



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

FOURTH SECTION

CASE OF KALLIO v. FINLAND

(Application no. 40199/02)

JUDGMENT

STRASBOURG

22 July 2008

FINAL

22/10/2008

This judgment may be subject to editorial revision.

In the case of Kallio v. Finland,

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

Lech Garlicki, *President*,
Giovanni Bonello,
David Thór Björgvinsson,
Ján Šikuta,
Päivi Hirvelä,
Ledi Bianku,
Mihai Poalelungi, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 1 July 2008,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 40199/02) against the Republic of Finland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Finnish national, Mr Pentti Antton Kallio (“the applicant”), on 6 November 2002.

2. The applicant was represented by Mr J. Pelkonen, a lawyer practising in Kaarina. The Finnish Government (“the Government”) were represented by their Agent, Mr Arto Kosonen of the Ministry for Foreign Affairs.

3. The applicant alleged a violation of Article 6 § 1 and § 3 (d) of the Convention on account of the lack of an oral hearing, the refusal to hear his evidence and that of four witnesses and the refusal to stay the proceedings.

4. On 25 April 2007 the President of the Fourth Section of the Court decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29§ 3).

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1953 and lives in Kaarina.

6. The applicant is the sole answerable partner in a limited partnership company called Porin West-Print Ky. At the material time its line of

activities was, *inter alia*, car repair and painting services, restaurant services and metal work.

A. The pre-trial investigation into alleged tax fraud

7. The National Bureau of Investigation carried out a pre-trial investigation into the business activities of Porin West-Print Ky. The applicant, who was questioned as a suspect in an alleged tax fraud, proclaimed his innocence. In his closing statement, he expressed the view that other companies, represented by two other named individuals, had carried out the business activities which were the subject of the investigation and were therefore liable to pay tax. The file does not disclose whether anyone was charged with and convicted of the alleged offence.

B. The tax inspection and the subsequent appeal proceedings

1. The tax inspection

8. In 1999 the south-west Finland Tax Office carried out a tax inspection into Porin West-Print Ky. It found that during the period from July 1998 to 20 December 1999 over 840,000 Finnish marks (FIM) (approximately 141,278 euros (EUR)) had been credited to the company's account. The money had been paid in by several companies but most of the funds had not been recorded in the company's books as income.

9. Basing himself on those transactions, the tax inspector considered that there was evidence of a sub-contracting relationship between Porin West-Print Ky and another company, R. Porin West-Print Ky's line of activities had to be considered to include the sale of sub-contracting services to R. Formally this activity had been carried out in the name of another company T./Porin West-Print Ky and company F. For this reason, the tax inspector considered that Porin West-Print Ky was liable for the deduction of tax and social-security contributions in respect of the salaries paid to identified and unidentified employees. The total amount of the salaries was estimated on the basis of a list of hours worked found in the book-keeping records of R. and the bank statements of Porin West-Print Ky and the applicant. The salaries paid to identified employees ran to FIM 324,681 for the year 1998 and 53,000 in 1999. An additional FIM 50,000 was added in respect of unidentified employees to the estimated salaries for 1998.

2. The south-west Finland Tax Office's decision

10. Based on this reassessment, the Tax Office increased the tax liability and ordered the payment of FIM 359,609 in respect of 1998 and

FIM 59,913 in respect of 1999. The file does not disclose the amounts of the tax surcharges.

11. Following a rectification request, the first amount was reduced to FIM 354,952.

3. *The proceedings in the Turku Administrative Court*

12. Porin West-Print Ky appealed to the Turku Administrative Court (*hallinto-oikeus, förvaltningsdomstolen*), requesting an oral hearing and that the court hear testimony from the applicant and four other persons, Mr E.N., Mr A.L., Mr M.V. and Mr H.S. Porin West-Print Ky also requested a stay of enforcement until the case had been examined. According to the application form lodged with the Court, the amount in dispute was by then equivalent to EUR 33,885.

