European Union

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Some Recent Decisions of the European Court of Human Rights on Tax Matters

The author examines recent decisions of the ECtHR relating to human rights and taxation including a claim regarding the failure to return aircraft seized in the course of a tax investigation of an unrelated party, a claim for an exemption from a government social security system where the applicant had private coverage, an allegation that the applicant's right to a fair trial had been breached where evidence was obtained as a result of an exchange of information and a case alleging tax police abuse.

1. Aircraft without Engines or Propellers

Sometimes there are cases reported from the European Court of Human Rights (ECtHR) in Strasbourg that involve such egregious breaches of taxpayers' rights that one wonders how the tax administration of the country concerned can ever have been permitted to act in the way that it did. The case of *East/West Alliance Limited v. Ukraine* (2014)[1] is just such an example. Perhaps the facts are so extreme that there is little to learn from the case, but it is an interesting read nonetheless.

The company that brought the case was an Irish company with a representative office in the Ukraine. It owned a number of aircraft: the aircraft concerned here were six AN-28s and eight L-410s, which were registered with the Ministry of Transport of the Ukraine as owned by the company. The company was a member of the Titan Consortium, together with two other companies, ATI and URARP. In 2001, these two other companies were subject to searches and investigations by the Ukrainian tax police on suspicion of tax evasion. The Irish company was not under investigation. The facts are set out in some detail in the decision, but in simplified form they were as follows.

In January 2001, the title documentation relating to some of the aircraft was seized by the Ukrainian tax police. In March 2001, this was followed by seizure of the aircraft themselves. Arrangements were made for custody of the aircraft but, despite this, they were vandalized (of which, more below). In 2002, the six AN-28s were declared ownerless (note that the aircraft documentation had previously been seized) and their sale was authorized. Five of the L-410s also disappeared while they were in the authorities' custody, possibly also sold. The Irish company tried multiple procedures to obtain restitution of the aircraft, including obtaining orders from local courts for the return of the aircraft. However, it proved impossible for one reason or another to have the aircraft returned, despite court orders to do so. Eventually, in 2011, experts inspected the AN-28 aircraft and concluded that they consisted of various items and components, which could no longer be classified as aircraft. Around the same time, experts examined the remaining L-410 planes and concluded that there were components and items of three planes, but their engines and propellers were missing and they could no longer be classified as aircraft.

Having failed to obtain the return of the aircraft seized by the tax authorities, the Irish company brought its claim before the Court in Strasbourg. Aside from setting out the facts in some detail, the ECtHR explained the general principles relating to the peaceful enjoyment of property in Article 1 to the First Protocol to the European Convention on Human Rights (ECHR or "the Convention") (right to enjoyment of possessions).[2] The Court distinguished an earlier case on the seizure of property by tax authorities – the *Gasus Dosier* (1995) case[3] – on the grounds that the aircraft remained factually and legally within the ownership of the Irish company throughout (which, it should be recalled, was not the subject of the tax investigation). The Court was then scathing in its assessment of the behaviour of the tax authorities, noting that it disclosed indications of bad faith and arbitrariness, did not comply with the requirement of lawfulness and was abusive. As an overall conclusion the Court stated:[4]

> The Court cannot but conclude that the applicant company has been deprived of its six AN-28 and eight L-410 aircraft in an utterly arbitrary manner, contrary to the rule of law principle.

This is an unusually strongly worded denunciation of the acts of tax authorities. One key to the events may possibly be hidden in a small comment near the start of the decision: the president of the Ukrainian office of the Irish company and of the Titan Consortium was a Mr L until March 2002, "when he was elected to the National Parliament".

After this catalogue of sad events, the decision turns to the question of remedies. The Irish company had claimed approximately USD 166 million (based upon the current market value of 14 aircraft similar to those for which it had been deprived), plus lost profits for the period when the

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1. UA: ECtHR, 23 Jan. 2014, Application No. 19336/04, *East/West Alliance Limited v. Ukraine*.
2. *East/West Alliance Limited v. Ukraine* (19336/04), at paras. 166-168.
3. NL: ECtHR, 23 Feb. 1995, series A No. 306 – B, *Gasus Dosier*.
4. *East/West Alliance Limited v. Ukraine* (19336/04), at para. 215.

aircraft were seized of slightly over USD 60 million, as well as interest on the lost profits. The ECtHR set out, at some length, the general principles for the determination of the amount of "just satisfaction", which is designed to place the applicant, if possible, in the position as if there had been no breach of the Convention. Since the aircraft could not be restored, the government concerned had to pay compensation, but here the Court disagreed with the calculations of the company. The Court noted that the aircraft had been purchased second-hand and there was no evidence of the current market value of similar aircraft purchased at the same time that had been subject to usual wear and tear. The Court also recognized that there had been lost profits, but found it impossible to define the amount of the lost profits with precision. Overall, the Court awarded an aggregate sum of EUR 5 million to cover all heads of damage.

At this point one has to stand back and, even without any expertise in aircraft ownership, aircraft operations or aircraft leasing, conclude that this figure appears derisory. The applicant company was deprived of fourteen aircraft for almost a decade. What it eventually received back was a collection of components and rusting parts that would, in all probability, have been of negligible value. It is interesting to note that one of the judges dissented on the grounds that the Court was not ready to make a decision on the amount of compensation, and that the question of just satisfaction should have been reserved for further evidence, calculations and submissions by the parties.

