ARTICLES

Should Article 6 ECHR (Civil) Apply to Tax Proceedings?

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Perhaps the single most important current issue relating to the European Convention on Human Rights and taxation is whether the civil aspects of Art. 6 of the Convention should apply to tax proceedings. It is understood that the European Court of Human Rights (ECtHR) has reserved a case on this point – *Ferrazzini v Italy*[1] – to a Grand Chamber to resolve this question.

In this article I examine the legal arguments and, to a lesser extent, the policy arguments for the application of the civil aspect of Art. 6 to tax proceedings. I conclude that there are good legal arguments for recognizing the applicability of Art. 6 to tax proceedings, and even better policy arguments for reaching that conclusion.

1. Background

Article 6 of the Convention – in the English version of the text – provides as follows:

> 'Article 6: *Right to a fair trial*
> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly and the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice.'

Paragraphs 2 and 3 of Art. 6 contain additional guarantees in criminal cases: they are not relevant to this discussion. This article considers only whether the civil aspects of Art. 6 should apply to tax litigation.

Since the Convention was concluded in English and French, both texts being equally authentic,[2] the French text of Art. 6 is particularly relevant. This provides as follows:

> 'Article 6:
> Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi, qui décidera, soit des contestations sur ses droits et obligations de caractère civil, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle. Le jugement doit être rendu publiquement, mais l'accès de la salle d'audience peut être interdit à la presse et au public pendant la totalité ou une partie du procès dans l'intérêt de la moralité, de l'ordre public ou de la sécurité nationale dans une société démocratique, lorsque les intérêts des mineurs ou la protection de la vie privée des parties au procès l'exigent, ou dans la mesure jugée strictement nécessaire par le tribunal, lorsque dans des circonstances spéciales la publicité serait de nature à porter atteinte aux intérêts de la justice.'

The issue of the applicability of the civil aspects of Art. 6 to tax proceedings turns upon whether or not those proceedings involve 'the determination of ... civil rights and obligations ...' or, in the French text, '*contestations sur ses droits et obligations de charactère civil* ...'. These phrases are to be given an autonomous Convention meaning.[3]

As most readers of this article will be aware, there is a long and continuous jurisprudence of the European Commission of Human Rights (ECnHR) and, more recently, of the ECtHR to the effect that ordinary tax proceedings for the determination of a tax liability do not involve the determination of civil rights and obligations. In a previous article,[4] I have examined the jurisprudence of the ECnHR and ECtHR and

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1 Application no. 44759/98. I am very grateful to Professor Doctor Maarten Feteris for drawing this case to my attention, and to my former student Miss Sylvie Lopardi for keeping me informed about the progress of this case.

2 See the concluding wording of the Convention.

3 On the general meaning of this phrase, see *Ringeisen v Austria (No. 1)* (1971) 1 EHRR 455 (at para. 94 especially), and *König v Germany* (1978) 2 EHRR 170 (at paras. 88 to 90 especially).

identified 34 decisions of the ECnHR and two decisions of the ECtHR in which it was stated that Art. 6 did not apply to ordinary proceedings for the determination of a tax liability. Subsequent to writing that article,[5] at least six further cases have come to light where it was stated that Art. 6 did not apply to ordinary tax proceedings.[6]

A typical recent statement by the ECtHR on this point would be as follows:[7]

> 'However, the Court reiterates that under the settled case-law of the Convention institutions, Article 6 § 1 of the Convention does not apply to ''disputes'' (*contestations*) relating to public law and, in particular, tax proceedings as such since they do not concern disputes over rights and obligations that are ''civil'' in character (see, among other authorities, *Company S. and T. v. Sweden*, application no. 11189/84, decision of the Commission of 11 December 1986, Decisions and Reports (DR) 50, pp. 121, 140; *Kustannus Oy Vapaa Ajattelija AB, Vapaa-Ajattelijain Liitto – Fritänkarnas Förbund r.y. and Kimmo Sundström v. Finland*, application no. 20471/92, decision of the Commission of 15 April 1996, DR 85-A, pp. 29, 44). Nor is it sufficient to show that a dispute is ''pecuniary'' in nature for it to be covered by the notion of ''civil rights and obligations''. Apart from fines imposed by way of ''criminal penalty'', this will be the case, in particular, where an obligation which is pecuniary in nature derives from tax legislation (see the *Schouten and Meldrum v. the Netherlands* judgment of 9 December 1994, Series A no. 304, pp. 20-21, § 50; and, *mutatis mutandis*, the *Maillard v. France* judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1304, s. 41).'

