of an enquiry which is limited under section 9A(5) or 12AC(5) of this Act, the amendment to which the enquiry relates is incorrect, and

(b) to furnish the officer with such accounts or particulars as he may reasonably require for that purpose.'

[9] There are two aspects of s 19A to be noted. First, that it applies only where notice of enquiry has been given: if it has not been given any requirement purportedly under s 19A(2) is not a 'requirement under section 19A(2)' and so no penalty can arise under s 97AA(1). Second, the person to whom the requirement may be addressed is the person to whom the enquiry notice was given and no other.

[10] Section 12AC of TMA 1970 Act provides:

'(1) An officer of the Board may enquire into a partnership return if he gives notice of his intention to do so ("notice of enquiry")—

(a) to the partner who made and delivered the return, or his successor,

(b) within the time allowed'.

[11] Section 100 of TMA 1970 specifies that:

'100 Determination of penalties by officer of Board

(1) Subject to subsection (2) below and except where proceedings for a penalty have been instituted under section 100D below … an officer of the

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

…

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

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

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

The facts

[12] **HMRC** sent partnership tax returns for the years ended 5 April 2004 and 5 April 2005 to 'J and A Gibbins'.

[13] The 2003–04 and 2004–05 returns were received by **HMRC** on 31 January 2005 and 1 February 2006 respectively. The returns indicated that **Flaxmode** Ltd was the nominated partner (being the partner nominated by the other partners in accordance with the rules on the return given with the notice on the return).

[14] On 7 November 2005 and 22 September 2006 an officer of **HMRC** wrote to each of the partners advising them of **HMRC**'s intention to enquire respectively into the 2003–04 and 2004–05 returns with a copy to the agent.

[15] On 20 December 2005 and 24 October 2006 an officer of **HMRC** sent a s 19A notice to Mr JCM Gibbins (who was not the nominated partner) asking for documents and particulars within 30 days with a copy to the agent. The information requested was:

(1) Final figures to replace the provisional figures on the tax return.

(2) The accounts and capital computation for the specific year in question.

[16] On 1 March 2007 an officer of **HMRC** wrote two letters to the company secretary of **Flaxmode** Ltd (the nominated partner) requiring specified documents and particulars under s 19A, one letter in respect of 2003–04 and the other for 2004–05, since the letter dated 7 November 2005 and 22 September 2006 had not been sent to the nominated partner. **Flaxmode** Ltd did not appeal the notices.

[17] On 1 May 2007, 5 June 2007, 6 July 2007 and 7 August 2007, **HMRC** issued daily penalty notices against the appellant, pursuant to s 97AA(1)(b). Further penalties were issued on 6 September 2007 and 9 October 2007. On each occasion, letters had previously been sent warning of the risk of continuing penalties. Appeals were received in respect of each penalty notice.

[18] The appellant appealed against the penalty determinations under s 97AA on the ground that no notice of enquiry had been served on the nominated partner in compliance with s 12AC(1). As a result, the requirement under s 19A could not take effect and no penalty could be due under s 97AA. The appellant contended that the letter it received was merely a courtesy letter, not a notice

under s 12AC(1). **HMRC** submitted, on the other hand, that the letter to the taxpayer was a notice of enquiry within s 12AC(1) and that the subsequent letter requiring documents and particulars was a valid notice of requirement within s 19A.

[18] Special Commissioner Hellier on 15 January **2008** dismissed the appeals. He held that the purpose of a notice under s 12AC was to provide the nominated partner with a warning or intimation of an enquiry. That did not require particular formality: all that was needed was something in writing which informed the taxpayer that an enquiry was underway. Thus, a letter which announced an intention to enquire into a tax return was sufficient to be a notice for the purposes of s 12AC. The letter received by the appellant was quite clear: it could not have been in doubt that the officer intended to enquire into the returns. Accordingly, a notice of enquiry under s 12AC was served on the taxpayer.

[19] Further penalties under s 97AA(1)(b) in respect of tax years 2003–04 and 2004–05 were issued on 8 November 2007, 11 December 2007, 10 January **2008**, and 21 February **2008**.

[20] The appellant complied with the request for documents contained in the letter of 1 March 2007 in respect of year 2003–04 on 25 March **2008**. A separate s 19A notice was issued on 12 May **2008** in respect of 2003–04 requesting further information following from that supplied on 25 March **2008**. That notice was not complied with and a penalty under s 97AA(1)(a) was issued on 9 July **2008** in respect of that failure. The appellant has withdrawn its appeal against that penalty.

