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

FIRST SECTION
[In its composition prior to 1 November 2001]

CASE OF JANOSEVIC v. SWEDEN

(Application no. 34619/97)

JUDGMENT

STRASBOURG

23 July 2002

FINAL

21/05/2003

In the case of Janosevic 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. 34619/97) 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 national, Mr Velimir Janosevic ("the applicant"), on 28 November 1996.

2. The applicant alleged that his rights under Article 6 of the Convention had been violated as the Tax Authority's decisions on taxes and tax surcharges had been enforced prior to a court determination of the dispute.

3. 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).

4. 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.

5. A hearing took place in public in the Human Rights Building, Strasbourg, on 26 September 2000 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Swedish Government ("the Government")*
Ms I. KALMERBORN, Ministry for Foreign Affairs, *Agent*,
Mr A. LINDGREN, Ministry of Justice,
Ms A. LUNDQVIST, Ministry of Justice,

Mr P. KINDLUND, Ministry of Finance,
Ms M. JÖNSSON, Ministry of Finance, *Advisers*;

(b) *for the applicant*
Mr J. THÖRNHAMMAR, *Counsel*,
Ms N. KAMTSAN, *Adviser*.

The Court heard addresses by Mr Thörnhammar and Ms Kalmerborn.

6. By a decision of 26 September 2000, following the hearing, the Chamber declared the application admissible.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

8. In the autumn of 1995, as part of a large-scale investigation into taxicab operators, the Tax Authority (*skattemyndigheten*) of the County of Stockholm carried out a tax audit of the applicant's taxi firm. Having discovered in the course of the audit certain irregularities in the tax returns for the assessment year 1994, the Tax Authority drafted an audit report on 1 December 1995 containing a supplementary tax assessment and invited the applicant to submit comments. The applicant challenged the report and requested that further investigative measures be carried out.

9. Having regard to the findings of the audit and the applicant's observations, the Tax Authority – by decisions of 22 and 27 December 1995 – increased the applicant's liability to income tax by 286,859 Swedish kronor (SEK), to value-added tax (*mervärdesskatt*) by SEK 192,866 and to employer's contributions (*arbetsgivaravgifter*) by SEK 253,783. Moreover, as the information supplied by the applicant in his tax returns was found to be incorrect and the figure given for the turnover of the business had been revised upwards under a discretionary assessment procedure, the Tax Authority ordered him to pay tax surcharges (*skattetillägg, avgiftstillägg*) amounting to 20% or 40% of the increased tax liability, depending on the type of tax involved. The additional taxes levied on the applicant, including interest and surcharges, totalled SEK 1,020,300, of which SEK 161,261 were surcharges. The amounts relating to value-added tax and employer's contributions were payable on 5 January 1996 and those relating to income tax on 10 April 1996.

B. Request for a stay of execution

10. Claiming that the information relied upon by the Tax Authority to calculate the turnover of his business was inaccurate, the applicant, by a letter of 8 March 1996, requested the Authority to reconsider its decisions. As he risked being declared bankrupt before his tax liability had been determined by the courts, he also requested a stay of execution in respect of the amounts assessed. The request was 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.

11. In letters of 19 April 1996 to the applicant's counsel the Tax Authority responded to the applicant's request for a stay of execution as follows:

> "... The Tax Authority considers that the prerequisites laid down in section 49, subsection 1(2) or (3), of the Tax Collection Act [*Uppbördslagen*, 1953:272] for granting a stay of execution have been fulfilled.
>
> According to section 49, subsection 2, of the Tax Collection Act, the Tax Authority may, in certain cases, require that security be provided for any amount in respect of which a stay of execution is sought.
>
> Having regard to the information contained in [the applicant's] tax return and considering the other circumstances in the case, the Tax Authority finds that [the applicant's] ability to pay is open to serious doubt.
>
> The Tax Authority is of the opinion that [the applicant] has to provide security for the amount ... in respect of which he has requested a stay of execution. Only a banker's guarantee will be accepted as security.
>
> You are hereby invited to provide security. This should be done no later than 8 May 1996.
>
> Should you fail to provide security by the date mentioned above, the Tax Authority will reject your request."

12. By decisions of 21 May 1996 the Tax Authority rejected the applicant's request for a stay of execution, as no security had been furnished.

13. The applicant appealed against those decisions to the County Administrative Court (*länsrätten*) of the County of Stockholm, claiming that he should be exempted from the obligation to provide security and granted a stay 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 applicant without a court having first determined whether he had any liability to pay the amounts involved.