In that article I also showed that the origins of this constant jurisprudence are weak.[8] The earliest case on the point was in 1961.[9] That case contains no report of a full discussion on the topic. This was followed by a further case in 1962[10] and a third case in 1965.[11] By 1966, the ECnHR was following its earlier decisions[12] and by 1973 the ECnHR was referring to a '*jurisprudence constante*' to the effect that Art. 6 did not apply to tax matters.[13]

So far as one can tell from the rather brief reports in these cases, none of them involved a detailed discussion of the issue whether or not Art. 6 should apply – in its civil aspect – to tax proceedings. In fact, none of the cases in the lengthy jurisprudence on this point has ever considered in detail whether or not Art. 6 should apply. For example, none of the tax cases has considered whether there is any basis in the '*travaux préparatoires*' to the Convention for this approach.

The view adopted in the existing jurisprudence seems to be heavily influenced by the different divisions of the law in continental European, civil law countries. In those countries – unlike common law countries – a separate division of administrative or public law has long been recognized, and tax proceedings are a quintessential example of a public law issue. The members of the ECnHR, therefore, assumed that in identifying 'civil rights and obligations' on the one hand and 'criminal charges' on the other, the draftsmen of the Convention intended to exclude administrative matters.[14]

Tax proceedings are not the only matters that have been held to fall outside the scope of Art. 6. Other areas include matters relating to nationality and immigration,[15] matters relating to military or civilian service,[16] electoral rights[17] and civil service employment disputes.[18] Civil service employment disputes is an interesting area where the ECtHR has recently changed its approach and, in a 'landmark' decision, held that Art. 6 does apply to disputes concerning the employment of all but the more senior civil servants.[19]

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[4] 'Taxation and the European Convention on Human Rights', *BTR* 2000, pp. 211–377, and also 40 *European Taxation* 2000, pp. 298–374.

[5] Most of the research on that article took place between January and March 2000.

[6] These cases are the decision of the ECnHR in *Guy Giraud v France* (Application no. 33850/96) and the ECtHR decisions in *Claus Simon v Germany* (Application no. 33681/96), *Ephrem and Huguette Passet v France* (Application no. 38434/97), *Louis Maury v France* (Application no. 36858/97), *M-TP v France* (Application no. 41545/98), and *Camille Gantzer v France* (Application no. 43604/98).

[7] Taken from *Vidacar SA and Opergrup SL v Spain* (application nos. 41601/98 and 41775/98), decision of 20^{h} April 1999.

[8] See 2000 *BTR* 2000, p. 211 at pp. 229–230 and 40 *European Taxation* 2000, p. 298 at pp. 306–307.

[9] *AX and BX v Germany* (Application no. 673/59, decided on 28 July 1961).

[10] *X v Germany* (Application no. 945/60, decided on 10 March 1962).

[11] *X v Belgium* (Application no. 2145/64, decided on 1 October 1965).

[12] See *A B C & D v Netherlands* (Application no. 1904/63, decided on 23 May 1966).

[13] See *X v Belgium* (Application no. 5421/72, decided on 5 February 1973).

[14] In so deciding, it was perhaps forgotten that some of the principal draftsmen of the Convention came from common law countries.

[15] See Jessica Simor and Ben Emmerson, *Human Rights Practice* (looseleaf, Sweet & Maxwell, London), para. 6.033.

[16] *Ibid*., para. 6.037.

[17] *Ibid*., para. 6.040.

[18] *Ibid*., para. 6.042.

[19] See *Pellegrin v France* (Application no. 28541/95, decided on 8 December 1999).

2. The *Travaux Préparatoires*

The Vienna Convention on the Law of Treaties, Art. 32 states that:

> 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.'

