International

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

**In this note, the author examines recent decisions of the European Court of Human Rights regarding the retroactive application of legislation to decided cases, taxation and the freedom of religion, surcharges and para-fiscal levies, and abuse by tax authorities.**

## 1. Application of Retroactive Legislation to Decided Cases

A company disagrees with an assessment to tax by the tax department. The company appeals to the Supreme Court and is successful and the tax assessment is annulled. The Ministry of Finance then induces parliament to adopt a new law "interpreting" the relevant legislation with retroactive effect. The tax inspectorate then requests the Supreme Court to review its judgment in light of the new legislation; the Supreme Court does so, reverses its previous judgment, and declares the company liable for the tax.

Not necessarily the country you were thinking of: in *Agurdino SRL v. Moldova* (2011)[1] the European Court of Human Rights (ECtHR) held that this conduct by Moldova violated the right to a fair trial (article 6(1) of the European Convention on Human Rights (ECHR or "the Convention")), and the right to enjoyment of possessions (article 1 of the First Protocol of the Convention).

The taxpayer company had claimed an exemption from VAT, but the revenue authority had issued an assessment for approximately EUR 126,000, plus a fine of approximately EUR 101,000 (i.e., approximately an 80% fine). In June 2002, the Supreme Court held that the company was entitled to exemption from VAT. More than three years later, in October 2005, the Moldovan parliament adopted legislation interpreting the relevant tax rules in a way contrary to that decided by the Supreme Court. A month later, the tax inspectorate asked the Supreme Court to review its previous judgment under provisions in the Civil Procedure Code that allowed a judgment to be reviewed within three months if a new document was discovered; the Supreme Court did so and quashed its previous judgment.

The taxpayer company first complained of a breach of its right to a fair trial. It was significant in this respect that there was a substantial penalty so that the case fell within article 6(1) insofar as the proceedings concerned the fine. The re-opening of the case was clearly not the type of "discovery" of missing documents that the Civil Procedure Code contemplated, and no explanation had been given why the three-month time limit had been extended. The ECtHR dealt with the matter, however, as a matter of more general principle:

> [25] The right to a fair hearing before a tribunal as guaranteed by Article 6(1) of the Convention must be interpreted in the light of the Preamble to the Convention, which, in its relevant part, declares the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue their ruling should not be called into question […]
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> [26] Legal certainty presupposes respect for the principle of *res judicata* […] that is, the principle of the finality of judgments. This principle insists that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination.

The ECtHR concluded that the overturning of the judgment by the Supreme Court "infringed the principle of legal certainty and the applicant company's 'right to court' under Article 6(1) of the Convention".

As a secondary argument, the company submitted that the reversal of the judgment infringed its right to peaceful enjoyment of its possessions contrary to article 1 of the First Protocol to the Convention. On this, the ECtHR was equally decisive:

> [40] The Court considers that the applicant company had a 'possession' for the purposes of Article 1 of Protocol No. 1, namely the amount of money which it had been absolved from paying to the Inspectorate by virtue of the Supreme Court's judgment of 19 June 2002. Quashing such a judgement after it has become final and unappealable constitutes an interference with the judgement beneficiary's right to the peaceful enjoyment of that possession […]. Even assuming that such an interference may be regarded as serving the public interest, the Court finds that it was not justified, as a fair balance was not preserved and the applicant company was required to bear an individual and excessive burden […].

It followed that there had been a violation of article 1 of the First Protocol. This is a ringing confirmation that retroactive tax legislation (when permissible) can never reverse the effect of a final, binding court judgment. To attempt to do so undermines basic concepts such as respect for the rule of law and the principle of legal certainty.

What is particularly interesting about this case is that it was decided against the government both on the grounds of right to a fair trial and of right to enjoyment of possessions. The International Covenant on Civil and Political Rights (ICCPR– which applies to a much wider range

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1. MD: ECtHR, 27 Sept. 2011, Application No. 7359/06, *Agurdino SRL v. Moldova*.

of countries than the European Convention)[2] does not contain a right to enjoyment of possessions; however, it does contain – in article 14 – a right to a fair trial. There is every reason to expect that exactly the same outcome would follow, therefore, under the ICCPR. All countries that are signatories to the ICCPR should, therefore, be equally aware that attempted retroactive legislation to reverse a final and binding judgment of the courts would equally fall foul of the ICCPR.