14. By judgments of 11 July 1996 the County Administrative Court upheld the Tax Authority's decisions of 21 May 1996. The court noted at the outset that the formal prerequisites for granting a stay of execution under section 49, subsection 1(3), of the Tax Collection Act had been fulfilled. However, subscribing to the reasons given by the Tax Authority, it found that the applicant could not be granted a stay of execution unless security was provided.

15. The applicant, who did not furnish security, lodged a notice of appeal. On 21 May 1997 the Administrative Court of Appeal (*kammarrätten*) in Stockholm refused him leave to appeal against the County Administrative Court's judgments. His request for leave to appeal against the appellate court's decisions was refused by the Supreme Administrative Court (*Regeringsrätten*) on 3 November 1998.

C. Enforcement proceedings

16. In February 1996 the applicant was registered as being in arrears with value-added tax and employer's contributions and the corresponding tax surcharges and interest imposed as a result of the Tax Authority's decisions. The amounts relating to income tax did not become payable until 10 April 1996.

17. On 29 March 1996 the Enforcement Office (*kronofogde-myndigheten*) of the County of Stockholm, representing the State, filed a petition with the District Court (*tingsrätten*) of Huddinge, requesting that the applicant be declared bankrupt. According to a statement submitted by the Office, the applicant's tax liability as of 22 March 1996 amounted to SEK 653,144, including penalties for late payment (*dröjsmålsavgifter*) that had accrued since the final date on which payment could have been made. That amount included SEK 89,323, plus 6% in penalties for late payment, in tax surcharges. The Office noted that an investigation had revealed that the only property owned by the applicant was some vehicles, but of insufficient value to cover the debt.

18. The applicant was summoned to appear before the District Court on 23 April 1996. The court commenced its examination of the case but, at the insistence of the applicant – who referred to the fact that his request for a stay of execution was still pending before the Tax Authority – adjourned the bankruptcy proceedings until 21 May 1996, when it held a second hearing in the case. When heard by the court the applicant now stated that he was unable to comply with the Tax Authority's condition for granting a stay of execution, namely providing security. By a decision of 10 June 1996, after rejecting the applicant's request for a further adjournment, the District Court declared the applicant bankrupt. In so doing it had regard to the fact that, under section 103 of the Tax Collection Act, the applicant was under an obligation to pay the debt, was unable to provide the security required in

order to obtain a stay of execution and had to be considered insolvent as he had been found to have no distrainable assets.

19. The 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 he had challenged the Tax Authority's decisions regarding his liability to taxes and tax surcharges.

20. The applicant's appeal was dismissed by the Court of Appeal on 18 June 1996. Leave to appeal against the appellate court's decision was refused by the Supreme Court (*Högsta domstolen*) on 18 September 1996.

21. According to a report by the bankruptcy administrator of 30 January 1998, all the applicant's vehicles, with the exception of a car that had been leased to the applicant and had no residual value, had been sold by him shortly before he was declared bankrupt. The value of the remainder of the applicant's assets listed in the statement of affairs was estimated at SEK 8,800, whereas the debt came to approximately SEK 1,690,000.

22. On 18 February 1998 the bankruptcy proceedings were terminated owing to a lack of assets.

23. 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

24. On 30 October 1997 the applicant was sentenced by the District Court to ten months' imprisonment for tax fraud (*skattebedrägeri*) and a bookkeeping offence (*bokföringsbrott*). The tax fraud concerned the above-mentioned value-added tax. The conviction was based on information obtained by the Tax Authority during its audit of the applicant's taxi firm and statements he had made in his tax returns.

25. The judgment was upheld by the Court of Appeal on 16 November 1998. Leave to appeal to the Supreme Court was refused on 4 March 1999.

E. Further proceedings concerning the taxes and tax surcharges

26. As mentioned above, on 8 March 1996 the applicant requested the Tax Authority to reconsider its decisions on taxes and tax surcharges. In a letter of 23 April 1996, the applicant referred to the District Court's order the same day temporarily adjourning the bankruptcy proceedings (see paragraph 18 above) and stressed the need for a speedy reconsideration by the Tax Authority. On 24 February 1999 the Authority – noting that the

applicant had appealed against the decisions on taxes and tax surcharges – stood by its previous decisions and refused to change them. Consequently, the matters were automatically referred to the County Administrative Court for determination.