In my previous article, I examined briefly the *travaux préparatoires* to the Convention.[20] So far as one can tell, there is no specific discussion of taxes or tax litigation anywhere in the preparatory work for the Convention. The point is made that the draft Convention in its English text referred to 'the determination ... of his rights and obligations in a suit at law'. This wording seems to have been deliberately adopted to make it clear that administrative proceedings were to be excluded from the field of application of the Convention. However, very shortly before the Convention was opened for signature in November 1950, Art. 6 was amended to the present English language text which refers to 'the determination of his civil rights and obligations'. The previous article concluded that, at best, the *travaux préparatoires* provide no clear indication that it was intended to exclude ordinary tax proceedings from the scope of Art. 6.

So far as one can tell, none of the tax cases have examined the *travaux préparatoires* to determine whether or not Art. 6 is applicable. The fullest examination of the *travaux* in a related context is in the joint dissenting opinion of seven judges in the case of *Feldbrugge v Netherlands*.[21] That case concerned the question whether or not Art. 6(1) applied to a dispute concerning the applicant's right to receive sickness benefit. The majority of the ECtHR held that such a dispute over the entitlement to a social security benefit involved the determination of civil rights and obligations. A substantial minority dissented and, in the course of their dissent, considered the supplementary means of interpretation of Art. 6(1). The dissenting opinion contains the following analysis:

> '[20] The adjective ''civil'' was added to the English version of Article 6(1) in November 1950 on the day before the Convention was opened for signature, when a committee of experts examined the text of the Convention for the last time and ''made a certain number of formal corrections and corrections of translations''. Whilst no specific explanation was given for the last minute change to Article 6(1), it is a fair inference that the reason was merely to align the English text more closely with the language of the French text: prior to the change, although the French version has spoken, as now, of ''*droits et obligations de charactère civil*'', the English version had read ''rights and obligations in a suit of law''.
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> These two expressions had first been introduced at a meeting (March 1950) of the Committee of Experts on Human Rights of the Council of Europe and were evidently taken directly from the equivalent Article of the then existing draft of the International Covenant on Civil and Political Rights of the United Nations. It is therefore relevant to trace their history in the *travaux préparatoires* of the International Covenant.
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> [21] The crucial discussion on the draft International Covenant took place on 1 June 1949 during the 5th session of the United Nations Commission on Human Rights. The French and Egyptian delegations had presented an amendment that referred to ''*droits et obligations*'' ''rights and obligations'', without qualification. The reaction of the Danish representative (Mr Sørensen) to this amendment was reported as follows:
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> > ''The representatives of France and Egypt propose that everyone should have the right to have a tribunal determine his rights and obligations. Mr Sørensen considered that that position was much too broad in scope; it would tend to submit to judicial decision any action taken by administrative organs exercising discretionary power conferred on them by law. He appreciated that the individual should be ensured protection against any abuse of power by administrative organs but the question was extremely delicate and it was doubtful whether the Commission could settle it there and then ....''
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> The French representative replied that ''the Danish representative's statement had convinced him that it was very difficult to settle in that Article all questions concerning the exercise of justice in the relationships between individuals and governments''. He was therefore prepared to let the words ''*soit de ses droits et obligations*'' in the first sentence of the Franco-Egyptian amendment be replaced by the expression ''*soit des contestations sur ses droits et obligations de charactère civil*''. (Rendered in the English version of the summary record as ''or of his rights and obligations in a suit of law''.) He agreed that the problem ''had not been

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[20] See *BTR* 2000, pp. 231–232 and 40 *European Taxation* 2000, p. 308.

[21] Application no. 8562/79; Series A, no. 99 (1982) 8 EHRR 425 at 439–447.

fully thrashed out and should be examined more thoroughly''.

Later the same day, a drafting committee produced a text which contained the expression ''in a suit of law'' in English and ''*de charactère civil*'' in French. The formula employed in the text is the one that was ultimately adapted for Article 14 of the International Covenant in 1966.

[22] It thus seems reasonably clear that the intended effect of the insertion of the qualifying term ''*de charactère civil*'' in the French text of the draft International Covenant was to exclude from the scope of the provision certain categories of disputes in the field of administration ''concerning the exercise of justice in the relationships between individuals and governments''.'

