COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF
VÄSTBERGA TAXI AKTIEBOLAG AND VULIC v. SWEDEN

(Application no. 36985/97)

JUDGMENT

STRASBOURG

23 July 2002

FINAL

21/05/2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Västberga Taxi Aktiebolag and Vulic v. Sweden,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mrs W. THOMASSEN, *President*,
Mrs E. PALM,
Mr GAUKUR JÖRUNDSSON,
Mr R. TÜRMEN,
Mr C. BÎRSAN,
Mr J. CASADEVALL,
Mr R. MARUSTE, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 10 June and 9 July 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 36985/97) against the Kingdom of Sweden lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swedish limited liability company, Västberga Taxi Aktiebolag, and a Swedish national, Nino Vulic ("the applicants"), on 20 May 1997.

2. The applicants were represented before the Court by Mr J. Thörnhammar, a lawyer practising in Stockholm. The Swedish Government ("the Government") were represented by their Agents, originally by Ms E. Jagander and subsequently by Ms I. Kalmerborn, Ministry for Foreign Affairs.

3. The applicants alleged, in particular, that they had been deprived of their rights under Article 6 of the Convention as the Tax Authority's decisions on taxes and tax surcharges had been enforced prior to a court determination of the disputes.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. By a decision of 3 April 2001 the Chamber declared the application partly admissible.

7. The applicants and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The first applicant, Västberga Taxi Aktiebolag, a taxi company, was dissolved due to a lack of assets on 2 December 1997. The second applicant, Nino Vulic, was the director of the first applicant. At the time when the tax liability in dispute in the present case arose, he owned 50% of its shares. Later, he acquired all the shares of the company.

A. The Tax Authority's decisions on taxes and tax surcharges

1. The first applicant

9. In the autumn of 1994, as part of a large-scale investigation into taxicab operators, the Tax Authority (*skattemyndigheten*) of the County of Stockholm carried out a tax audit concerning the first applicant's taxi business. Having previously submitted its tax returns for the assessment year 1994, the first applicant was asked to submit supplementary information on several occasions, starting on 29 November 1994. Having discovered in the course of the audit certain irregularities in the tax returns, the Tax Authority informed the first applicant on 20 February 1995 that it intended to revise upwards the figure given in the tax returns for the turnover of the taxi business and impose additional taxes and tax surcharges on the company. The first applicant was invited to submit further comments, which it did.

10. Having regard to the findings of the audit and the first applicant's observations, the Tax Authority – by a decision of 10 August 1995 – revised upwards the turnover of the company's business by more than 400,000 Swedish kronor (SEK). After deductions for undeclared salary and petrol costs, the Tax Authority's assessments resulted in an increase in the deficit of the first applicant's business. However, by decisions of 11 and 15 August 1995, the taxation bases for calculating value-added tax (*mervärdesskatt*) and employer's contributions (*arbetsgivaravgifter*) were raised upwards in correspondence with the turnover and, as a consequence, the first applicant's liability to value-added tax and employer's contributions were increased by SEK 47,956 and 125,650, respectively. Moreover, as the information

supplied by the first applicant in its tax returns was found to be incorrect and its liability to value-added tax and employer's contributions had been increased under a discretionary assessment procedure, the Tax Authority ordered it to pay tax surcharges (*skattetillägg, avgiftstillägg*) amounting to 20% of the increased tax liability. The additional taxes levied on the first applicant, including interest and surcharges, totalled SEK 232,069, of which SEK 34,710 were surcharges. It appears that the whole of the amount was payable in October 1995.

2. The second applicant

11. On 11 August 1995 the Tax Authority presented a report, according to which it intended to raise upwards the second applicant's taxable income and impose a tax surcharge, as a consequence of the assessments concerning the first applicant. The second applicant was invited to submit comments, which he did.

12. By a decision of 6 October 1995 the Tax Authority increased the second applicant's liability to income tax by SEK 146,602. Like the first applicant, and for the same reasons, he was ordered to pay tax surcharges. The additional tax levied on the second applicant, including interest and surcharges, totalled SEK 226,776, of which SEK 57,757 were surcharges. The whole of the amount was payable on 12 February 1996.

B. Requests for stays of execution

13. Claiming that the information relied upon by the Tax Authority to calculate the turnover of the first applicant's business was inaccurate, both applicants challenged the Tax Authority's decisions, the first applicant on 4 September 1995 in a request for the Authority's reconsideration and the second applicant on 18 December 1995 in an appeal against the relevant decision. The applicants also requested that the execution of the amounts assessed be stayed. The requests were prompted by the fact that neither an appeal to a court nor a request for reconsideration by the Tax Authority had in itself any suspensive effect on the obligation to pay the taxes and surcharges due as a result of the impugned decisions.

14. By decisions of 8 September 1995 and 17 February 1996 the Tax Authority rejected the applicants' requests for stays of execution, stating that the prerequisites laid down in section 49 of the Tax Collection Act (*Uppbördslagen*, 1953:272) had not been fulfilled.

15. By judgments of 22 February and 8 March 1996, following appeals by the applicants, the County Administrative Court (*länsrätten*) of the County of Stockholm quashed the Tax Authority's decisions and referred the cases back to the Authority. Having found that the formal prerequisites for granting stays of execution under section 49, subsection 1 (3) of the Tax Collection Act had been fulfilled, the court went on to state:

> "However, the granting of a stay of execution under this particular provision is conditional on security being provided, if, for some reason, it can be assumed that the amount in respect of which a stay of execution has been sought will not be duly paid. As the Tax Authority did not rule on the compliance with that condition, the County Administrative Court finds that the decision[s] should be quashed and the case[s] referred back to the Tax Authority, which must examine the question whether security is required."

16. On 7 and 30 May 1996, respectively, the Tax Authority again rejected the applicants' requests for stays of execution. The Tax Authority found that the applicants' ability to pay was open to doubt, that stays of execution could not therefore be granted unless security was provided and that, although given the opportunity to do so, the applicants had failed to provide security. Accordingly, their requests could not be granted.

17. The applicants appealed against those decisions to the County Administrative Court, claiming that they should be exempted from the obligation to provide security and granted stays of execution. Both claims rested on the contention that it would be unreasonable and amount to a violation of Article 6 of the Convention for enforcement proceedings to be instituted against the applicants without their cases having first been determined "in due course".

18. By judgments of 12 September 1996, subscribing to the reasons given by the Tax Authority, the County Administrative Court upheld the impugned decisions.

19. The applicants, who did not furnish security, lodged a notice of appeal. On 30 October 1996 the Administrative Court of Appeal (*kammarrätten*) in Stockholm refused them leave to appeal against the County Administrative Court's judgments. They did not appeal to the Supreme Administrative Court (*Regeringsrätten*).

C. Enforcement proceedings

20. Meanwhile, each of the debts being outstanding and no stays of execution having been granted, the applicants were registered as being in arrears with the taxes and tax surcharges imposed as a result of the Tax Authority's decisions. Enforcement proceedings were therefore instituted against both applicants.

1. The first applicant

21. On 20 December 1996 the Enforcement Office (*kronofogde-myndigheten*) of the County of Stockholm, representing the State, filed a petition with the District Court (*tingsrätten*) of Stockholm, requesting that the first applicant be declared bankrupt. According to a statement submitted by the Office, as of 16 December 1996 the first applicant's tax liability relating to the assessment year 1994 amounted to SEK 271,733, including

penalties for late payment (*dröjsmålsavgifter*) that had accrued since the final date on which payment could have been made. That amount included SEK 33,041, plus 6% in penalties for late payment, in tax surcharges. The first applicant also had a smaller tax liability relating to the assessment year 1996. The Office noted that an investigation had revealed that the first applicant owned no property that could be seized in order to cover the debts in question.

22. The District Court held a hearing in the case on 3 February 1997. Although duly summoned, however, no representative of the first applicant appeared before the court. Instead, written observations previously submitted on its behalf were read out. According to the minutes of the hearing, the first applicant alleged in those observations that Article 6 of the Convention had been breached in that it had been denied a fair hearing.

23. By a decision of 10 February 1997 the District Court declared the first applicant bankrupt. In so doing it noted that the alleged breach of Article 6 of the Convention did not affect the State's standing to petition for bankruptcy, that the first applicant was under an obligation to pay the debts and that it had to be considered insolvent as it had been found to have no distrainable assets.

24. The first applicant appealed to the Svea Court of Appeal (*Svea hovrätt*), claiming, *inter alia*, that the District Court's decision amounted to a violation of Article 6 of the Convention in that the enforcement proceedings had been allowed to continue irrespective of the fact that the Tax Authority's decisions regarding its liability to taxes and tax surcharges had not yet been reviewed by a court.

25. The first applicant's appeal was dismissed by the Court of Appeal on 21 February 1997. Leave to appeal against the appellate court's decision was refused by the Supreme Court (*Högsta domstolen*) on 6 May 1997.

26. On 2 December 1997 the bankruptcy proceedings were terminated owing to a lack of assets.

2. The second applicant

27. On 23 and 25 April 1996 the Enforcement Office seized the second applicant's savings in two banks, amounting to a total of SEK 18,132, in partial defrayment of his tax liability.

28. The second applicant appealed to the District Court, requesting that the seizure be quashed. The appeal was dismissed by the court on 28 June 1996. He made no further appeals, considering that they would have no prospects of success.

29. Following the Enforcement Office's decision of 22 November 1996 to seize part of the second applicant's monthly income, some minor amounts were recovered. By a decision of 5 December 1997 this seizure was discontinued. As of 21 August 2001 the second applicant's tax liability relating to the assessment year 1994 amounted to SEK 346,161, including

penalties for late payment. Of the original debt of SEK 226,776, SEK 201,910 remained unpaid. In accordance with section 3 of the Statute of Limitations for Tax Claims (*Lagen om preskription av skattefordringar m.m.*, 1982:188), the whole debt became statute-barred on 31 December 2001, at the end of the fifth year following the day it became due.

D. Criminal proceedings

30. On 30 August 1995 the Tax Authority reported the second applicant to the Public Prosecution Office (*åklagarmyndigheten*) in Stockholm for suspected tax crimes based on the information obtained during the tax audit and the statements made in the applicants' tax returns. On 23 May 1997 the second applicant was indicted for a bookkeeping offence. A hearing was held by the District Court on 22 January 2001. During the course of the hearing, the public prosecutor withdrew the charges and the District Court consequently struck the case out of its list.

