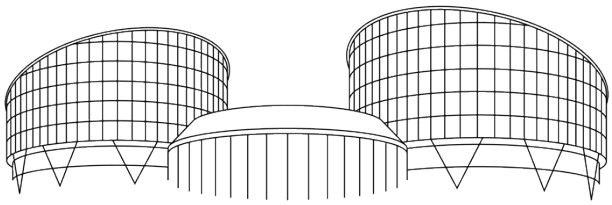

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF SEGAME SA v. FRANCE

(Application no. 4837/06)

JUDGMENT
[Extracts]

STRASBOURG

7 June 2012

FINAL

07/09/2012

This judgment has become final under Article 44 § 2 of the Convention.

In the case of Segame SA v. France,

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

Dean Spielmann, *President*,
Elisabet Fura,
Karel Jungwiert,
Mark Villiger,
Ann Power-Forde,
Ganna Yudkivska,
André Potocki, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 10 May 2012,

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

PROCEDURE

1. The case originated in an application (no. 4837/06) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a company incorporated under French law, Segame SA ("the applicant company"), on 16 January 2006.

2. The applicant company was represented by Mr P. Schiele, and subsequently by Mr E. Morain, lawyers practising in Paris. The French Government ("the Government") were represented by their Agent, Mrs E. Belliard, Director of Legal Affairs, Ministry of Foreign Affairs.

3. The applicant company alleged, in particular, a breach of Article 6 § 1 of the Convention in so far as it had not had access to a court with full jurisdiction in respect of a tax penalty imposed on it.

4. On 9 October 2008 notice of the application was given to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant is a limited company under French law with its registered office in Paris.

6. The applicant company ran an art gallery in Paris. In judgments of 13 September and 8 November 1993, the Paris Commercial Court ordered

its judicial reorganisation, followed by its compulsory liquidation. On 21 December 2004, there being no more outstanding debts, the court terminated the liquidation proceedings.

A. Proceedings concerning supplementary tax assessment

7. From 27 October 1993 to 12 April 1994 the tax authorities inspected the applicant company's accounts for the period from 1 January 1991 to 8 November 1993. On 6 May and 5 October 1994 they sent them two supplementary tax assessments – one for 1991 and one for 1992 and 1993 – *inter alia* for supplementary tax on precious metals, jewellery, works of art, collectors' items and antiques (hereinafter "the tax on works of art"), in accordance with the provisions of Articles 302 *bis* A to 302 *bis* E of the General Tax Code (since 1993, Articles 150 V *bis* to 150 V *sexies* of the same code).

8. In addition to the additional tax, the applicant company was charged interest for late payment and a fine was imposed under Article 1788 *ter* of the General Tax Code (Article 1770 *octies* since 1993), equal at that time to 100% of the unpaid tax. On 25 January 1995 the company was served with a demand to pay a total of 15,927,514 French francs ((FRF) – 2,428,133 euros (EUR)), of which the fine accounted for half (FRF 7,963,757 or EUR 1,214,066.93).

9. On 24 December 1997 the applicant company, represented by its court-appointed administrator, lodged a complaint with the Director of Revenue seeking relief from all the surcharges and fines demanded. It alleged on the one hand that the tax on works of art could be likened either to a value-added tax, which was contrary to Directives 77/388/EEC and 94/5/EC of the Council establishing special provisions applicable, *inter alia*, to works of art and collectors' items, or to a capital-gains tax, with an effect equivalent to an export restriction or an internal taxation, both of which were prohibited by Articles 34 and 95 of the Treaty of Rome. The applicant company also argued that the fines, which could be likened to criminal convictions within the meaning of the European Convention on Human Rights, should have been imposed by a court.

10. On 8 June 1998 the Director of Revenue rejected the complaint, stating that the tax concerned was not comparable to a value-added tax and did not hinder the free movement of goods, in so far as it applied to sales made either in France or in any other European Community member State. The Director of Revenue also pointed out that the Court, in its *Bendenoun v. France* judgment (24 February 1994, Series A no. 284) had acknowledged that the system of administrative penalties was compatible with Article 6 § 1 of the Convention, provided that their application was subject to court supervision.