[21] The information requested for 2004–05 has still not been provided. As a result additional daily penalties have been issued on 26 March **2008**, 25 April **2008** and 29 May **2008**.

[22] On 1 December 2007 a s 19A notice was issued in respect of tax year 2005–06. The notice of enquiry under s 12AC TMA 1970 for this tax year was sent to the nominated partner. Penalties under s 97AA(1)(b) have been imposed for the appellant's failure to comply with the 1 December notice on 26 March **2008**, 25 April **2008** and 29 May **2008**.

[23] The penalties under appeal are as follows:

Date of penalty notice	**Accounting year**	**Penalty under s 97AA(1)(b) (£)**
8 November 2007	2003–04	900 (30 days)

8 November 2007	2004–05	900 (30 days)
11 December 2007	2003–04	990 (33 days)
11 December 2007	2004–05	990 (33 days)
10 January **2008**	2003–04	900 (30 days)
10 January **2008**	2004–05	900 (30 days)
21 February **2008**	2003–04	1,260 (42 days)
21 February **2008**	2004–05	1,260 (42 days)
26 March **2008**	2004–05	1,020 (34 days)
26 March **2008**	2005–06	1,020 (34 days)
25 April **2008**	2004–05	900 (30 days)
25 April **2008**	2005–06	900 (30 days)
29 May **2008**	2004–05	1,020 (34 days)
29 May **2008**	2005–06	1,020 (34 days)

Dispute one: Were the penalty determinations under s 97AA(1)(b) of TMA 1970 *criminal charges* within the meaning of Strasbourg case law?

Parties' submissions

[24] The appellant argued that a s 97AA(1)(b) penalty constituted a criminal offence which engaged art 6(3) of the ECHR. The appellant relied on the judgment of Henderson J in *Pipe v Revenue and Customs Comrs* [**2008**] **STC** 1911 for its contention that the ECHR applied to penalties imposed under s 97AA(1)(b).

[25] At paras [55] and [56] of the decision Henderson J stated that:

> 'In view of the conclusion which I have reached, it is strictly unnecessary for me to decide whether the taxpayers were indeed "charged with a criminal offence" within the meaning of art 6(3). However, as the point was fully argued I will briefly express my view. In the light of the guidance in *Han* and *King v Walden*, I consider that continuing daily penalties imposed pursuant to a direction under s 93(3) are penalties imposed for a criminal offence within the autonomous Convention meaning of art 6(3). Such penalties do, in my judgment, have a distinct and substantial punitive and deterrent element, as well as the administrative purpose of securing belated compliance with the taxpayers' obligations. The punitive element is brought out by the discretion as to the amount of the penalties, subject only to the upper limit of £60 a day, and the fact that the amount of the penalty imposed for each default can become quite substantial over a fairly short period (for example 30 days at a daily rate of £60 makes a total of £1,800, and as the present case shows one such penalty may be imposed for each outstanding return). In addition, the need for **HMRC** to make a positive decision to impose daily penalties, and the need (in the context of s 93) to obtain a prior direction from the Commissioners, are in my view pointers towards the same conclusion.
>
> I cannot accept Mr Brennan's submission that the penalties are simply an administrative means of securing production of the returns, and in my judgment the decision of Etherton J in *Sharkey v Revenue and Customs Comrs* [2006] EWHC 300 (Ch), [2006] **STC** 2026 (with which I respectfully agree) is clearly distinguishable. The fixed penalties in issue in that case were automatic, small in amount, and (as the judge pointed out) were not necessarily a prelude to further daily penalties. They could therefore properly be regarded as primarily an administrative spur to encourage compliance'.

[26] The decision in *Pipe* was concerned with a daily penalty under s 93 TMA 1970 for failure to submit a tax return. The appellant contended that Henderson J's rationale applied equally to a daily penalty under s 97AA(1)(b). The appellant asserted that s 97AA(1)(b) penalties were similarly criminal in nature in that they have a distinct and substantial punitive and deterrent element and that the amount imposed can become substantial over a relatively short period of time. Finally discretion was given to **HMRC** on the amount of the penalty levied, and a positive decision was required on behalf of **HMRC** to impose them.

