

Some Recent Tax Decisions of the European Court of Human Rights

The imposition and collection of taxes continue to raise a miscellany of different issues under the European Convention on Human Rights. This short article discusses some recent cases that raise: freedom of religion and the right to privacy (Arts. 9 and 8 of the Convention, respectively), the right to the enjoyment of possessions (Art. 1 of the First Protocol of the Convention), freedom of speech and the defamation of tax officials (Art. 10) and the right to a fair trial (Art. 6). They illustrate how the Convention may impact on tax and its collection in ways one might not have anticipated.

1. Declarations of Non-Religion for Tax Purposes

Germany is one of those remaining countries that collect a church tax: in this case, the Bavarian Church Tax equal to 8% of an individual's income tax. To assist in the withholding of tax by employers, communes issued to taxpayers an identity card which either stated one of the six religious organizations which were entitled to receive the tax, or had an "nil" entry (the report refers to this entry as «--») for religion if the taxpayer either did not belong to one of those six congregations, or had opted out of the payment of the church tax. In *Wasmuth v. Germany*¹ the applicant complained that a "nil" entry on his identity card infringed his rights to freedom of religion (including a right not to manifest any religion) and his right to a private life. It is clear from the case that part of his objection was against any mention of religion on his identity card, another part was intended to render more difficult the collection of church tax which he objected to on the grounds that it subsidized certain religions that were antipathetic to homosexuality.

In previous case law, the Court of Human Rights had held that any reference to religion in a general identity card infringed the freedom to manifest or not manifest a religion. However, here, the Court distinguished those cases by noting that the cards were issued for tax purposes and were not for general usage. They were normally only produced to an employer on the commencement of employment, and served the purpose only to notify the employer whether church tax had to be deducted in respect of one of the six congregations. On that basis, the Court held that the interference with the freedom of religion was justified and proportionate; it also rejected on similar grounds any challenge based on the right to privacy. It seems doubtful, however, that any more general collection of information about religious affiliations of taxpayers for tax purposes would be permissible.

2. Clarification on the Non-Deductibility of Input VAT

The article in this series published in June 2009² discussed the case of *Bulves AD v. Bulgaria*³ which held that the refusal to allow the deduction of input VAT was, in the circumstances of that case, an infringement of the right to enjoyment of property. The Court of Human Rights has clarified the scope of that decision in four joined cases entitled *Nazarev and Others v. Bulgaria*.⁴

In each of these four cases the applicant was a registered person for VAT but was denied the deduction of input tax for various reasons. In some of the cases, the VAT inspectors had discovered irregularities in the applicant's accounts; in others there were doubts whether the input tax related to services that had actually been supplied. The Court recapitulated its findings in the *Bulves AD* case by explaining that the applicant company there had a legitimate expectation that it would be allowed to deduct the input VAT, but the refusal to allow the deduction was disproportionate as a result of a rigid interpretation of the relevant legislation and an automatic refusal to allow deduction without adequate review of relevant factors. The court explained its decision in *Bulves AD* as follows:

The Court [in *Bulves AD*] found further that the interference was disproportionate as a result of a rigid interpretation of the relevant legislation by the domestic authorities, in that the refusal of VAT deduction was automatic and without adequate review of relevant factors such as (i) the timely and full discharge by the applicant company of its VAT reporting obligations, (ii) its inability to secure compliance by its supplier with its VAT reporting obligations, and (iii) the fact that there was no fraud in relation to the VAT system of which the applicant company had knowledge or the means of obtaining such knowledge.

Having explained its judgment in *Bulves AD*, the Court went on to apply that approach to the facts of each of the four applications. In each case, the Court held that the refusal to allow the deduction of input VAT was justified and was proportionate.

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1. Application No. 12884/03, judgment of 17 February 2011. Unfortunately, the judgment is only available in French at present.
2. P. Baker, "Some Recent Cases from the European Court of Human Rights", *European Taxation* 6 (2009), pp. 326-327.
3. Application No. 3991/03, judgment of 22 January 2009.
4. Application Nos. 26553/05, 25912/09, 40107/09 and 12509/10, judgment of 25 January 2011.

3. Defaming Tax Inspectors Has Its Limits

To follow up again on a case mentioned in another article in this series: the article published in December 2010⁵ referred to the decision in *Mariapori v. Finland*⁶ and summarized that case as: “the freedom of expression in Article 10 includes the right to defame revenue officers”. A subsequent decision makes it clear that the defamation of revenue officers has its limits.