B. Proceedings concerning exemption from supplementary tax on works of art and related penalties

11. On 31 July 1998 the applicant company brought an action before the Paris Administrative Court seeking exemption from the supplementary tax on works of art demanded of it for the years 1991 to 1993 and from the related penalties, based on the same grounds as its earlier complaint.

12. By a judgment of 4 November 2004, the court rejected the action. Concerning the conformity of the tax penalty with Article 6 § 1 of the Convention, it pointed out that the courts responsible for tax matters had full power of review over the facts concerned and their classification by the authorities, and decided in each case, in the light of the results of that review, either to uphold or apply the tax penalty effectively incurred in the amount provided for by law, without being able to adjust it to the circumstances of the particular case, or, if they considered that the authorities had not established that the infringements of the General Tax Code had been made out, not to fine the taxpayer. The court accordingly deemed that Article 6 § 1 did not necessarily require the tax court to have the power to adjust the amount of the penalty to suit the particular circumstances of the case.

13. On 10 January 2005 the applicant company lodged an appeal with the Paris Administrative Court of Appeal.

14. During those proceedings, order no. 1512 of 7 December 2005 reduced the fine provided for under Article 1788 of the General Tax Code (which became Article 1770 *octies* in 1993) from 100% to 25% of the unpaid tax.

15. On 13 February 2006 the tax authorities reduced the fine by EUR 910,549.93, and on 6 July 2006 the additional tax on works of art demanded was reduced by EUR 28,735.12 because of a mistake in the calculation.

16. The applicant company used the same arguments before the Court of Appeal as it had before the Administrative Court.

17. By a judgment of 24 November 2006, the Administrative Court of Appeal, having taken note of the reductions and ruled that there was no need for it to take those amounts into account, upheld the judgment on the whole but reduced the price the tax authorities had placed on one work acquired by the applicant company. After careful consideration it rejected the applicant company's formal and substantive arguments that the tax was at variance with Community law, for example, or that it should not have been applied to the acquisition of certain works. The court also rejected the argument under Article 6 § 1 of the Convention concerning the fine, for similar reasons to those given by the lower court, pointing out that the Administrative Court had full jurisdiction as required by Article 6 § 1, which did not require the

court to be able to lower the rate of a fine when the legislation provided for a single rate.

18. The applicant company appealed to the *Conseil d'Etat* on points of law, alleging, *inter alia*, that the tax was incompatible with Community law and the fine incompatible with Article 6 § 1 of the Convention, in so far as the court had no power to adjust it to reflect the seriousness of the taxpayer's conduct according to a statutory scale.

19. By a judgment of 27 June 2008, the *Conseil d'Etat* rejected the appeal. Regarding the fine, it held as follows:

> "Considering ... on the one hand that, in order to make the rate of the fine proportionate to the offence, the order of 7 December 2005 fixed it at 25%, and on the other hand that the tax court, having exercised its full power of review over the facts of the appeal and the classification adopted by the authorities, decides, in each case, depending on the results of that review, either to uphold the surcharge imposed by the authorities or to cancel it if it considers that the taxpayer has not infringed the rules applicable to works of art, and that it therefore has full jurisdiction as required under the provisions of paragraph 1 of Article 6 of the Convention ..., which do not imply that even where the legislation provides for a single rate for the fine in question the court must be able to adjust it and apply a rate lower than that provided for by law; accordingly, in not setting aside the fine provided for in Article 1761 of the General Tax Code in the present case, the court did not commit any error of law."

C. Proceedings concerning the determination of the tax base and the collection of the tax on works of art

1. Proceedings concerning the tax base

20. On 5 April 2005 the applicant company lodged two appeals with the *Conseil d'Etat* challenging the interpretation by the Minister of the Economy, Finance and Industry ("the Minister") of the tax law found in the basic administrative documents (in its successive versions of 15 October 1989 and 15 June 1993), whereby the Minister defined the base of the tax on works of art as their selling price, including commission.

21. The applicant company pointed out that Parliament alone had the power to create a tax and determine the key details of its establishment and collection, and submitted that the Minister, in whose name the administrative documents concerned had been drafted, had overstepped his powers.

22. During the proceedings the tax was completely rewritten and the numbering changed, by Article 33 of the Budget Amendment Act 2005, adopted on 30 December 2005 and effective from 1 January 2006. On that occasion the provisions concerning the base of the tax, previously found in the administrative documents, and those concerning the collection of the tax, previously found in the regulatory part of the General Tax Code, were incorporated in the legislative part of the Code.