[27] **HMRC** contended that the ECHR did not apply to daily penalties under s 97AA(1)(b). Counsel for **HMRC** submitted that Henderson J's ruling on the applicability of the ECHR to daily penalties under s 93 was obiter. Further counsel argued that the facts of this appeal were distinguishable from those in *Pipe,* and as a result Henderson J did not consider particular features peculiar to s 97AA(1)(b) penalties. Counsel pointed out that a s 97AA(1)(b) penalty, unlike a daily penalty under s 93, did not require confirmation by a tribunal (the former general commissioners). Finally counsel suggested that Henderson J overlooked the fact that the failure to produce documents under s 19A did not depend upon some dishonest or criminal conduct on the part of the taxpayer. This was relied upon by Etherton J in *Sharkey v Revenue and Customs Comrs* [2006] EWHC 300 (Ch), [2006] **STC** 2026, 77 TC 484 when holding that a fixed penalty under s 97AA(1)(a) was not criminal in nature.

[28] Counsel for **HMRC** concluded that a s 97AA(1)(b) penalty did not amount to a criminal charge under art 6 of the ECHR. The proceedings were classified as civil for domestic purposes. The nature of the contravention under a s 19A notice did not involve proof of any qualitative misconduct on the part of the taxpayer. The penalties imposed under s 97AA(1)(b) were not tax-geared but based on a daily rate.

Consideration

[29] The concept of a criminal charge under art 6 has an autonomous ECHR meaning. The tribunal's starting point is to examine the contravention under s 97AA(1)(b) against the three criteria for determining a criminal charge within the meaning of the ECHR. The Court of Appeal in ***Customs and Excise*** *Comrs v Han* [2001] EWCA Civ 1040 at [26], [2001] **STC** 1188 at [26], [2001] 1 WLR 2253 identified the criteria as:

> 'There are effectively three criteria applied by the Strasbourg court in order to determine whether a criminal charge has been imposed (see *Engel* and, more recently, *AP, MP and TP v Switzerland* (1997) 26 EHRR 541 at 558, para 39). They are: (a) the classification of the proceedings in domestic law; (b) the nature of the offence; and (c) the nature and degree of severity of the penalty that the person concerned risked incurring. The Strasbourg court does not in practice treat these three requirements as analytically distinct or as a “three stage test”, but as factors together to be weighed in seeking to decide whether, taken cumulatively, the relevant measure should be treated as “criminal”. When coming to such decision in the course of the court's “autonomous” approach, factors (b) and (c) carry substantially greater weight than factor (a)'.

[30] A s 97AA(1)(b) penalty is classified as civil proceedings in UK legislation. The nature of the offence under s 97AA(1)(b) involves no proof of qualitative misconduct on the part of the taxpayer. No allegation of dishonesty or even

negligent conduct has to be established against the taxpayer. All that is necessary to contravene the section is a failure to produce the information sought in the relevant notice. The penalty itself for a daily contravention is modest. The penalty only becomes substantial if the taxpayer persistently fails to provide the required information. Further there is no power to impose a penalty once the taxpayer has provided the information.

The officer determining the penalty has discretion about the imposition of the daily penalty, and its amount. In this appeal **HMRC** did not issue penalties on a day-by-day basis, but gave the appellant periods of at least 30 days in which to comply with the s 19A notices before any penalty was issued.

[31] A s 97AA(1)(b) penalty does not have in common many of the features which led the High Court in *King v Walden (Inspector of Taxes)* [2001] **STC** 822, 74 TC 45, and the Court of Appeal in *Han* to deciding that specific tax-geared penalties under TMA 1970 and the Value Added Tax Act 1994 ('VAT Act 1994') respectively were criminal offences.

[32] In *King v Walden* the penalty under consideration was for fraudulent or negligent delivery of incorrect returns or statements. Jacob J held (at para 71) that the penalty was criminal because:

> 'In my judgment the system of imposition of penalties for fraudulent or negligent delivery of incorrect returns or statements is “criminal” for the purposes of art 6(2). I so hold for the following reasons: (a) Plainly the system is intended to punish the defaulting taxpayer and to operate as a deterrent. (b) The amount of fine is potentially very substantial. (c) The amount of fine is not related to any administrative matter. In particular the fine is not limited to the administrative and other extra cost of dealing with the taxpayer concerned. (Curiously I suspect the cost to the state of dealing with Mr King, taking into account **the Revenue**'s internal costs as well as the cost of the commissioners greatly exceeds the fine actually imposed, namely £58,000). (d) The amount of fine imposed depends upon the degree of culpability of the taxpayer, the less culpable the more mitigation there is. Mitigation is an essentially criminal rather than civil consideration. (e) It is accepted that generally (leaving out of account s 46(2) and s 101) it is not for the taxpayer to show that the determination of penalties was wrong. On appeal the burden of proof lies on the Crown. In this regard there is a clear distinction between a penalty determination and an appeal against ordinary assessment where the burden of showing it was wrong lies on the taxpayer'.