In *Taffin & Contribuables Associés v. France*⁷ the applicants were an individual and an association which published a monthly information bulletin about the collection of tax. In 2001 it contained an interview with a TV producer who had successfully challenged a tax investigation by the French revenue. In that article, it referred to a tax inspector by name and alleged that she had “wanted the taxpayer’s skin at any price”, had been totally irresponsible, and had committed not simply errors but grave irregularities. The publisher and the association, along with the TV producer, were charged under an 1881 law for public defamation of a civil servant. The French Court imposed fines of EUR 1,500 and EUR 1,200 which was upheld on appeal. The publisher challenged this as an infringement of the freedom of expression in Art. 10 of the Convention.

Rejecting the application, the Court noted that the freedom of expression included the right to make statements which might wound, shock or disquiet, but there was still an obligation of judgment and balance to be exercised by a publisher when considering the accuracy of serious allegations made against a civil servant. The freedom of expression also included duties and responsibilities: given the seriousness of the accusations against the tax inspector, neither the charge nor the penalty were disproportionate. The case may be seen, particularly, as an example of the obligation on a publisher to exercise judgment when deciding to publish extreme criticisms of the conduct of a tax official.

4. Right to a Fair Trial

Several recent cases raise the issue of the length of tax-related proceedings where the right to a fair trial in Art. 6 applies to those proceedings (because, for example, they involve tax penalties). A rather extreme example of this is the case of *Wienholtz v. Germany*⁸ where criminal proceedings for tax-related offences against the applicant lasted for a total of seventeen years and three months. The Court held that the length of the proceedings was excessive. What was unusual about the case was that the criminal proceedings were suspended for some ten years, at the request of the taxpayer, while the liability to tax was challenged before the tax tribunals. This ten-year suspension was the principal reason for the delay in the criminal case.

Even though the suspension of the criminal proceedings was at the request of the taxpayer, the Strasbourg Court held that the criminal tribunal failed in its responsibility to ensure a trial within a reasonable time by allowing the proceedings to be suspended for that long. Once the sus-

pension of the proceedings had gone on for some time, the Criminal Court should have reconsidered the suspension, even though it was at the request of the taxpayer.

Finally, in connection with the right to a fair trial, the case of *Metalco Bt v. Hungary*⁹ raises an issue of the burden of proof in a civil case related to tax. In 1996, the applicant, a Hungarian limited partnership, owed some 10 million forints in unpaid taxes. The Hungarian revenue authority attached shares belonging to the partnership worth over 100 million forints. The partnership had intended to sell the shares, but the tax authority banned the sale and did not itself proceed to auction the shares within two months as required by Hungarian law. Eventually, the tax debt was cancelled and the assets unfrozen, but by that stage the company had been liquidated and the shares had lost their entire value.

The partnership sued the revenue authority for damages for the value of the shares, but their claim failed on the grounds that they had failed to prove that there was a buyer available and willing to purchase the shares in the company.

The Court of Human Rights first held that there had been a violation of the right to enjoyment of property in Art. 1 of the First Protocol of the Convention by the seizure of the shares and their retention after an auction should have been held. The continued retention of the shares was not lawful under Hungarian law.

On the right to a fair trial, the Court found that there was also an infringement of the principle of “equality of arms” by requiring the applicant to prove a hypothetical fact: that is, the availability of a potential purchaser for the shares. The Court emphasized that it was the tax authority’s own unlawful omission to hold an auction within two months that prevented a purchaser from coming forward to purchase the shares. There was a strong element in the case that the breach of the right to a fair trial arose from requiring the taxpayer to prove the existence of a purchaser, when the actions of the tax authorities had themselves prevented any purchaser from being identified via an auction. The applicant had claimed, inter alia, EUR 385,000 which was equal to the value of the shares which had become worthless: the Court of Human Rights awarded “on an equitable basis” EUR 50,000 for all heads of claim by the partnership.

5. Concluding Comments

If there is any linking theme to these very diverse cases, it must be this: that revenue authorities, in countries which are members of the Council of Europe, need to be aware that human rights can impact on their activities in a wide variety of ways. This is illustrated by: declarations of non-

5. P. Baker, “Some Recent Tax Decisions of the European Court of Human Rights”, *European Taxation* 12 (2010), pp. 568-569.
6. Application No. 37751/07, judgment of 6 July 2010.
7. Application No. 42396/04, judgment of 18 February 2010. Unfortunately, the decision is only available in French at present.
8. Application No. 974/07, judgment of 21 December 2010. Unfortunately, the decision is only available in French at present.
9. Application No. 34976/05, judgment of 1 February 2011.

religious affiliation by taxpayers; non-deductibility of input VAT; prosecuting taxpayers for defaming tax officials; delays in handling tax investigations and tax appeals; the enforcement of tax debts and even the conduct of claims

against the revenue authorities for damages. Tax advisors also need to be aware, and perhaps slightly creative, in assessing circumstances where the human rights of taxpayers may have been breached.

BOOK

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