13. Porin West-Print Ky argued that Mr H.S. or companies T. and F., both controlled by Mr H.S., were responsible for social-security contributions. Although he had given Mr H.S. use of the Porin West-Print Ky bank card, the applicant had had nothing to do with the sub-contracting activities of Mr H.S. and his companies. As the sub-contracting work had been invoiced using the names and business indexes of the companies of Mr H.S., Porin West-Print Ky could not be considered liable to taxation.

14. The Administrative Court received the written statements of the Tax Office and the tax inspector and the observations of the Tax Ombudsman and Porin West-Print Ky. The latter requested a stay of proceedings until the alleged tax fraud had been examined by the District Court.

15. In its decision of 22 May 2002 the Administrative Court noted that the company had requested an oral hearing to hear testimony about its business activities, about the identity of the employer in the sub-contracting jobs, about the sub-contracting invoiced on behalf of companies T., E. and F. and about the negotiations and sub-contracting jobs for R. It found an oral hearing manifestly unnecessary having regard to the tax inspection report, the other documents on the file and the fact that the applicant and three of the witnesses proposed had made statements on these issues during the pre-trial investigation. It did not comment on the request for a stay of proceedings.

16. The Administrative Court referred in evidence to, *inter alia*, the statements of the applicant and three of the witnesses proposed given during the pre-trial investigation and the tax inspection. It rejected the appeal and gave the following reasons:

“... ”

Conclusions

The Administrative Court considers, in particular on the basis of the statements of Mr H.S. and Mr M.V., the use of the preliminary taxation register of company T. ...

and the transactions on the bank account, that it has been shown that the applicant has operated actively within Porin West-Print Ky. Therefore, the allegation that he did not have knowledge of the sub-contracting invoicing but only functioned as an employee of the companies owned by Mr H.S. is not credible. The applicant, as the answerable partner, is responsible for those using the company's bank account and for the purposes of this use. The fact that Mr H.S. has used the company's bank card does not show how the money withdrawn has been used.

The Administrative Court finds that Porin West-Print Ky has carried out sub-contracting jobs for R. and that the invoicing has gone through companies T. and F. as dummies, as explained by the applicant himself in his reply at the preparatory stage of the tax inspection. Therefore the company is, as an employer, liable for the deduction of the tax and social-security contributions in respect of the salaries paid to its employees. As the estimation of the amounts of the salaries has not been shown to be incorrect, there is no reason to amend the decision to order payment."

4. The proceedings in the Supreme Administrative Court

17. Porin West-Print Ky appealed again, renewing at the same time its request either for an oral hearing in the Supreme Administrative Court or for the case to be referred back to the lower court.

18. On 27 September 2002 the Supreme Administrative Court refused leave to appeal. It reasoned:

"The question in this case is whether Porin West-Print Ky is to be considered responsible as an employer for the deduction of tax and social-security contributions in respect of the employees considered to have worked for it, that is, whether Porin West-Print Ky is rightly considered to be liable to pay for the sub-contracting jobs in respect of which the contract invoicing and salaries have gone through the company's books and bank accounts. There is no reason to bring the case before the Supreme Administrative Court in the interests of the application of the law in other, similar cases or the uniformity of legal practice. Nor has there been any manifest error in the examination of the case. There are likewise no pressing economic reasons to grant leave to appeal."

II. RELEVANT DOMESTIC LAW AND PRACTICE

19. Section 38(1) of the Administrative Judicial Procedure Act (*hallintolainkäyttölaki, förvaltningsprocesslagen*; as amended by Act no. 433/1999) provides that an oral hearing must be held if requested by a private party. An oral hearing may, however, be dispensed with if a party's request is ruled inadmissible or immediately dismissed, or if an oral hearing is clearly unnecessary due to the nature of the case or other circumstances.

20. In this regard, the explanatory report of the Government Bill (no. 217/1995) for the enactment of the Administrative Judicial Procedure Act states that an oral hearing contributes to a focused and immediate procedure but since it does not always bring any added value, it is important that the flexibility and cost effectiveness of the administrative procedure is

not undermined. An oral hearing is to be held when it is necessary for the clarification of the issues and the hearing can be considered beneficial for the case as whole.