Comment is made further below about the difference in wording between the International Covenant and the European Convention. These paragraphs from the dissenting opinion seem to give rather less weight to the fact that the text of the European Convention was changed from 'rights and obligations in a suit at law'[22] to the final version of 'civil rights and obligations'. That would seem to be more than a formal correction or correction of translation.

Even assuming, however, that it is right to trace the preparatory work for the Convention in to the drafting of the International Covenant, it seems clear that the comment of Mr. Sørensen was intended to limit Art. 14 so that there was no requirement that there should be a judicial procedure to challenge any decision taken by administrative organs exercising discretionary powers. There is nothing to suggest that the amendment was in any way related to the fair trial protections which were to be given where a state had already provided for an appeal against administrative decisions to an independent tribunal. There certainly seems to be nothing in the preparatory work for the Convention which establishes that, where the law establishes an appeal to an independent tribunal, such a tribunal is not engaged in the determination of civil rights and obligations.

3. A comparison with other human rights instruments

Reference has already been made in the discussion of the *travaux préparatoires* to the text of the International Covenant on Civil and Political Rights. It is quite interesting to place the wording and text of Art. 6 of the European Convention in its context of similar provisions in other human rights instruments.

The starting point is Art. 10 of the Universal Declaration of Human Rights adopted and proclaimed by the UN General Assembly on 10 December 1948.[23] Article 10 states:

'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'

The French text of Art. 10 also refers to '*ses droits et obligations*' (with no qualification), as do the other official and unofficial translations of the text. Thus there is nothing in the Universal Declaration to suggest that the guarantee of a fair trial was not to apply to tax proceedings.

Reference has already been made above to the International Covenant on Civil and Political Rights[24] which provides in Art. 14 as follows:

'(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, *or of his rights and obligations in a suit at law*, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ....' (emphasis added).

The French version of Art. 14 uses similar wording to the French version of Art. 6 of the European Convention:

'1. Tous sont égaux devant les tribunaux et les cours de justice. Toute personne a droit à ce que sa cause soit entendue équitablement et publiquement par un tribunal compétent, indépendant et impartial, établi par la loi, qui décidera soit du bien-fondé de toute accusation en matière pénale dirigée contre elle, soit *des contestations sur ses droits et obligations de caractère civil*' (emphasis added).

Thus the draftsmen of the International Covenant in 1966 considered that the French phrase '*contestations sur ses droits et obligations de charactère civil*' was the equivalent phrase to the English text's 'rights and obligations in a suit of law', while the draftsmen of the European Convention rendered the identical French words into English as 'civil rights and obligations'.

There seem to be two possible conclusions one might take from this. First, since the English and French texts of both international instruments are equally authoritative, one must assume that the two English translations of the same French text both have the same meaning, and that 'the determination of his civil rights and obligations' means the same as 'the

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[22] Note that the collection of preparatory materials for the Convention refers to 'a suit at law' and not 'a suit of law' as the dissenting judgment states.

[23] General Assembly Resolution 217A(III).

[24] Adopted and opened for signature by the United Nations General Assembly on 16 December 1966, General Assembly Resolution 2200A(XXI).

determination ... of his rights and obligations in a suit at law'. The difficulty with this is in deciding whether the French phrase is to have the wider meaning of 'determination of civil rights and obligations' or the narrower meaning of 'determination of his rights and obligations in a suit at law'. Alternatively, one could point to the fact that the two English texts clearly do not have the same scope and that it is impermissible to try to interpret one of these English texts by reference to another text with different wording.

Perhaps more interesting than to try to puzzle out why different wording was adopted for the International Covenant and the European Convention is to note the wording of the equivalent provision in the American Convention on Human Rights:[25]

> 'Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, *fiscal*, or any other nature' (emphasis added).

It is clearly significant that the draftsmen of the American Convention in 1969 decided that it was necessary to make express reference to the fact that fiscal rights and obligations came within the scope of the equivalent of Art. 6. Presumably they did so having become aware that the ECnHR had already held that tax disputes did not come within the scope of Art. 6.