27. On 30 August 2000 the applicant requested an oral hearing at which it was proposed that certain witnesses would give evidence. Later, asked by the County Administrative Court to clarify his request, the applicant stated that an oral hearing was not required on the issue of the assessment of the tax surcharges, but was necessary so that the court could hear evidence relating to the information on which the tax decisions were based. By a letter of 5 September 2001 the County Administrative Court informed the applicant that it did not find a hearing necessary and ordered him to make his final observations in the case in writing.

28. By judgments of 7 December 2001 the County Administrative Court upheld the Tax Authority's decisions of 22 and 27 December 1995 and rejected the applicant's request for an oral hearing, considering that the information on which the impugned decisions were based was reliable and showed that the applicant's income and the taxes 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 amounts levied on the applicant could not be considered too high. With respect to the tax surcharges, the County Administrative Court made extensive references to the judgments of the Supreme Court of 29 November 2000 and the Supreme Administrative Court of 15 December 2000 (see paragraphs 51-55 below) and concluded that the Swedish provisions on tax surcharges were in conformity with the Convention. It considered that there had been sufficient reasons to impose the surcharges in question and that no legal basis for remitting them had been shown. In that connection, it dismissed the applicant's argument that the allegedly excessive length of the proceedings constituted by itself a reason to remit the surcharges.

29. The applicant has appealed to the Administrative Court of Appeal, where the dispute is at present pending.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Taxes and tax surcharges

30. 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.

31. 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.

32. 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.

33. 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.

34. Notwithstanding the fact that the taxpayer has furnished incorrect information, no tax surcharge will be imposed in certain situations, for example where the tax authority has corrected obvious miscalculations or written errors by the taxpayer, where 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 where the taxpayer has corrected the information voluntarily (Chapter 5, section 4).

35. 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 where the failure appears excusable by reason of the nature of the information in question or other special circumstances, or where 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.

36. 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).

37. 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.

38. 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).

39. 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

40. 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.

41. 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).

42. 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(1) of the Tax Collection Act). According to the preparatory documents, the second condition will be satisfied not only where an outcome favourable to the taxpayer is just as likely as an unfavourable one, but also in cases where 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).

43. 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(2)).

44. 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.

45. 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 36-37 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

46. 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*) taken 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).

47. 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).

48. 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

49. 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.

50. 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

51. 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* 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 *non 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.

52. 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 51 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 *Bendenoun* [*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 *Bendenoun* 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 *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. ...”

53. 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 *Salabiaku* [*Salabiaku v. France*, judgment of 7 October 1988, Series A no. 141-A] 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 where 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."

54. 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 35 above).

55. 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 *Källander v. Sweden* [no. 12693/87, Commission decision of 6 March 1989, unreported].

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 (see 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

56. In his original application to the Commission, the applicant alleged breaches of Articles 6 and 14 of the Convention and Article 1 of Protocol No. 1 in relation to the enforcement of taxes and tax surcharges prior to a court determination of the tax issues. On 26 September 2000, at the hearing before the Court, he further questioned whether there had not also been a breach of the principle of *non bis in idem*. In observations submitted on 18 December 2000, he alleged that, in the latter respect, there had been a violation of Article 4 of Protocol No. 7 to the Convention.

57. The Government asked the Court not to examine the complaint under Article 4 of Protocol No. 7 in the present case as it had allegedly been made out of time.

58. The Court notes that the issue of *non bis in idem* was raised at a late stage of the proceedings and that a formal complaint under Article 4 of Protocol No. 7 was not made until after its decision to declare the application admissible. The Court finds that the additional complaint has

been made too late to be examined in the present case. The scope of the case before the Court is thus determined by the decision on admissibility which covered the complaints made under Article 6 of the Convention.

II. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

59. The applicant 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, he maintained that the tax assessment proceedings had not been determined within a reasonable time and that he had been unable to obtain a fair hearing in those pending proceedings. Moreover, he had been deprived of his right to be presumed innocent until proved guilty according to law. He 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. Submissions of the parties

(a) The Government

60. The Government argued that the applicant's "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 *Ferrazzini v. Italy* ([GC], no. 44759/98, 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.

61. 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 applicant

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

63. Furthermore, the tax surcharges imposed on him constituted a "criminal charge" within the meaning of Article 6. The applicant 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 penalties. He 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

64. 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, *Ferrazzini*, cited above, § 29). The facts of the present case do not give reason to review that conclusion.

