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Some Recent Decisions of the European Court of Human Rights

This article examines some recent cases of the European Court of Human Rights (ECtHR) on tax matters. The cases examined relate to searches of premises by revenue officers, taxes that impose an excessive burden and legal aid in tax appeal cases.

Searches of Premises by Revenue Officers

One of the more difficult issues in the application of the European Convention on Human Rights (ECHR) to tax matters is the question of searches of premises by revenue authorities. In 1993, in the leading case of *Funke, Miailhe and Crémieux v. France*,[1] the ECtHR found that there had been an infringement of, inter alia, Art. 8 of the ECHR when French revenue officers searched premises without a prior judicial authorization. A recent case, *Ravon and others v. France*,[2] has held that the procedures for judicial authorization of searches and seizures by the French revenue authorities also contravene Art. 6 of the ECHR.

Under Art. L.16B of the Law on Fiscal Procedure (*Livre des Procédures Fiscales*, LPF), the President of the local *Tribunal de Grande Instance* can authorize a search of premises by revenue officials and the seizure of evidence found. The power is used only in cases of particular gravity, where there is evidence of fiscal evasion. The President of the Tribunal has to issue an order setting out instructions and details relating to the visit. Art. L.16B of the LPF provides, however, that the order issued by the President can only be challenged on appeal by way of cassation under the Criminal Procedure Code and that such an appeal does not suspend the order. The Court of Cassation has also held that the authority of the President to supervise the search ends once the search is completed, the report prepared, and the inventory of items seized is presented to the occupant of the premises (or his representative).

In this case, Mr Ravon, and two companies that he controlled, complained of a search made on their premises under the authority of Art. L.16B of the LPF. In July 2000, the French revenue authorities obtained orders from the Presidents of the Tribunals in Marseille and Paris to search premises owned by Mr Ravon and these companies. The premises were visited the next day and documents were seized. Subsequently, Mr Ravon and one of the companies were advised that no adjustment to their tax liability would be made and the other company was subject to no audit procedure.

After the searches had been carried out, Mr Ravon and the companies challenged the whole procedure by bringing an action before the Presidents of the two tribunals that had authorized the searches. These legal challenges were, however, rejected on the grounds that the function of the President had come to an end once the searches were completed and the reports and inventories compiled.

Mr Ravon and the two companies complained to the ECtHR of a breach of Art. 6(1) (the right to a fair trial), Art. 8 (right to privacy) and Art. 13 (right to an effective remedy) of the ECHR. The Court considered the case primarily under Art. 6(1) of the ECHR on the grounds that the allegation was that the applicants had been denied an effective right to approach a court to challenge the search and to protect the inviolability of their premises (*droit au respect du domicile*).

An initial question was whether Art. 6 of the ECHR applied at all. Pointing to the *Ferrazzini*[3] line of cases, the French government argued that this was a fiscal matter and, therefore, neither involved the determination of civil rights and obligations or a criminal charge within Art. 6(1) of the ECHR. The Court disagreed. This was a dispute over the infringement by the revenue authorities of the applicants' right to respect for their premises. That was a dispute over a civil right guaranteed both by the French Civil Code and by Art. 8 of the ECHR. Art. 6(1) of the ECHR, therefore, applied under its civil head.

Having decided that Art. 6(1) of the ECHR applied, the question was whether or not the applicants had an effective access to a tribunal to determine their rights. The ECtHR concluded that they did not have effective access to a tribunal to determine this dispute. Whilst in theory they could have applied to the President of the Tribunal who issued the order permitting the search while the search was going on, as they were not informed of this right or of how to contact the President this was more theoretical than effective. Other possible routes for challenging the search also did not give them an effective remedy; for example, the appeal by way of cassation would have checked purely the formal validity, and in these circumstances would not have provided an adequate remedy for the infringement of the right to inviolability of premises.

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1. (1993) 16 EHRR 297, 332 and 357 (Application Nos. 10828/84, 12661/87 and 11471/85).
2. Application No. 18497/03, judgment of 21 February 2008. Unfortunately, the decision of the ECtHR is only available in French.
3. (2002) 34 EHRR 45 (Application No. 44759/98).

Whilst this case turns in part on the particular French procedures involved, it does have much broader implications. The ECtHR clearly saw the right to privacy of premises as a civil right so that a dispute over the possible infringement of that right would come within the scope of Art. 6(1) of the ECHR. The taxpayer who is subject to a search of his premises (and this would appear to apply both to business premises and homes) must have effective access to an independent tribunal to challenge both whether a search should have taken place at all, and the conduct of that search. Merely having a requirement of judicial authorization for the search is not sufficient. As Art. 6(1) of the ECHR applies to the taxpayer's right to challenge the infringement of the privacy of his premises, all the guarantees in Art. 6(1) must apply to that challenge, i.e. there must be a right of access to an independent tribunal with a determination within a reasonable time. The case has, therefore, much wider implications than the French procedures at issue.