One way of looking at the express reference to fiscal disputes in the American Convention is to say that it confirms that the European Convention was not to apply to such disputes. That would, however, be the wrong approach to take. The ECtHR has taken an alternative approach to the comparison between different international human rights instruments – an approach which might best be characterized as an attempt to ensure a common core of human rights, universally protected throughout the world. Thus the ECtHR has been willing to read in to the European Convention the protection of rights not expressly guaranteed by the wording of the Convention. The clearest example of this is the right to silence in criminal matters which is not expressly mentioned in the European Convention but has been read in by the ECtHR.[26] Based on this approach, the ECtHR may instead conclude that, if the American Convention applies to fiscal litigation, so should the European Convention.

It would seem quite illogical for the determination of fiscal rights and obligations to be subject to fair trial guarantees in those countries which are parties to the American Convention on Human Rights, but not to be subject to similar guarantees in the countries of the Council of Europe. While such a situation might arise if express wording excluded tax litigation from the scope of the European Convention, the wording of Art. 6 is, at best, ambiguous on the point. In those circumstances it seems entirely appropriate that the ECtHR might – and *Ferrazini* may give it the opportunity to do so – ensure that there is an equivalent measure of protection in Europe and in the American States.

4. Erosion of the exclusion of tax proceedings

The jurisprudence of the ECnHR – and, more recently, of the ECtHR – to the effect that Art. 6 does not apply to ordinary tax proceedings is clearly established. However, a number of developments in the application of Art. 6 have eroded the scope of this exclusion. Some of these developments have been less than desirable: for example, the extension of the scope of the criminal aspect of Art. 6 to cover certain tax proceedings. One might speculate that one of the reasons why the Strasbourg organs have been willing to extend the scope of Art. 6 to matters peripheral to normal tax proceedings may be because the organs are uncomfortable about the general exclusion of tax proceedings from the scope of the right to a fair trial.

The first area of erosion concerns cases which, while they may originally have arisen out of a tax dispute, involve claims which can properly be regarded as falling within the scope of civil rights and obligations. Thus, claims to damages,[27] for restitution of tax overpaid,[28] and claims for the annulment of a tax assessment,[29] have all been held to fall within the scope of Art. 6(1), even though in all such cases the proceedings arose ultimately out of a dispute relating to taxes.[30]

The second erosion concerns disputes relating to the payment of social security contributions. In one of the

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[25] Sponsored by the Organisation of American States and signed at the Inter-American Specialised Conference on Human Rights at San José, Costa Rica on 22 November 1969.

[26] See *Funke v France* (Application no. 10828/84; Series A, no. 2-A) (1993) 16 EHRR 297 at 325, para. 41 and *Saunders v United Kingdom* (Application no. 19187/91) (1996) 23 EHRR 313 at 337, para. 68. For a further example of the interpretation of the Convention by reference to other human rights instruments, see *Soering v UK* (Application no. 14038/88; Series A, no. 161) (1989) 11 EHRR 439 at para. 88.

[27] See *Editions Periscope v France* (Application no. 11760/85).

[28] See *The Building Societies* case (Application no. 21319/93 and others), and see *DC v Italy* (Application no. 13120/87).

[29] See *Filippello v Italy* (Application no. 25564/94).

[30] These cases are discussed in greater detail in *BTR* 2000, p. 211 at pp. 233–235 and 40 *European Taxation* 2000, p. 298 at pp. 308–310.

leading decisions in this area – *Schouten & Meldrum v Netherlands*[31] – the ECtHR examined the question whether a dispute relating to the payment of social security contributions fell within Art. 6(1). The Court concluded that the dispute had a preponderance of private law features over public law features, consequently the civil aspects of Art. 6(1) were applicable.

Although the ECtHR took the opportunity of reaffirming the general rule that Art. 6(1) does not apply to ordinary tax disputes[32] the decision is nonetheless of significance for tax proceedings. In many countries there is a very narrow distinction between the payment of social security contributions and taxes. In the United Kingdom, for example, national insurance contributions may be seen as a supplement to the general income tax. Disputes relating to national insurance contributions are now heard by the same tribunals that hear disputes against liability to income tax. Thus the situation may arise that a taxpayer appeals against a liability to income tax and, at the same time, a liability to national insurance contributions on the same income. When hearing the appeal, the General Commissioners or Special Commissioners are obliged to have regard to Art. 6(1) with respect to the national insurance contributions appeal but not, at present, the income tax appeal.