65. Having regard to the fact that tax surcharges were imposed on the applicant, 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, *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, p. 18, § 50, and *Lauko v. Slovakia*, judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, p. 2504, § 56).

66. 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 52 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.

67. 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 *Lauko*, cited above, pp. 2504-05, § 57).

68. As regards the nature of the conduct imputed to the applicant, the Court notes that the Tax Authority and the County Administrative Court found that the applicant had supplied incorrect information in his 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 applicant on objective grounds without the need to establish any criminal intent or negligence on his 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 *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 32 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 *Öztürk*, cited above, pp. 20-21, § 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 applicant was charged with a criminal offence.

69. 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 very substantial, totalling SEK 161,261. 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 *Lauko*, cited above, p. 2505, § 58).

70. The Court also notes that the Supreme Court considered in its judgment of 29 November 2000 (see paragraph 51 above) that there were weighty arguments for regarding Article 6 as being applicable under its criminal head to proceedings involving tax surcharges. Furthermore, the Supreme Administrative Court, in its judgments of 15 December 2000 (see paragraphs 52-55 above), held that the Swedish tax surcharge is to be regarded as falling under Article 6.

71. To sum up, the Court concludes that the proceedings concerning the tax surcharges imposed on the applicant 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. Submissions of the parties

(a) The Government

72. The Government left it to the Court to decide whether there had been a violation of the Convention as regards the length of the tax assessment proceedings. Noting that an overall assessment of the reasonableness of the length of those proceedings could not be made as they had not yet been concluded, the Government did not deny that the proceedings had so far taken a long time. This was allegedly partly due to the large number of similar cases that were being dealt with simultaneously by the Tax Authority and the fact that it had awaited the outcome of the application for a stay of execution.

73. The Government, however, maintained that the applicant had had access to a court affording him a fair hearing that satisfied the requirements of Article 6 of the Convention and in which his right to be presumed innocent in accordance with paragraph 2 of that Article was respected. They claimed that even in the proceedings before the Tax Authority the applicant had benefited from many of the legal safeguards afforded by Article 6. Furthermore, the applicant had had recourse to the administrative courts which had 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. In so far as the immediate enforcement of the tax debt as determined by the Tax Authority could be considered to have limited the applicant's 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 applicant 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. They also pointed out that the applicant had been declared bankrupt on account of a tax debt of which the surcharges formed only a minor part. As he had virtually no assets, he would have been declared bankrupt even if no surcharges had been imposed. Furthermore, in the event of a successful appeal against the Tax Authority's decisions, the applicant's position could be restored by having the bankruptcy decision quashed and by bringing a claim for compensation from the State for any financial loss incurred on account of that decision.

74. Furthermore, with regard to the applicant's right to be presumed innocent, the Government, referring to the Commission's decision in *Källander*, cited above (see paragraph 55), 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 applicant had committed an offence and that no final decision had been taken on whether the applicant would have to pay the surcharges. Moreover, the burden of proving that the applicant had submitted incorrect information in his tax returns was entirely on the Tax Authority.

(b) The applicant

75. The applicant pointed out that his tax case, which concerned the assessment year 1994 and thus his income during 1993, was examined by the first-instance court on 7 December 2001 and was still pending. He submitted that a "reasonable time" within the meaning of Article 6 of the Convention had been exceeded, especially in view of the measures that had already been taken against him and the fact that there was no longer any point in witnesses being called, as they would not be able to give evidence about the situation in 1993.

76. The applicant further claimed that he had not had access to a court affording him a fair hearing under Article 6. In addition to the effects of the allegedly excessive length of the proceedings, he 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 applicant to have an effective right of appeal, the execution of the Tax Authority's decisions should have been stayed. The applicant also asserted that he had not had 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. Furthermore, the immediate enforcement of the tax decisions and the bankruptcy order had caused the applicant irreparable damage, as his private and professional finances had been ruined as a result of the bar on carrying on business activities during

bankruptcy. The applicant, therefore, said that any future reparation he might receive would not effectively remedy the damage he had sustained.

77. The applicant 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. He 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 applicant's 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 applicant's contention that there had been a presumption of guilt with regard to the tax surcharges.

2. The Court's assessment

78. The Court first notes that the tax assessment proceedings are still pending; the judgments of the County Administrative Court were delivered on 7 December 2001 and the applicant has since lodged an appeal with the Administrative Court of Appeal. The Court will therefore determine whether, as claimed by the applicant, the proceedings conducted and the measures taken so far have involved breaches of his rights under Article 6 of the Convention.

