

## The application of the European Convention on Human Rights to tax cases: the right to a fair trial in tax matters<sup>1</sup>

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### 1. Introduction: the right to a fair trial

Since the European Convention on Human Rights was signed on 4 November 1950, entering into force on 3 September 1953, and ratified by the signatory States,<sup>3</sup> the competent judicial authority, the European Court of Human Rights, sitting in Strasbourg, has ruled on an ever increasing number of cases concerning tax issues.

In order to establish a framework for the application of the Convention to tax cases, a number of steps need to be taken, and a number of questions answered.

First, what exactly is a tax case?

Second, which articles of the Convention can be invoked by European citizens to ensure the protection of their rights as taxpayers?

The starting point for this article is an observation<sup>4</sup> which partially answers this second question: the majority of the cases heard by the Court revolve around the possible application (and violation) of Art. 6 of the Convention, laying down rules on the right to a fair trial.

Art. 6, sect. 1, states that: "In the determination of his civil rights and obligations or of any criminal charges against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and

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<sup>3</sup> The United Kingdom was the first country to ratify in March 1951; Germany followed in 1952, Italy in 1955. For an overview, reference should be made to the website of the Council of Europe, Treaty Office (<http://conventions.coe.int>).

<sup>4</sup> Fact sheets on taxation can be consulted on the website of the European Court of Human Rights (<https://www.echr.coe.int>). See, also Baker, Philip, *Taxation and Human Rights*, in *GITC Review*, Vol. 1. No.1, 2001.

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 (...)".

This is obviously a general rule, applicable to all kinds of trials, provided that they concern the determination of a civil right and/or criminal charges. In other words, a person (a physical person or a legal person such as a business entity) is entitled to appeal to the European Court of Human Rights, invoking the violation of Art. 6, only if a civil right is concerned or a criminal charge has been brought against him. It is therefore necessary to consider tax cases in this perspective, in order to extend the safeguards of a fair trial to tax proceedings.

## **2. The traditional position of the Court: tax cases are excluded**

In general terms, tax cases basically arise where there are contrasting positions between the tax authorities and taxpayers over fiscal issues, such as the assessment of direct or indirect taxes, the settlement of an outstanding tax liability, the reimbursement of taxes that were not due, the payment of tax credits, and so on.

The European Court of Human Rights has consistently held that ordinary tax proceedings (i.e., when a dispute relates to purely fiscal matters) do not imply the determination of civil rights and obligations, since: "Tax is an area of administrative or public law; it is not a civil law matter"<sup>5</sup>. This extreme position of the Court, that is rather conservative in its classification of tax law, has in some instances been softened in disputes deemed to be covered by civil law rules<sup>6</sup>.

In spite of these case-by-case rulings, the traditional orientation of the Court has come to the fore once again in a number of important

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<sup>5</sup> Baker P., op. cit.

<sup>6</sup> Malherbe J., in "Per una Costituzione Fiscale Europea", 2008, p. 262-266. See the rulings of the European Court of Human Rights in *Hentrich vs France*, 22.9.1994, and *National and Provincial Building Society, Leeds Permanent Building Society and The Yorkshire Building Society vs UK*, 23.10.1997.

judgments<sup>7</sup>. Especially since the *Ferrazzini case*, the position of the Court has attracted significant criticism from more a number of authors.

### **3. The determination of criminal charges: tax charges can be criminal**

In order to establish whether a case involves a criminal charge or not, the European Court of Human Rights traditionally resorts to the *Engel Criteria*<sup>8</sup>. The Engel criteria involve the application of three tests to the case under scrutiny: 1) the legal classification of the offence in domestic law; 2) the nature of the offence; 3) the degree of severity of the possible sanction. The first test is particularly significant, as it may prevent the national classification of "criminal" from setting aside the safeguards under Article 6 (that are usually more extensive)<sup>9</sup>.

The Court has shown a constant tendency to extend the application of Art. 6 to criminal cases, and has often combined the Engel criteria, so as to strengthen them, and to classify cases as criminal<sup>10</sup>. Tax proceedings have been treated in the same way, though formally speaking tax charges do not come under the criminal jurisdiction as they are usually regulated by administrative laws<sup>11</sup>.