Of course, in the European context, the scope of article 6 is restricted by the highly undesirable ruling in the *Ferrazzini v. Italy* (2011)[3] case. Article 6 was applicable here because there was a substantial fine that constituted a criminal penalty. The Human Rights Committee under the ICCPR has never held that article 14 is so restricted (and hopefully they never will do so, and will reject the incorrect conclusion in *Ferrazzini*). In fact, this case illustrates another reason why the *Ferrazzini* decision was so undesirable: there would have been no breach of article 6 if this had involved simply a tax liability and no fine, since an ordinary tax dispute would not have fallen within the scope of that article. There would, of course, still have remained the same conclusion under the First Protocol.

It is the practice of certain states in Europe (the United Kingdom, for example) in the rare instances of enacting retroactive tax legislation, to "grandfather" existing and binding, final court decisions by excluding them from the effect of the retroactivity. It is now clear that such grandfathering is required by the Convention (and, it is reasonable to state, the ICCPR).

## 2. Taxation and the Freedom of Religion: Jehovah's Witnesses in France

Article 9 of the Convention guaranteeing the freedom of religion is seldom invoked successfully in a tax case. However, the impact of that article is illustrated by the case of *The Association of Jehovah's Witnesses v. France* (2011).[4]

Jehovah's Witnesses are treated as a sect in France and were not registered to receive donations free of transfer duties. As a result of a tax investigation, in 1997, the Association received assessments to transfer duties of an amount in excess of EUR 22 million, together with penalties and interest of approximately an equivalent amount. The transfer taxes arose from voluntary donations given by followers to the Association. The Association, which had premises and over 250,000 members in France, contended that the amount of the tax, penalties and interest was such that it would require the disposal of the Association's premises and, in effect, the ending of its activities. Certain statements made by politicians about cults in France suggested that this may have been the objective of the government.

Having failed to challenge the tax assessment successfully before the French courts, the Association complained to the ECtHR on grounds that the effect of the taxation would be to interfere with the freedom to practice religion in article 9 of the Convention. This article guarantees the freedom of thought, conscience and religion, which may not be subject to any restrictions other than those that are provided for by law, are necessary in a democratic society, and pursue certain acceptable purposes.

The first issue for the Court was whether taxation might constitute an interference with the enjoyment of the freedom of religion. The Court accepted that the level of tax in this case had such an impact on the resources of the Association as to undermine its capacity to carry on its religious activities. There was, therefore, an interference with the rights guaranteed by article 9.

The issue then was whether or not such interference was in accordance with law and necessary in a democratic society. The Court focussed on the question of whether it was in accordance with law. The Association argued that for 50 years it had never been taxable on voluntary donations, that it was far from clear that transfer duties applied to gifts to legal persons (as opposed to natural persons), and that, in the absence of any system for declaring voluntary donations, the existence of such donations would only come to the attention of the revenue authority if there were a tax investigation. The imposition of the tax lacked sufficient clarity to be said to be in accordance with the law.

The Court explained that to be "in accordance with the law", first the law must be sufficiently accessible so that the citizen can obtain sufficient information to understand his or its legal position. Secondly, the law must be pronounced with sufficient explanation to permit a taxpayer to regulate his conduct so that he would be aware of the consequences of the actions. In this case, there was uncertainty whether transfer duties applied to gifts to associations. This was also the first case where the examination of accounts in the course of a tax investigation was regarded as the disclosure of transfers to the revenue authority. Having regard to all these matters, the Court was not convinced that the taxpayer was able to foresee to a reasonable degree the consequences that would result from the receipt of donations and the presentation of its accounts to the tax administration. As a consequence, the interference with the freedom of religion was not in accordance with the law, and could not, therefore, be justified under article 9(2).

There are two important aspects in this case. The first, the idea that a tax burden could be so high as to interfere with the activities of a religious organization, requiring it, in effect, to cease its activities. This has some resonance with the statements made by the Court from time to time in connection with article 1 of the First Protocol where the Court states that taxation must not impose such a high and individual burden that it undermines the economic

2. There are currently 167 signatories to the ICCPR, as compared to 47 parties to the ECHR.
3. IT: ECtHR, 12 June 2011, Application No. 44759/98, *Ferrazzini v. Italy*.
4. FR: ECtHR, 30 June 2011, Application No. 8196/05, *The Association of Jehovah's Witnesses v. France* – at present this judgment is only available in French. The author is extremely grateful to Rui Palma of Linklaters, Portugal for drawing his attention to this case.

viability of the taxpayer.[5] The facts were extreme in this case: the amount of the tax plus penalties plus interest, when compared with the assets of the Association, were such as to ensure that, if payable, the Association would need to cease its religious activities.