79. 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 64 above), the Court will consider the proceedings to the extent to which they determined a "criminal charge" against the applicant, although that consideration will necessarily involve the "pure" tax assessments to a certain extent.

(a) Access to a court

80. 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, *Deweer v. Belgium*, judgment of 27 February 1980, Series A no. 35, pp. 24-26, §§ 48-49, and *Aït-Mouhoub v. France*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3227, § 52).

81. The Court notes that the basis for the various proceedings in the present case is the Tax Authority's decisions of 22 and 27 December 1995, which imposed additional taxes and tax surcharges on the applicant. 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 *Bendenoun v. France*, judgment of 24 February 1994, Series A no. 284, pp. 19-20, § 46, and *Umlauft v. Austria*, judgment of 23 October 1995, Series A no. 328-B, pp. 39-40, §§ 37-39).

82. Under Swedish law, appeals against the Tax Authority's decisions of 22 and 27 December 1995 as well as its decision of 21 May 1996 concerning the request for a stay of execution lay to the administrative courts. Indeed, the applicant has availed himself 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.

83. 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 *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, pp. 12-14, § 24).

84. Under the tax laws relevant to the present case, notably Chapter 6, sections 6 and 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 37 above). In the normal case, therefore, reconsideration by the tax authority is a precondition for the court's examination of the appeal.

85. On 8 March 1996 the applicant requested the Tax Authority to reconsider its decisions of 22 and 27 December 1995 to impose additional taxes and tax surcharges on him. The action taken by the applicant was thus not identified as an appeal. The Court considers, however, that the characterisation of his action is not of decisive importance for determining whether he had effective access to the courts, as the Tax Authority was, in any event, under an obligation to reconsider its decision before the case could be referred to a court and there is nothing to suggest that the scope or duration of its reconsideration would differ depending on how the action was characterised. Moreover, it appears from submissions made by the applicant in the enforcement and stay-of-execution proceedings that his intention was to obtain a court determination of his liability to pay the amounts in question. Furthermore, in its decisions following reconsideration of the assessments, the Tax Authority stated that the applicant had appealed against the decisions concerning additional taxes and tax surcharges. It also appears that the applicant's action was in fact treated as constituting formal appeals as, after reconsidering the assessments the Tax Authority automatically referred the matters to the County Administrative Court, in accordance with the provisions applicable to appeals.

86. Soon after the applicant had asked the Tax Authority to reconsider its tax assessments, enforcement measures were taken against him on the basis of those assessments which eventually led to his being declared bankrupt by the District Court on 10 June 1996. Furthermore, his request for a stay to prevent immediate execution was rejected by the County Administrative Court on 11 July 1996, as he had not been able to provide the required banker's guarantee.

87. The above facts show that the impugned decisions of the Tax Authority had serious implications for the applicant. Indeed, they entailed consequences not only for his private finances but also for his taxi business. Some of those consequences were liable to become more serious as the proceedings progressed and would be difficult to estimate and redress should he succeed in his attempts at having the decisions overturned. By finding, in its judgment of 11 July 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 amount in question would result in considerable damage for the applicant or would otherwise appear unjust, the County Administrative Court acknowledged the applicant's difficulties.

88. It is true that no money was recovered from the applicant and that, due to the lack of distrainable assets, he would have been declared bankrupt

on the basis of the tax debt alone. Consequently, the tax surcharges have in fact never been paid by the applicant. Nevertheless, the Court considers that the enforcement measures taken – covering also the surcharges, which remained payable – and the situation in which the applicant was placed made it indispensable if he was to have effective access to the courts for the procedures he 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.

89. However, the Tax Authority's decisions on their reconsideration of the assessments were not taken until 24 February 1999, that is to say almost three years after the applicant's request. Only thereafter were the matters referred to the County Administrative Court for determination. By that time, the enforcement and stay-of-execution proceedings had already been finalised. The facts of the case do not reveal any particular justification for such a delay. The Court further notes that the applicant was declared bankrupt due to his failure to pay the alleged tax debt, including the tax surcharges, not only long before the County Administrative Court was called upon to determine the applicant's liability to pay that debt but also before it had decided his application for a temporary stay of execution.