Two important judgments stand as good examples of the willingness of the Court to extend the safeguards under Art. 6 to tax cases by classifying as criminal the charges against which taxpayers are required to defend themselves.

In *Bendenoun vs France*, the Court "did not underestimate the importance of several factors pointing to the administrative nature of the tax penalty. It

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<sup>7</sup> See, among others, the decisions of ECoHR *Schouten and Meldrum vs The Netherlands*, 9.12.1994, and *Ferrazzini vs Italy*, 12.07.2001,

<sup>8</sup> Decision of the ECoHR, *Engel and others vs the Netherlands*, 8.6.1976.

<sup>9</sup> In plain words, the first test means that the national classification alone is not sufficient to establish whether a charge is criminal, or rather whether a charge is not criminal.

<sup>10</sup> Crisafulli F., "Relazione su CEDU e giusto processo tributario", University of Pescara (<http://www.scigiur.unich.it/eventi>).

<sup>11</sup> In Italy, for instance, the regime of fiscal surcharges is regulated by Legislative Decrees no. 471/1997 and 472/1997.

noted, however, in the light of its case-law, the predominance of others which made the charge a criminal one<sup>12</sup>.

In *Jussila vs Finland*, the Court stated again that “although the tax surcharges in the case were part of the fiscal regime, they were imposed by a rule whose purpose was deterrent and punitive. The offence was therefore criminal<sup>13</sup>”.

#### 4. Further steps

After establishing that, in the above mentioned cases, Art. 6 applies to tax proceedings “for the determination (...) of any criminal charge”, the Court is required finally to ascertain whether the taxpayer’s right to a fair trial has been infringed or not<sup>14</sup>.

With reference once again to *Bendenoun* and *Jussila*, while they can be considered leading cases from the point of view of general classification, it should be noted that in both cases the Court decided that there was no violation of Art. 6, since the fair trial requirements were complied with in the national proceedings.

However, many other important cases can be cited in which the violation of Art. 6 was ascertained, often unanimously<sup>15</sup>.

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<sup>12</sup> Decision of the ECoHR *Bendenoun vs France*, 24.2.1994. The predominant factors listed by the Court were: the nature of the offences with which Mr Bendenoun was charged under French law; the fact that the tax surcharges were intended not as a pecuniary compensation for a damage, but as a punishment; the consideration that the surcharges were imposed under a general rule, whose purpose was both deterrent and punitive; and, finally, the observation that the amount of the surcharge was substantial.

<sup>13</sup> Decision of the ECoHR *Jussila vs Finland*, 23.11.2006,.

<sup>14</sup> Baker P., “*The application of the European Convention on Human Rights to tax matters in the UK*”, p. 21-25 (<http://www.taxbar.com>).

<sup>15</sup> Among others, see the decision of the ECoHR *J.J. vs the Netherlands*, 27.3.1998, in which the Court stated that the right of the applicant to adversarial proceeding (*i.e.*, to know all the evidence presented in front of the national courts) was infringed. Decision of the ECoHR *J.B. vs Switzerland*, 3.5.2001, where the Court recognized the taxpayer’s rights to remain silent and not to incriminate himself. Decisions of the ECoHR *Janosevic vs Sweden* and *Vastberga Taxi Aktiebolag and Vulic vs Sweden*, both 23.7.2002, where the Court unanimously ascertained that there had been a violation of Art. 6 sec.1 because of the length of the proceedings.

## 5. Conclusion

Clearly the main issue of the extension of the “right to a fair trial” to tax cases has not yet been satisfactorily resolved, since the Court still does not recognize the application of Art. 6 to “pure” tax disputes. With this approach, the unitary nature of tax law and tax proceedings is lost in matters of classification, and the long overdue unconditional extension of safeguards fails to go beyond a case-by-case approach<sup>16</sup>.

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<sup>16</sup> Among others, Malherbe J., op.cit.; Della Valle E., “*Il giusto processo tributario. La giurisprudenza della C.edu*”, in *Rassegna Tributaria*, 2/2013.