Taxes That Impose an Excessive Burden

In theory, a tax that imposes an excessive burden and undermines the economic position of the taxpayer infringes the right of protection of property in Art. 1 of the First Protocol to the ECHR.[4] This position is entirely theoretical. To date, no taxpayer has ever successfully challenged a substantive tax provision on this basis (so far as the author is aware). A recent case illustrates this.

In *Imbert de Tremiolles v. France*,[5] a husband and wife challenged the French capital tax.[6] The basis of the complaint was that in the years in question the amount of capital tax payable by them exceeded the net income (after certain non-deductible taxes) that they received from the property on which the tax was imposed. For example, in 1997 they received a net income from the property of FRF 787,938, but had a capital tax liability of FRF 1,061,219. Despite this, the ECtHR concluded that the tax fell within the wide margin of appreciation enjoyed by States in the tax field. It will be interesting to see if and when the ECtHR (if ever) strikes down a substantive tax provision as being excessive.

Legal Aid for Tax Penalty Appeals

Two recent cases have considered the availability of legal aid for tax penalty cases. The right to legal aid arises if the tax case involves the determination of a criminal charge and it then arises under Art. 6(3)(c) of the ECHR, which states that:

> Everyone charged with a criminal offence has the following minimum rights:
> ...
> c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; ...

If a tax dispute involves a criminal charge (because the dispute involves the liability to a general penalty imposed for failure to comply with the tax law), then the right to legal aid in appropriate circumstances arises.

In *Persson v. Sweden*,[7] the taxpayer was subject to tax charges and also criminal proceedings. One of his complaints under Art. 6 of the ECHR was that he was not provided with free legal aid to initiate compensation proceedings against the Swedish state and, consequently, the "equality of arms" principle had been infringed. The ECtHR noted, however, that there was no evidence that he had applied for legal aid and had been refused it, and so the complaint was rejected.

More interestingly, the case of *Barsom and Varli v. Sweden*,[8] discusses the question of legal aid in the rather vexed area of "mixed" cases. These are cases that involve both a challenge to the amount of tax payable and to penalties or surcharges. The dispute over the amount of tax payable falls, in accordance with the ECtHR's jurisprudence, entirely outside of Art. 6 of the ECHR. In contrast, the dispute over the penalty engages the guarantees under the criminal heading of Art. 6 of the ECHR, including the right to legal aid.

In this case, the two taxpayers owned together 75% of the shares in a company, which ran a restaurant. Following a tax audit, the two taxpayers were subject to additional assessments to tax, plus surcharges in relatively low figures (EUR 11,460 and EUR 15,610, respectively). The applicants complained that their right to free legal assistance under Art. 6(3)(c) of the ECHR had been violated, as they were refused legal aid.

The ECtHR first confirmed that the imposition of the surcharges involved the determination of a criminal charge within the meaning of Art. 6 of the ECHR and that the right to be effectively defended by a lawyer is a fundamental feature of fair trial. Art. 6(3)(c) of the ECHR, however, only requires free legal assistance when it is in the interests of justice to grant it. The Court noted that the main concerns of the taxpayers were the tax assessments, and the penalties were relatively minor. The case was also not particularly complex from a legal point of view. It turned largely on its facts and the applicants could have presented their cases without legal assistance. On that basis, the Court found that there was no indication that legal aid was indispensable for effective access to the courts.

This is another example of a "mixed" case where the main issue is not the "criminal" liability to penalties, but, rather, the tax assessment itself. Art. 6 of the ECHR does not apply at all to the dispute concerning the tax assessment, so that there is no right to a fair trial under the ECtHR in respect of the tax assessment dispute. The real issue is whether or not the absence of legal aid deprived the applicants of a right to a fair trial in connection with their criminal charge. In this case, clearly the answer from the ECtHR was "no".

4. The leading case where this was said was the case of *Wasa Liv v. Sweden* (Application No. 13013/87).
5. Application Nos. 25834/05 and 27815/05, judgment of 4 January 2008.
6. The *impôt de solidarité sur la fortune* under Art. 885A of the General Tax Code (*Code Général des Impôts*).
7. Application No. 27098/04, judgment of 27 March 2008.
8. Application Nos. 40766/06 and 40831/06, judgment of 4 January 2008.