23. By a judgment of 10 February 2006, the *Conseil d'Etat* joined the appeals and rejected them. It considered, based on the impugned provisions of the General Tax Code, that the law "implicitly but necessarily" intended to base the tax on works of art on the selling price and, for want of further clarification on this point, the selling price taken into account as a base for the tax should be understood to include all the costs borne by the purchaser. That being so, the *Conseil d'Etat* considered that, in basing the tax on works of art on the selling price including commission, the Minister had correctly interpreted the impugned provisions and had not laid down any new rules or overstepped his authority.

2. Proceedings concerning the collection of the tax

24. On 21 June 2005 the applicant company lodged two appeals with the *Conseil d'Etat* to set aside the decisions by which the Prime Minister had implicitly rejected its requests to revoke the regulations governing the means of collecting the tax on works of art, issued pursuant to the Law of 19 July 1976 introducing the said tax. It contended that the provisions in question were of a legal nature and had been introduced by an authority which had no law-making powers. It further alleged that the legal provisions concerning the persons to whom the tax applied were confusing and unclear, in breach of the principle, enshrined in Article 7 of the Convention, that only the law can define a crime and prescribe a penalty.

25. By a judgment of 5 May 2006, the *Conseil d'Etat* joined the appeals and rejected them. It considered that the regulatory authority had simply laid down the procedure for collecting the tax, in conformity with the provisions of the Law of 19 July 1976, and had not overstepped its authority or the terms of its remit. It further considered that the argument concerning the principle, enshrined in Article 7 of the Convention, that only the law can define a crime and prescribe a penalty could not be relied on in favour of setting aside the refusal to revoke the regulations in issue.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant domestic law

26. The fixed-rate tax on works of art is a particular way of taxing capital gains. It was introduced by Article 10 of the Law of 19 July 1976 on the taxation of capital gains and the creation of a fixed-rate tax on precious metals, jewellery, works of art, collectors' items and antiques. Until 1993 it was embodied in Articles 302 *bis* A to 302 *bis* E of the General Tax Code,

then until 31 December 2005 in Articles 150 V *bis* to 150 V *sexies* of the same code. The relevant parts of those Articles read as follows.

Article 150 V *bis*

"I. Subject to the specific provisions applicable to business profits, ... the sale of jewellery, works of art, collectors' items and antiques shall be subject to a 7% tax[1] when the value exceeds FRF 20,000; when the price is between FRF 20,000 and 30,000, the base of the tax shall be reduced by a sum equal to the difference between FRF 30,000 and the said price.

...

These provisions shall also be applicable to sales made in another member State of the European Economic Community.

..."

Article 150 V *ter*

"The tax provided for in Article 150 V *bis* shall be borne by the seller. It shall be paid by the intermediary taking part in the transaction or, failing that, by the buyer, within thirty days and under the same guarantees as turnover tax. However, where the sale is made in another member State of the European Community, the tax shall be paid by the seller, under the same conditions.

The tax shall not be levied where the seller is a professional dealer in the goods concerned."

Article 150 V *sexies*

"The seller of jewellery or other objects mentioned in the second line of paragraph I of Article 150 V *bis* may opt, by a declaration made at the time of the sale, for the scheme defined in Articles 150 A to 150 T provided that he is able to show proof of the date and price of acquisition. The conditions of this option are fixed by decree of the *Conseil d'Etat*."

27. The Budget Amendment Act 2005 (Law no. 2005-1720 of 30 December 2005), which took effect on 1 January 2006, changed those provisions. Among other things it covered the person legally liable for the tax on works of art, the base on which the tax was assessed and how it was collected. Henceforth, Article 150 VK paragraph 1 of the same code reads:

"The tax shall be borne by the seller or the exporter. It shall be paid by the intermediary resident in France for tax purposes who takes part in the transaction and under his responsibility or, failing that, by the seller or the exporter.

..."

1. The tax was initially fixed at 6%, and was increased to 7% in 1993.

28. Failure to pay the tax on works of art gives rise to a fine. At the material time Article 1788 of the General Tax Code (which became Article 1770 *octie*s in 1993) provided:

> "Breaches of Articles 150 V *bis* to 150 V *sexies* shall give rise to a tax penalty equal to the unpaid tax and collected in the same manner as turnover tax."