[33] In *Han* the Court of Appeal held that a penalty for evading VAT as a result of dishonest conduct under s 60 VAT Act 1994 was criminal. Potter LJ placed weight on the fact that the circumstances giving rise to a s 60 penalty could equally form the basis of a criminal prosecution under s 72 of the 1994 Act. Further Potter LJ considered that the penalty must be substantial and its purpose punitive and deterrent in order to be classed as criminal within the Strasbourg authorities (see [2001] **STC** 1188 at [72]–[73], [2000] 1 WLR 2253 at [72]–[73]).

[34] Although Etherton J in *Sharkey* [2006] **STC** 2026 restricted his findings to a fixed penalty under s 97AA(1)(a), the tribunal considers that his analysis on the offence and the purpose of the penalty applied equally to a s 97AA(1)(b) penalty. Both penalties are imposed for the same contravention by a taxpayer, namely, a failure to produce documents in accordance with a s 19A notice

which does not depend upon some dishonest or criminal conduct. Etherton J acknowledged this at para [35] of his decision with reference to the penalties:

> 'The penalties under s 97AA for failure to produce documents under s 19A do not depend upon some dishonest or criminal conduct on the part of the taxpayer, or even a belief or mere suspicion by **the Revenue** of any such dishonest or criminal conduct. They are wholly independent of any prosecution, or intended prosecution or enquiry into dishonest or criminal conduct'.

[35] No penalty may be imposed under either subsection of s 97AA(1) after the taxpayer remedies the default in respect of the documents. This appeared to be the reason for Etherton J holding that the primary

purpose of a s 97AA(1)(a) penalty is to procure the production of documents. The tribunal considers that the same reasoning applies to a s 97AA(1)(b) penalty. At para [37] Etherton J said:

> 'Further, I accept the submission of Mr Ward that the function of the £50 fixed penalty under TMA, s 97AA is not merely punishment and deterrence. He accepts that there is an element of punishment, but he submits, and I agree, that the primary objective of the £50 fixed penalty is to procure the production of the documents requested by **the Revenue**: cf *Lauko v Slovakia, Han,* and *Szott-Medynska v Poland* (9 October 2003, unreported). Mr Ward points out, for example, that TMA, s 97AA(4) expressly provides that no penalty shall be imposed under s 97AA(1), in respect of a failure within that subsection, at any time after the failure has been remedied'.

[36] It follows from the above analysis that a s 97AA(1)(b) penalty does not meet the first two criteria of a criminal charge under the ECHR. It appears that Henderson J in *Pipe* placed weight on the third criterion, the nature and the severity of penalty, when he decided that a daily penalty under s 93 TMA 1970 was a criminal charge. This tribunal agrees with **HMRC** that Henderson J's ruling was obiter, and did not have direct application to a daily penalty for failure to produce documents. This tribunal, however, would question whether the third criterion can be determinative of the question whether a penalty is a criminal charge, particularly when the other two criteria point in the opposite direction. The Court of Appeal described the three-criteria test as cumulative which suggests to the tribunal that no single criterion can decide the question of criminal charge.

[37] Regardless of the correct construction of the three-criteria test, the tribunal decides that the primary objective of a s 97AA(1)(b) penalty is to procure production of documents with deterrence and punishment playing a subordinate role. The daily penalty in itself is modest, and lower than the fixed penalty when imposed by an **HMRC** officer. The fact that the number of daily penalties can increase if the taxpayer persistently defaults with his obligation to provide documents does not in the tribunal's view alter the fundamental modest nature of the penalty. Thus the tribunal finds that a s 97AA(1)(b) penalty does not meet the third criterion.

