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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 concerning searches of premises by Revenue officers, retrospective validation of Revenue officials' authority, and miscellaneous tax matters.

1. Searches of Premises by Revenue Officers Revisited

My article on recent decisions of the European Court of Human Rights (ECtHR), which was published in the June 2008 issue of *European Taxation*,[1] discussed the ECtHR judgment of 21 February 2008 in the case of *Ravon and others v. France*.[2] That case concluded that the procedure under Art. L.16B of the French Law on Fiscal Procedure for authorizing the search of premises by the French Revenue authorities violated Art. 6 of the European Convention. The violation arose from the fact that the judge who authorized the search had no competence to adjudicate on challenges to the legality of the search after it had been completed. The ECtHR concluded that such searches potentially violated the sanctity of an individual's home, even though the search was carried out in connection with a tax investigation. Any challenge to the search involved the determination of civil rights, and so fell within Art. 6. The French procedure breached Art. 6 because there was the lack of an adequate recourse to an independent tribunal to challenge the search.

The *Ravon* decision has been followed in a number of subsequent cases before the Court in Strasbourg where Art. L.16B has been held to violate Art. 6. These cases include: *Société IFB v. France*[3], *Maschino v. France*[4] and *Kandler and others v. France*.[5] However, in its most recent judgment on the topic the ECtHR reached a different conclusion. In the case of *SA LPG Finance Industrie v. France*[6] the Court noted that the legal position (that the judge who authorized the search ceased to be competent to adjudicate on the legality of the search once the search was completed) rested upon two decisions of the *Cour de Cassation* from 1999. However, by a judgment of 10 May 2007 in the *Winkler* case, the *Conseil d'Etat* concluded that the judge remained competent to decide on the regularity of the search that he had authorized. This new jurisprudence gave the complainants a route for challenging the legality of the search, so that the requirements of Art. 6 were satisfied. The applicants had failed to take advantage of that route, and so their challenge to Art. L.16B failed on grounds that they had failed to exhaust domestic remedies.

Though this decision may conclude the discussion of the legality of the French procedure on searches by the French Revenue authorities, it does not alter the basic premise of the *Ravon* case. This premise is that a search by Revenue authorities involves a potential infringement of the inviolability of premises. Any challenge to such a search is a dispute concerning civil rights, and Art. 6 of the Convention requires access to an independent tribunal to challenge the search.

The case law on searches by the French Revenue authorities has also thrown up other interesting issues under the Convention. In the case of *André and another v. France*,[7] the complainants were a French lawyer and his law firm. They were representing a company in connection with its dispute with the Revenue authorities. The French tax administration obtained authorization under Art. L.16B of the Law on Fiscal Procedure to search the offices of the lawyer. The search was carried out in the presence of the president (*bâtonnier*) of the Marseille Bar. A large body of documents was removed. The complainants challenged the search both under Art. 6 (right to a fair trial) and Art. 8 (right to privacy).

The Art. 6 challenge was essentially the same as in the *Ravon* case, and the Court held that there was a violation of Art. 6(1).[8]

More interesting, however, was the challenge under Art. 8 on grounds of infringement of professional privilege. The Court noted that legal professional privilege is fundamental to the operation of the judicial system and that any infringement of the right to privacy of a lawyer's office must be subject to additional safeguards and must be proportionate and necessary in the circumstances of the case. Here, the search of the premises was subject to the special safeguard of the presence of the president of the bar. However, the search of the lawyer's premises was disproportionate to its objective. The Court considered that a search of a lawyer's premises might be appropriate where the lawyer was himself suspected of an offence or participation in the fraud of his client. However, there was no such suspicion here, and

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1. P. Baker, "Some Recent Decisions of the European Court of Human Rights", *European Taxation* 6 (2008), pp. 315-316.
2. Application number 18497/03, judgment of 21 February 2008.
3. Application number 2058/04, decision of 20 November 2008.
4. Application number 10447/03, judgment of 16 October 2008.
5. Application number 18659/05, judgment of 18 September 2008.
6. Application number 43387/85, decision of 19 May 2009.
7. Application number 18603/03, judgment of 24 July 2008.
8. The events occurred prior to the change in French law discussed in the *SA LPG Finance Industrie* case.

the search was carried out to confirm the Revenue authorities' suspicion of fraud on behalf of the lawyer's client. A search of the lawyer's premises in those circumstances was disproportionate and a breach of Art. 8.

This decision relates specifically to the search of a lawyer's home or office. Even with added safeguards, such a search would clearly be a violation of Art. 8, unless there are grounds for suspecting the lawyer personally of commission of an offence. A search is clearly not permissible simply to obtain information relevant only to the client's liability.

