

***Ferrazzini* and the inclusion of tax proceedings under Article 6 § 1 ECHR¹**

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1. Introduction

The European Convention on Human Rights (ECHR) represents the core of rights recognized for European citizens, also with a view to improving the integration between different countries with different legal cultures.

The broad interpretation of the general principles provided by the European Court of Human Rights (ECtHR, hereinafter the Court), is intended to influence the decisions of national judges required to hand down rulings on fundamental rights in accordance with national law. The courts are responsible for the application and interpretation of the general principles, taking a position on their limits and extent. The complex interaction between principles deriving from international and national sources requires the intervention of the courts to provide an interpretation that ensures the effectiveness of the rules, while considering the evolution of the society in which they are applied.

With reference to the right to a fair trial within a reasonable time laid down in Article 6 § 1 of ECHR,³ it may be assumed that the rights relating to tax proceedings are not expressly considered as part of the common cultural

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³Article 6 § 1 Right to a fair trial "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.*"

http://www.echr.coe.int/Documents/Convention_ENG.pdf.

and legal heritage, because their scope is limited to civil rights and obligations or to criminal cases.

However, in a number of cases, the Court has been asked to rule on issues cutting across civil law and tax law, as a result of the alleged violation of a citizen's rights during a trial. The rulings handed down in the various cases reveal that there is no consolidated interpretation entirely ruling out the application of Article 6 § 1 of ECHR to tax proceedings⁴. The uncertainty of interpretation is a sign of evolution of the common approach to the relation between human rights and national rights in the tax field.

*Ferrazzini*⁵ is a leading case in this respect because it concerns the question of whether the rights of the defendant in tax proceedings, the matter of the dispute, deserve the same protection as other fundamental rights, although their nature is different (i.e. administrative⁶ considering the legal categories adopted under the Convention. The defendant, Mr Ferrazzini, was involved in tax proceedings in Italy concerning the payment of tax on immovable assets arising from the purchase of land, and these proceedings continued for over 10 years. The qualification of the transaction, in order to attract the tax benefits granted by the law in specific cases, was disregarded by the tax authority, giving rise to legal action against the taxpayer. The tax authority, in addition to the request for payment of the tax, levied a pecuniary sanction.

The taxpayer appealed to the Court, arguing that the proceedings breached his rights to a trial within a reasonable period of time, but the Italian government argued that the rights at stake were not within the scope of the ECHR because of their specific nature.

The Court took the view that the ECHR did not apply in this case, adopting a restrictive interpretation of the concept of civil rights and obligations.

⁴ BAKER P., The Decision in Ferrazzini: Time to Reconsider the Application of the European Convention on Human Rights to Tax Matters, *Intertax*, Volume 29, Issue 11.

⁵ European Court of Human Rights Judgment: *Ferrazzini vs Italy*- n. 44759/98 of 12 July 2001.

⁶ Continental European civil law, unlike the common law, considers a clear separation between the administrative rules and the civil rules because of their source that is respectively public law and private law. The relations between citizens and the government are traditionally governed by public law although they provide juridical effects on individual situations in the same way as private law.

2. The reason for the exclusion of tax proceedings from the protection granted under Article 6 § 1 ECHR

The Court upheld the argument that there was no violation of the fundamental rights protected by the ECHR. The rights invoked by the taxpayer during the tax proceedings did not comply with the qualification of the rights protected by Article 6§1. In this case, also the sanctions did not have any impact on the civil rights of the taxpayer. The two main arguments were that the Italian proceedings were not related to “criminal charges” and taxation matters were limited to public law⁷. Although the ECHR provides an autonomous concept of “civil rights and obligations”, characterized by a pecuniary interest, this factor is not itself sufficient for the rights of the defendant in tax proceedings to come under the protection of the Convention, taking into account the evolution of society and the protection granted to individuals. This argument means that rights based on relations between the taxpayer and the public administration, as in the case of tax proceedings, cannot be considered fundamental human rights due to their connection with the national law and the discretionary power of the public administration: as a result the procedural safeguards for these rights can be upheld only by the national courts⁸. Following the Court’s reasoning, the grounds of the limitation are to be found in the public nature of these rights, despite their effects on individuals, which are comparable with the effects of civil rights.

3. Judge Lorenzen’s dissenting opinion challenging the narrow interpretation of the scope of the Convention

The Court did not reach unanimity on this decision, probably because there is no settled case-law on the narrow interpretation of the scope of the

⁷ Point 21 of the judgment: “*The existence of an individual’s tax obligation vis-à-vis the State belonged, in their submission, exclusively to the realm of public law. That obligation was part of the civic duties imposed in a democratic society and the purpose of the specific provisions of public law was to support national economic policy*”.

