International

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Some Recent Tax Decisions of the European Court of Human Rights

This article examines some recent cases of the European Court of Human Rights concerning, in particular, the quality of tax laws and the acceptable limits of criticism of revenue officers.

1. Striking Down Unclear Tax Laws

Sometimes – occasionally – a decision comes along which confirms an opinion which you have held for years. The recent decision in *Shchokin v. Ukraine*[1] is just such an example. For years it has been predicted that the European Court of Human Rights (ECtHR) would one day decide that part of the tax legislation of a country was so unclear as to lack the "quality of law". Lacking the quality of law, the legislation could not provide a valid legal basis for the interference with the enjoyment of property which the purported taxation would otherwise entail. The consequence was that the purported taxation had to be declared to be a breach of the right to enjoyment of property.

The facts of the case may be somewhat extreme, but they are probably not that far removed from situations that arise quite frequently in the experience of many tax practitioners. The applicant before the ECtHR was an individual living in the Ukraine. For each of the years 2001, 2002 and 2003, the local tax inspectorate reassessed the amount of income tax due from him and increased the amount of that tax. At that time, the legislation imposing income tax was a Ministerial Decree of 1992 which had the legal status of an Act of Parliament. The Decree provided for two systems of tax rates for taxing an individual's business income. First, for income earned at the taxpayer's principal place of business, the Decree laid down a progressive scale of taxation. Second, for income earned by the taxpayer outside his principal place of business, the Decree established a fixed 20% tax rate. For each of the three years in question, the local tax inspectorate took income earned by the taxpayer outside his principal place of business and applied to that income not the 20% fixed rate but the progressive scale of taxation. The consequence was an increased tax liability for the three years of just under 5,800 Ukrainian hryvnias (approximately EUR 580 for the three years).

The tax inspectorate based its approach on an Instruction issued by the Principal Tax Inspectorate in 1993. They also pointed to a Presidential Decree of 1994 on the application of progressive taxation. However, Art. 67 of the Ukrainian Constitution provided that bye-laws (such as the Instruction) could not change the applicable tax rate. Only Ministerial Decrees had the same legal force as laws passed by Parliament. There was, therefore, a clear conflict between the different legal norms: the Ministerial Decree having the force of law and providing for a flat rate of 20%, while the Instruction and the Presidential Decree provided for progressive taxation.

Having failed in his challenge before the Ukrainian courts, the taxpayer brought his complaint to the ECtHR in Strasbourg alleging a violation of the right to enjoyment of property under Art. 1 of the First Protocol of the European Convention (right to enjoyment of possessions). It was not in dispute that the increase in the tax liability constituted an interference with the applicant's property rights. The question was whether this was justified in accordance with Art. 1.

The ECtHR stated that the first and most important requirement of Art. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful. That is, that it should be "subject to the conditions provided for by law". The requirement of the rule of law was only satisfied if the tax measures had a basis in domestic law and satisfied the "quality of law" which required that they should be accessible, precise and foreseeable in their application. The ECtHR stated that it could not comprehend why the 20% flat rate tax was ignored, particularly when Instructions issued by the tax inspectorate could only deal with the application of the income tax law and not conflict with the Ministerial Decree.

The ECtHR's conclusion is summarized in Para. 56 as follows:

> [...] the Court is not satisfied with the overall state of domestic law, existing at the relevant time, on the matter in question. It notes that the legal relevant acts have been manifestly inconsistent with each other. As a result, the domestic authorities applied on their own discretion, the opposite approaches as to the correlation of those legal acts. In the Court's opinion the lack of the required clarity and precision of the domestic law, offering divergent interpretations on such an important fiscal issue, upset the requirement of the 'quality of law' under the Convention and did not provide adequate protection against arbitrary interference by the public authorities with the applicant's property rights.

The Court concluded that the increase in the applicant's tax liability infringed Art. 1 of the First Protocol, and awarded the applicant EUR 1,200 in respect of non-pecuniary damage.

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1. Application Nos. 23759/03 and 37943/06, Judgment of 14 October 2010. I am extremely grateful to Dr Robert Attard of Malta for drawing this case to my attention.