E. Further proceedings on taxes and tax surcharges

1. The first applicant

31. As mentioned above, on 4 September 1995, the first applicant requested the Tax Authority to reconsider its decisions on taxes and tax surcharges. On 9 October 1995 the Authority decided not to change its decision of 10 August 1995 concerning the assessment of the turnover of the company's business. Subsequently, the first applicant sent comments and questions to the Tax Authority, which replied to the questions on 17 February 1996. On 22 February 1996 the first applicant lodged formal notices of appeal against the Tax Authority's decisions. It also submitted comments and questions to the Tax Authority, which, by a letter of 19 August 1996, stated that it stood by its decisions. The first applicant presented further observations on 5 September 1996. By decisions of 11 and 12 June 1997 the Tax Authority refused to change the impugned decisions. Consequently, the matters were automatically referred to the County Administrative Court for determination.

32. By a decision of 17 July 2000 the County Administrative Court dismissed the first applicant's appeals. The Court considered that, as it had been dissolved on 2 December 1997, the company lacked legal capacity (*rättskapacitet*) to act as a party. Accordingly, the appeals could not be examined.

33. On 9 October 2001 the Administrative Court of Appeal upheld the County Administrative Court's decision. On 12 November 2001 the first applicant appealed to the Supreme Administrative Court. By a decision of

23 April 2002 the latter court granted leave to appeal. Thus, the matter is presently pending before the Supreme Administrative Court.

2. The second applicant

34. At the same time as his appeal of 18 December 1995, the second applicant submitted comments and questions to the Tax Authority, which replied on 17 February 1996. A few days later he sent a letter to the Authority. By a letter of 19 August 1996 the Authority stated that it stood by its previous decision. The second applicant presented further comments on 5 September 1996. On 12 June 1997 the Tax Authority refused to change the impugned decision. Consequently, the matter was automatically referred to the County Administrative Court for determination.

35. By a judgment of 29 March 2000 the County Administrative Court upheld the Tax Authority's decision of 6 October 1995. It considered that the information on which the impugned decisions were based was reliable and showed that the applicant's income and the tax in question could not be assessed in accordance with the statements made in his tax returns. Thus, the Tax Authority had had good reason to make discretionary tax assessments based on the information obtained during the audit. Furthermore, the amount levied on the applicant could not be considered too high. The County Administrative Court also considered that there had been sufficient reasons to impose the tax surcharge in question and that no legal basis for remitting it had been shown.

36. On 15 December 2000 the Administrative Court of Appeal upheld the County Administrative Court's judgment. During the course of the proceedings before the appellate court the second applicant was on one occasion granted a four-week extension of a time-limit for the submission of observations. On 12 January 2001 he appealed to the Supreme Administrative Court. Following another extension of a similar time-limit, he completed his appeal on 20 April 2001. By a decision of 3 May 2002 the Supreme Administrative Court refused him leave to appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Taxes and tax surcharges

37. The rules on taxes and tax surcharges relevant to the present case were primarily laid down in the Taxation Act (*Taxeringslagen*, 1990:324), the two Value-Added Tax Acts (*Lagen om mervärdeskatt*, 1968:430, replaced by *Mervärdesskattelagen*, 1994:200) and the Collection of Social Security Charges from Employers Act (*Lagen om uppbörd av socialavgifter från arbetsgivare*, 1984:688). Issues concerning taxation and the imposition of tax surcharges were regulated in a very similar manner in the various

acts. In the following section, therefore, reference is made only to the provisions of the Taxation Act. The Collection of Social Security Charges from Employers Act and parts of the Value-Added Tax Act 1994 were replaced by the Tax Payment Act (*Skattebetalningslagen*, 1997:483) as from 1 November 1997. As no essential changes have been made by either the enactment of the Tax Payment Act or amendments to the Taxation Act, the following account describes both the present system and the one applicable at the material time.

38. Income tax, value-added tax and employer's contributions are all determined by county tax authorities, to which taxpayers are obliged to submit information relevant to the assessment of taxes. For the purpose of securing timely, sufficient and correct information, there are provisions stipulating that, under certain circumstances, the tax authorities may impose penalties on the taxpayer in the form of tax surcharges.

39. These surcharges were introduced into Swedish legislation in 1971. The new provisions entered into force on 1 January 1972 at the same time as a new act on tax offences. According to the preparatory documents (Government Bill 1971:10), the main purpose of the reform was to create a more effective and fairer system of penalties than the old one, which was based entirely on criminal penalties determined by the ordinary courts following police investigation and prosecution. Unlike penalties for tax offences, the new surcharges were to be determined solely on objective grounds, and, accordingly, without regard to any form of criminal intent or negligence on the part of the taxpayer. It was thought that the old system did not function satisfactorily, since a large number of tax returns contained incorrect information whereas relatively few people were charged with tax offences. Now that the new system has been introduced only serious tax offences are prosecuted.

40. A tax surcharge is imposed on a taxpayer in two situations: if he or she, in a tax return or in any other written statement, has submitted information of relevance to the tax assessment which is found to be incorrect (chapter 5, section 1 of the Taxation Act) or if, following a discretionary assessment, the tax authority decides not to rely on the tax return (chapter 5, section 2). It is not only express statements that may lead to the imposition of a surcharge; concealment, in whole or in part, of relevant facts may also be regarded as incorrect information. However, incorrect claims are not penalised; if the taxpayer has given a clear account of the factual circumstances but has made an incorrect evaluation of the legal consequences thereof, no surcharge is imposed. The burden of proving that the information is incorrect lies with the tax authority. A discretionary tax assessment is made if the taxpayer has submitted information which is so inadequate that the tax authority cannot base its tax assessment on it or if he or she has not filed a tax return despite having been reminded of the obligation to do so (chapter 4, section 3). In the latter case the decision to

impose a tax surcharge will be revoked if the taxpayer files a tax return within a certain time-limit. The surcharge amounts to 40% of either the income tax which the Tax Authority would have failed to levy if it had accepted the incorrect information or the income tax levied under the discretionary assessment. The corresponding provisions on value-added tax and employer's contributions stipulate that the surcharge comes to 20% of the supplementary tax levied on the taxpayer. In certain circumstances, the rates applied are 20% or 10%, respectively, for the various types of tax.

41. Notwithstanding the fact that the taxpayer has furnished incorrect information, no tax surcharge will be imposed in certain situations, for example when the tax authority has corrected obvious miscalculations or written errors by the taxpayer, when the information has been corrected or could have been corrected with the aid of certain documents that should have been available to the tax authorities, such as a certificate of income from the employer, or when the taxpayer has corrected the information voluntarily (chapter 5, section 4).

42. Moreover, in certain circumstances, a tax surcharge will be remitted. Thus, taxpayers will not have to pay a surcharge if their failure to submit correct information or to file a tax return is considered excusable owing to their age, illness, lack of experience or comparable circumstances. The surcharge should also be remitted when the failure appears excusable by reason of the nature of the information in question or other special circumstances, or when it would be manifestly unreasonable to impose a surcharge (chapter 5, section 6). The phrase "the nature of the information" primarily covers situations where a taxpayer has had to assess an objectively complicated tax question. According to the preparatory documents (Government Bill 1991/92:43, p. 88), the expression "manifestly unreasonable" refers to situations in which the imposition of a tax surcharge would be disproportionate to the fault attributable to the taxpayer or would be unacceptable for other reasons. If the facts of the case so require, the tax authorities must have regard to the provisions on remission, even in the absence of a specific claim to that effect by the taxpayer (chapter 5, section 7). In principle, however, it is up to the taxpayer to show due cause for the remission of a surcharge.

43. If dissatisfied with a decision concerning taxes and tax surcharges, the taxpayer may, before the end of the fifth year after the assessment year, request the tax authority to reconsider its decision (chapter 4, sections 7 and 9). A decision concerning surcharges may also be reviewed at the taxpayer's request after the expiry of this time-limit, if the decision on the underlying tax issue has not yet become final (chapter 4, section 11). The tax authority may also, on its own motion, decide to review its own earlier decision. A review to the taxpayer's disadvantage must be made before the end of the year following the assessment year unless the taxpayer, *inter alia*, has submitted incorrect information during the course of the tax proceedings or

has failed to file a tax return or to furnish required information, in which case the time-limit normally expires at the end of the fifth year after the assessment year (chapter 4, sections 7 and 14-19).

44. The tax authority's decision may also be appealed against to a county administrative court. As with requests for reconsideration, an appeal has to be lodged before the end of the fifth year after the assessment year (chapter 6, sections 1 and 3), unless it concerns a tax surcharge based on a tax decision that has not yet become final (chapter 6, section 4). Following the appeal, the tax authority must reconsider its decision as soon as possible and, if it decides to vary the decision in accordance with the taxpayer's request, the appeal will become void (chapter 6, section 6). If the decision is not thus amended, the appeal is referred to the county administrative court. If special reasons exist, an appeal may be forwarded by the tax authority to the county administrative court without reconsidering the assessment (chapter 6, section 7). Further appeals lie to an administrative court of appeal and, subject to compliance with the conditions for obtaining leave to appeal, the Supreme Administrative Court.

45. A tax surcharge is connected to the tax in respect of which it has been imposed in that a successful objection to the underlying tax has an automatic effect on the tax surcharge, which is reduced correspondingly (chapter 5, section 11). The tax surcharge may, however, be challenged separately, if grounds for reduction or remission exist (see above).

46. If the proceedings before a county administrative court or an administrative court of appeal concern a tax surcharge, the appellant has the right to an oral hearing (chapter 6, section 24).

B. Tax collection

47. At the material time, the collection of taxes and tax surcharges was regulated by the Tax Collection Act, the Value-Added Tax Act 1994 and the Collection of Social Security Charges from Employers Act. The provisions of these Acts relevant to the present case were very similar and, for this reason, only the provisions of the Tax Collection Act are set out below. Since 1 November 1997 tax collection has been regulated by the Tax Payment Act which contains essentially the same rules as the Tax Collection Act.

48. A request for reconsideration or an appeal against a decision concerning taxes and tax surcharges has no suspensive effect on the taxpayer's obligation to pay the amounts in question (section 103 of the Tax Collection Act and chapter 5, section 13 of the Taxation Act).

49. However, the tax authority may grant a stay of execution in respect of taxes and surcharges provided that one of the following three conditions is met: (1) if it may be assumed that the amount imposed on the taxpayer will be reduced or remitted, (2) if the outcome of the case is uncertain, or

(3) if payment of the amount in question would result in considerable damage for the taxpayer or would otherwise appear unjust (section 49, subsection 1 of the Tax Collection Act). According to the preparatory documents, the second condition will be satisfied not only when an outcome favourable to the taxpayer is just as likely as an unfavourable one, but also in cases when it is more probable than not that the proceedings will result in the taxpayer's claims being rejected. However, a stay will not to be granted if the request for reconsideration or the appeal has little prospect of success (Government Bill 1989/90:74, p. 340). An example of a situation where "considerable damage" might result is the forced sale of the taxpayer's real estate or business or other property of great importance to his financial situation and livelihood (ibid., pp. 342-43).