Order no. 2005-1512 of 7 December 2005 on the simplification of taxation and the harmonisation and adjustment of penalties reduced the fine provided for in Article 1770 *octies* from 100% to 25% of the unpaid tax. Article 1770 *octies* became Article 1761 § 2 of the General Tax Code.

B. The full proceedings before the administrative courts

29. Traditionally a distinction is made between a full administrative-law action (before an administrative court having full jurisdiction) and an appeal for judicial review seeking to have an administrative decision set aside. In the latter type of appeal the power of the administrative court is limited: it can only set aside a decision retroactively because of a legal flaw, without ruling on the merits. In a full administrative-law action, on the other hand, the powers of the administrative court are much broader: not only can it set aside or uphold an administrative decision, but it can also vary it, replace it with its own decision and rule on the rights of the interested party. It can also order the administrative authorities to pay damages. What is more, when the administrative court has full jurisdiction it examines the lawfulness of the decision referred to it in the light of the legal and factual circumstances at the time when it gives judgment (not, as in appeals for judicial review, at the time when the administrative decision was taken).

Full administrative-law actions include appeals to establish the liability of the State in contractual or extra-contractual matters, actions concerning fiscal or electoral matters (municipal and district), appeals against administrative sanctions, and various other actions.

30. In the realm of tax litigation, the administrative courts have jurisdiction in matters concerning direct taxes and turnover tax, while cases concerning indirect taxes are a matter for the ordinary courts. As a result, the administrative courts have the power to cancel the taxes and related penalties demanded by the tax authorities and can also fix the sum to be paid, within the limits of the applicable legal provisions. As regards penalties, the administrative courts can replace a higher rate with a lower rate when several rates are applicable depending on the taxpayer's conduct.

C. The relevant domestic case-law

31. On the question of the power of the courts to vary the rate of tax penalties, the French Supreme Courts have adopted different solutions.

1. The Court of Cassation

32. Where fines are imposed in the event of late payment of the differential tax on motor vehicles (Article 1840 N *quater* of the General Tax Code – repealed on 1 March 2005), the Court of Cassation, in a judgment of 29 April 1997, declined to apply the Article in question as being contrary to Article 6 § 1 of the Convention in so far as "it did not provide for a full administrative-law action against the administrative decision enabling the court to rule on the principle and the amount of the fine" (*Cass. com.*, *Ferreira*, *Bulletin* 1997 IV no. 110).

33. That approach was subsequently confirmed (*Cass. com.*, 17 November 1998, *Dupuis*, no. 96-21749; *Cass. com.*, 15 June 1999, *Lise*, *Bulletin* 1999 IV no. 130). In the judgment of 15 June 1999 mentioned above, the Court of Cassation held as follows:

> "Article 1840 N *quater* ... is incompatible with Article 6 § 1 of the Convention ... only in so far as the court before which proceedings are brought challenging a penalty imposed on a taxpayer by the tax authorities cannot rule on the principle and size of the fine, so the task of the court, before which the [individual concerned] argued that he had paid the tax immediately after being ordered to pay it, was to assess the proportionality of the penalty with the taxpayer's conduct ..."

The Court of Cassation explained in a judgment of 1 July 2003 (*Cass. com.*, *Gallotte*, no. 00-13966), concerning a 40% supplementary tax demand for failure to declare a gift:

> "Article 6 § 1 ... opens up the right to appeal to a court having full jurisdiction to ensure that a fine imposed by the tax authorities is proportionate to the taxpayer's conduct in the particular circumstances of the case, and ... the trial court can exercise the power thus vested in it only if the party challenging the fine enables it to assess the principle and the amount of the fine ..."

2. The Conseil d'Etat

34. The *Conseil d'Etat* initially ruled on Articles 1728 and 1729 of the General Tax Code, which provide for different penalties depending on the taxpayer's conduct and its classification in law (Article 1729, as it stood at the material time, provided for a 40% increase in the fine if the taxpayer had acted in bad faith, and 80% if there was deception).

