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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 ECtHR relating to human rights and taxation including the application of the prohibition of double jeopardy regarding tax offences; the right to an oral hearing in tax surcharge cases; rights to enjoyment of property and the margin of appreciation; tax exemptions and tax deductions in relation to religious organizations; and confidentiality, freedom of speech and taxpayer information.

This note is part of a regular series of notes by Philip Baker highlighting, in particular, recent decisions of the ECtHR relating to human rights and taxation.

1. Double Jeopardy and Tax Offences

Failure to comply with tax obligations can result in multiple consequences: the taxpayer may be found liable to pay additional tax, with interest; the taxpayer may become liable for fines or surcharges; in extreme cases, the taxpayer may also be prosecuted for offences related to tax compliance; the taxpayer may be liable to penalties for specific offences such as those relating to the maintenance of records or bookkeeping. This gives rise to the possible application of the prohibition of double jeopardy (often referred to as the *ne bis in idem* principle), which is found in article 4 of the Seventh Protocol to the European Convention on Human Rights (ECHR). That article provides as follows:

> Article 4 – right not to be tried or punished twice
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> 1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

The Seventh Protocol has been signed and ratified by 43 of the 47 members of the Council of Europe: the only states that have signed but not ratified are Germany, the Netherlands and Turkey, while the United Kingdom is the only state that has neither signed nor ratified the Protocol. Thus, the prohibition of double jeopardy applies in virtually all of the Member States of the Council of Europe.

Guidance on the application of the prohibition of double jeopardy in tax cases has been given recently in the case of *Lucky Dev v. Sweden* (2014).[1] The facts in that case reflect in part the procedures followed in Sweden, but also give some guidance of general application.

Mrs Dev ran two restaurants together with her husband. Following an investigation, on 1 June 2004, the Swedish Tax Agency issued an increased assessment to tax on Mrs Dev, together with an increased VAT liability; she was also ordered to pay tax surcharges of 40% of the income tax and 20% of the VAT. Mrs Dev challenged these assessments and tax surcharges through the Administrative Court and Court of Appeal; her application for leave to appeal was finally refused by the Supreme Administrative Court on 20 October 2009. Meanwhile, on 5 August 2005, criminal proceedings were initiated against Mrs Dev on two grounds. First for an aggravated tax offence, and secondly for an aggravated bookkeeping offence. On 16 December 2008, the Stockholm District Court acquitted her of the aggravated tax offence, but convicted her of the aggravated bookkeeping offence and imposed on her a suspended sentence and an order to perform 160 hours of community service. She did not appeal against that decision, which became binding on 8 January 2009.

The aggravated tax offence, bookkeeping offence and the matters in respect of which she was ordered to pay tax surcharges all arose fundamentally out of the same matrix of facts. She complained to the European Court of Human Rights (ECtHR) of a breach of the principle of double jeopardy in article 4 of the Seventh Protocol.

The issue of double jeopardy in tax cases is one that had been considered extensively by the Swedish courts. The case law of the Swedish Supreme Court and Supreme Administrative Court is examined in some detail in the decision of the ECtHR. One of the difficulties faced by that case law was the change in approach adopted by the ECtHR in the decision in *Zolotukhin v. Russia* (2009).[2]

With regard to Mrs Dev, the ECtHR noted that the prohibition in article 4 applies both to the right not to be tried and the right not to be punished twice for the same offence. The Swedish government accepted that the tax surcharges came within the determination of a criminal charge under article 6 of the ECHR, and that the same meaning of criminal charge applied also for the purposes of article 4 of the Seventh Protocol. Thus the proceedings leading to the tax surcharges, the proceedings (in respect of which she

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1. SE: ECtHR, 27 Nov. 2014, Application No. 7356/10, *Lucky Dev v. Sweden*.
2. RU: ECtHR, 10 Feb. 2009, Application No. 14939/03, *Zolotukhin v. Russia*. Reference should also be made to the decision in FI: ECtHR, 16 June 2009, Application No. 13079/03, *Ruotsalainen v. Finland*. The issue of double jeopardy has also been considered more recently in the VAT context by the Court of Justice of the European Union (ECJ) in the case of SE: ECJ, 26 Feb. 2013, Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, ECJ Case Law IBFD.

was acquitted) for an aggravated tax offence and the proceedings for a bookkeeping offence all involved criminal charges.