2. Retrospective Validation of Revenue Officials' Authority

Arising once again in France (the ECtHR is not infrequently troubled with issues concerning the conduct of the French Revenue authorities) another case has discussed the retrospective validation of the authority of Revenue agents. The case is *Joubert v. France*.[9]

In 1990, M. and Mme. Joubert sold shares in a company that they owned to Company B. Following an investigation of Company B by a branch of the French tax authority, the *Direction des Vérifications Nationales et Internationales* (DVNI), M. and Mme. Joubert had the capital gain on the disposal of their shares reassessed, with a 40% penalty imposed. They challenged this and in September 1995 they commenced an action before the Administrative Tribunal of Bordeaux. A basis of the challenge was that the DVNI was not competent to make the adjustment, since at that time that particular branch of the French Revenue service could only deal with persons connected with companies that had been investigated, and M. and Mme. Joubert were not connected with Company B (which had been the subject of the investigation).

While their case was pending before the Administrative Tribunal, on 31 December 1996 Art. 122 of the Finance Act 1997 was published, retrospectively validating the actions taken by different branches within the French Revenue including the DVNI. In June 1999, the Administrative Tribunal found in favour of the taxpayers on the grounds that Art. 122 of the Finance Act was incompatible with Art. 6(1) of the European Convention. However, this decision was overturned by the Administrative Court of Appeal, and a challenge to the *Conseil d'Etat* failed.

M. and Mme. Joubert brought a case to the ECtHR based, inter alia, on the allegation that the retrospective nature of Art. 122 deprived them of the right to property, contrary to Art. 1 of the First Protocol of the European Convention. The ECtHR concluded, first, that M. and Mme. Joubert had a right to property in the form of a legitimate expectation that the additional assessments against them would be quashed on the grounds of the lack of competence of the DVNI. The retrospective legislation had deprived them of the legitimate expectation: the question was whether that could be justified.

The ECtHR concluded that, even though the margin of appreciation enjoyed by governments in tax matters is wide, retrospective validation of the actions of the DVNI went beyond that margin of appreciation. It appeared to the Court that the main reason for validating the previously unauthorized actions was concern on the part of the French authorities of the cost to the treasury if a significant number of tax assessments were declared invalid. That was not a sufficient justification in the public interest for the retrospective legislation. The taxpayers had also alleged that the French Revenue had delayed their case before the Administrative Tribunal, knowing that retrospective legislation was in the pipeline.

It is quite interesting to compare this case with the ECtHR jurisprudence on retrospective tax legislation, particularly where that legislation has been enacted to counter perceived tax avoidance activities.[10] The Court seems to have been more willing to accept retrospective changes to substantive tax law, as opposed to the retrospective change to procedural tax rules in this case.

3. Miscellaneous Cases

In its judgment in *Glor v. Switzerland*[11] the ECtHR found a Swiss tax - the military-service exemption tax - to be discriminatory. The tax (in an amount of EUR 477 in 2001) was payable by an individual who was declared unfit for military service on the grounds of a disability, but whose disability was not sufficiently serious to exempt him from payment of the tax. In this case, Mr Glor was willing to perform military service, but was declared unfit on the grounds of suffering from diabetes. Had his disability been more serious (exceeding 40%) he would have been exempted from the tax. However, his disability was found to be insufficiently serious to provide for exemption. The ECtHR concluded that the disability threshold was too arbitrary, and that perhaps Mr Glor might have been offered civilian service (an option reserved for conscientious objectors alone). The Court found that the tax violated the non-discrimination provision in Art. 14 taken in conjunction with the right to privacy in Art. 8. There was no reasonable justification for the distinction between persons who are unfit for service and not liable to pay the tax, and those who were regarded as unfit for service but still obliged to pay the tax.

In *Faccio v. Italy*[12] the ECtHR concluded that sealing a television set in a nylon bag to enforce payment of a TV licence fee was a proportionate measure. M. Faccio had filed a request to terminate his subscription to public TV services and refused to pay his TV licence fee. In 2003 the tax police sealed his TV set in a nylon bag so that it could not be used. He complained of infringe-

9. Application number 30345/05, judgment of 23 July 2009.
10. See, for example, *SB v. Finland*, application number 30289/96, judgment of 16 March 2004, as well as the old decision in *ABC and D v. United Kingdom*, application number 8531/79, determination of 10 March 1981.
11. Application number 13444/04, judgment of 30 April 2009.
12. Application number 33/04, decision of 17 April 2009.

ment of Art. 10 (the freedom of expression) on the grounds that his right to receive information had been infringed and of Art. 8 (right to respect for family and private life) on the grounds that his right to respect for property and private life had been infringed. The ECtHR concluded that it was not appropriate for an individual who did not wish to watch public channels to terminate his obligation to pay the licence fee: that would amount to depriving the tax of its very nature, as a contribution to the provision of a community service. The amount of the tax was reasonable (EUR 107.50 for 2009) and the sealing of the TV set in a bag was proportionate to the aim pursued.

One wonders whether, following this case, sealing up other items of electronic equipment – such as sealing an individual's mobile phone into a nylon bag – might be a method of enforcement more widely adopted by Revenue authorities. It may also prove a useful device for parents frustrated at their children's constant attachment to electronic devices!