It is not particularly surprising that a case such as this should have been decided in this way. There have been earlier attempts to challenge tax legislation on the grounds that it was inadequately publicized or insufficiently clear.[2] However, none of those previous attempts had been successful. Perhaps, the deciding factor here was that there were clearly conflicting legal norms, one having the force of a Parliamentary law, the other being an Instruction issued by the Tax Inspectorate; the Revenue Officers followed the latter in preference to the former. However, the case ultimately reflects a general principle: taxation is an interference with the right to enjoyment of property, and tax laws must satisfy the basic minimum requirements of the quality of law in that they must be accessible, precise and foreseeable in their application.

How many tax systems of countries that are members of the Council of Europe can be said to be, *in every respect*, based on laws that are accessible, precise and foreseeable in their application?

This judgment is not unexpected, but may represent a strikingly powerful weapon. It may provide the basis for taxpayers and their advisers to force governments (at the threat of a trip to Strasbourg) to ensure that tax laws meet these minimum quality standards. If this judgment has that result, it will be highly laudable.

One point to note about the case: it was an application by an individual taxpayer. In *Spacek*,[3] the taxpayer was a company and failed in its claim partly because the Court held that a company might be expected to seek advice from a tax adviser who would have access to the internal rule at issue in that case. In *Shchokin* there is no such suggestion that the individual should have sought professional advice. Again, it had been speculated that the ECtHR would eventually hold that tax laws should be accessible and foreseeable in their application to the individual taxpayer without that taxpayer needing to take professional advice.

There is a particular pleasure in reading a judgment which confirms a view that one has anticipated for many years, particularly if that judgment leads to an improvement in the quality of the drafting of tax laws for the future.

2. Defaming Tax Officers

It is probably something of an over-simplification to summarize the next case as: "the freedom of expression in Article 10 includes the right to defame revenue officers". However, it is tempting to summarize the case in that way.[4]

Anna-Liisa Mariapori was a tax expert in Finland. In 1997 she acted as an expert witness in a case where the defendant had been charged with tax fraud. In her oral evidence in court, Ms. Mariapori expressed her opinion that the tax inspectors had intentionally made mistakes in estimating the defendant's taxable income. These comments, accusing the tax officers of intentionally inserting incorrect figures, were reported in the press. Despite her expert evidence, the defendant was convicted of tax fraud.

Subsequent to that trial, Ms. Mariapori published a book about taxation in which she repeated the allegations that named tax inspectors had knowingly and intentionally committed perjury. She was then charged with aggravated defamation based upon what she had said in court and in her book. Following various court proceedings, she was convicted and sentenced to a fine of EUR 5,000 and four months' conditional imprisonment. After the conviction was upheld on appeal, she brought various complaints before the ECtHR. The most interesting one was that her conviction violated her freedom of expression in Art. 10 of the European Convention.

In examining her complaint under this head, the ECtHR noted that civil servants acting in their official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals. With respect to the statements made in the court proceedings, the ECtHR concluded that, in a democratic society, the tax inspectors could have been reasonably expected to tolerate such statements made by the applicant under oath as a witness for the defence. With respect to the statements made in the applicant's book, this was a polemical document aimed at generating a public debate. The focus of the ECtHR's criticisms here were on the imposition of a prison sentence. The Court concluded that there was no justification whatsoever for the imposition of a prison sentence, a sentence which was manifestly disproportionate in this case. The Court concluded that there had been a violation of Ms Mariapori's freedom of expression.

So, the case is not perhaps a carte blanche to defame revenue officers, but certainly a recognition that revenue officers as civil servants must be expected in a democratic society to tolerate a degree of criticism even amounting to allegations of impropriety.

3. Final Note

The *Yukos* case is still awaiting a judgment on its merits. Meanwhile the ECtHR has ruled that an application by one of the former Yukos directors, Platon Lebedev, is admissible.[5] The Court will now proceed to decide the case on its merits.

2. See, for example, *Spacek sro v the Czech Republic* (Application No. 26449/95), Judgment of 9 November 1999.
3. Id.
4. *Mariapori v. Finland* (Application No. 37751/07), Judgment of 6 July 2010.
5. See Application No. 13772/05, Judgment of 27 May 2010.