The third, and perhaps most significant, erosion of the principle that Art. 6 does not apply to tax disputes concerns penalties imposed for tax-related offences. Since the leading case of *Bendenoun v France*[33] the ECtHR has accepted that tax-related fines may involve the determination of a criminal charge within the autonomous, Convention meaning of that term.[34] There are now more than 30 cases in which the Strasbourg organs have held that tax-related penalties fall within the category of criminal charges. As a consequence, the full guarantees in criminal cases apply to these proceedings. These guarantees include the right to silence and the principle of non-heritability of criminal penalties.[35] The author is very doubtful whether it is appropriate to apply these guarantees to tax penalties.[36]

While there is no evidence to support this thesis, one might speculate that one of the reasons why the Strasbourg organs have been willing to extend the criminal protections of Art. 6 to tax penalty proceedings is because, if they were not do so, the result would be that no fair trial guarantees would apply to the proceedings.

The latest extension of this development is potentially the one most likely to erode the general principle of non-applicability of Art. 6 to tax proceedings. In the recent case of *Georgiou v United Kingdom*,[37] the applicants were assessed to additional sums by way of VAT and separately assessed to penalties under the civil penalty regime. They appealed against the tax assessment and the penalty assessment and the appeals were consolidated and heard together by the VAT Tribunal. The applicants subsequently made various complaints about the conduct of the proceedings under Art. 6. The argument was raised that the criminal aspects of Art. 6 applied to the penalty appeal but not to the appeal against the tax liability. The ECtHR rejected this argument on the grounds that the two issues were inextricably linked in the proceedings and that it was not possible to separate those to which Art. 6 applied from those to which it did not apply.

This creates a particularly peculiar and anomalous situation. In some European countries it is the practice to include a penalty assessment together with an assessment for additional tax wrongly underdeclared: in those countries, an appeal against the tax assessment and the penalty will be heard together and Art. 6 will apply to the entire proceedings. In other countries – of which the United Kingdom is an example – the liability to additional tax is assessed separately from the assessment to penalties. Nevertheless, it is possible – as was the case in *Georgiou* – for the tax appeal and the penalty appeal to be heard together. If that is done, Art. 6 would apply to the entire proceedings.

One may find oneself in the bizarre situation that a taxpayer – in circumstances where he knows that the upholding of a tax liability will inevitably lead to an assessment for penalties – may actually request that penalties be assessed early so that an appeal against those penalties can be joined with the appeal against the tax assessment: in those circumstances, Art. 6 will presumably apply to the entire proceedings.

An anomalous situation has been created by the application of the criminal aspects of Art. 6 to tax proceedings through the 'back door' of tax penalty disputes. One is left wondering whether the various ways in which the general principle (of the non-applicability of Art. 6 to tax proceedings) has been eroded have produced the result that the general principle is now unsustainable.

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[31] Application no. 19005/91 (1994) 19 EHRR 432.

[32] See paragraph 50 of the judgement.

[33] Application No. 12547/86 (1994) 18 EHRR 54.

[34] The cases on the application of criminal charge to tax matters are discussed in *BTR* 2000, p. 211 at pp. 235–238 and 40 *European Taxation* 2000, p. 298 at pp. 310–312.

[35] On this, see the cases of *AP, MP and TP v Switzerland* (Application no. 19958/92) and *EL, RL and JOL v Switzerland* (Application no. 20919/92).

[36] In an extreme case an elderly taxpayer engaged in serious tax evasion might, for example, refuse entirely to supply any information to the tax authorities once it becomes clear that an investigation might involve the imposition of severe penalties; the taxpayer may be hoping that the investigation will drag on beyond the individual's lifespan and that the penalty will not be exigible from his heirs or personal representatives.

[37] (Application no. 40042/98, decided on 16 May 2000). This is not the only case that has decided this point but it is particularly clear.