⁸ RUSEN E., *Taxation and Property Rights under the European Convention on Human Rights*, Intertax, Volume 39, Issue I.[[5]]

ECHR. In other cases involving tax proceedings, the Court upheld the application of Article 6§1,⁹ considering the penalties or fines issued in a tax dispute as criminal sanctions¹⁰.

Since the ECHR does not provide any definition of civil rights and obligations, the underlying principle of the provision is to be found in the *Travaux préparatoires* relating to the article.

3.1 The weak justification for the exclusion of the field of taxation based on the *Travaux préparatoires*

Following the arguments put forward by Judge Lorenzen it is clear that the rationale for the exclusion, which is not expressly mentioned, is to be found only in a historical perspective. In 1950 the boundaries between the public administration's discretionary powers and judicial powers were not sufficiently clear and they were different in each country. Today, such distinctions are clearer, due to the integration of principles across Europe and an increase in legislative activity¹¹. As a result the new context shows that the relations between the individuals and governments do not only have a public dimension, regardless of whether they involve the exercise of justice.

The uncertainty arising from the rule, for the purposes of extending the application of Article 6 §1, should not be dealt with by applying an economic criterion, such as the pecuniary interest, but by recognizing that in a democratic society taxation is based on the application of legal rules.

It is also important to recognize an "erosion of the exclusion of tax proceedings¹²" due to the idea that in several cases tax litigation gives rise to claims that can be protected as civil rights (e.g. claims for damages).

⁹ GREGGI M., *The Protection of Human Rights and the Right to a Fair Tax Trial in the Light of the Jussila Case*, Intertax, Volume 35, Issue 11.

¹⁰ PARTOUCHE L., *The "Right to a Fair Trial": the French Civil Supreme Court Reduces its Scope of Application to Tax Matters*, Intertax, Volume 33, Issue 2.

¹¹ Taxation matters, especially as a consequence of a tax assessment, are not based on the discretionary power of the public administration but on the application of the law, which is the legal source of taxes.

¹² BAKER P., *Should Article 6 ECHR (Civil) Apply to Tax Proceedings?*, Intertax, Volume 29, Issue 6-7.

Considering the European context, the justification for the exclusion provided by the Court does not appear to be defensible, bearing in mind that all the rights claimed in any proceeding are themselves the expression of a civil right, intended as a right typical of civil societies. In this scenario the distinction between public and civil law provides a weak justification for excluding the rights deriving from tax litigation that deserves the same protection as other legal categories in the human rights framework.

3.2 The need to establish a general theory to identify fundamental rights, with autonomous criteria other than traditional legal categories

Assuming that civil rights and obligations invoked within a trial are considered to be human rights, the question that immediately arises from the dissenting opinion is: What is a fundamental right? How is it possible to recognize a fundamental right? The traditional juridical categories, such as civil, public, and politic rights, all have a common basis in the general theory of law¹³. This kind of analysis is preliminary to the identification of the other legal categories, even if is not acceptable for such categories to constitute a limitation on the protection guaranteed by the ECHR. Generally human rights are intended as rights pertaining to individuals in a universal conception,¹⁴ and they are not established by rules because they represent rules in themselves. The connection between the fundamental right and the community consists in the impossibility of transferring the right because each member of the community enjoys this right independently. The possibility to transfer a right is incompatible with the nature of fundamental rights, representing the limit and the peculiarity of human rights reflecting principles of law.

In the light of these criteria, each traditional legal category should include rights with this peculiarity. For this reason, the rights of the defendant in

¹³ PERRONE A., *Art. 6 della CEDU, diritti fondamentali e processo tributario: una riflessione teorica*, *Rivista di Diritto Tributario*, fasc. 10, 2013, pag. 919.

¹⁴ The universal conception means the two-way effect of the right. The effects are directed at individuals as human beings, and to other individuals interacting with them.

tax proceedings should not be treated in a discriminatory way compared to the rights of the defendant in other type of proceedings.

4. Conclusion *de iure condendo* approaching a third way for a broader interpretation of the ECHR, considering the integration of the common principles

The defence of the common cultural legal heritage of European countries has been upheld by the ECHR, but its structure needs to take into account the ongoing European evolution. The *révirement* of the position of the Court is necessary to give effect to the application of the principles laid down in the ECHR. The concept of civil right should not be framed only as a right of a civil nature, but as a right common to civil societies.