Secondly, this is now one of a small number of cases where the Court has held that the imprecision of tax legislation, so that the taxpayer was not able to predict its tax treatment, meant that the tax rules lacked the quality of law required.[6] Given the almost impenetrable complexity of tax legislation in many countries, this is a real warning for draftsmen of such legislation.

At the end of the day, it is important to recognize what has happened in this case. A tax liability in the millions of euros, so large that it would have forced the Association to cease its religious activities, was held to be an infringement of the freedom of religion and not to be capable of justification on grounds that the legislation in question lacked the quality of law. This is a judgment of some significance.

## 3. Surcharges and Para-Fiscal Levies

Whether or not a tax surcharge or penalty involves a criminal charge for the purposes of article 6 of the Convention (right to a fair trial) has been litigated extensively over the past two decades.[7] A recent case considered this issue in the context of a para-fiscal levy.

The claimant in *Steininger v. Austria* (2012)[8] was a company carrying on the business of slaughtering cattle and pigs. It was liable to pay agricultural marketing charges under Austrian law; it failed to do so and was issued with a payment order together with a surcharge equal to 60% of the unpaid contributions. The company appealed to the Austrian Federal Minister acting as the appeal authority, but the appeal was dismissed. The company complained to the ECtHR that there had been a breach of article 6 of the Convention on the grounds that it had not had access to an independent and impartial tribunal established by law to determine the criminal charge against it. The Court concluded that the criminal head of article 6 applied with respect to the surcharges, and that this article guaranteed the right to appeal to an independent tribunal with full power to decide on issues of fact and law. The company had been denied such access to a tribunal, consequently there was a violation of article 6. The decision that a 60% surcharge for non-payment of a para-fiscal levy constituted a criminal charge is entirely consistent with the case law on tax penalties.

## 4. Worrying Reports of Abuse by Tax Authorities

For those who consider that human rights protections have little or anything to do with the administration of taxation, several cases in recent months show the dangers of potential abuse of powers by tax authorities. These cases have involved allegations of infringement of the rights of privacy by abusive searches by tax police [9] and even allegations of torture and inhuman and degrading treatment. [10] While cases of this nature reaching Strasbourg seem to be relatively few, it is worrying for anyone concerned with human rights and tax administration that even some of these cases are occurring.

5. *See*, for example, SE: ECtHR, 14 Dec. 1988, Application No. 13013/87, *Wasa Liv v. Sweden*.
6. On this, *see* CZ: ECtHR, 9 Nov. 1999, Application No. 26449/95, *Spacek v. Czech Republic*; CZ: ECtHR, 20 Sept. 2005, Application No. 68741/01, *CBC-Union SRO v. Czech Republic*; UA: ECtHR, 14 Oct. 2010, Application No. 23759/03, *Shchokin v. Ukraine* – unclear law; and RU: ECtHR, 20 Sept. 2011, Application No. 14902/04, *Yukos v. Russia* – change of law.
7. *See* the line of cases running from FR: ECtHR, Application No. 12547/86, 24 Feb. 1994, *Bendenoun v. France* to FI: ECtHR, 23 Nov. 2006, Application No. 73053/01, *Jussila v. Finland*.
8. AT: ECtHR, 17 Apr. 2012, Application No. 21539/07, *Steininger v. Austria*.
9. *See* the allegations in LV: ECtHR, 27 Mar. 2012, Application No. 40927/05, *Boze v. Latvia* and LV: ECtHR, 7 Feb. 2012, Application No. 28926/10, *Vinks & Ribicka v. Latvia*, both of which involve searches by the Finance Police Department of the Latvian State Revenue Service.
10. UA: ECtHR, 3 Nov. 2011, Application No. 18773/05, *Terletskaya v. Ukraine*, which describes a fracas following a visit by a tax police squad, during which it is alleged that a punch was thrown by a tax police officer.

 