[38] Henderson J in reaching his decision that a s 93 daily penalty was criminal in nature was influenced by the fact that a penalty could only be imposed after a positive decision by **HMRC** and the need to obtain a prior direction from the commissioners. A s 97AA(1)(b) penalty also requires a positive decision but not prior approval of a judicial body. This tribunal is not

persuaded that the feature of a positive decision is unique to criminal offences, and in the circumstances of this appeal is not sufficient to render a s 97AA(1)(b) penalty criminal.

[39] The tribunal finds that a daily penalty under s 97AA(1)(b) is classified as civil in UK legislation and the contravention giving rise to it comprises a failure to produce with no overtones of criminal or negligent misconduct. Further the penalty's primary objective is to remedy the default rather than to punish and deter, and the quantum is modest. Thus the tribunal holds that a s 97AA(1)(b) penalty is not a criminal charge within the meaning of the ECHR.

Dispute two: Did the penalty determinations comply with art 6(3) of the ECHR

Parties' submissions

[40] In view of its finding under the first dispute, the tribunal is not required to consider whether the s 97AA(1)(b) penalties are compliant with art 6(3) of ECHR. **HMRC** counsel, however, presented its case in the alternative that if art 6 applied, the penalties met the requirements of art 6(3).

[41] The appellant alleged that only art 6(3)(a) had been breached. Article 6(3) provides minimum rights for persons facing criminal charges. Article 6(3)(a) requires:

> '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'.

[42] The appellant presented various distinct arguments in support of its contention that **HMRC** had not complied with art 6(3)(a):

> (1) ***Argument one (applying to tax years 2003–/04 and 2004–05)***: **HMRC** Manual EM 7042 indicated that a notice of enquiry under s 12AC TMA 1970 was issued as part of a statutory function and implied that the notice has a degree of 'formality' as the accompanying letters to partners other than the nominated partner have no statutory function and were issued as a matter of good customer service. As the letter opening the enquiries for the years 2003–04 and 2004–05 did not comply with the terms of EM 7042 which **HMRC** have taken on itself by publishing in the public domain the enquiries for both years were invalid ab initio and all penalties levied subsequently were unlawful and should be struck down. This interpretation should be applied to give proper effect to the municipal legislation under s 3(1) Human Rights Act 1998 having regard to art 6(3). The appellant was entitled to rely on EM 7042 as a shield and the wording of the manual indicated that the notice of enquiry should be 'formal' in nature. The issue of notices under s 12AC TMA 1970 to JCM Gibbins instead of to **Flaxmode** Ltd could not be saved by s 114(2)(a) TMA 1970. The principles established in *Fleming (Inspector of Taxes) v London Produce Co Ltd* [1968] 2 All ER 975, [1968] 1 WLR 1013 and *Bayliss v Gregory* [1987] **STC** 297 at 322–324, [1989] AC 398 at 435–437 were relied on. A notice issued to the wrong person was too fundamental in nature to be capable of correction in this manner.
>
> (2) ***Argument two (applying to all tax years in dispute)***: The penalty notices and preliminary letters have not referred to Human Rights Act 1998 and Convention rights. Leaflet COP 11 was not issued in breach of the

> conditions **HMRC** has imposed on itself in EM 1363 and EM 7048. Such warnings were a pre-requisite where penalties of a criminal nature may be imposed. As the appellant was entitled to be informed in 'detail' and the right of appeal lies against the penalty determinations rather than the penalty notices the failure of **HMRC** to issue a copy of the determinations when imposing the penalties meant that the requirement to notify 'in detail' was not satisfied. The determinations were disclosed by **HMRC** later at the request of the appellant.

[43] **HMRC** counsel contended that the first argument was essentially a recast of the appellant's appeal before Special Commissioner Hellier on 15 January **2008** (***Flaxmode*** *Ltd v Revenue and Customs Comrs* [**2008**] **STC** (**SCD**) **666**). In those circumstances **HMRC** relied on the previously determined points, both as an issue estoppel and as an authority in its own right. In respect of the second argument **HMRC** counsel submitted that the purpose of art 6(3)(a) was simply to inform the accused of the charge, and not to provide him with evidential material on which he may rely upon in order to challenge the charge. In short the accused needs to know what the charge comprised, not what was the strength of the case against him (see Lester, Pannick and Herberg *Human Rights Law and Practice* (3rd edn, 2009) para 4.6.66 and *Brozicek v Italy* (1989) 12 EHRR 371, para 42).