90. Having regard to the foregoing, and in particular to what was at stake for the applicant, the Court considers that, in taking almost three years to decide the applicant's requests for reconsideration of the assessments, the Tax Authority failed to act with the urgency required by the circumstances of the case and thereby unduly delayed a court determination of the main issues concerning the imposition of additional taxes and tax surcharges. As a consequence, the applicant did not have effective access to the courts.

There has accordingly been a breach of Article 6 § 1 of the Convention in respect of the right of access to a court.

(b) Length of the proceedings

91. 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, *Eckle v. Germany*, judgment of 15 July 1982, Series A no. 51, p. 33, § 73).

92. The Court considers that the applicant was substantially affected by the proceedings in the present case when on 1 December 1995 the Tax Authority drafted an audit report containing a supplementary tax assessment, which included tax surcharges. The report was immediately communicated to the applicant. Thus, for the purposes of Article 6 § 1, the period to be taken into consideration began on 1 December 1995. The relevant period has not yet ended as the court proceedings on taxes and tax

surcharges are still pending, currently before the Administrative Court of Appeal. To date, the proceedings have lasted almost six years and eight months.

93. 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).

94. In the present case, the Tax Authority and the courts have had to assess the turnover of the applicant's taxi business and his liability to additional taxes and tax surcharges. The Court therefore considers that the proceedings concern issues of some complexity. However, the County Administrative Court – the only judicial body thus far to have determined these issues on the merits – examined the applicant's appeals against the Tax Authority's decisions of 22 and 27 December 1995 in its judgments of 7 December 2001, that is after almost six years. During that period, the case was pending before the Tax Authority for almost three years and before the County Administrative Court for approximately two years and nine months. There is no indication that the applicant contributed to the length of those periods by his conduct. Nor can the relative complexity of the case justify such lengthy periods. On the contrary, the enforcement measures taken against the applicant called for a prompt examination of his appeals. The length of 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 in reconsidering the appealed decisions deprived the applicant of effective access to the courts.

95. Bearing in mind that the proceedings in the case have not yet been concluded, the Court considers that their overall length up till now 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.

(c) Presumption of innocence

96. 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, *Bernard v. France*, judgment of 23 April 1998, *Reports* 1998-II, p. 879, § 37). It will accordingly consider the applicant's complaint from the standpoint of these two provisions taken together.

97. The meaning of paragraph 2 of Article 6 was described by the Court in *Barberà, Messegué and Jabardo v. Spain* (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."

98. The Court first observes that the administrative courts examining the applicant's 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 applicant's appeals in the tax assessment case or the enforcement and stay-of-execution proceedings have prejudged or will prejudge the merits of the cases.

99. However, the applicant has complained that the presumption of innocence was breached in two respects: firstly, he 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 he was presumed guilty; secondly, the fact that the Tax Authority's decisions concerning tax surcharges were enforced before his liability to pay the surcharges had been determined by a court prejudiced his position in the substantive proceedings.

100. In respect of the applicant's 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 *Salabiaku*, 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 where 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 paragraph 35 above).

Consequently, the starting-point for the tax authorities and courts must be that inaccuracies found during 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.

101. In *Salabiaku*, cited above, 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.

102. In assessing whether, in the present case, this principle of proportionality was observed, the Court acknowledges that the applicant was faced with a presumption that was difficult to rebut. However, he was not left without any means of defence. It is clear that, in challenging the Tax Authority's decisions on taxes and tax surcharges, the applicant has maintained that he submitted correct information in his 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 applicant has relied in his 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 was open to the applicant to put forward grounds for a reduction or remission of the surcharges and to adduce supporting evidence. Thus, he could have claimed, as an alternative line of defence, that, even if he was 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, apart from his contention that the surcharges should be remitted due to the length of the proceedings, the applicant has not made any such claim and the County Administrative Court – which was obliged to examine of its own motion whether there were grounds for remission – concluded, in its judgments of 7 December 2001, that no legal basis for remitting the tax surcharges had been found.

103. 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.

104. 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 53 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, except for the reference to the length of the proceedings, the applicant did not rely on the grounds for remission in the relevant tax assessment proceedings.

105. The applicant has claimed that his 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 his liability to pay them.

106. 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.

107. 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.

108. 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.

109. However, the Court is called upon to decide whether the above-mentioned limits on early enforcement were exceeded to the detriment of the applicant 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 applicant's right of effective access to a court thus required that the courts proceed without undue delay, no amount was actually recovered from the applicant. Moreover, due to his lack of assets, the 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 applicant's interests in the present case.