50. If, in cases where the second or third condition just referred to is applicable, it may be assumed – due to the taxpayer's situation or other circumstances – that the amount for which a stay of execution is requested will not be duly paid, the request cannot be granted unless the taxpayer provides a bank guarantee or other security for the amount due. Even in these cases, however, a stay may be granted without security if the relevant amount is relatively insignificant or if there are other special reasons (section 49, subsection 2).

51. The application of section 49 of the Tax Collection Act was examined by the Supreme Administrative Court in a judgment of 17 November 1993 (case no. 2309-1993, published in *Regeringsrättens Årsbok* (RÅ) 1993 ref. 89). In that case, the National Tax Board (*Riksskatteverket*) and the Administrative Court of Appeal had found that the applicant company – which had appealed against the National Tax Board's decision to impose on it certain energy taxes and interest in the total amount of approximately SEK 6,400,000 – could not be granted a stay of execution. The Supreme Administrative Court noted, however, that there was some uncertainty as regards the main issue in the case – whether the income in question was at all taxable – and that the tax levied constituted a considerable sum. For these reasons, it found that it would be unreasonable to demand payment of the amount before a court had determined the applicant company's tax liability. Noting that security in principle had to be provided by the company, the Supreme Administrative Court nevertheless took account of the fact that the Administrative Court of Appeal was expected to determine the tax-liability issue within a short time and that special reasons therefore existed for not requiring security. Accordingly, the applicant company was granted a stay of execution without security until one month after the Administrative Court of Appeal's judgment.

52. A taxpayer may request the tax authority to reconsider its decision concerning the stay-of-execution issue and may appeal against its decision to a county administrative court. The procedure is essentially identical to that followed in regard to requests for reconsideration and appeals

concerning the main tax issues (sections 84, 96 and 99 of the Tax Collection Act; see paragraphs 43-44 above). Further appeals to an administrative court of appeal and the Supreme Administrative Court are subject to leave to appeal being granted (section 102).

C. Enforcement and bankruptcy

53. The enforcement offices are under an obligation to levy execution on a debtor upon request, even if the tax authority's decision concerning tax and tax surcharges is not final (chapter 3, section 1 and chapter 4, section 1 of the Enforcement Code (*Utsökningsbalken*) in conjunction with sections 59 and 103 of the Tax Collection Act; the latter provisions have been replaced by similar provisions in the Tax Payment Act). If the debtor does not have enough distrainable property, the enforcement office may request a district court to declare him or her bankrupt. The debtor will normally be considered insolvent if it is discovered during attempts to levy distress in the six months preceding the presentation of the bankruptcy petition that his or her assets are insufficient to pay the debt in full (chapter 2, section 8 of the Bankruptcy Act (*Konkurslagen*, 1987:672)). If the bankrupt's estate is not sufficient to defray all the existing and expected bankruptcy expenses and other liabilities that the bankrupt has incurred, the bankruptcy proceedings will be terminated (chapter 10, section 1 of the Bankruptcy Act).

54. If a bankruptcy petition is based on a tax debt determined by a decision that is not yet final, the court examining the petition is required to make an independent assessment of the alleged debt, having regard to the evidence adduced in the bankruptcy proceedings. The court accordingly has to make a prediction about the outcome of the pending tax assessment proceedings (judgment of the Supreme Court of 9 June 1981, case no. Ö 734/80).

55. If a limited liability company has been declared bankrupt and the bankruptcy proceedings are terminated without any remaining assets, the company is dissolved (chapter 13, section 19 of the Limited Liability Companies Act (*Aktiebolagslagen*, 1975:1385)). Under established Swedish case-law, the general rule is that a company thus dissolved has no legal capacity and may not therefore act as a party to legal proceedings. Some exceptions to the rule have been made. As stated by the Supreme Administrative Court in a judgment of 16 June 2000 (case no. 7017-1997, RÅ 2000 ref. 41), exceptions have been allowed in cases where it has been considered that special reasons relating to the interests of the company or the opposite party called for a dispute to be examined by a court after the dissolution of the company. As an example of such special reasons, the court mentioned the possibility that a company's claims in tax proceedings would be accepted and lead to repayment of taxes and, as a consequence, a

further distribution to the bankruptcy creditors. In the case before the court, the company in question was found to have no justified interest of its own in the continuation of the relevant tax proceedings as the successful outcome of those proceedings would not lead to any assets being returned to the company or the bankruptcy estate. However, the State had sued the former company directors in civil proceedings, claiming that they were jointly responsible for the tax debt in dispute in the company's case. Finding that it was uncertain whether the directors could have the underlying tax issue examined in the civil proceedings, the court considered that they had a justified interest in having the tax issue determined in the tax proceedings. As a consequence, the dissolved company was given the right to act as a party to those proceedings.

56. As taxes and tax surcharges are payable even if the tax authority's decision is not final, the decision may be varied or quashed after the relevant amounts have been paid. If so, the amount overpaid is refunded with interest (chapter 18, section 2 and chapter 19, sections 1 and 12 of the Tax Payment Act). If distress has been levied on the taxpayer's property or he or she has been declared bankrupt on account of the tax debt, the distress warrant or bankruptcy decision will be set aside on appeal. Should the warrant or decision have become final, the taxpayer may, upon request, have the case reopened and the warrant or decision quashed (chapter 58 of the Code of Judicial Procedure (*Rättegångsbalken*)). Any property that has been distrained upon will, if possible, then be restored to the taxpayer (chapter 3, section 22 of the Enforcement Code). The same applies to property forming part of a bankrupt's estate to the extent that it is not required for the payment of the bankruptcy expenses and other liabilities (chapter 2, section 25 of the Bankruptcy Act). If the taxpayer's property has been sold and the amount obtained from the sale has been used to pay off the alleged tax debt, the taxpayer will receive financial compensation. In addition, it is open to the taxpayer to bring an action for damages against the State for the financial loss caused by the distress or the bankruptcy (chapter 3, section 2 of the Tort Liability Act (*Skadeståndslagen*, 1972:207)), on the ground that the authorities or the courts have acted wrongfully or negligently.

D. Tax offences

57. Criminal proceedings may be brought against a taxpayer who has furnished incorrect information to a tax authority or who, with the object of evading tax, has failed to file a tax return or similar document. If the taxpayer has acted with intent and his actions have resulted in his being charged too little tax, he will be convicted of tax fraud. The possible sentence ranges from a fine for petty offences to imprisonment for a maximum of six years for cases of aggravated tax fraud (sections 2 to 4 of

the Tax Offences Act (*Skattebrottslagen*, 1971:69)). If the taxpayer is considered to have been grossly negligent in submitting incorrect information, he may be convicted of making a negligent misrepresentation to the tax authorities (*vårdslös skatteuppgift*) (section 5). A criminal charge under the Tax Offences Act is brought in accordance with the rules governing criminal proceedings in general which means, *inter alia*, that there can only be a criminal conviction on prosecution and trial by the courts of general jurisdiction.

58. Under Swedish law, the fact that a tax surcharge has already been imposed on the same grounds as those forming the basis of the criminal charge is no bar to criminal proceedings. Moreover, a decision to impose a surcharge has no binding force or any other effect that might prejudice the determination of the criminal charge. However, it was the intention of the legislature that the trial court would be aware when considering the criminal charge that a surcharge had been imposed (Government Bill 1971:10, pp. 351 and 364).

E. Tax surcharges and the Convention in Swedish case-law

59. In a judgment delivered on 29 November 2000 the Supreme Court considered whether a person could be convicted for a tax offence in criminal proceedings following the imposition of a tax surcharge in tax proceedings (case no. B 868-99, published in *Nytt juridiskt arkiv* (NJA) 2000, p. 622). Having noted that, under Swedish law, a surcharge is not considered a criminal penalty and thus does not prevent trial and conviction for a tax offence relating to the same act, the Supreme Court went on to examine the matter under the Convention. It first considered, in the light of the European Court's case-law, that there were weighty arguments for regarding Article 6 as being applicable under its criminal head to proceedings involving a tax surcharge. Even assuming this to be the case, it held, however, that the principle of *ne bis in idem*, as set forth in Article 4 of Protocol No. 7 to the Convention, did not prevent criminal proceedings from being brought against someone for an act in respect of which a surcharge had already been levied.

60. On 15 December 2000 the Supreme Administrative Court delivered two judgments in which it examined the applicability of Article 6 of the Convention to the tax surcharges imposed under the Swedish tax system. In one of the judgments (case no. 1990-1998, RÅ 2000 ref. 66), noting the criteria established by the European Court for determining whether an offence qualified as "criminal", the Supreme Administrative Court gave an extensive opinion on the application of these criteria to the surcharges in question. It stated, *inter alia*, the following:

> "The Swedish legislature has described the tax surcharge as an administrative sanction akin to a penalty... . The rules on oral hearings in chapter 6, section 24 of the

Taxation Act should be seen as a manifestation of the desire to bring taxation procedure into line with the legal safeguards laid down in Article 6 of the Convention. Also, according to case-law (RÅ 1987 ref. 42), the rules on voting in chapter 29 of the Code of Judicial Procedure [in the criminal-procedure part of the Code] are applicable in cases concerning surcharges under the former Taxation Act (1956:623). The tax surcharge appears to have been considered a predominantly criminal sanction in other contexts as well. For example, it was stated in the preparatory documents to the legislation establishing the rule prohibiting *ex post facto* laws in chapter 2, section 10, subsection 1 of the Instrument of Government [*Regeringsformen*] – which covers penalties, other criminal sanctions and other special legal effects of a criminal offence – that the proposed rule also applied to administrative sanctions akin to penalties such as tax surcharges, charges for the late payment of taxes and late-payment fees under various tax laws. ... However, under Swedish law, there is no requirement of intent or negligence on the part of the taxpayer for the imposition of a tax surcharge. Also, the surcharge, to a certain extent, has the character of a conditional fine [*vitesfunktion*] and can be remitted on purely objective grounds. Moreover, it cannot be converted into a prison sentence. Therefore, it has been considered that the surcharge is not to be classified as a penalty under the Swedish legal system but rather as an administrative tax sanction. Accordingly, its classification as such under the Swedish legal system does not constitute sufficient reason for regarding it as a criminal sanction within the meaning of the Convention.

With respect to the other two criteria applied by the European Court in this connection – that is, the nature of the offence and the nature and degree of severity of the sanction – the following should be taken into account. The Swedish rules on tax surcharges are general and concern all taxpayers. The purpose of the system of administrative sanctions is to exert pressure on taxpayers, by means of a considerable financial sanction, to observe the obligations prescribed by the laws on taxes and charges. It should also be noted that the Swedish tax surcharge, in its present form, replaced earlier procedures of a purely criminal nature. As regards the characteristics that have been established by the European Court as referring to the nature and degree of severity of the sanction, it should be borne in mind that a surcharge is levied in proportion to the tax avoided by the provision of incorrect information. This means that surcharges may in principle come to very large amounts without any upper limit.