In an opinion of 5 April 1996 concerning Article 1729, the *Conseil d'Etat* stated:

> "[T]he law ... making penalties proportionate to the taxpayer's conduct provided for the surcharge applied to vary according to the legal classification given to the conduct concerned. The relevant court, having fully exercised its power of review of the authorities' classification of that conduct, must apply the relevant surcharge rate provided for by law, without being able to vary it in consideration of the seriousness of the offence committed by the taxpayer." (*CE*, Houdmond opinion, *Revue de jurisprudence fiscale* (RJF) 5/96, no. 607)

35. In another case concerning the possibility of varying the penalties provided for in Article 1729, the *Conseil d'Etat* gave the following explanation in an opinion of 8 July 1998:

> "[T]he relevant court, having fully exercised its power of review of the facts and the authorities' classification thereof, decides in each case, depending on the results of the review, either to uphold or apply the surcharge effectively incurred at the rate provided for by law, without being able to vary it in consideration of the seriousness of the offence committed by the taxpayer, or, if it considers that the authorities have failed to establish that the taxpayer is guilty of deception or of acting in bad faith, only to charge interest for late payment. The provisions of paragraph 1 of Article 6 of the Convention ... do not oblige it to proceed otherwise ..." (*CE*, Fattell opinion, RJF 1998, no. 970; see also *CE*, 24 September 2003, *Société Paolo Nancéienne*, RJF 12/03, no. 1393)

36. The *Conseil d'Etat* used the same reasoning in respect of Article 1728 of the General Tax Code, which provides for different rates of fine depending on the seriousness of the taxpayer's failure to comply with the obligations concerning tax returns (*CE*, 8 March 2002, *SARL Clinique de Mazargues*, RJF 2002, no. 671, and *CE*, 6 June 2007, *Lemarinier*, RJF 2007, no. 1042).

37. Subsequently, the *Conseil d'Etat* transposed this approach to penalties which, although they appeared in a separate Article of the General Tax Code, were part of a series of repressive measures that included penalties provided for in other Articles of the Code (see, for example, regarding the 5% fine provided for in Article 1788 *septies* (now Article 1788 A 4) of the Code in the event of failure to declare an immediately deductible value-added tax, *CE*, 30 November 2007, *Société Sideme*, RJF 2008, no. 172; regarding the 50% fine provided for in Article 1740 *ter* (now Article 1737) of the Code in the event of concealment or falsification of the identity or address of suppliers or clients, *CE*, 26 May 2008, *Société Anonyme Norelec*, RJF 2008, no. 981, and for the 150% fine (reduced to 100% in 2005) imposed under Article 1730 of the Code for obstructing a tax assessment, *CE*, 5 March 2009, *Gonzales-Castrillo*, *Droit fiscal* 2009 no. 10).

3. The Constitutional Council

38. In two decisions of 17 March 2011, following two preliminary questions of constitutionality concerning the 40% tax surcharge provided for in Articles 1728 and 1729 of the General Tax Code (for, respectively, non-declaration after receipt of notice and bad faith on the part of the taxpayer), the Constitutional Council declared the Articles in question to be in conformity with the Constitution, in the following similar terms in both decisions:

> "The principle of the individualisation of penalties that results [from Article 8 of the Declaration of 1789] implies that a tax surcharge, when imposed as a penalty, may be applied only if the authorities, subject to judicial review, expressly ordered it taking

into account the particular circumstances in each case; it cannot, however, prevent the law from laying down rules to ensure the effective repression of offences;

...

The impugned provision instituted a financial penalty the nature of which is directly linked to that of the offence; the law itself adjusted the penalties according to the seriousness of the offence; the court decides in each case, having fully exercised its power of review of the facts and the authorities' classification thereof, either to maintain ... the surcharge effectively incurred at the rate provided for by law, or to replace it by another rate provided for in the other provisions of the Article ... if it considers it legally justified [(Article 1728)], or, if it considers that the authorities have failed to establish that the taxpayer is guilty of deception or of acting in bad faith, it may decide only to charge interest for late payment [(Article 1729)]; it thus has the power to make the penalties proportionate to the taxpayer's conduct; the rate of 40% is not manifestly disproportionate ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION FOR LACK OF ACCESS TO A COURT WITH FULL JURISDICTION

39. The applicant company complained of a violation of Article 6 § 1 of the Convention, the relevant parts of which read as follows:

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

It complained about the fine imposed on it under Article 1770 *octies* (now Article 1761 § 2) of the General Tax Code. It considered that that provision did not give the courts competent to deal with tax matters full jurisdiction to increase or decrease the fine in proportion with the seriousness of the offence held against the taxpayer.