[44] Counsel for **HMRC** pointed out that each of the penalty notices issued in this appeal were in the same format and provided the same essential information, which was more than sufficient to comply with the requirements of art 6(3)(a). In particular each penalty notice:

(1) Identified that it was a penalty notice for failure to produce documents.

(2) Was addressed to the appellant and dated.

(3) Stated that a penalty determination has been made against the appellant under s 100(1) TMA 1970.

(4) Explained that the penalty arose under s 97AA(1)(b) TMA in respect of the appellant's failure to comply with a dated notice served under s 19A(2) TMA.

(5) Stated the amount of the penalty and explained the basis and method of calculation, including a statement of the period to which the penalty related.

(6) Stated the time within which an appeal against the determination may be made.

Consideration

[45] The tribunal considers that the appellant in respect of ***Argument one*** was restating its case before Special Commissioner Hellier on 15 January **2008**. The tribunal endorses the findings of Special Commissioner Hellier.

[46] Special Commissioner Hellier found that **HMRC** sent two different letters to the partners regarding the enquiry into the 2003–04 and 2004–05 partnership returns, namely:

(1) The letters to **Flaxmode** and, I believe, all the partners other than Mr JCM Gibbins said:

'I am writing to tell you that I intend enquiring into the Tax Return for the year ended 5 April [2004–05] of [J & A Gibbins] of which [you] are a member. I will write to Mr J C M Gibbins, as nominated partner to ask separately for the information needed.

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… if we decide to make enquiries into any non-partnership aspects of [your] return we shall write separately to tell you.'

(2) The letter to Mr JCM Gibbins said:

'I am writing to tell you that I intend enquiring in relation to [the] Return … My enquiry is into certain aspects of the return …

… I attach a copy of a letter I am sending to your adviser requesting information about the [return]. I will be dealing with your tax adviser to obtain the information. You should talk to them about my letters.'

[47] Special Commissioner Hellier recorded the appellant's contention that a valid notice under s 12AC could only be given to the nominated partner; the nominated partner was **Flaxmode** Ltd not Mr JCM Gibbins; and the letter to **Flaxmode** was not a 'notice of … intention' to enquire within s 12AC(1). Thus no enquiry notice had been given and no penalty could be due.

[48] Special Commissioner Hellier decided that it was clear to him that the letter to Mr JCM Gibbins (see para [46](2) above), could not be a notice within s 12AC since it was not given to the nominated partner. Further he did not believe that the specificity of these provisions permitted one to treat a notice given to one partner as a notice given to all: to do so would defeat the object of the provisions. Thus Special Commis-

sioner Hellier concluded that the only question for him was whether the letters to **Flaxmode** (see para [46](1) above) were s 12AC notices*. If they were then the subsequent s 19A notices were valid.*

[49] Special Commissioner Hellier decided (at para 27) that the letters to **Flaxmode** were sufficient notices because—

> 'It does not seem to me that s 12AC requires particular formality about the giving of notice. *Chambers English Dictionary* (7th edn) defines "notice" as intimation, announcement, information, warning. It seems to me that the purpose of the notice to be given is to warn the taxpayer that an enquiry is underway so that he knows questions may be asked and that time limits may be affected, and to provide a mechanical activation of the enquiry procedure. This does not require something formal: all that is needed is something in writing which informs the taxpayer that an enquiry is underway. It seems to me therefore that a letter which announces that "I intend enquiring into" a tax return is sufficient to be a notice for the purposes of s 12AC'.

[50] The appellant submitted that its arguments in respect of art 6(3)(a) were not advanced before Special Commissioner Hellier in which case, if its arguments are correct, the special commissioner's conclusion that a s 12AC notice did not require particular formality is not sustainable. This tribunal disagrees. The appellant's submission was misconceived. An enquiry under a s 12AC notice is not an investigation, and has no criminal connotations. The character of the enquiry does not change retrospectively as a result of a subsequent decision by **HMRC** to institute criminal proceedings. In this appeal, assuming for the moment that the daily penalties imposed against the appellant are criminal charges, art 6(3)(a) would only be engaged at the time a criminal charge is in contemplation, which at the earliest would be when the s 19A notice is issued. The fact that art 6(3)(a) may apply to a penalty, it is not engaged at the time when the s 12AC notice is issued. Thus the appellant's arguments on art 6(3)(a) do not disturb Special Commissioner Hellier's decision that the letters to **Flaxmode** were sufficient to constitute s 12AC notices.