In the Supreme Administrative Court's opinion, the last-mentioned aspect strongly indicates that Article 6 is to be regarded as applicable to the Swedish tax surcharge. In a recently delivered judgment, the Supreme Court also stated, in the light of the European Court's case-law, that "there are weighty arguments for regarding Article 6 as being applicable also to Swedish proceedings concerning tax surcharges" [the Supreme Court's judgment of 29 November 2000, see paragraph 59 above]. One consideration that might still cause some doubt is that the Swedish surcharge differs from the French one with regard to one of the four factors to which the European Court attached importance in its final assessment in the Bendenoun case [Bendenoun v. France judgment of 24 February 1994, Series A no. 284]: it cannot be converted into a prison sentence. Furthermore, contrary to the French rules, the Swedish rules on surcharges lack a subjective element in the real sense ... .

However, the fact that the Swedish tax surcharge cannot be converted into a prison sentence is not, in the Supreme Administrative Court's opinion, a strong argument against finding Article 6 to be applicable. There is no doubt that a fine imposed under criminal law falls under Article 6, irrespective of whether or not it can be converted into a prison sentence. Moreover, the judgment in the Bendenoun case must be taken to indicate that financial sanctions other than a fine may also fall under Article 6, at

least if they are of some significance. Furthermore, following the European Court's judgments in the cases of Lauko ... and Kadubec [Lauko and Kadubec v. Slovakia judgments of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, pp. 2492 and 2518, respectively], both of which concerned fines imposed in respect of minor offences, it must now be regarded as established that the imposition of a prison sentence is not a prerequisite for an act to be viewed as a criminal offence within the meaning of the Convention. Nor, in the circumstances, can an independent or even significant meaning be attached to the lack of subjective elements (instead, there is reason to make a separate assessment as to the compatibility of strict liability with the presumption of innocence ...).

In view of the foregoing the Supreme Administrative Court finds, having regard to all the circumstances, that the Swedish tax surcharge is to be regarded as falling under Article 6 of the Convention. ..."

61. The Supreme Administrative Court went on to examine the compatibility of the tax surcharges with the presumption of innocence under Article 6 § 2 of the Convention. It gave the following opinion:

"It is probable that, in determining whether strict criminal liability is compatible with the Convention, the European Court will apply essentially the same test as it did in the Salabiaku case [Salabiaku v. France judgment of 7 October 1988, Series A no. 141] with respect to liability established on the basis of presumptions. This means that liability must not arise entirely automatically on proof of the objective elements. Instead, in order for there to be no conflict with the presumption of innocence, the individual must have the possibility of some form of defence based on subjective circumstances.

As has been mentioned above, a tax surcharge is imposed by means of an administrative procedure without any requirement of intent or negligence. An appeal against a decision concerning a surcharge lies to an administrative court. If intent or gross negligence is established, liability under criminal law may be imputed following trial and conviction by a court of general jurisdiction.

Taxation in Sweden is largely based on information given by the individual and certification by him or her of information received from other sources. The purpose of the tax surcharge is to emphasise, *inter alia*, that the individual is required to be meticulous in fulfilling the duty of filing a tax return and the related obligation to submit information. In principle, carelessness is not acceptable. Furthermore, the taxpayer must normally have an understanding of what information is of relevance to the examination of a claim in order to avoid the risk of incorrect information being considered to have been given and a surcharge imposed. In other words, the taxpayer is required to have a certain knowledge of the tax rules.

Inaccuracies and failures of the kind that may cause the imposition of a tax surcharge occur in a very large number of cases. The requirements of foreseeability and uniformity in the imposition of surcharges have therefore been regarded as calling for surcharges to be levied in accordance with relatively simple and standardised rules. However, the rules and regulations must also meet demands for a reasonably nuanced assessment ... and provide guarantees of legal certainty. Therefore, a surcharge is not imposed automatically when incorrect information is submitted. Firstly, certain types of inaccuracies are excluded and, secondly, authorities and courts must consider whether there are grounds for remitting the surcharge, even if no specific claim to that effect has been made.

> The following may be stated with particular reference to the grounds for remitting surcharges. The requirements of understanding and meticulousness must be proportionate to the taxpayer's ability and capacity to comprehend the tax rules and apply them to the existing situation. The rules on remission are aimed at preventing the imposition of a tax surcharge as a result of, for example, excusable ignorance or a misunderstanding as to the content of a tax rule. They are also supposed to prevent a surcharge from being imposed when other excusable mistakes are made in discharging the duty to file a tax return. The rules on remission are, moreover, drafted in such a way as to allow the authorities and courts a certain latitude in assessing questions of remission, having regard to the subjective position of the taxpayer. Indeed, the grounds for remission – in conjunction with the rules providing, on objective grounds, for surcharges not to be imposed or to be set aside in particular circumstances – may in certain cases allow of considerations that lead to greater exemption from surcharges than would be the case if the imposition of surcharges were conditional on the taxpayer having acted intentionally or negligently. Although the grounds for remission are not entirely comparable to the conditions for accountability which the subjective elements represent in criminal law, they must, when taken together with the cases in which surcharges are excluded on purely objective grounds, be considered as affording the taxpayer, where appropriate, sufficient scope for avoiding the imposition of surcharges to prevent a conflict with the presumption of innocence as set out in Article 6 of the Convention arising. In general, however, this requires that the courts, in applying the rules on surcharges, should indeed make a nuanced and not too restrictive assessment in each individual case as to whether there are grounds for setting aside or remitting the tax surcharge."

62. The Supreme Administrative Court also considered that the Swedish tax surcharge complied with the general requirement under the Convention for measures to be proportionate. It held that a system of sanctions against breaches of the obligation to submit tax returns and information to the tax authorities served an important public interest. Moreover, it noted, *inter alia*, that the requirement of proportionality was reflected in the rules on surcharges as, under chapter 5, section 6 of the Taxation Act, surcharges were to be remitted in cases where they would be "manifestly unreasonable" (see paragraph 42 above).

63. In the other judgment delivered on 15 December 2000 (case no. 2922-1999) the Supreme Administrative Court was called upon to examine whether the enforcement of a tax surcharge prior to a court examination of a taxpayer's liability to pay the surcharge in question conflicted with the presumption of innocence under Article 6 § 2 of the Convention. It made the following assessment:

> "The Article stipulates that the presumption of innocence shall be observed until guilt has been proved according to law. It does not follow from the wording of the Article that a criminal sanction that has been imposed cannot be enforced before the decision has become final. There are, furthermore, examples both in Sweden and in other European countries of regular criminal sanctions being enforceable notwithstanding the fact that the decision has not become final ... .
>
> Moreover, there is nothing in the case-law of the European Court to support the view that Article 6 § 2 prevents the enforcement of decisions concerning criminal sanctions that have not become final. In this connection, it should be pointed out that

the European Commission of Human Rights expressly accepted the immediate enforcement of tax surcharges in the case of Källander v. Sweden [application no. 12693/87, decision of 6 March 1989, unpublished].

The conclusion of the Supreme Administrative Court is that Article 6 § 2 does not prevent enforcement on the ground that a decision concerning tax surcharges has not become final.

It remains to be determined whether the enforcement of an administrative authority's decision on surcharges requires the matter to have been examined by a court.

It follows from Article 6 § 1 that everyone charged with a criminal offence has a right to have his or her case determined by a court. However, the rules in Article 6 are not considered to preclude the examination by an administrative authority of issues falling under the Article, provided that the individual may subsequently bring the matter before a court that fully affords the legal safeguards laid down in the Article ... .

In the Supreme Administrative Court's opinion, it is unclear to what extent the presumption of innocence should be taken to require that a decision by an administrative authority concerning a criminal sanction against which an appeal has been made should not be enforced before a court has examined the appeal. It appears that the question has not been determined by the European Court. However, it seems reasonable to assume that enforcement may not take place if it would make it impossible for the original legal position to be restored in the event that the subsequent judicial examination resulted in the authority's decision being varied.

As far as tax surcharges are concerned, a taxpayer may appeal to a court against an administrative authority's decision to impose such a surcharge. If the taxpayer's appeal is successful, any amount that has been paid will be refunded with interest. It is also possible for the taxpayer to request a stay of execution in connection with the appeal. It is unlikely that any enforcement measures will be taken pending the court's examination of the application for a stay (cf. Government Bill 1996/97:100, p. 352). Under the rules applicable in the instant case, a stay may be granted if it can be assumed that the amount imposed on the taxpayer will be reduced or that he will be relieved of the obligation to pay the amount, if the outcome of the case is uncertain or if payment of the amount imposed would result in considerable damage for the taxpayer or otherwise appears unjust. In certain cases, a stay can be granted only on condition that security is provided (section 49, subsections 1 and 2 of the Tax Collection Act; there are now largely corresponding rules in ... the Tax Payment Act).

The rules on stays of execution provide the taxpayer with the opportunity to have a preliminary examination by a court of the final outcome of the case concerning tax surcharges. If the taxpayer refrains from using this option or if the court, following an examination, finds that it cannot be assumed that the taxpayer's appeal on the merits will be successful, or even that the outcome is uncertain and that, moreover, there is no reason to expect considerable damage to result from payment of the surcharge, it cannot, in the view of the Supreme Administrative Court, be contradictory to Article 6 § 2 to require immediate enforcement.”

THE LAW

I. SCOPE OF THE CASE

64. In their original application to the Commission, the applicants alleged breaches of Article 6 §§ 1 and 2 and Article 14 of the Convention and Article 1 of Protocol No. 1 to the Convention in relation to the enforcement of taxes and tax surcharges prior to a court determination of the tax issues. In observations submitted on 13 June 2001 the applicants alleged that Article 6 § 2 of the Convention had been breached also on account of the fact that the surcharges had been imposed solely on objective grounds. The second applicant further claimed that the criminal proceedings brought against him had not been determined within a reasonable time under Article 6 of the Convention and had not respected the principle of *ne bis in idem* as set out in Article 4 of Protocol No. 7 to the Convention.

65. The Government asked the Court not to examine the issues raised in the applicants' letter of 13 June 2001 as they had been introduced after the Court's admissibility decision.