Where there has been such abusive conduct by a revenue authority as the Court found here, to award the level of compensation that was granted in this case (EUR 5 million as against USD 166 million claimed) might be seen as effectively exonerating the revenue authority from its conduct. There is a danger of bringing the ECtHR itself into disrepute. If the Court had doubts as to the correct quantification, then it should have followed the dissenting judgment and reserved the amount of compensation for a further hearing.

2. Opting Out of Social Security Taxes

The applicant in the case of *Marcu v. Romania* (2013)[5] was a lawyer in Bucharest. In 1999, she joined the bar, having previously been employed in the private sector and having contributed to the Bucharest City Social Security Fund. Upon commencing practice she took out medical insurance and joined the insurance fund for advocates, which provided a range of services including pension cover. She then ceased to make any contributions to the National Fund for Social Insurance and Health (FNUASS).

In 2010, the Bucharest City Social Security Fund claimed from her the unpaid contributions for FNUASS, together with interest and penalties. She challenged this on various grounds including Article 1 of the First Protocol on the basis that the obligation to pay to the national insurance fund was inequitable, discriminatory and abusive since it limited independent workers in their choice of medical insurance.

The Court rejected her claim, first on the grounds that the Convention does not guarantee the right to choose between different social security providers. Secondly, the payment of contributions did not undermine the financial position of the applicant, nor was it a disproportionate measure, bearing in mind that the level of FNUASS contributions was fixed at 6.5% of taxable income and applied uniformly to all workers. In the view of the Court, this level was not excessive and it provided for an equitable distribution of the cost of providing a general regime of health insurance between all workers.

It seems clear, from reading the case, that the main complaint was that the applicant was already making private provision for health, pension and other forms of insurance. She objected to paying for a system from which she would not benefit. In that context, it is interesting that the Court accepted that a contribution of 6.5% of taxable income – once again for benefits that the taxpayer would not receive – was not disproportionate.

3. The Deficiencies of Exchange of Information

The case of *Janyr v. The Czech Republic* (2013)[6] identifies one of the problems arising from the exchange of information between different countries. The applicant was under investigation for potential customs offences. In 1999, a limited amount of information was supplied by the customs authorities in Gibraltar to their Czech colleagues. This included a denial that a Gibraltar company had entered into any transactions with a company with which the taxpayer was associated. The applicant was subsequently charged with customs offences. Unfortunately, further exchange of information with the authorities in Gibraltar proved impossible.[7] As a consequence, the applicant was unable to challenge the original information exchanged. He was convicted and sentenced to five years in prison. He complained that there had been a breach of article 6 of the Convention and the right to a fair trial on the grounds that the Czech courts had failed to obtain the attendance of a witness from Gibraltar that would have allowed him to challenge the evidence against him.

The Court held that there had been no breach of the right to a fair trial; in doing so, the Court examined in some detail the evidence against the applicant and concluded that the information obtained from Gibraltar (which he had wished to challenge) formed only a small part of the evidence against him. On an overall assessment, there had been no breach of a right to a fair trial.

5. RO: ECtHR, 12 Nov. 2013, Application No. 8986/13, *Marcu v. Romania*.

6. CZ: ECtHR, 31 Oct. 2013, Application No. 42937/08, *Janyr v. The Czech Republic*. An application has been made for a re-hearing before the Grand Chamber. The author is grateful to his former student Rui Palma of Linklaters, Portugal for drawing his attention both to this case and to *Marcu v. Romania* (89868/13).

7. At paragraph 15 of the decision there is a peculiar sentence that suggests that Commonwealth countries regularly refuse to cooperate in cases relating to tax offences.

This highlights a very real problem with the exchange of information, which will usually involve the provision of evidence helpful to the revenue authorities. However, without access to equivalent opportunities to request information from other countries, a taxpayer charged with a civil or criminal matter may find himself in a position where he is unable to challenge the evidence obtained by exchange and consequently is unable to obtain a fair trial. The answer may lie in the tax authorities making certain that evidence that might exonerate the taxpayer is also sought by way of exchange and by making all evidence received from another country available to the taxpayer. It is certainly the case that the systems presently in place are designed primarily to supply the revenue authority with material with which they can assess or convict the taxpayer. Perhaps greater attention needs to be paid, in practice, to safeguards for the taxpayer, including providing him with evidence that would allow him to challenge any evidence presented against him.

4. Further Worrying Reports of Abuse by Tax Authorities

Previously in this series of articles on decisions of the ECtHR, attention has been drawn to the growing number of reports of alleged abuse of power by tax authorities. Worryingly, this trend is continuing. One recent example involved allegations of inhumane and degrading treatment by tax police.[8] Though the case was primarily about another matter, the taxpayer alleged that an unscheduled inspection by the tax police to his shop led to a fracas during which an employee was punched and in which he sustained injuries to his arm and lip. The Court concluded, however, that the available material did not clearly demonstrate any violent behaviour on the part of the tax police and that the applicant himself might have been responsible for the injuries. Certainly, the description of the incident suggests a relatively violent encounter between the applicant and the tax police, though it was hard to see which party had been at fault.

Whatever may have been the circumstances of that particular case, the number of cases coming to the ECtHR and involving allegations of grossly abusive conduct by revenue authorities – particularly tax police – is particularly disturbing. No doubt in some countries the tax police have to deal with smugglers, organized criminal groups, and operate in very dangerous circumstances. However, if some of the allegations of abusive conduct by tax authorities are to be believed, there is a need to establish better practices to ensure proper protection of taxpayers' rights and a more co-operative environment between revenue authorities and taxpayers.

8. *See* UA: ECtHR, 16 Jan. 2014, Application No. 6318/03, *Fuclev v. Ukraine*.