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[51] In respect of the appellant's second argument, the tribunal agrees with the editors of *Human Rights Law and Practice* at para 4.6.66, on the purpose of art 6(3)(a) which states that:

> 'Article 6(3)(a) provides that a criminal defendant has the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him … Thus art 6(3)(a) has been restrictively interpreted so as to require that the accused be informed of the nature of the charge against him and the material facts upon which it is based, but not necessarily the evidence in support.'

[52] The tribunal adopts **HMRC**'s description of the penalty notices issued against the appellant recorded in para [44] above. The tribunal finds that the details comprised in the penalty notices complied with the requirements of art 6(3)(a). The notices informed the appellant of the size of the penalty, the statute authorising the penalty, the reason for its imposition, the method for paying the penalty and the rights of appeal. Further the appellant was also warned in the s 19A notices that it would be liable to a penalty if it did not provide the requested information and documents.

[53] The appellant contended that **HMRC** did not comply with its own manuals and should have referred to Human Rights Act and ECHR rights in its correspondence and sent the leaflet COP 11 in order comply with art 6(3)(a)

[54] The reason why **HMRC** did not comply with its manuals on Human Rights Act because at the time it issued the penalty notices it did not consider them to be *criminal* penalties. Regardless of the view that **HMRC** took on the s 97AA(1)(b) penalties, the tribunal finds that the provisions of art 6(3)(a) does not require **HMRC**

to provide the *accused* with details of his rights under the Human Rights Act and an explanation of how the Human Rights Act operate.

[55] The COP 11 leaflet was associated with the **HMRC**'s enquiry into partnership returns. The tribunal has ruled in para [50] above that art 6 is not engaged when an enquiry under s 12AC is opened.

[56] The appellant's final submission under this heading was that the right of appeal was against the penalty determination not the penalty notice. In those circumstances the appellant should have been provided with a copy of the determination as well as the penalty notice to satisfy the requirements of art 6(3)(a). The tribunal considers the appellant's submission has no merit. Article 6(3)(a) does not require any particular documents to be enclosed with the notification of the charge or for the notification to take a specific form.

[57] In conclusion art 6(3)(a) requires the accused to be informed promptly in a language which he understands and in detail of the nature and the cause of the accusation against him. In this appeal the appellant's rights under art 6(3)(a) were met by the service of the penalty notices on it. The notices covered all the salient points required by art 6(3)(a). Thus if the ECHR applied to s 97AA(1)(b) penalties, there was no breach of art 6(3)(a).

Dispute three: Did the penalty determinations meet the requirements of s 100(1) of TMA 1970?

Parties' submissions

[58] The appellant argued that s 97AA(1)(b) penalties were imposed under s 100(1) TMA 1970 which permitted authorised officers to make penalty determinations. As the appeals were against the penalty determinations, then in order for the determinations to be valid they must meet the requirements of s 100(1). According to the appellant, the determinations must be made by an

officer specifically authorised by the Board, and that the officer must select the amount of the penalty. The appellant accepted that the penalty determinations which were subject of this appeal have been made by an officer specifically authorised by the Board. The appellant, however, contended that they did not meet the requirements of s 100(1) TMA 1970 on two grounds:

> (1) They did not deal separately with each year and as income tax is an annual tax each year should be considered separately.
>
> (2) Other than the determination made on 13 February **2008** (Notice 21 February **2008**) the authorised officer did not state a specific amount of penalty and merely gave a general authorisation. A general authorisation was not a determination in the terms required by s 100(1).

Consideration

[59] **HMRC**'s record of the penalty determinations against the appellant consisted of an internal memorandum prepared by the investigating officer to the authorised officer for each determination. The investigating officer's memorandum generally comprised one page of text covering such matters as the quantum of the penalty recommended, the number of days in default, the reasons for the appropriateness of the penalty, the proportionality of the penalty with the tax at risk, details of the appellant's continuing default, and the status of any ongoing appeals. The authorised officer indicated his determination of the penalty by writing *agreed* or phrases to similar effect at the top of the memorandum followed by his initials and date. On the memorandum for the 13 February **2008** determination the authorised officer added the words 'Further penalties of £30 per day have been authorised'.