66. The Court notes that the applicants, in their original application, claimed that they had not been presumed innocent, within the meaning of Article 6 § 2 of the Convention, in the proceedings relating to taxes and tax surcharges, as enforcement measures had been taken prior to a court determination. It is true that they did not submit that the surcharges had been imposed on objective grounds until after the Court's decision to declare the application admissible. Nevertheless, the Court finds that that submission constituted merely a development of their arguments in respect of their complaint under Article 6 § 2 and that it may accordingly be taken into account in the present case (see, *mutatis mutandis*, the Open Door and Dublin Well Woman v. Ireland judgment of 29 October 1992, Series A no. 246, p. 23, § 49). However, noting that the issues raised in respect of the second applicant in the letter of 13 June 2001 did not relate to any complaints previously presented to the Court, it finds that those additional complaints have been made too late to be examined in the present case.

II. THE GOVERNMENT'S PRELIMINARY OBJECTION

67. The Government, as they had done already at the admissibility stage, claimed that the domestic remedies had not yet been exhausted in regard to the question whether the first applicant – a limited liability company which had been dissolved – was entitled to have the Tax Authority's tax assessment decisions reviewed by the courts. The question was pending before the Supreme Administrative Court.

68. The first applicant requested the Court to reject the Government's preliminary objection on the ground that the decisions taken by the County Administrative Court and the Administrative Court of Appeal to dismiss its appeals against the Tax Authority's decisions due to its having been dissolved were based on applicable legal provisions and relevant case-law.

69. The Court notes that the first applicant, on 12 November 2001, appealed against the Administrative Court of Appeal's decision to the Supreme Administrative Court and that the latter court, on 23 April 2002, granted the first applicant leave to appeal. The question whether the first applicant will have legal capacity to challenge the Tax Authority's decisions on taxes and tax surcharges before the courts is thus at present pending before the Supreme Administrative Court. The Court notes that the first applicant has done what is required of it in order to exhaust domestic remedies under Article 35 § 1 of the Convention. Furthermore, having regard to Swedish case-law on the legal capacity of a dissolved company (see paragraph 55 above), it is not clear whether the first applicant will eventually be allowed to act as a party to the tax proceedings in question. However, the Court considers that the Government's preliminary objection is linked to the issues raised by the first applicant's complaints under Article 6 of the Convention and therefore joins this plea to the merits.

III. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

70. The applicants complained of the fact that the Tax Authority's decisions concerning additional taxes and tax surcharges had been enforced prior to a court determination of the disputes. In particular, they maintained that the tax assessment proceedings had not been determined within a reasonable time and they had been unable to obtain a fair hearing in those proceedings. Moreover, they had been deprived of their right to be presumed innocent until proved guilty according to law. They relied on Article 6 of the Convention, which, in so far as is relevant to the complaint, provides:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> ..."

A. Applicability of Article 6 of the Convention

1. The submissions of the parties

(a) The Government

71. The Government argued that the applicants' "civil rights and obligations" within the meaning of Article 6 of the Convention were not at stake in the proceedings in question. Referring to the Court's judgment in the Ferrazzini case (*Ferrazzini v. Italy* [GC], no. 44759/98, to be published in ECHR 2001-VII) and previous judgments by the Court concerning tax proceedings, they concluded that tax disputes fell outside the scope of Article 6, which provision was thus not applicable to the enforcement of taxes in the present case.

72. As to the applicability of Article 6 under its criminal head, the Government preferred to leave this question to the Court's discretion. Nevertheless, they pointed to certain aspects of Swedish tax surcharges that suggested that their imposition did not amount to a "criminal charge" within the meaning of Article 6. Firstly, under the Swedish legal system, the surcharges belonged to administrative law. Secondly, their purpose was not primarily deterrent or punitive, as shown, *inter alia*, by the fact that they were imposed exclusively on objective grounds without the need to show any criminal intent or negligence. Instead, the main purpose of the surcharges was to protect the financial interests of the State and the community as a whole by emphasising the importance of providing the tax authorities with adequate and correct information as a basis for tax assessments. Thus, they were intended to have a preventive effect and were basically fiscal in nature. Thirdly, although the surcharges in the present case had been substantial, the imposition of a large pecuniary sanction did not necessarily lead to the conclusion that a "criminal charge" was involved. Moreover, the surcharges could not be converted into a prison sentence. Nor did the rates of the surcharges vary according to the nature and seriousness of the taxpayer's conduct.

(b) The applicants

73. The applicants submitted that the proceedings in question involved a determination of their "civil rights and obligations". They referred, *inter alia*, to the far-reaching effects of the Tax Authority's decisions, including the first applicant being declared bankrupt due to its inability to pay the alleged tax debt, which had been enforceable immediately. Despite their enormous impact on the applicants, the Tax Authority's decisions had still not been finally examined by the courts. Thus, the tax assessments had been of crucial importance for their private rights and obligations.

74. Furthermore, the tax surcharges imposed on them constituted "criminal charges" within the meaning of Article 6. The applicants pointed to the fact that they had replaced earlier criminal-law procedures, which made it clear that they had been classified in the Swedish legal system as criminal sanctions. They also asserted that the surcharges were based on a presumption of guilt which could only be rebutted in exceptional cases. Moreover, they were imposed in accordance with a general rule designed to

have a deterrent and punitive effect. There were thus sufficient reasons for finding Article 6 applicable, and the fact that the surcharges could not be converted into a prison sentence should not be considered a decisive factor.

2. The Court's assessment

75. The Court has consistently held that, generally, tax disputes fall outside the scope of "civil rights and obligations" under Article 6 of the Convention, despite the pecuniary effects which they necessarily produce for the taxpayer (see, as the most recent authority, the *Ferrazzini v. Italy* judgment cited above, § 29). The facts of the present case do not give reason to review that conclusion.

76. Having regard to the fact that tax surcharges were imposed on the applicants, the question arises whether the proceedings in the present case instead involved a determination of a "criminal charge". The Court reiterates that the concept of "criminal charge" within the meaning of Article 6 is an autonomous one. In determining whether an offence qualifies as "criminal", three criteria are to be applied: the legal classification of the offence in domestic law, the nature of the offence and the nature and degree of severity of the possible penalty (see, among other authorities, the Öztürk v. Germany judgment of 21 February 1984, Series A no. 73, p. 18, § 50, and the Lauko v. Slovakia judgment cited above, p. 2504, § 56).

77. As regards the domestic classification of tax surcharges, the Court notes that they are not imposed under criminal law provisions but in accordance with various tax laws. Moreover, they are determined by the tax authorities and the administrative courts. It further appears that the Swedish legislature and the courts have considered that, under the Swedish legal system, the surcharges are not characterised as criminal penalties but rather as administrative sanctions (see the judgment of the Supreme Administrative Court, cited at paragraph 60 above). Consequently, although in some respects the surcharges have been placed on an equal footing with criminal penalties, the Court finds that the surcharges cannot be said to belong to criminal law under the domestic legal system.

78. It is therefore necessary to examine the surcharges in the light of the second and third criteria mentioned above. These criteria are alternative and not cumulative: for Article 6 to apply by virtue of the words "criminal charge", it suffices that the offence in question should by its nature be "criminal" from the point of view of the Convention, or should have made the person concerned liable to a sanction which, by its nature and degree of severity, belongs in general to the "criminal" sphere. This does not exclude that a cumulative approach may be adopted where the separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a "criminal charge" (see the Lauko v. Slovakia judgment cited above, pp. 2504-05, § 57).

79. As regards the nature of the conduct imputed to the applicants, the Court notes that the Tax Authority and the County Administrative Court found that the applicants had supplied incorrect information in their tax returns. The resultant tax surcharges were imposed in accordance with tax legislation – *inter alia*, chapter 5, sections 1 and 2 of the Taxation Act – directed towards all persons liable to pay tax in Sweden and not towards a given group with a special status.

Moreover, although there is, as argued by the Government, a public financial interest in ensuring that the tax authorities have adequate and correct information when assessing tax, this information is secured by means of certain requirements laid down in Swedish tax legislation, to which is attached the threat of a considerable financial penalty for non-compliance. It is true that the tax surcharges were imposed on the applicants on objective grounds without the need to establish any criminal intent or negligence on their part. However, the lack of subjective elements does not necessarily deprive an offence of its criminal character; indeed, criminal offences based solely on objective elements may be found in the laws of the Contracting States (see the Salabiaku v. France judgment of 7 October 1988, Series A no. 141-A, p. 15, § 27). In this connection, the Court notes that the present system of tax surcharges has replaced earlier purely criminal procedures. It appears that the change from the earlier system which was one of penalties for intentional or negligent conduct to the new system based on objective factors was prompted by the need for greater efficiency (see paragraph 39 above).

Furthermore, the present tax surcharges are not intended as pecuniary compensation for any costs that may have been incurred as a result of the taxpayer's conduct. Rather, the main purpose of the relevant provisions on surcharges is to exert pressure on taxpayers to comply with their legal obligations and to punish breaches of those obligations. The penalties are thus both deterrent and punitive. The latter character is the customary distinguishing feature of a criminal penalty (see the Öztürk v. Germany judgment cited above, p. 20, § 53).

In the Court's opinion, the general character of the legal provisions on tax surcharges and the purpose of the penalties, which are both deterrent and punitive, suffice to show that for the purposes of Article 6 of the Convention the applicants were charged with a criminal offence.

80. The criminal character of the offence is further evidenced by the severity of the potential and actual penalty. Swedish tax surcharges are imposed in proportion to the amount of the tax avoided by the provision of incorrect or inadequate information. The surcharges, normally fixed at 20% or 40% of the tax avoided, depending on the type of tax involved, have no upper limit and may come to very large amounts. Indeed, in the present case the surcharges imposed by the Tax Authority's decisions were substantial, totalling SEK 34,710 for the first applicant and SEK 57,757 for the second

applicant. It is true that surcharges cannot be converted into a prison sentence in the event of non-payment; however, this is not decisive for the classification of an offence as "criminal" under Article 6 (see the Lauko v. Slovakia judgment cited above, p. 2505, § 58).

81. The Court also notes that the Supreme Court considered in its judgment of 29 November 2000 (see paragraph 59 above) that there were weighty arguments for regarding Article 6 as being applicable under its criminal head to proceedings involving tax surcharges. Further, the Supreme Administrative Court, in its judgments of 15 December 2000 (see paragraphs 60-63 above), held that the Swedish tax surcharge is to be regarded as falling under Article 6.

82. To sum up, the Court concludes that the proceedings concerning the tax surcharges imposed on the applicants involved a determination of a "criminal charge" within the meaning of Article 6 of the Convention. This provision is therefore applicable in the present case.

B. Compliance with Article 6 of the Convention

1. The submissions of the parties

(a) The Government

83. As regards the length of the tax assessment proceedings in the case, the Government adduced that the factual issues had been fairly complex and the Tax Authority had handled both cases without delays. With regard to the court proceedings, the second applicant had allegedly caused some delays by requesting extensions of time-limits and the Administrative Court of Appeal had handled the matter with great promptness. The Government therefore maintained that the duration of the proceedings in the second applicant's case could not be regarded as unreasonable in the particular circumstances. As regards the first applicant, the Government left it to the Court to decide whether there had been a violation of Article 6 in this respect.