40. The Government contested that argument.

A. Admissibility

41. The Court notes that the Government, in their observations, considered that Article 6 § 1 of the Convention was applicable under its criminal head, and shares that opinion.

42. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other ground. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant company

43. The applicant company pointed out that the fine provided for under former Article 1770 *octies* of the General Tax Code was automatically applied by the authorities in the event of a supplementary assessment of the tax on precious metals, jewellery, works of art, collectors' items and antiques ("the tax on works of art"). It also pointed out that, when the supplementary tax was upheld by the tax court, that court was also obliged to maintain the corresponding penalties. This was the direct result of the wording of the former Article 1770 *octies*, according to which it was the revised tax assessment alone that triggered the application of the penalty. Contrary to what the Government said concerning the powers of the administrative authorities, the tax inspectors had no choice but to apply the penalty in question. The only way to avoid such automatic application was if the penalty was cancelled or a compromise was reached (Article L. 247 of the Code of Tax Procedure), which the authorities accepted only at their discretion and subject to the taxpayer promising not to take legal action. So there was no hope for a taxpayer who wanted to challenge both the revised tax assessment and the related penalties of seeing the authorities cancel the penalty or agree to its reduction.

44. Concerning the powers of the courts competent to deal with tax matters, the applicant company argued that, while the penalties could generally be challenged in terms of their application procedure and their lawfulness, in the instant case its complaints only concerned their lawfulness. The courts had no power to reduce or cancel the fines without also reducing or cancelling the corresponding revised tax assessment, so their hands were tied by the automatic nature of the penalty.

45. The applicant company further explained that, contrary to what the Government suggested, the law provided for no possibility of varying the fine, as the General Tax Code provided for only one fine in respect of the tax on works of art (100% at the time, 25% today). In reply to the Government's argument that there was no point in giving the courts the power to vary the fine, the applicant company pointed out that it had been the victim of certain salesmen who had undertaken (some in writing) to opt for the ordinary capital-gains scheme, but had failed to honour their commitment, which had obliged the authorities to increase its taxes as the purchaser, even though it had acted in good faith. It considered that, in such circumstances, the court should have been able to reduce the penalties.

(b) The Government

46. The Government began by pointing out that, contrary to what the applicant company asserted, the tax authorities were never legally bound to apply a penalty, as no legislative or regulatory provision obliged them to do so. According to the established case-law of the *Conseil d'Etat*, while their hands were tied when it came to establishing and collecting taxes in compliance with the legal rules, they were not when it came to tax penalties (see, for administrative sanctions, *CE* 8 January 1971, *Sieur Gallon*, *Recueil Lebon*, p. 21, and for tax penalties, *CE* 1 October 1979, *Association pour l'unification du christianisme mondial*, RJF 11/99, p. 837). Furthermore, the tax authorities had the power to vary or cancel a fine to allow for exceptional situations, as provided for in Article L. 247 of the Code of Tax Procedure. Also, the taxpayer had the possibility to apply for judicial review of an administrative refusal to cancel a fine.

47. The Government further argued that in tax matters the courts did not mechanically apply the same treatment to penalties as to the unpaid taxes. It was true that if the court discharged the taxpayer from liability for unpaid tax, the penalties automatically followed suit, but they could be reduced or cancelled even if the unpaid tax remained due. The Government pointed out that the taxpayer could challenge the fines on the grounds of the procedure followed in imposing them, or their lawfulness. The court ruled separately on the penalties and verified that the legal requirements had been complied with. In particular it examined the notions of "bad faith" (*mauvaise foi* in French, now called *manquement délibéré* or "wilful disregard") and "deception" (*manœuvres frauduleuses*), which incurred different levels of penalty. There were numerous examples where the penalty for lack of good faith had been reduced or cancelled regardless of whether or not the tax owed was upheld. Where infringements of the tax on works of art under the General Tax Code were concerned, the number of actions was too small to tell whether the courts would adopt a strictly objective approach to the facts or take the circumstances of the error into account.