[60] Section 100(1) does not prescribe the form that a penalty determination should take other than that the determination should be made by an authorised officer. Section 100(3) sets out additional requirements for the notice of the determination in that the notice shall state the date on which the penalty was issued, and the time which an appeal against the determination may be made. The appellant takes no point with the form of the penalty notices. Returning to the disputed issue, this tribunal considers that in order for a determination to fulfil the requirements of s 100 TMA 1970 the supporting documentation should show that the penalty has been made by an authorised officer and that the officer has considered the circumstances of the individual case. The tribunal finds that the supporting documentation for the determinations in this appeal demonstrated that an authorised officer imposed the penalty, and did so having considered the circumstances of the case. The tribunal finds the appellant's submission on separate tax years not supported by the facts. The memorandum prepared by the investigating officer clearly identified the tax years in dispute, and that separate daily penalties were required. In the tribunal's view it was unnecessary for the investigating officer to relate explicitly the separate daily penalties to a tax year. The link was obvious from the face of the document. Equally the fact that the authorised officer has not explicitly stated the penalty amount imposed did not render the determination invalid. In the tribunal's view it was clear from the supporting documentation what penalty had been authorised. The tribunal, therefore, holds that the disputed penalty determinations complied with s 100 TMA 1970.

[2010] SFTD 498 at 511

Dispute four: Reasonable excuse

Parties' submissions

[61] The appellant contended that it had a reasonable excuse for the penalty determinations dated 26 March **2008** and 25 April **2008** only. The reasonable excuse put forward was that the appellant's agent had experienced an exceptional pressure of work as a consequence of changes to inheritance tax and capital gains tax by the Chancellor in the Pre Budget Report. According to the agent, this led to a flood of instructions to review wills and capital gains tax positions. The capital gains work up to 5 April **2008** was particularly heavy.

[62] **HMRC** objected to the admission of the appellant's evidence on reasonable excuse, which had not been submitted prior to the hearing. The tribunal decided to admit the evidence and heard from Mr Bibby.

[63] **HMRC** contended that the evidence given by Mr Bibby of workload pressures did not amount to a reasonable excuse. Essentially the reasonable excuse put forward was not that of the taxpayer but of its agent. In those circumstances the taxpayer's course of action was to pursue a claim against the agent. If the agent's workload pressures were capable of being a reasonable excuse, it did not as a matter of fact amount to a reasonable excuse in this appeal. The upsurge in work was foreseeable, and the agent failed to take reasonable steps to cater for the increased work.

Consideration

[64] Section 118(2) of TMA 1970, which deals with the defence of reasonable excuse, states that:

> 'For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the Commissioners or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed [not to have failed to do it unless the excuse ceased and after the excuse ceased, he shall be deemed] not to have failed to do it if he did it without unreasonable delay after the excuse had ceased'.

[65] Unlike the defence of reasonable excuse for VAT penalties, the fact of reliance on a third party was not precluded from being a reasonable excuse for the purpose of s 118(2) of the 1970 Act.

[66] The s 97AA(1)(b) penalties have been imposed against the appellant not the agent. The defence of reasonable excuse under s 118(2) is available to the appellant not his agent. The appellant has given no evidence to the tribunal about its reasons for failing to comply with the s 19A notice which gave rise to the daily penalties. The tribunal does not know whether the appellant entrusted its agent with the task of meeting the notice requirements. There was no evidence of what steps the appellant took to ensure that his agent did his job. The tribunal has only heard from the agent about his workload pressures. The agent provided no evidence of his working relationship with the appellant or the steps that the appellant took to secure compliance with the notice. The tribunal concludes that there is no evidence of a reasonable excuse for the penalty determinations dated 26 March **2008** and 25 April **2008**.

Decision

[67] The tribunal decides the following:

(1) A s 97AA(1)(b) penalty was not a criminal charge within the meaning of the ECHR.

(2) If the ECHR applied to s 97AA(1)(b) penalties, there was no breach of art 6(3)(a).

(3) The disputed penalty determinations complied with s 100 TMA 1970.

(4) There was no evidence of a reasonable excuse for the penalty determinations dated 26 March **2008** and 25 April **2008**.

[68] In view of the above findings the tribunal dismisses the appeal and confirms the penalties imposed.

A party wishing to appeal this decision to the Upper Tribunal must seek permission by making an application in writing to the tribunal within 56 days of being provided with full written reasons for the decision. An application for permission must identify the alleged error(s) in the decision and state the result the party making the application is seeking.

Appeal dismissed.

Aaron Turpin Barrister