84. As to the right of access to a court, the Government submitted that this question was premature with respect to the first applicant as the Supreme Administrative Court had not yet decided whether the dissolved company was entitled to have the Tax Authority's decisions reviewed by the courts. In general and on the assumption that the first applicant would eventually have such a review, the Government stated the following. The court proceedings in the case afforded the applicants a fair hearing that satisfied the requirements of Article 6 of the Convention and in which their right to be presumed innocent in accordance with paragraph 2 of that Article was respected. The Government claimed that even in the proceedings before the Tax Authority the applicants had benefited from many of the legal safeguards afforded by Article 6. Furthermore, the administrative courts

have jurisdiction to examine all aspects – both facts and law – of the matter before them. Throughout the tax assessment proceedings, it was for the Tax Authority to prove that incorrect information had been furnished and that, consequently, there were grounds for imposing tax surcharges.

85. In so far as the immediate enforcement of the tax debts as determined by the Tax Authority could be considered to have limited the applicants' access to a court, the Government contended that that limitation had been proportionate. Enforcement served to protect the financial interests of the State and the community as a whole. Given the considerable length of time allowed for lodging an appeal against a tax decision – normally five years after the assessment year – a system giving an absolute right to a stay of execution without security having been provided would probably lead to a vast increase in the number of appeals with a view to postponing or even avoiding the payment of taxes. The Government argued, moreover, that the applicants had had a preliminary examination by the courts of the Tax Authority's decisions concerning taxes and tax surcharges in the stay-of-execution proceedings; in both those proceedings and the bankruptcy proceedings, the courts had to conduct a summary review of the merits of the applicant's tax case. The Government pointed out, in regard to the first applicant, that that preliminary examination had been concluded before enforcement proceedings had been taken and the company declared bankrupt. Furthermore, the declaration of bankruptcy had been based not only on the tax debt that was of relevance in the present case but also taxes determined in 1996. The relevant surcharges formed only a minor part of the total amount. As the first applicant had no distrainable assets, it would have been declared bankrupt solely on the tax debt from 1996 and even if no surcharges had been imposed. Furthermore, in the event of a successful appeal against the Tax Authority's decisions, the applicants' positions could be restored by having the bankruptcy decision quashed and by bringing claims for compensation from the State for any financial loss incurred on account of that decision.

86. Further, with regard to the applicants' right to be presumed innocent, the Government, referring to the European Commission's decision in the above-mentioned Källander case (see paragraph 63), asserted that the notions of innocence and guilt were of no relevance to the imposition of tax surcharges, that there had been no allegation in the tax proceedings that the applicants had committed an offence and that no final decision had been taken on whether the first applicant would have to pay the surcharges. Moreover, the burden of proving that the applicants had submitted incorrect information in their tax returns was entirely on the Tax Authority.

(b) The applicants

87. The applicants submitted that a “reasonable time” within the meaning of Article 6 of the Convention had been exceeded. They pointed

out that the second applicant's tax assessment had been examined by the County Administrative Court on 29 March 2000 and had only recently been finally determined by the courts although he had appealed against the relevant Tax Authority decision already in December 1995. The first applicant's appeals – which had been lodged before the declaration of bankruptcy – had been dismissed by the County Administrative Court on 17 July 2000, that is about three and a half years after that declaration. The applicants disputed the Government's contention that the cases had involved complex issues.

88. The applicants further claimed that they had not had access to a court affording them a fair hearing under Article 6. In addition to the effects of the allegedly excessive length of the proceedings, they relied on the following arguments in this context. The proceedings before the Tax Authority had not involved a determination that complied with the requirements of Article 6. Nor was, allegedly, the County Administrative Court a "tribunal established by law" as the administrative courts were not authorised to deal with criminal matters. Moreover, in order for the applicants to have an effective right of appeal, the execution of the Tax Authority's decisions should have been stayed. The first applicant also asserted that it had not had a court determination of the disputed tax assessments as, on account of the dissolution of the company, its appeals against the Tax Authority's decisions had been dismissed. As this had been done in accordance with applicable legal provisions and case-law, it was unlikely that there would be a different decision by the Supreme Administrative Court, where the case was pending. Furthermore, there had not been a preliminary examination of the tax issues in the bankruptcy proceedings, as the courts that had heard the bankruptcy petition had not examined the underlying tax decisions or the Tax Authority's investigation. The applicants further stated that the immediate enforcement of the tax decisions and the bankruptcy order concerning the first applicant had caused them irreparable damage. The applicants, therefore, said that any future court examination or reparation would not effectively remedy the damage they had sustained.

89. The applicants also submitted that, in general, a taxpayer had an almost insurmountable burden of proof when claiming that a tax surcharge should not be imposed or should be remitted. They said that the case-law showed that orders for the remission of surcharges were made only rarely. Moreover, the enforcement measures, including the bankruptcy proceedings, had prejudiced the applicants' position in the ongoing tax assessment proceedings. Such measures, if taken before a determination by a court, thus conflicted with the legal safeguards afforded by the Convention. For those reasons, the principle of presumption of innocence had not been upheld in the tax assessment proceedings. Rather, it was the

applicants' contention that there had been a presumption of guilt with regard to the tax surcharges.

2. The Court's assessment

90. The Court first notes that, whereas the tax assessment proceedings concerning the second applicant were concluded by the Supreme Administrative Court's refusal to grant leave to appeal on 3 May 2002, the proceedings concerning the first applicant are still pending. On 23 April 2002 the Supreme Administrative Court granted the first applicant leave to appeal against the lower instances' decisions that the company, having been dissolved, lacked legal capacity to act as a party in the tax assessment proceedings. In respect of the first applicant, the Court will therefore determine whether, as claimed, the proceedings conducted and the measures taken so far have involved breaches of its rights under Article 6 of the Convention.

91. It is further to be noted that the relevant domestic proceedings have concerned both taxes and surcharges. In the light of its conclusion that Article 6 does not apply to the dispute over the tax itself (see paragraph 75 above), the Court will consider the proceedings to the extent to which they determined a "criminal charge" against the applicants, although that consideration will necessarily involve the "pure" tax assessments to a certain extent.

(a) Access to a court

92. The Court reiterates that Article 6 § 1 of the Convention embodies the "right to a court" – of which the right of access is one aspect – as a constituent element of the right to a fair trial. This right is not absolute, but may be subject to limitations permitted by implication. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired. Furthermore, they will not be compatible with Article 6 § 1 if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among other authorities, the Deweer v. Belgium judgment of 27 February 1980, Series A no. 35, pp. 24-25, §§ 48-49, and the Aït-Mouhoub v. France judgment of 28 October 1998, *Reports* 1998-VIII, p. 3227, § 52).

93. The Court notes that the basis for the various proceedings in the present case is the Tax Authority's decisions of 10, 11 and 15 August and 6 October 1995, which imposed additional taxes and tax surcharges on the applicants. The tax authorities are administrative bodies which cannot be considered to satisfy the requirements of Article 6 § 1 of the Convention. The Court considers, however, that Contracting States must be free to empower tax authorities to impose sanctions like tax surcharges even if they come to large amounts. Such a system is not incompatible with Article 6 § 1

so long as the taxpayer can bring any such decision affecting him before a judicial body that has full jurisdiction, including the power to quash in all respects, on questions of fact and law, the challenged decision (see the Bendenoun v. France judgment of 24 February 1994, Series A no. 284, pp. 19-20, § 46, and the Umlauft v. Austria judgment of 23 October 1995, Series A no. 328-B, pp. 39-40, §§ 37-39).

94. Under Swedish law, appeals against the Tax Authority's decisions imposing additional taxes and tax surcharges as well as its decisions of 7 and 30 May 1996 concerning the requests for stays of execution lay to the administrative courts. Indeed, the applicants have availed themselves of that remedy. It is thus clear that the administrative courts are competent to examine questions relating to tax surcharges. It is true that, as a consequence, they sit in proceedings that are of a criminal nature for the purposes of the Convention although they have no general jurisdiction to deal with issues that are classified as belonging to the criminal law under the Swedish legal system. However, the Court notes that the administrative courts – like the courts of general jurisdiction that determined the bankruptcy issue – have jurisdiction to examine all aspects of the matters before them. Their examination is not restricted to points of law but may also extend to factual issues, including the assessment of evidence. If they disagree with the findings of the Tax Authority, they have the power to quash the decisions appealed against. For these reasons, the Court finds that the judicial proceedings in the case have been conducted by courts that afford the safeguards required by Article 6 § 1.

95. It remains to be determined, however, whether the rules governing appeals against decisions of the tax authorities and, in particular, the application of those rules in the instant case prevented the applicant from having effective access to the courts. In this respect, the Court reiterates that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trail (see the Airey v. Ireland judgment of 9 October 1979, Series A no. 32, pp. 12-13, § 24).

96. Under the tax laws relevant to the present case, notably chapter 6, sections 6-7 of the Taxation Act, when an appeal is lodged with a county administrative court the tax authority should reconsider its decision. Only if there are special reasons may the appeal be referred directly to the court (see paragraph 44 above). In the normal case, therefore, reconsideration by the tax authority is a precondition for the court's examination of the appeal.

97. The Court notes that the first applicant, on 4 September 1995, requested the Tax Authority to reconsider the decisions concerning additional taxes and tax surcharges and, on 22 February 1996, lodged formal appeals against those decisions. Thus, the decisions were challenged before the first applicant was declared bankrupt. Also, the appeals were

referred to the County Administrative Court after the Tax Authority's decisions of 11 and 12 June 1997 on their reconsideration of the assessments, at a time when the company had not yet been dissolved. Nevertheless, the County Administrative Court dismissed the first applicant's appeals on 17 July 2000 on the ground that, following the dissolution of the company, it lacked legal capacity to act as a party. That decision was upheld by the Administrative Court of Appeal. Upon the first applicant's further appeal, the Supreme Administrative Court granted leave to appeal by a decision of 23 April 2002. Nevertheless, so far, the first applicant has not had a court determination of its liability to the taxes and tax surcharges in question. Irrespective of whether or not it will eventually have such a determination, the question arises whether a possible future court review, in the circumstances of the case, could be regarded as affording an effective access to the courts under Article 6 § 1. In examining this question, the Court will take into account the events that have already taken place in the various proceedings in the case.

In this respect, the Court notes that, after the first applicant had challenged the Tax Authority's decisions concerning taxes and surcharges, the Authority, on 7 May 1996, rejected its request for a stay to prevent the immediate execution on the ground that it had not provided the required banker's guarantee. The latter decision was upheld by the County Administrative Court on 12 September 1996. Bankruptcy proceedings ensued, which led to the first applicant's bankruptcy through a decision of the District Court of 10 February 1997.