21. During the period from 2000 to 2006 the Supreme Administrative Court did not hold any oral hearings in tax matters. As to the eight administrative courts, appellants requested an oral hearing in a total of 603 cases. The courts held an oral hearing in 129 cases. There is no information as to how many of these taxation cases concerned the imposition of a tax surcharge. During the first six months of 2006, the administrative courts held a total of 20 oral hearings in tax matters.

22. Witnesses who have been called by a party or by the administrative authority that made the decision, or whose oral testimony the appellate body considers necessary, may be heard in an oral hearing. A party may be heard under oath concerning circumstances of special relevance to the resolution of the matter. Chapter 17, sections 18-39, of the Code of Judicial Procedure (*oikeudenkäymiskaari, rättegångsbalken*) apply to the hearing of witnesses (section 39 of the Administrative Judicial Procedure Act).

23. Testimony must be oral. A witness must not refer to a written statement. However, the witness may use written notes as a memory aid (Chapter 17, section 32(1)). A statement that a witness has previously given to the court, to the public prosecutor or to the police may be read out in connection with the hearing of the witness only if, in his or her testimony, the witness retracts his or her earlier statement, or explains that he or she cannot or will not testify (section 32(2)).

24. A written statement of a private nature, a pre-trial investigation record or a statement entered or stored in another document must not be admitted as evidence unless otherwise provided in an Act (Chapter 17, section 11(1), of the Code of Judicial Procedure; Act no. 690/1997). Section 11(2-3) lists exceptions to the prohibition on using written preliminary investigation material. For example, if a witness cannot be questioned in the main hearing or outside the main hearing, the court may allow the pre-trial investigation record or another document or statement to be taken into account in a hearing. The Administrative Judicial Procedure Act contains no restriction on the use of pre-trial investigation material in the consideration of a case.

25. The said Act provides that the statement of reasons must indicate which facts and evidence have affected the decision and on which legal grounds it is based (section 53).

26. The employer is responsible for the deduction of tax and the remittance of tax deducted and employer's social-security contributions to the tax authority (section 14 of the Prepayment Act (*ennakkoperintälaki, lagen om förskottsuppbörd*; Act no. 1118/1996). If an employer has, in part or in full, failed to deduct tax from an employee's income or to remit the amount deducted, the tax office must order payment of the amount not

deducted or not remitted without prejudice to section 39 (section 38(1)). Deducted tax may be ordered to be paid at the maximum rate of 40 %, if the deduction has not been carried out in the case referred to in subsection 1 (section 38(2)). An order may be waived, if the failure to deduct has been insignificant as concerns the circumstances or the total amount unpaid. An order of payment may also be carried out by assessment on the grounds laid down in section 41 (section 39). An employer who has failed to deduct and to remit the deducted tax must also be ordered to pay, in addition to the amount unpaid, a tax surcharge as provided in section 3 of the Act on Tax Surcharges and Penalty Interest (*laki veronlisäyksestä ja viivekorosta, lag om skattetillägg och förseningsränta*; Act no. 1556/1995) (section 43(1)). A surcharge must be ordered to be paid even though the amount not deducted or remitted has subsequently been paid (section 3(2)). A surcharge is not imposed where the order of payment of the deducted tax is waived due to the insignificance of the amount (section 3(4)). The tax office may increase tax deduction liability twofold at most where the person responsible for carrying out the deduction has, due to gross negligence, failed to observe his obligation to provide the relevant information or has submitted a return or some other piece of information or document with essential inaccuracies (section 44). Where a return or some other piece of information or a document is not submitted, or is submitted with essential inaccuracies referred to in paragraph 1(4) for the purpose of fraud, the tax deduction liability must be increased by 50% at least and threefold at most (section 44(2)). A surcharge is imposed in respect of the tax deduction liability only as concerns the deficiencies in the information referred to in paragraphs 1 and 2 (section 44 (3)).