110. Having regard to the foregoing, the Court considers that the applicant's 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 of the Convention in this respect.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

111. 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

112. The applicant submitted that he had sustained pecuniary damage in respect of loss of income due to his being declared bankrupt. He estimated that loss at 1,978,000 Swedish kronor (SEK) for the years 1995 to 2002. In addition to requesting compensation for that amount, he insisted that the whole tax debt resulting from the relevant Tax Authority decisions – including taxes, tax surcharges and interest – be cancelled. As of 23 August 2000 the debt amounted to SEK 1,735,689. In the event that the State was not ordered to cancel the tax debt, the applicant claimed the same amount in damages.

Moreover, the applicant sought SEK 5 million for non-pecuniary damage, on account of mental pain and suffering which the proceedings and measures had caused him and his family.

113. The Government contended that there was no causal link between a violation of Article 6 of the Convention and the loss of income which the applicant alleged he had sustained as, in view of his financial situation, he 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. In addition, the applicant had failed to substantiate any loss of income. 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 debt 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 debt had actually been paid; the remainder had become statute-barred on 31 December 2001.

If the Court were to find a violation of Article 6, the Government acknowledged that the 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 25,000 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.

114. 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 applicant 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. Accordingly, it awards the applicant the sum of 15,000 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

115. The applicant claimed SEK 572,625, apparently including value-added tax (VAT), in legal fees for the proceedings before the Commission and the Court. This amount corresponded to 263.5 hours of work for the applicant's counsel at an hourly rate of SEK 1,750 and 111.5 hours of work for an assistant lawyer at an hourly rate of SEK 1,000. The applicant further claimed SEK 31,653 in expenses incurred in attending the Court's hearing in the case.

116. The Government considered the number of hours of work stated by the applicant to be excessive. They pointed out that much of the work performed related to both the present case and *Västberga Taxi Aktiebolag and Vulic v. Sweden* (no. 36985/97, 23 July 2002). The oral hearing held by the Court, however, justified a larger award for costs in the present case. The Government accepted the hourly rate claimed for the assistant lawyer but found that an hourly rate of SEK 1,500 would suffice for the applicant's counsel, bearing in mind that the rate currently applied within the Swedish legal-aid system is SEK 1,221 inclusive of VAT.

117. 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, § 120, ECHR 2001-V). Having regard to the similarity between the facts and submissions in the present case and *Västberga Taxi Aktiebolag and Vulic*, the Court awards the applicant by way of costs and expenses the global sum of EUR 35,000, including VAT.

C. Default interest

118. 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 euros 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 the 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;

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 applicant, 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 15,000 (fifteen thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 35,000 (thirty-five 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 Mrs 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. In my opinion, the limits, which the presumption of innocence should place on the execution of criminal sanctions before they are determined by a court, should be defined on a somewhat stricter basis.

The general point of departure set out by the majority (paragraph 106 of the judgment) is, 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". On the contrary, my preference would be to state that, in principle, the presumption of innocence should be seen as excluding the execution of criminal sanctions before a court has decided on the liability of the person concerned. Otherwise, the right of the individual to have a criminal charge determined by a court could be sapped of any real meaning. This would apply also to proceedings concerning tax penalties.

For the purpose of examining the justification of early enforcement of tax penalties, the Court proposes a balancing exercise between the interests of the State in pre-emptive enforcement and the rights of the individual (paragraph 106 of the judgment). This proposal, however, does not provide sufficient clarity as to how the *presumptio innocentiae* should limit the interests of the State. My approach would rather be to find that this principle is breached when such pre-emptive execution has the effect of a sanction.

While the special features of tax collection and the problem of tax evasion may provide a respectable reason relating to the general interest which could justify early enforcement, this is not necessarily the case for tax penalties, as is set out by the Court in paragraph 107 of the judgment. When a taxpayer is fined for filing a false tax declaration and he contests this, a fine should in principle not be executed before a court has examined the issue of whether the declaration was incorrect.

Admittedly, specific State interests could justify a different approach, for example where there was a reasonable fear that the person concerned would leave the country or would conceal his assets to evade execution. However, in a balancing exercise such as that proposed by the majority, the interests of the State should not be respected to such an extent that early execution could have the character of a sanction. This might occur, for example, when the consequences of execution cannot be undone or are irreparable or when the amount of money executed is such that it gives rise to serious financial problems for the person concerned, or leads to bankruptcy. In that respect I am not convinced by the majority that the fact that a bankruptcy decision

caused by early enforcement of a fine can be quashed upon a request for a reopening of bankruptcy proceedings (paragraph 108 of the judgment) could genuinely compensate for a disturbing and invasive bankruptcy decision.