98. In regard to the second applicant, the Court reiterates that he appealed against the Tax Authority's decision on 18 December 1995. In partial defrayment of the alleged tax debt, the Enforcement Office, in April 1996, seized his savings in two banks. His request for a stay of execution was rejected by the Tax Authority on 30 May 1996 and the County Administrative Court on 12 September 1996 as, like the first applicant, he had not provided a banker's guarantee. By a decision of the Enforcement Office of 22 November 1996 part of the second applicant's monthly income was seized. This seizure was discontinued a year later.

99. The above facts show that the impugned decisions of the Tax Authority had serious implications for the applicants. Indeed, they affected the first applicant's very existence as it could not continue its business during the bankruptcy and was dissolved when the bankruptcy proceedings were terminated and they entailed consequences for the second applicant's private finances. Some of those consequences were liable to become more serious as the proceedings progressed and would be difficult to estimate and redress should they succeed in their attempts at having the decisions overturned. By finding, in its judgments of 22 February and 8 March 1996, that the prerequisites for a stay of execution under section 49, subsection 1 (3) of the Tax Collection Act had been fulfilled, that is to say that

requiring payment of the amounts in question would result in considerable damage for the applicants or would otherwise appear unjust, the County Administrative Court acknowledged the applicants' difficulties.

100. It is true that no money was recovered from the first applicant and that, due to the lack of distrainable assets, it would have been declared bankrupt on the basis of the tax debt alone. Furthermore, the amounts seized from the second applicant only defrayed a minor part of the tax fixed by the Tax Authority. Consequently, the tax surcharges have in fact never been paid by the applicants. Nevertheless, the Court considers that the enforcement measures taken – covering also the surcharges, which remained payable – and the situation in which the applicants were placed made it indispensable if they were to have effective access to the courts for the procedures they had set in motion to be conducted promptly. The very essence of this right would otherwise be impaired. It should be noted that chapter 6, section 6 of the Taxation Act prescribes that the Tax Authority's reconsideration should be made as soon as possible.

101. The Tax Authority's decisions on their reconsideration of the assessments were taken on 11 and 12 June 1997, that is about one year and nine months after the first applicant had requested that reconsideration and about one and a half years after the second applicant's appeal. Only thereafter were the matters referred to the County Administrative Court for determination. It is true that the applicants submitted observations and questions to the Tax Authority on at least three occasions and that it was thus called upon to take various action in the matters. However, during the period when the matters were before the Tax Authority, the first applicant was declared bankrupt and the second applicant had bank savings seized. The latter measure was taken although the request for a stay of execution had not yet been decided. As regards the first applicant, it should be added that the company was dissolved soon after the referral of the case to the County Administrative Court. Still, the court decided to refuse the first applicant standing before it only on 17 July 2000, that is more than three years after the court had been seized with the case and more than two and a half years after the dissolution of the company. The proceedings have continued following the first applicant's appeals and still – more than six and a half years after the Tax Authority was asked to reconsider its decisions concerning taxes and tax surcharges – no access to court has been granted to the first applicant for a determination of these issues. In respect of the second applicant, the County Administrative Court delivered its judgment on 29 March 2000, that is two years and nine months after the Tax Authority's decision on their reconsideration. Overall, the Court cannot find that the facts of the cases reveal any particular justification for the periods that the applicants have had to await a court determination.

102. Having regard to the foregoing, and in particular to what was at stake for the applicants, the Court considers that the Tax Authority and the

County Administrative Court have failed to act with the urgency required by the circumstances of the cases and thereby unduly delayed court determinations of the main issues concerning the imposition of additional taxes and tax surcharges. As regards the first applicant, even if a court determination were to be provided in the future, the overall delay in obtaining such a determination means that the access to the courts thereby acquired could not be considered effective. In sum, the applicants have not had effective access to the courts. It follows, therefore, that the Government's preliminary objection is rejected.

There has accordingly been a breach of Article 6 § 1 in respect of both applicants' right of access to court.

(b) Length of the proceedings

103. The period to be taken into consideration under Article 6 § 1 of the Convention must be determined autonomously. It begins at the time when formal charges are brought against a person or when that person has otherwise been substantially affected by actions taken by the authorities as a result of a suspicion against him (see, among other authorities, the Eckle v. Germany judgment of 15 July 1982, Series A no. 51, p. 33, § 73).

104. The Court considers that the applicants were substantially affected by the proceedings in the present case when on 20 February and 11 August 1995, respectively, they were informed by the Tax Authority of its intention to impose additional taxes and tax surcharges on them. Thus, for the purposes of Article 6 § 1, the periods to be taken into consideration began on those dates. With respect to the first applicant, the relevant period have not yet ended as the proceedings concerning the company's tax assessment are pending before the Supreme Administrative Court. To date, these proceedings have lasted about seven years and five months. As regards the second applicant, the relevant period ended on 3 May 2002 when the tax assessment proceedings were concluded as a consequence of the Supreme Administrative Court's decision to refuse him leave to appeal. The proceedings relevant to the second applicant thus lasted almost six years and nine months.

105. The reasonableness of the length of proceedings is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities (see, among other authorities, *Selmouni v. France* [GC], no. 25803/94, § 112, ECHR 1999-V).

106. In the present cases, the Tax Authority and – in so far as the second applicant is concerned – the courts have had to assess the turnover of the first applicant's taxi business and to determine the applicants' liability to additional taxes and tax surcharges. The Court therefore considers that the proceedings concern issues of some complexity. However, the County

Administrative Court dismissed the first applicant's case for a lack of legal capacity on 17 July 2000, that is almost five years after the Tax Authority's original decisions, and examined the second applicant's appeal on 29 March 2000, that is almost four and a half years after the impugned Tax Authority decision. Furthermore, although the Administrative Court of Appeal cannot be criticised for the time spent to examine the second applicant's appeal, it took almost one year and three months to determine the relatively uncomplicated question of the first applicant's right to act as a party to the relevant proceedings. Moreover, the Supreme Administrative Court spent more than a year on the question whether to grant the second applicant leave to appeal. Except for the occasions on which the applicants submitted some observations and questions to the Tax Authority (see paragraph 101 above) and the short extensions of time-limits afforded the second applicant at a late stage of the proceedings, there is no indication that the length of the respective proceedings was due to the applicants' conduct. Nor can the relative complexity of the main tax issues justify such lengthy periods. On the contrary, the enforcement measures taken against the applicants called for prompt examinations of their appeals. The greater part of the time spent in the proceedings must therefore be attributed to the conduct of the authorities. In this context, the Court reiterates its above conclusion that the delay caused by the Tax Authority and the courts has deprived the applicants of effective access to the courts.

107. Bearing in mind that the proceedings concerning the first applicant have not yet been concluded, the Court considers that the overall length of the proceedings in the applicants' cases has exceeded what, in the particular circumstances, may be regarded as “reasonable” under Article 6 § 1 of the Convention.

There has accordingly also been a breach of Article 6 § 1 in respect of the length of the proceedings in both applicants' cases.

(c) Presumption of innocence

108. The Court reiterates that the presumption of innocence enshrined in Article 6 § 2 is one of the elements of the fair criminal trial that is required by paragraph 1 (see, among other authorities, the Bernard v. France judgment of 23 April 1998, *Reports* 1998-II, p. 879, § 37). It will accordingly consider the applicants' complaint from the standpoint of these two provisions taken together.

109. The meaning of paragraph 2 of Article 6 was described by the Court in the Barberà, Messegué and Jabardo case (judgment of 6 December 1988, Series A no. 146, p. 33, § 77) in the following way:

> “Paragraph 2 embodies the principle of the presumption of innocence. It requires, *inter alia*, that when carrying out their duties, the members of a court should not start

> with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him."

110. The Court first observes that the administrative courts examining the applicants' appeals against the Tax Authority's decisions have full jurisdiction in the cases and have power to quash the impugned decisions. The cases are to be examined on the basis of the evidence presented, and it is for the Tax Authority to show that there are grounds, under the relevant laws, for imposing the tax surcharges. Moreover, there is no indication that the members of the courts examining the applicants' appeals in the tax assessment cases or the enforcement and stay-of-execution proceedings have prejudged or will prejudge the merits of the cases.

111. However, the applicants have complained that the presumption of innocence was breached in two respects: firstly, they had an almost insurmountable burden of proof when claiming that a tax surcharge should not be imposed or should be remitted such that the reality was that they were presumed guilty; secondly, the fact that the Tax Authority's decisions concerning tax surcharges were enforced before their liability to pay the surcharges had been determined by a court prejudiced their position in the substantive proceedings.

112. In respect of the applicants' first contention, the Court notes that Swedish tax surcharges are imposed on objective grounds, that is, without any requirement of intent or negligence on the part of the taxpayer. As the Court has previously held (see the Salabiaku v. France judgment cited above, p. 15, § 27), the Contracting States may, in principle and under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence.

However, the relevant provisions on tax surcharges prescribe that, in certain situations, the surcharge is not to be imposed at all or is to be remitted. Thus, under chapter 5, section 6 of the Taxation Act, the surcharge is to be remitted if, *inter alia*, the provision of incorrect information or the failure to file a tax return appears excusable due to the nature of the information in question or other special circumstances, or when the imposition of the surcharge would be manifestly unreasonable. The tax authorities and courts shall consider whether there are grounds for remission even if the taxpayer has not made any claim to that effect. However, as the duty to consider whether there are grounds for remission only arises in so far as the facts of the case warrant it, the burden of proving that there is reason to remit a surcharge is, in effect, on the taxpayer (see further paragraph 42 above).

Consequently, the starting point for the tax authorities and courts must be that inaccuracies found in a tax assessment are due to an inexcusable act

attributable to the taxpayer and that it is not manifestly unreasonable to impose a tax surcharge as a penalty for that act. The Swedish tax system thus operates with a presumption, which it is up to the taxpayer to rebut.

113. In the Salabiaku judgment the Court pointed out (p. 15, § 28):

> "Article 6 § 2 does not ... regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."

Thus, in employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim sought to be achieved.

114. In assessing whether, in the present case, this principle of proportionality was observed, the Court acknowledges that the applicants were faced with a presumption that was difficult to rebut. However, they were not left without any means of defence. It is clear that, in challenging the Tax Authority's decisions on taxes and tax surcharges, the applicants have maintained that they submitted correct information in their tax returns and that the Authority's tax assessments were erroneous as they were based on inaccurate information gathered during the tax audit. In so doing, the applicants have relied in their defence, in so far as the surcharges are concerned, on chapter 5, section 11 of the Taxation Act (and similar provisions in other relevant laws), according to which a successful objection to the taxes themselves will automatically result in a corresponding reduction in the surcharges. However, it has been open to the applicants to put forward grounds for a reduction or remission of the surcharges and to adduce supporting evidence. Thus, they have been able to claim, as an alternative line of defence, that, even if they were found to have furnished incorrect information to the Tax Authority, it was excusable in the circumstances or that, in any event, the imposition of surcharges would be manifestly unreasonable. However, the applicants have not made any such claim and the Country Administrative Court – which was obliged to examine of its own motion whether there were grounds for remission – concluded, in its judgment of 29 March 2000 concerning the second applicant, that no legal basis for remitting the tax surcharge had been found.