5. Summary of the legal position

There is no doubt that there is a clear line of jurisprudence of the Strasbourg organs establishing that Art. 6 does not apply to ordinary tax proceedings. However, that line is balanced very precariously on very weak foundations. The earliest cases seem to have proceeded on an assumption that Art. 6 was not to apply to tax disputes rather than a clear examination of the issue. Examination of the *travaux préparatoires* to the Convention does not support that line of jurisprudence. Comparison with other human rights instruments shows that the American Convention on Human Rights specifically includes fiscal proceedings within its scope. As the case law of the Strasbourg organs has developed, the general non-applicability of Art. 6 has been so eroded as to raise doubts regarding the sustainability of the remaining general rule.

In these circumstances, the author is clearly of the view that the time has come for the ECtHR – probably in the case of *Ferrazzini* – to review its previous jurisprudence and to decide that the civil aspects of Art. 6 apply to ordinary tax disputes for the determination of the quantum of tax liability.

6. Policy isues ivolved

What exactly would it mean if the civil aspects of Art. 6 were to apply to ordinary tax proceedings? Article 6(1) states: 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. The right to an independent and impartial tribunal established by law should give rise to no real problem with regard to tax litigation. Questions have been raised as to whether a tribunal whose members are appointed by the government that is imposing the tax – and whose tenure of office is relatively limited – is sufficiently independent and impartial. If that is a problem, the solution would be to ensure greater independence and impartiality of tribunal members.

The right to a public hearing may be problematic in practice in those jurisdictions where it has been traditional to hear tax appeals in private. It should be remembered, however, that it is the right of the taxpayer to request a hearing in public: there seems little reason why the guarantee would not be sufficiently secured if tax cases were generally in private but with a right for the taxpayer (of which he would have to be informed) to request a public hearing if he so wished.

Inherent in Art. 6(1) is, of course, the 'right to a court': that is, the right to take a dispute about tax to an independent and impartial tribunal for a determination. This may give some difficulties in systems where it is a requirement to pay the tax before an appeal may be lodged. The solution to that problem should be achieved if the tribunal had a power to dispense with the requirement of pre-payment of the tax in appropriate circumstances.

Undoubtedly the major difficulty in applying Art. 6(1) to tax proceedings is the requirement of a determination within a reasonable time. It is understood, for example, that the *Ferrazzini* case has been selected from almost 2,000 cases where the taxpayer alleges unreasonable delay in the determination of his tax liability. If the sole reason for excluding tax proceedings from Art. 6(1) is to allow such proceedings to continue in circumstances which would constitute unreasonable delay for criminal or other civil matters, then that is an abysmal justification for the exclusion of tax proceedings from Art. 6(1). There seems no good reason why a taxpayer should not be entitled to have his fiscal rights and obligations – just as his criminal charges and his other civil rights and obligations – determined within a reasonable time.

In this respect, it is relevant to note that the Strasbourg organs have never fixed a specific time beyond which delay becomes unreasonable: unreasonableness depends on the particular circumstances of the case. No doubt in tax cases the ECtHR could develop an approach which accepts that a delay which would be unreasonable in the context of a criminal liability (possibly leading to imprisonment) might not be unreasonable in a case involving a tax liability. Overall, it is hard to see why Art. 6(1) should not apply to tax proceedings.

To the contrary, the author considers that there is a real danger if the ECtHR continues down its present line of extending Art. 6 to tax proceedings through the back door of criminal charges. If that continues to happen, then there is a real danger that the handling of tax investigations will be more and more assimilated to the handling of criminal investigations. Tax advisers will advise their clients to exercise the right to silence guaranteed to them on the basis that, if they were found guilty of a serious mis-statement of a tax liability, substantial penalties might follow. This may result in tax administrations utilizing a criminal approach more frequently, particularly if the administration believes that they are subject to the same test of reasonable length of proceedings as would apply in a criminal case.

7. Conclusion

It will suffice by way of conclusion to state that the author is clearly of the view that there are good policy arguments in favour of rejecting the existing jurisprudence of the Strasbourg organs and holding that the civil aspect of Art. 6 apply to ordinary tax proceedings. There seems no good legal argument against this approach, but good legal reasons for recognizing that the existing jurisprudence is wrong.