27. The Employer's Social Security Contribution Act (*laki työnantajan sosiaaliturvamaksusta, lagen om arbetsgivares socialskyddsavgift*; Act no. 66/1963) provides that if an employer who is liable to pay the said contribution fails, in part or in full, to pay it, the provisions of the Prepayment Act are applicable to the redress and the recovery from the employer of the amount not paid (section 10).

28. In the Income Tax Act (*tuloverolaki, inkomstskattelagen*; Act no. 1535/1992), the term "business consortium" refers, *inter alia*, to a limited partnership company (section 4). A business consortium is not an independently taxable unit. However, a level of expected return is established for a consortium for its business activities and, deductions having been made to cover any losses sustained during previous fiscal years, the return is distributed to shareholders as revenue to be taxed according to the share they have in the revenue of the consortium (section 16). The answerable partner of a limited partnership company is equally responsible for paying the taxes imposed on the business liable to pay taxes and contributions as he or she is for paying his or her personal taxes

(section 39(1) of the Taxation Act (*veronkantolaki, lagen om skatteuppbörd*; Act no. 609/2005).

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

29. The applicant complained that the proceedings had been unfair as the courts had refused to hold an oral hearing and to hear his testimony and that of four witnesses proposed by him. He also complained that the Administrative Court had refused his request that the proceedings be stayed.

Article 6 § 1 and 6 § 3 (d) of the Convention, in their relevant parts, read as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

...”

30. The Government contested that argument. They conceded, however, that Article 6 under its criminal head was applicable to the tax surcharge proceedings.

A. Admissibility

31. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

The applicant

32. The applicant argued that he had requested an oral hearing on the following grounds. The tax inspector had misinterpreted testimonies given in a pre-trial investigation and the applicant's view regarding the contents of those testimonies differed from that of the inspector and the tax authority. In the applicant's view, it was clear from the pre-trial statements of Mr J.J., Mr H.S, Mr R.K and Mr M.V., the managing director who had ordered the sub-contracting work, that Mr J.J. and Mr H.S were liable to pay tax. The applicant had also asked the Administrative Court not to examine the case until the conclusion of the criminal case or at least until the consideration of charges had been completed. Furthermore, an oral hearing had been necessary to clarify the case and the applicant's right to due process required that the case should not be decided solely on the basis of pre-trial testimonies since the reliability of those had to be ascertained by further questioning before the court.

33. The applicant argued that the tax surcharge was very substantial. The person liable for tax payable on the sub-contracting work performed continuously for the same client company had to be identified. The invoices for sub-contracting work had been sent in the name of three different companies: companies A., T. and F. The applicant had stated that neither he nor his company Porin West-Print Ky was liable for tax, because the sub-contracting work had not been part of his or his company's business operations. The liability for tax could not lie with him and his company simply on the grounds that the company's bank account was used in the invoicing, as he had given Mr. H.S. the right to use the bank account. The tax liability had actually fallen on Mr H.S. and the companies he used in invoicing.

34. The tax inspector considered in his report that the party liable for tax payable on the sub-contracting work was Porin West-Print Ky and the applicant as its responsible partner. The applicant considered the inspector's assessment, which was based on the pre-trial testimonies, erroneous. In addition, he had contested the credibility of the testimonies of Mr H.S. and

Mr M.V. An oral hearing would also have provided information of relevance for the determination of the issues to be decided. The Administrative Court had based its findings on those testimonies.

35. The applicant took the view that the present case was different from the case of *Jussila v. Finland* ([GC], no. 73053/01) in which the tax surcharge at stake had been minor. In the applicant's case the amount of the tax surcharge had been more than 100 per cent of the tax imposed. Furthermore, in the case of *Jussila* there had been no issue of credibility whereas the present case had turned on an assessment of the credibility of the pre-trial statements, which were conflicting.