115. The Court also has regard to the financial interests of the State in tax matters, taxes being the State's main source of income. A system of taxation principally based on information supplied by the taxpayer would not function properly without some form of sanction against the provision of incorrect or incomplete information, and the large number of tax returns that are processed annually coupled with the interest in ensuring a foreseeable and uniform application of such sanctions undoubtedly require that they be imposed according to standardised rules.

116. In view of what has been stated above, in particular the fact that the relevant rules on tax surcharges provide certain means of defence based on subjective elements and that an efficient system of taxation is important to the State's financial interests, the Court considers that the presumptions applied in Swedish law with regard to surcharges are confined within reasonable limits. Nevertheless, as the Supreme Administrative Court stated in a judgment delivered on 15 December 2000 (see paragraph 61 above), this conclusion in general "requires that the courts ... make a nuanced and not too restrictive assessment in each individual case as to whether there are grounds for setting aside or remitting the tax surcharge". As has been mentioned above, however, the applicants have not relied on the grounds for remission in the relevant tax assessment proceedings.

117. The applicants have claimed that their right to be presumed innocent was breached also by the fact that the Tax Authority's decisions concerning tax surcharges were enforced prior to a determination by a court of their liability to pay them.

118. The Court notes that neither Article 6 nor, indeed, any other provision of the Convention can be seen as excluding, in principle, enforcement measures being taken before decisions on tax surcharges have become final. Moreover, provisions allowing early enforcement of certain criminal penalties can be found in the laws of other Contracting States. However, considering that the early enforcement of tax surcharges may have serious implications for the person concerned and may adversely affect his or her defence in the subsequent court proceedings, as with the position with the use of presumptions in criminal law, the States are required to confine such enforcement within reasonable limits that strike a fair balance between the interests involved. This is especially important in cases like the present one in which enforcement measures were taken on the basis of decisions by an administrative authority, that is, before there had been a court determination of the liability to pay the surcharges in question.

119. In assessing whether, in the present case, the immediate enforcement of the surcharges exceeded the limits mentioned above, the Court first notes that the financial interests of the State, which are such a prominent consideration in maintaining an efficient taxation system, do not carry the same weight in this sphere. This is because, although tax surcharges may involve considerable amounts of money, they are not intended as a separate source of income but are designed to exert pressure on taxpayers to comply with their obligations under the tax laws and to punish breaches. Thus, surcharges are a means of ensuring that the State receives taxes due under the relevant legislation. Accordingly, whereas a strong financial interest may justify the State's applying standardised rules and even legal presumptions in the assessment of taxes and tax surcharges and collecting taxes immediately, it cannot by itself justify the immediate enforcement of tax surcharges.

120. Another factor to be taken into account is whether the tax surcharges can be recovered and the original legal position restored in the event of a successful appeal against the decision to impose the surcharges. The Court notes that, under Swedish law, a successful appeal will lead to the reimbursement of any amount paid with interest. Moreover, a bankruptcy decision can be quashed upon a request for the reopening of the bankruptcy proceedings. It is also possible to bring proceedings against the State for compensation for any financial loss caused by the bankruptcy. Nevertheless, in cases where considerable amounts have been the subject of enforcement, reimbursement may not fully compensate the individual taxpayer for his or her losses. A system that allows enforcement of considerable amounts of tax surcharges before there has been a court determination of the liability to pay the surcharges is therefore open to criticism and should be subjected to strict scrutiny.

121. However, the Court is called upon to decide whether the above-mentioned limits on early enforcement were exceeded to the detriment of the applicants in the present case. In this respect, the Court notes that, although the decisions on tax surcharges remained valid and the surcharges enforceable such that the applicants' right of effective access to a court thus required that the courts proceed without undue delay, no amount was actually recovered from the first applicant and only a minor amount, far from covering the tax debt as such, was recovered from the second applicant. Moreover, due to its lack of assets, the first applicant would have been declared bankrupt on the basis of the tax debt alone. In these circumstances, the Court finds that the possibility provided for by Swedish law of securing reimbursement of any amount paid constituted a sufficient safeguard of the applicants' interests in the present case.

122. Having regard to the foregoing, the Court considers that the applicants' right to be presumed innocent has not been violated in the present case.

There has accordingly been no breach of Article 6 §§ 1 and 2 in this respect.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

123. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

124. The applicants submitted that they had sustained pecuniary damage due to first applicant's bankruptcy. They estimated that the first applicant had sustained a loss of assets amounting to SEK 286,358 and that the second applicant had lost income for the years 1997 to 2002 in the amount of SEK 1,178,839. In addition to requesting compensation for those amounts, the second applicant insisted that the whole tax debt resulting from the relevant Tax Authority decision – including taxes, tax surcharges and interests – be cancelled. As of 13 June 2001 the debt apparently amounted to SEK 340,000. In the event that the State was not ordered to cancel the tax debt, the second applicant claimed the same amount in damages.

Moreover, the second applicant sought SEK 5,000,000 for non-pecuniary damage, on account of mental pain and suffering which the proceedings and measures had caused him and his family. Without stating any grounds, the first applicant sought SEK 286,358 under this head.

125. The Government contended that there was no causal link between a violation of Article 6 of the Convention and the loss of assets or income which the applicants alleged they had sustained. The Government contended that the first applicant had had hardly any assets at all at the time of the declaration of bankruptcy and, in view of its financial situation, would have been declared bankrupt in any event on account of the taxes assessed by the Tax Authority. Thus, the tax surcharges had been of no relevance to the bankruptcy decision. Further, the second applicant had failed to substantiate any loss of income as his average declared income during the years 1997 to 2000 had been well above the income received from the first applicant the year before its bankruptcy. The Government further stated that the Court had no power under Article 41 to oblige a State to cancel a tax debt. Moreover, they contested that there was any causal link between the alleged pecuniary damage relating to the tax debts and the alleged violations of the Convention, which did not relate to the imposition of taxes and surcharges but to the enforcement of the decisions. In any event, only a very small amount of the relevant tax debts had actually been paid; the remainder had become statute-barred on 31 December 2001.

Should the Court find a violation of Article 6, the Government acknowledged that the second applicant should be given some compensation for non-pecuniary damage. However, they found the applicant's claim in this respect to be excessive and suggested that SEK 20,000 would be a reasonable amount for a violation as regards the length of the proceedings. As to other possible violations of Article 6, the Government preferred to leave it to the Court to determine an award on an equitable basis. With respect to the first applicant, the Government disputed the claim, noting that no arguments had been put forward by the applicant.

126. The Court reiterates that it has found violations of Article 6 of the Convention in respect of the right of access to a court and of the length of

the proceedings. Irrespective of the extent of any pecuniary damage sustained by the applicants on account of the decisions and measures taken by the domestic authorities and courts, the Court finds that there is no causal link between that damage and the violations found.

However, the Court finds it appropriate to make an award for non-pecuniary damage. Noting that the second applicant was the sole shareholder of the first applicant at the time of the latter's bankruptcy and dissolution, it awards the applicants the joint sum of 20,000 euros (EUR) under that head. The award is made in euros, to be converted into the national currency at the date of settlement, as the Court finds it appropriate that henceforth all just satisfaction awards made under Article 41 of the Convention should in principle be based on the euro as the reference currency.

B. Costs and expenses

127. The first applicant claimed SEK 50,000 and the second applicant SEK 325,000, apparently including value-added tax (VAT), in legal fees for the proceedings before the Commission and the Court. This amount corresponded to a total of 215 hours of work for the applicants' counsel at an hourly rate of SEK 1,750.

128. The Government considered the number of hours of work stated by the applicant to be excessive, having regard to the fact that the much of the work performed related to both the present case and the case of Janosevic v. Sweden (application no. 34619/97). The Government also found that an hourly rate of SEK 1,500 would suffice, bearing in mind that the rate currently applied within the Swedish legal-aid system is SEK 1,221 inclusive of VAT.

129. The Court reiterates that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, 10 May 2001, § 120). Having regard to the similarity between the facts and submissions in the present case and in the case of Janosevic v. Sweden, the Court awards the applicants by way of costs and expenses the global and joint sum of EUR 20,000, including VAT.

C. Default interest

130. As the awards are expressed in euros to be converted into the national currency at the date of settlement, the Court considers that the default interest rate should also reflect the choice of the euro as the reference currency. It considers it appropriate to take as the general rule that the rate of the default interest to be paid on outstanding amounts expressed

in euro should be based on the marginal lending rate of the European Central Bank to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that Article 6 of the Convention is applicable in the present case;

2. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention in respect of both applicants' right of access to a court;

3. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention in respect of the length of the proceedings in both applicants' cases;

4. *Holds* by six votes to one that there has been no violation of Article 6 §§ 1 and 2 of the Convention in respect of the right to be presumed innocent;

5. *Holds* unanimously
   (a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 20,000 (twenty thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 20,000 (twenty thousand euros) in respect of costs and expenses;
   (b) that simple interest at a rate equal to the marginal lending rate of the European Central Bank plus three percentage points shall be payable from the expiry of the above-mentioned three months until settlement at the rates applicable during the default period;

6. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 23 July 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Wilhelmina THOMASSEN
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

a) concurring opinion of Ms Thomassen;

b) partly dissenting opinion of Mr Casadevall.

W.T.
M.O'B.

CONCURRING OPINION OF JUDGE THOMASSEN

I agree with the majority of my colleagues as regards the outcome of this case.

Nevertheless, I have some reservations with regard to the more general reasoning of the majority of the Court concerning the relation between the *presumptio innocentiae* and the early enforcement of tax penalties in general.

My reservations are – *mutatis mutandis* – set out in my concurring opinion in the case of Janosevic v. Sweden (no. 34619/97), delivered on the same day as the present judgment.

PARTLY DISSENTING OPINION OF JUDGE CASADEVALL

(*Translation*)

I do not share the majority's view on the last of the applicants' complaints. For the same reasons and applying the same principles as set out in my partly dissenting opinion in the case of Janosevic v. Sweden (no. 34619/97, delivered on the same day), I consider that the execution of the tax surcharges imposed by the Tax Authority before the courts were able to determine whether the applicants had any criminal liability also infringed Article 6 § 2 of the Convention.