

Reflections on property rights and confiscatory tax systems¹

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The right to property is expressly laid down in Art. 1 of Protocol no. 1 to the European Convention on Human Rights (hereinafter, the ECHR), in which the Parties agree that "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." Over a period of several decades, these provisions, that were adopted to safeguard the right of States to regulate property rights, have been turned by the European Court of Human Rights (hereinafter the ECtHR) into an instrument of protection of taxpayers against the unlawful actions of States.

The concept of "peaceful enjoyment of possessions", along with international principles of law such as legality and proportionality, has become a central standard in ECtHR case law for evaluating the tax legislation of States Parties³. However, this does not mean that the ECtHR interferes excessively with the fiscal powers of the States, since the Court often repeats in its judgments that States Parties have ample latitude in tax

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³ There is extensive case law relating to Art. 1 of Protocol no. 1 of ECHR as for ex. ECtHR, *Buffalo s.r.l. in liquidazione vs. Italy*, Judgment of 3 July 2003, where the Court stated that a refusal to refund unduly paid taxes constitutes a violation of peaceful enjoyment of possessions and ECtHR, *Dangeville vs. France*, Judgement of 16 April 2002, in which the Court declared that the refusal of the French Supreme Administrative Court to order the refund of VAT collected in breach of an EU directive was contrary to property rights as laid down in the ECHR. Similar positions are expressed in ECtHR, *Eko-Elda Avee vs. Greece*, Judgment of 9 March 2006 and ECtHR, *Intersplav vs. Ukraine*, Judgment of 9 January 2007, where tax legislation unlawfully undermined the fiscal situation of the taxpayers.

matters, and usually avoids providing any definition of confiscatory taxes⁴. Clearly it is not the duty of the ECtHR to ensure an equal and fairly distributed tax system in general, as this is the responsibility of the States Parties and in this connection there are no decisions ascertaining a violation of Art.1 of Protocol no. 1 ECHR based only on an excessive tax burden or extremely high tax rates. The ECtHR considers whether there is a fair balance between the public interest of the community and the protection of fundamental rights of the taxpayer, whereas national authorities have to establish what, how and how much to tax.

All these ideas are to be found also in three recent judgments,⁵ in which the Court ascertained a violation of Art. 1 of Protocol no. 1 by the Hungarian tax legislator arising from the retroactive application of a 98% tax rate on certain payments for public-sector employees on termination of employment. In addition to the facts of the case, the legal background and findings relating to the infringement of the legality principle (retroactivity of the rule), and the non-discrimination principle (only public-sector employees were affected), two interesting *obiter dicta* are to be found in the part of the ruling addressing the proportionality of this measure⁶. First, finding that in these specific cases an overall tax burden of approximately 52% was to be considered excessive, the Court immediately stated, in a cautious tone, that "in several European countries – such as Sweden, Belgium, the Netherlands, Portugal and Italy – personal income tax rates reached about 75% in the past – although those rates were usually applicable only to the highest income brackets, related to revenues clearly exceeding the amount that is contemplated in the context of the present case". Second, in its analysis the Court referred to specific judgments of the States Parties, where the Constitutional Courts had found tax rates

⁴ The term "confiscation" in the tax field is present in ECtHR, *Gasus Dosier- und Fördertechnik GmbH vS. The Netherlands*, Judgment of 23 February 1995, but it almost disappeared in later cases as ECtHR, *Orion-Breclav, S.R.O. v. The Czech Republic*, 13 January 2004; ECtHR, *Imbert de Tremiolles v. France*, 4 January 2008, where the confiscatory nature of certain taxes was solved by declaring inadmissible the applications.

⁵ ECtHR, *N.K.M. vs. Hungary*, 14 May 2013; ECtHR, *Gáll vs. Hungary*, 25 June 2013 and ECtHR, *R.Sz. vs. Hungary*, 2 July 2013.

⁶ A 98% tax rate itself cannot be regarded as the sole criterion for determining the lack of proportionality as can be seen in the case of *R.Sz. vs. Hungary*, § 56, where the Court stated that "given the margin of appreciation granted to States in matters of taxation, the applicable tax rate cannot be decisive in itself".

exceeding 50% to be unconstitutional.

With regard to Italy there is a matter that is in need of clarification. The Court does not appear to be well informed about the general situation in the country, because it is not only the highest income brackets that are subject to high tax rates. Recent studies⁷ have confirmed that Italy has one of the highest tax burdens for SMEs. In 2011 Italy ranked higher than any other country in Europe with an overall tax burden on SMEs of 68.6%,⁸ that decreased to the present rate of 65.8% (with a general tax burden of 43.8% of GDP in 2013). In this respect the tax burden was and still is considered to be confiscatory by some legal scholars,⁹ but the Italian Constitutional Court has always rejected such a definition, never specifying a threshold that the legislator has to respect and never finding a specific tax rate to be unconstitutional, along the lines of the German 50% rule¹⁰. However, this approach does not fully comply with the principle upheld not only by the ECHR but also by Art. 42 of the Italian Constitution,¹¹ where the right to property is expressly recognized and should be granted to all. On this specific point it is interesting to notice the different attitudes of the Italian Constitutional Court in the tax field and in the case of expropriation in the public interest (compulsory purchase orders). In compulsory purchase cases, the Court has ruled that legitimate expropriation of an asset, imposed by the law in the public interest, cannot result in the elimination of property rights, and the payment of compensation between 60% and 76% does not pass the constitutionality test¹².

Both measures, taxation, on one the one hand, and compulsory purchase, on the other, affect the right to property and a similar solution, striking a fair balance between the public interest and the fundamental rights of taxpayers, should uphold the principle of equal treatment.

⁷ World Bank Report "Paying Taxes 2014".

⁸ World Bank Report "Paying Taxes 2011".

⁹ G. FALSITTA, *I divergenti orientamenti giurisprudenziali in Italia e in Germania sulle imposte dirette che espropriano l'intero reddito del contribuente*, in Riv. dir. Trib., 2010, 2, p. 139 and ff.

¹⁰ See for ex. Ital. Const. Court, decision no. 111/1997, where the tax on property added to business tax resulted in an overall tax burden of 107% at that particular time.

¹¹ The text states "Property is publicly or privately owned. Economic assets belong to the State, to entities or to private persons."

¹² See Ital. Const. Court, decision no. 348/2007.

Such a solution has been proposed,¹³ but unfortunately it has not been supported by the legislator nor by the Italian Constitutional Court. However, in *N.K.M, Gáll* and *R.Sz.* the ECtHR moved a step forward: it referred to the overall tax burden, on the one hand, and to specific constitutional case law, on the other, opening the way to positive developments in the coming years and hopefully resulting in a change of heart on the part of the Italian Constitutional Court.

¹³ G. FALSITTA, *I divergenti orientamenti giurisprudenziali in Italia e in Germania sulle imposte dirette che espropriano l'intero reddito del contribuente*, loc. cit., op. cit.