The Government

36. The Government submitted that the Administrative Court had found an oral hearing manifestly unnecessary having regard to the tax inspection report, the other documents on the file and the fact that the applicant, Mr M.V., Mr H.S. and Mr E.N. had made statements on these issues during the pre-trial investigation. The reasons for the decision referred, *inter alia*, to the pre-trial statements of the applicant, Mr H.S., Mr M.V., Mr E.N. The applicant held Mr H.S. and Mr J.J., who were heard as suspects in the pre-trial investigation, fiscally and criminally responsible. The applicant further considered that, due to the lack of an oral hearing, the reliability of the pre-trial statements could not be checked. The Government observed that in his application the applicant submitted that, in the pre-trial investigation, he as an active partner as well as H.S. had been heard as suspects and M.V. and E.N. as witnesses.

37. The Government observed that in the Administrative Court's decision the pre-trial investigation records were referred to under the item "Statements as reported in the pre-trial investigation reports and in the tax inspection". The court stated as follows:

"In the criminal pre-trial investigation, Mr H.S. stated that the invoices addressed to [company R.] had mainly, from July 1998, been made out by [the applicant]. According to Mr H.S., it was at the initiative of [the applicant] that invoices started to be made out in the name of [company T.]/West-Print. Mr H.S. said that he was told by [the applicant] in autumn 1998 that [company F.] was the new invoicing company that would be used. According to Mr H.S., he and the applicant had both worked independently hiring help for sites without being each other's employers. Both of them had worked for the Finnish State Railway and Perno Shipyard. Mr H.S. has stated, however, that he was responsible for less than two-thirds of the invoices sent to [company R.] in the name of [company T.]. As regards [company F.] he has not stated any amounts in FIM but has admitted to being responsible for some of the invoicing. According to Mr M.V., heard as a witness in the pre-trial investigation, Mr H.S. assumed a smaller role in sub-contracting negotiations ever since [the applicant] took up sub-contracting activities. Mr H.V. noted that the switch had taken place with the change of invoicing companies in July 1998. Mr E.N., heard as a witness in the pre-trial investigation, said that in early spring 1998 he had gone to work at a [company R.] site at the machine workshop of the State Railway having been contacted either by

Mr J.J., the owner of [company A.] or Mr H.S. without knowing specifically by which company he had been hired. Mr E.N. said he had received his salary in cash from either Mr J.J. or Mr H.S. He also stated that he knew that [the applicant] was also working at the [company R.] site and that he was the owner of West-Print. Mr E.N. did not know that West-Print and [company F.] had anything to do with the payment of his salary.”

38. The Government observed that the court had made use of pre-trial investigation material apparently submitted to it by the tax authority. The conclusions disclosed, on the other hand, that the tax inspection report concerning the company and other tax inspection reports were used in addition to the pre-trial investigation material. In the light of the statement of reasons, it could not be excluded that pre-trial material had been used at the tax inspection stage as well. On the basis of the statement of reasons, it was somewhat difficult to determine on which set of materials each conclusion was based. It was not possible to infer whether the observations on the entries in the accounts and the invoicing had been based solely on the tax inspection, or on the pre-trial material as well. In the decision it was observed that the inspection had disclosed that the cheque account of the company had, during the period July 1998 to 20 December 1999, been credited with over FIM 840,000 (EUR 134,214) by a number of different companies, with the majority of the funds not having been entered in the company’s books. In any event, evidence relying on invoicing and entries on the account could be regarded as objective and incontestable, proving the fact that considerable sums of money had been credited to the account of the company controlled by the applicant.

39. Furthermore, from the point of view of fiscal law, the nature of the relationship between company R., the applicant and the company controlled by him had also been an important consideration. These two considerations had been decisive, which became evident in the Administrative Court’s statement of reasons.

40. The case of *Jussila v. Finland* (cited above) differed somewhat from the present case which involved an assessment of the credibility of the accounts presented. Unlike the former, the present case also involved quite considerable tax surcharges. The Government emphasised that even if the applicant was not afforded an oral hearing, he had been given an opportunity which, moreover, he had used, to provide replies and comments to all memoranda and written statements by the tax authorities throughout the proceedings.