Had the surcharge been a decisive element in the decision to declare the applicant bankrupt – which was not the situation in this case – I would have voted for a violation of the presumption of innocence.

PARTLY DISSENTING OPINION OF JUDGE CASADEVALL

(Translation)

1. I do not share the majority's view on the last of the applicant's complaints. I consider that the execution of the tax surcharges imposed by the Tax Authority before the courts were able to determine whether the applicant had any criminal liability also infringed Article 6 § 2 of the Convention.

2. Without wishing to pass judgment on the Swedish fiscal legislation, it is my view that the strict application of a system that is already in itself too discretionary resulted, in the circumstances of the present case, in an infringement of the presumption of innocence. I reach that view on the same facts and for the same reasons that led the Court to find violations as regards the right of access to a court and the length of the proceedings. The Tax Authority's decisions on the taxes and tax surcharges were taken in *December 1995*, but it was not until *December 2001* (almost six years after the applicant's appeal) that the County Administrative Court delivered its decision on the merits. Indeed, the case is still pending [See paragraph 95 of the judgment]. However, in the meantime, in June 1996, even before ruling on the application for a stay of execution [Decisions of the Administrative Court of Appeal of 21 May 1997 and the Supreme Administrative Court of 3 November 1998, see paragraph 15 of the judgment. See also paragraph 89 *in fine*] when the conditions laid down in the Tax Collection Act for granting the applicant such a stay were satisfied [See paragraph 87 of the judgment], enforcement proceedings were commenced and the applicant declared bankrupt by the District Court [Decision of 10 June 1996, see paragraph 86 of the judgment], with the serious irreparable financial and professional consequences which that entailed for him [See paragraph 87 of the judgment]

3. The current Swedish fiscal system operates on the basis of objective criteria, in the interests both of efficient tax collection and of deterrence and retribution. Unlike the earlier system, there is no requirement of intentional or negligent conduct on the part of the taxpayer, and a presumption of criminal liability now operates against him or her [See paragraph 100 *in fine* of the judgment]. While the Convention does not prohibit certain presumptions of fact or of law in principle, it does require the Contracting States to remain within certain limits in this respect as regards criminal law. In addition, Article 6 § 2 requires States to confine presumptions of fact or of law provided for in the criminal law within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence [See *Salabiaku v. France*, judgment of 7 October 1988, Series A no.141-A, pp. 15-16, § 28.]. The presumption is, of course, rebuttable, assuming the taxpayer has a genuine opportunity of negating it [The

majority accept that it was difficult for the applicant to rebut such a presumption, see paragraph 102 of the judgment] before a court affording all the guarantees required by Article 6. However, in the instant case, since the Tax Authority did not refer the case to the County Administrative Court until February 1999, that is to say three years after the applicant's appeal and more than two and a half years after the execution proceedings had ended [See paragraph 90 of the judgment], it seems to me self-evident that he was denied such a possibility. The Court rightly held that the applicant had been deprived of effective access to a court.

4. As regards the arguments relied on by the majority for dismissing the complaint under Article 6 § 2, I note that they are essentially based on the *financial interest of the State* [See paragraphs 104 and 107 of the judgment]. That is clearly a general interest but, as the Court says in the judgment, a fair balance must be struck 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. The majority recognise that a system that allows enforcement of considerable amounts of tax surcharges before there has been a court determination of the liability to pay is open to criticism and should be subjected to strict scrutiny [See paragraph 108 *in fine* of the judgment]. However that did not stop them giving their blessing for such a system.

5. I do not find the majority's other arguments at all convincing, namely that under Swedish law it is possible to obtain reimbursement of any amount paid together with interest on a successful appeal or to have a bankruptcy order quashed on an application to reopen the proceedings, that the applicant had failed to pay his tax liability owing to insufficient means and his financial situation was such that bankruptcy was inevitable. These subsidiary considerations cannot take precedence over the presumption of innocence. In any event, while the possibilities referred to above may perhaps have existed if the applicant had been given effective access to a court within a reasonable time, that, as the Court has found, did not happen in the instant case.