48. In the present case the Government considered that the fact that the court had not had the power to vary the fine provided for in the former Article 1770 *octies* of the General Tax Code did not constitute a violation of the right to a fair hearing or the right to access to a tribunal within the meaning of Article 6 § 1 of the Convention. Firstly, they pointed out that the law itself provided for the sanctions to be proportionate to the misconduct, in so far as the fine was a percentage of the unpaid tax and its level was relatively moderate, as it had been reduced from 100% to 25% of the unpaid amount by the order of 7 December 2005, and that reduction had been applied to the applicant company in the course of the proceedings. The Government pointed out that the Court had already had occasion to find that this approach met the requirements of Article 6, and cited *Malige v. France* (23 September 1998, § 49, *Reports of Judgments and Decisions* 1998-VII),

and the Commission's decision in *Taddei v. France* (no. 36118/97, Commission decision of 29 June 1998, Decisions and Reports 94-B, p. 108). They added that in the present case the *Conseil d'Etat* had based itself on the *Malige* judgment in finding that Article 6 had not been violated, after having reviewed the proportionality of the fine, which was the only penalty provided for in respect of the tax on works of art. The Government referred in this connection to the points system for driving licences, where each breach of the Road Traffic Code led to the loss of a specific number of points.

49. The Government argued that in any event the lack of further reduction of the fine was justified by the very nature of the penalty, as there was in principle no possible justification for failure to pay tax. Especially in the present case, where the person who should have paid the tax (the seller) was not the person who actually bore the cost by law (the buyer), and not paying the Treasury the tax thus collected was an undue source of personal gain.

50. The Government explained that, generally speaking, the system of administrative penalties imposed in fiscal matters was linked to the massive number of individual cases dealt with, and was characterised by relatively simple scales because of the number of cases and the need to deal with them swiftly and in a uniform manner. The points system for driving licences which the Court endorsed in *Malige*, where a fixed number of points was removed for each type of offence, fell into the same category. In matters of tax penalties the law generally provided either for a small scale of different rates of fine for each type of offence, or for a single rate. The situation differed from the sanctions imposed in the economic field by independent administrative authorities, in the interests of "decriminalisation", such mechanisms being marked by a potential form of punishment that, although infrequent, was intended to be exemplary, and by texts that provided for high maximum fines coupled with the possibility of reducing them.

51. The Government submitted that to consider that Article 6 § 1 of the Convention embodied a general requirement to individualise all administrative penalties, of which tax penalties were merely one category, went beyond the aim of this Article on effective scrutiny by the courts and would have far-reaching consequences on the economics of mass administrative sanctions.

52. The Government also maintained that the administrative courts that dealt with cases concerning the application by the authorities of the fine provided for in the former Article 1770 *octies* of the General Tax Code could not be regarded as anything other than judicial bodies with full jurisdiction within the meaning of the Court's case-law, on which the *Conseil d'Etat* relied heavily. In French law the tax courts were judicial bodies with full jurisdiction, which meant that they checked not only the facts but also the law, and that they had the power to set aside

administrative decisions, but also to determine the amount of tax due or the penalty to be applied in accordance with and within the limits of the law. Where penalties were concerned, the courts verified the existence of the offence, then upheld the penalty if the offence was established, or cancelled it if it was not. They could also apply a lower rate where they considered appropriate (in respect of penalties for bad faith, for example), or agree to change one penalty for another at the request of the administrative authorities if certain conditions were met.

53. Where a single rate was provided for, as in the present case, the court had the choice in practice between confirming the penalty or cancelling it, having fully reviewed the facts and elements constituting the offence. In contrast with *Schmautzer v. Austria* (23 October 1995, Series A no. 328-A), where the Court had found a violation of Article 6 § 1 because of the limited review carried out by the Austrian courts, the Government emphasised that in the present case the appeal allowed the court to substitute its own assessment for that of the administrative authorities in ascertaining whether the facts justified the penalty, as provided for by law. The Government argued that even without the power to vary the penalty the court did have "full jurisdiction" within the meaning of the Court's case-law, and that the applicant company's right to a fair hearing had been respected in the present case.