41. The administrative courts had no obligation to stay the consideration of the tax proceedings due to the fact that a criminal pre-trial investigation of the case had not been completed. Administrative courts had exclusive competence to resolve questions of interpretation of fiscal law within the scope of application of the Prepayment Act, for example, who must be regarded as an employer and, consequently, liable to make the payments of deducted taxes. As far as the unpaid taxes were concerned, they also had

exclusive competence to determine the amount ordered (that is, deduction of taxes and the social-security contribution). Furthermore, the assessment of the responsibility of the employer under fiscal law was not binding on a criminal court in assessing whether the employer was also guilty of illegally evading tax prepayment liability or of a tax offence under the threat of a fine or a tax prepayment offence. The consideration of charges and the imposition of tax sanctions were two different matters and were considered separately. In considering charges it was possible to arrive at a decision to drop or dismiss charges whereas determining tax penalties left considerably less leeway for discretion. Moreover, bringing the tax proceedings to an end before the completion of the pre-trial investigations or the consideration of charges would have unnecessarily prolonged the proceedings.

2. The Court's assessment

42. Article 6 is applicable under its criminal head to tax surcharge proceedings (see *Jussila v. Finland*, cited above, § 38). Regarding the parties' differing views as to the role or impact of the taxation procedure as regards criminal proceedings, the Court notes that under Finnish practice, the imposition of a tax surcharge does not prevent criminal charges being brought for the same conduct. That is, however, done in separate proceedings before a criminal court.

43. As to the right to an oral hearing, the applicable principles are outlined in the judgment in the above-cited case of *Jussila v. Finland* (§§ 40-45). The Court does not doubt that checking and ensuring that the taxpayer has given an accurate account of his or her affairs and that supporting documents have been properly produced may often be more efficiently dealt with in writing than in oral argument (see *Jussila v. Finland*, § 47).

44. In the present case the applicant requested an oral hearing of his evidence and that of the witnesses Mr E.N., Mr A.L., Mr M.V. and Mr H.S.

45. This case can be distinguished from the case of *Jussila* in which Mr Jussila's purpose in requesting a hearing was to challenge the reliability and accuracy of the report on the tax inspection by cross-examining the tax inspector and obtaining supporting testimony from his own expert since, in his view, the tax inspector had misinterpreted the requirements laid down by the relevant legislation and given an inaccurate account of his financial position. The reasons for requesting a hearing in the case of *Jussila* therefore concerned in large part the validity of the tax assessment, which as such fell outside the scope of Article 6, although there was the additional question of whether the applicant's book-keeping had been so deficient as to justify a surcharge. The Administrative Court, which took the measure of inviting written observations from the tax inspector and a statement from an expert chosen by the applicant, found in the circumstances that an oral hearing was manifestly unnecessary as the information provided by the

applicant himself formed a sufficient factual basis for the consideration of the case. For those reasons, the Court in the *Jussila* case found that the lack of an oral hearing did not give rise to a breach of Article 6.

46. In its decision of 22 May 2002 the Administrative Court rejected the present applicant's request for an oral hearing, finding this manifestly unnecessary considering the tax inspection report, the other documents on the file and the fact that the applicant, Mr M.V., Mr H.S. and Mr E.N. had made statements on these issues during the pre-trial investigation.

47. The applicant argued that there were issues of credibility which required oral presentation of evidence to prove that his company was not an employer as regards the sub-contracting jobs. The applicant's purpose in requesting a hearing was to prove that he had had nothing to do with the sub-contracting activities of Mr H.S. and his companies. The applicant had been hired by Mr H.S. and an employee of the companies. As the sub-contracting work had been invoiced using the names and business indexes of the companies of Mr H.S., Porin West-Print Ky could not be considered liable to taxation. The applicant wished to give testimony about the business activities of Porin West-Print Ky and for the other witnesses to give testimony as follows: Mr E.N. and Mr A.L. about their employer in the sub-contracting jobs; Mr M.V. about the sub-contracting invoiced on behalf of companies T., E. and F.; and Mr H.S. about the negotiations and sub-contracting jobs for company R.