In the opinion of the author the application of Article 6§1 does not depend on the qualification of the nature of the rights of a defendant in a proceeding (i.e. administrative, civil or criminal), because it is the proceeding itself that presupposes a fundamental right, consisting in the right of a defendant whose rights are challenged in a Court or Tribunal.¹⁵ The right to defence is an overarching rule that is endorsed and protected by legal procedures regardless of the nature of the proceeding (e.g. the adversarial principle is recognized in civil, criminal and administrative trials). In Italy, for example, the procedural rights protected in tax proceedings are the same as in civil proceedings, making express reference to the rules (i.e. Article 16, *Decreto Legge* no.546 of 31 December 1992, about notification in tax proceedings, at paragraph 2, makes reference to Article 137 of the *Codice di Procedura Civile* on the same issues). The purpose of the above-mentioned rules is to establish a common system of communication of relevant information that is preliminary to the exercise of any right within a proceeding. In fact, compliance with these rules is mandatory and the proceeding could not be held without respecting them because the defence of the parties would be limited. If national law ensures

¹⁵ In this sense the European Court of Human Rights in judgment *Bendenoun*, 2 February 1994.

equal protection for the defendant in a trial, it could be considered as upholding the rights considered.

The rights derived from a trial have their rationale in the right to a defence, which is a fundamental right (that is not transferrable and is of universal application). This fact may be observed in different legal systems, for example, in Spain the rules on the acquisition of evidence in tax proceedings (Article 106 of *Ley General Tributaria* number 58 of 17 December 2003), refer to the rules of civil law applied to civil proceedings (*Codigo Civil* and *Ley de Enjuiciamiento civil* n.1 of 7 January 2000)¹⁶ with the aim of ensuring the possibility of rebuttal. In other words, the Spanish system allows evidence in civil proceeding and in tax proceedings to be produced by applying the same rules, because there is no substantial difference between the position of a defendant in civil proceedings and a defendant in tax proceedings when they exercise their right of defence by producing evidence or making a rebuttal.

The French system provides another interesting example of how the fundamental principles can evolve following the interaction between national law, as interpreted by the national supreme courts, and the international sources of law¹⁷. Although the rules on tax proceedings and civil proceedings are clearly separate, without any direct reference as adopted in Italy or Spain, the case law of the national supreme courts (i.e. the *Conseil d'État*¹⁸ and the *Court de Cassation*¹⁹) finds a common background in the right of the defendant, intended as "access to justice", to justify the compatibility of Article 6 § 1 of the Convention with tax proceedings²⁰. In this case, the interpretation of the national supreme courts is the *trait d'union* between national fundamental rights and the rights upheld by the ECHR and the laws

¹⁶ M. RODRÍGUEZ-BEREIJO LEÓN, *La Prueba en Derecho Tributario*, Thomson, Aranzadi, 2007.

¹⁷ For more details about the French experience consider the article by T. MASSON, *La protection du contribuable a travers la Convention Europeenne des droits de l'homme: une nouvelle consideration des droits de la defense?*, in *Fiscalité Européenne et Droit international des affaires*, Fontaneau, n. 131, 2002 .

¹⁸ Conseil d'État, judgment *Magiera*, of 28 June 2002

¹⁹ Cour de cassation, judgment *Kloener*, n. 1118, of 14 June 1996.

²⁰ J. LAMARQUE, *Sources du droit fiscal. Sources internationales- Application du principe de superiorité des normes internationales - Protection des droits de l'Homme*, JurisClasseur Procédures fiscales, 15 June 2010.

of the European Union. In other words the integration of fundamental rights starts from national law, in compliance with the international sources²¹.

The common base for all the proceedings is the fundamental right, considered as a principle, and the fair duration of a trial is a specific protection of this juridical situation. They are upheld both by national and international law due to their common background, and the protection of fundamental rights is an autonomous right that should not be limited by legal categories considering the effects on the individuals.

In conclusion the *Ferrazzini* case concerns a situation that is undoubtedly comparable to other judgments concerning the effects on the defendant, but only because of the qualification of the relation the defendant was not granted any protection for human rights, giving rise to discrimination in the application of the European Convention on Human Rights.

²¹ F. MARTINET and A. ANGOTTI, *Conseil d'État et Cour de cassation, juge de l'impôt: étude comparative (introduction générale et premier volet)*. – *La fiscalité européenne et constitutionnelle, ou "la théorie des lasagnes"*, Revue de Droit fiscal n° 42, 18 October 2012, 480.