

## EDITORIAL

### The Decision in *Ferrazzini*: Time to Reconsider the Application of the European Convention on Human Rights to Tax Matters

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In the June-July issue of this journal I wrote an article entitled 'Should Article 6 ECHR (Civil) Apply to Tax Proceedings?'. That article referred to the forthcoming decision of the European Court of Human Rights in the case of *Ferrazzini v Italy*.<sup>1</sup> The decision of the Grand Chamber of the Court was issued on 12 July 2001.

On the central issue of whether or not the guarantees for a fair trial in civil proceedings applied to tax litigation, the Grand Chamber of seventeen judges split. A majority of eleven judges decided that Art. 6 (Civil) did not apply to tax litigation: a substantial minority of six judges was prepared to depart from the prior jurisprudence of the Court and Commission and hold that the civil guarantees *did apply* to tax litigation.<sup>2</sup>

Those who have read my previous article will not be surprised to learn that I disagree with the decision of the majority and agree with the minority of judges. The majority approached the question on the historical basis that the draftsmen of the European Convention intended to exclude public law litigation from Art. 6. They then considered whether litigation over the existence and quantum of a tax liability fell within this excluded category of public law litigation. They concluded as follows:

'The Court considers that tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the tax authority remaining predominant. ... It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer.'

The minority, however, looked in somewhat greater depth at the *travaux préparatoires* to decide what type of public law dispute the draftsmen of the Convention intended to exclude from Art. 6. They noted that, with regard to a number of matters, the Court and Commis-

sion had, over the years, changed its viewpoint and decided that these disputes fell within the civil protections in Art. 6. They concluded that it was now time to recognize that tax disputes should no longer be excluded from the Art. 6 protections. Unfortunately, they were unable to persuade sufficient of their colleagues to agree with them on this (to my mind) obvious point.

In the short term, the law as declared by Strasbourg remains the same: ordinary tax proceedings for the determination of the existence or quantum of a tax liability remain outside the fair trial protections in Art. 6 of the Convention. National courts in Member States of the Council of Europe are not necessarily obliged to follow this interpretation: national authorities – including courts – may interpret the Convention to give greater protection to citizens than would be granted by Strasbourg; they may not give lesser protection than Strasbourg would require.

In the longer term, the issue will clearly need to be relitigated (unless the Convention is amended in the meantime). In the *Ferrazzini* case, the tax proceedings had already continued for almost fourteen years without being resolved at the time of the European Court's judgment. Similarly egregious breaches of human rights are not uncommon in other countries of the Council of Europe and are likely to be contested. It is notable in this context that the taxpayer in the *Ferrazzini* case was not legally represented before the Court in Strasbourg. Though there is little doubt that the judges of the Grand Chamber had access to relatively extensive research when preparing their judgments, it is still somewhat unacceptable that an issue of this importance should have been decided with representation only on one side.

At least for the present, the taxpayer in ordinary tax litigation has no right to a fair trial under Art. 6 of the Convention. In the absence of any equivalent protections under the constitutional or administrative law of the country concerned, the taxpayer has no right to:

#### Notes

<sup>1</sup> Application No.44759/98.

<sup>2</sup> There is no obvious explanation for the way in which the judges split. The eleven judges in the majority included judges from Switzerland, Sweden, Germany, France, Spain, Italy, Lithuania, Turkey, Norway, Hungary and Georgia. The minority of six judges consisted of the judges from Greece, Malta, Slovakia, Romania, Denmark and Luxembourg.