2. The Court's assessment

54. The Court reiterates that a system of administrative fines, such as the tax penalties in the present case, is not incompatible with Article 6 § 1 of the Convention so long as the taxpayer can bring any such decision affecting him before a court that affords the safeguards of that provision (see *Bendenoun v. France*, 24 February 1994, § 46, Series A no. 284, and *Silvester's Horeca Service v. Belgium*, no. 47650/99, § 25, 4 March 2004).

55. Respect for Article 6 § 1 of the Convention means that decisions taken by administrative authorities which do not themselves satisfy the requirements of Article 6 § 1 of the Convention must be subject to subsequent control by a judicial body that has full jurisdiction (see *Schmautzer*, cited above, § 34; *Umlauft v. Austria*, 23 October 1995, § 37, Series A no. 328-B; *Gradinger v. Austria*, 23 October 1995, § 42, Series A no. 328-C; *Pramstaller v. Austria*, 23 October 1995, § 39, Series A no. 329-A; *Palaoro v. Austria*, 23 October 1995, § 41, Series A no. 329-B; and *Pfarrmeier v. Austria*, 23 October 1995, § 38, Series A no. 329-C). The characteristics of a judicial body with full jurisdiction include the power to quash in all respects, on questions of fact and law, the decision of the body below. It must have jurisdiction to examine all questions of fact and law relevant to the dispute before it (see *Chevrol v. France*, no. 49636/99, § 77, ECHR 2003-III; *Silvester's Horeca Service*, cited above, § 27; and

A. Menarini Diagnostics S.R.L. v. Italy, no. 43509/08, § 59, 27 September 2011).

56. The Court notes that in the present case the applicant company was able to lodge an application with the Administrative Court to be exempted from paying the additional tax and the fines, and then an appeal with the Administrative Court of Appeal and an appeal for judicial review with the *Conseil d'Etat*. The Administrative Court concerned had broad powers and full jurisdiction in this case to assess all the elements of fact and law and could not only quash or uphold an administrative decision, but also change it or replace it with its own decision and rule on the rights of the interested party; in fiscal matters it could exempt the taxpayer from the disputed taxes and penalties or modify the amount thereof within the limits prescribed by law, and where penalties were concerned, it could lower the rate within the limits of the applicable legal provisions (see paragraphs 29-30 above; and contrast *Silvester's Horeca Service*, cited above, § 28).

57. Thus, the applicant company was able to submit to the Administrative Court and the Administrative Court of Appeal – both of which courts met the requirements of Article 6 § 1 – all the factual and legal arguments which it considered helpful to its application for exemption from the revised tax assessment and the related penalties (see, *mutatis mutandis*, *Malige*, cited above, § 48), including challenging the compatibility of the tax with Community law and discussing the base used to calculate the tax, which it persuaded the Administrative Court of Appeal to reduce (see paragraph 17 above).

58. The applicant company's complaint is that the administrative courts did not have the power to vary the tax fine in the absence of any legal provision to that effect.

59. The Court observes first of all that the law itself, to a certain degree, makes the fine proportionate to the seriousness of the taxpayer's conduct, by expressing it as a percentage of the unpaid tax, the calculation of which the applicant company had ample opportunity to discuss in this case (see, *mutatis mutandis*, *Valico S.r.l. v. Italy* (dec.), no. 70074/01, ECHR 2006-III). The Court also accepts the Government's point concerning the special need for fiscal measures to be sufficiently effective to preserve the interests of the State, and further observes that such cases differ from the hard core of criminal law for the purposes of the Convention (see, *mutatis mutandis*, *Jussila v. Finland* [GC], no. 73053/01, § 43, ECHR 2006-XIII). Lastly, it considers that the rate of the fine, fixed at 25% by the order of 7 December 2005, does not appear disproportionate (see *Malige*, cited above, § 49; and contrast, *mutatis mutandis*, *Mamidakis v. Greece*, no. 35533/04, § 48, 11 January 2007, and *Grifhorst v. France*, no. 28336/02, § 105, 26 February 2009).

60. Accordingly, in the absence of any arbitrariness, the Court concludes that there has been no violation of Article 6 § 1 of the Convention in the instant case.

...

FOR THESE REASONS, THE COURT UNANIMOUSLY

...

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in French, and notified in writing on 7 June 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips Registrar	Dean Spielmann President