48. The Court will therefore examine whether the protection of the applicant's interests required the holding of an oral hearing before the Administrative Court.

49. The Court observes that, pursuant to section 38(1) of the Administrative Judicial Procedure Act, an oral hearing must be held if requested by a private party. An oral hearing may, however, be dispensed with if a party's request is ruled inadmissible or immediately dismissed or if an oral hearing is clearly unnecessary due to the nature of the case or other circumstances. The explanatory report of the relevant Government Bill states that an oral hearing contributes to a focused and immediate procedure but since it does not always bring any added value, it is important that the flexibility and cost effectiveness of the administrative procedure is not undermined. An oral hearing is to be held when necessary for the clarification of the issues and the hearing can be considered beneficial for the case as whole.

50. In the present case the Administrative Court was called upon to examine the case as regards both the facts and the law. The applicant disputed the facts upon which the imposition of tax surcharges was founded, requesting an oral hearing of witness evidence in order to elucidate the relevant events. The Administrative Court had to make a full assessment of the case. The crucial question concerned the clarification of the facts and the credibility of the statements of the applicant and the four witnesses who had

allegedly been involved in the relevant activities. Nevertheless, the Administrative Court decided, without a public hearing, to uphold the decision. The Court finds that, in the circumstances of the present case, the question of the credibility of the written statements could not, as a matter of fair trial, have been properly determined without a direct assessment of the evidence given in person by the applicant and by the witnesses proposed.

51. There has accordingly been a violation of Article 6 § 1 of the Convention as regards the refusal to hold an oral hearing in the Administrative Court.

52. In view of the Administrative Court's firm conclusion that an oral hearing could be dispensed with, the Court considers that it is not necessary to examine separately whether the rights of the defence were violated by reason of the court's refusal to hear oral evidence and the use as evidence of the statements of the applicant and three witnesses that had been given during the pre-trial investigation and the tax inspection. Nor is it necessary to examine separately whether the Administrative Court's decision to go ahead with the proceedings disclosed a violation of Article 6.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

53. 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

54. Under the head of non-pecuniary damage the applicant claimed 30,000 euros (EUR) for mental suffering.

55. The Government considered that the award should not exceed EUR 2,500.

56. The Court accepts that the lack of guarantee of a fair trial has caused the applicant non-pecuniary damage, which cannot be made good by the mere finding of a violation. The Court, making its assessment on an equitable basis, awards the applicant EUR 3,000.

B. Costs and expenses

57. The applicant claimed EUR 9,666.67 (inclusive of value-added tax) for costs and expenses incurred before the Court plus EUR 2,458.54 (exclusive of VAT) for translation costs.

58. The Government considered that the hourly rate charged by counsel was excessive. The award should not exceed EUR 4,900 (inclusive of VAT). They questioned whether the applicant had produced the requisite documentation as regards the translation costs and considered that the award regarding these should not exceed EUR 1,000.

59. The Court reiterates that an award under this head may be made only in so far as the costs and expenses were actually and necessarily incurred in order to avoid, or obtain redress for, the violation found (see, among other authorities, *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports* 1998-VI, p. 2334, § 63).

60. In the present case, regard being had to the information in its possession, the above criteria and the fact that the application was examined under the joint procedure provided for under Article 29 § 3 of the Convention, the Court awards EUR 5,000 (inclusive of VAT) for the proceedings before the Court. As to the translation costs, the Court notes that sufficient documentation as required by Rule 60 of the Rules of Court has not been submitted. This claim must therefore be rejected.

C. Default interest

61. The Court considers it appropriate that the default interest 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 UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the refusal to hold an oral hearing in the Administrative Court;
3. *Holds* that it is not necessary to examine separately the applicant's complaints under Article 6 § 1 on account of the refusal to stay the proceedings and under 6 § 3 (d) of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

- (ii) EUR 5,000 (five thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 22 July 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Lech Garlicki
President