So far as the bookkeeping offence was concerned, this was sufficiently different in its constituent elements as not to involve the same offence as the tax surcharges or the aggravated tax offence. This reflects the approach of the ECtHR in looking to see whether the criminal charges are brought for the same offences or not.

With regard to the aggravated tax offence and the tax surcharges, however, the conduct at issue was fundamentally the same. The fact that there were parallel proceedings in place for over three and a half years, one concerning the tax surcharge and the other concerning the aggravated tax offence, was not of itself a breach of article 4. The proceedings for an aggravated tax offence terminated, however, with an acquittal, which became final on 8 January 2009. Despite this acquittal for an offence based upon essentially the same facts, the proceedings with regard to the tax surcharge continued after this acquittal for a further nine months until the decision of the Supreme Administrative Court in October 2009. To that extent, Mrs Dev was tried twice for the same criminal charge. The ECtHR found, therefore, a breach of article 4 of the Seventh Protocol because the tax surcharge proceedings continued for this further nine months. The Court awarded Mrs Dev EUR 2,000 in respect of non-pecuniary damage for the breach of the principle of double jeopardy.

From the point of view of the protection of taxpayer rights, this case is frankly unsatisfactory in a number of respects.

First, the conduct that led to the tax surcharges, the aggravated tax offence and the bookkeeping offence were fundamentally the same. It is unsatisfactory that, because the constituent elements of the bookkeeping offence were technically different, the taxpayer could be liable both for a criminal charge in respect of the bookkeeping offence and the tax surcharge at the same time.

Secondly, for a period of over three years (and Sweden is relatively speedy in dealing with tax matters by comparison with other countries) the taxpayer had to continue proceedings both in respect of substantial tax penalties and the possibility of criminal liability for the aggravated tax offences. The ECtHR concluded that the mere existence of parallel proceedings is not a breach of article 4; but that looks to be a clear example of being tried twice for the same offence. The Court focused on consecutive proceedings, but for the taxpayer the existence of concurrent proceedings can be equally disturbing.

Thirdly, it leads to a somewhat random result where there are both proceedings for a tax surcharge and for a criminal offence. In this particular instance, the criminal charge for an aggravated tax offence resulted in an acquittal while the proceedings challenging the tax surcharge continued.

Continuation of the proceedings in relation to the tax surcharge constituted, therefore, a breach of the principle of double jeopardy: presumably, the only way to avoid this would have been if the imposition of the tax surcharges had been vacated after the acquittal. Presumably, also, exactly the same result would have followed if Mrs Dev had been convicted for the aggravated tax offence as opposed to being acquitted. If, on the other hand, the proceedings to challenge the tax surcharge had come to a final conclusion before the conclusion of the criminal proceedings in relation to the aggravated tax offence, then it would appear to follow that the criminal proceedings should have terminated at that point. The outcome seems, therefore, to be random depending upon the speed at which the different proceedings reached their conclusion.

From the point of view of the tax administration, this presents a dilemma in practice where conduct could lead both to tax fines/surcharges and to a criminal charge. There is a significant incentive for the tax authority to introduce criminal offences, the constituent elements of which are not the same as the basis upon which tax fines/surcharges can be imposed, so that the principle of double jeopardy is simply sidestepped. If, however, the constituent elements of the liability for the fine/surcharge and the criminal liability are fundamentally the same, then the tax administration is faced with a dilemma: it is not in breach of the principle to continue with the two proceedings at the same time; however, whichever proceeding reaches its conclusion first, the other proceedings then have to be dropped. That suggests a fairly careful management of the two sets of proceedings.

Alternatively, it imposes on the tax administration a potentially difficult choice at the outset whether to seek to impose surcharges/fines and abandon any criminal proceedings, or whether to bring criminal proceedings and abandon the fines or tax surcharges.

In terms of protecting taxpayer rights, it is preferable for the taxpayer to face only one set of proceedings: either for an administrative fine/surcharge, or for a criminal liability. That does not appear, however, to be the technical answer given by the ECtHR. Two parallel proceedings for the determination of a criminal offence are permissible, so long as one does not continue after the other reaches its conclusion.

2. Oral Hearings in Tax Surcharge Cases

It is now, regrettably, well-established that ordinary proceedings for the determination of a tax liability do not fall within the scope of the right to a fair trial in article 6 of the ECHR.[3] On the other hand, most tax-geared fines or surcharges for failure to comply with tax obligations fall within the criminal head of that article.

In *Pakozdi v. Hungary* (2014),[4] the taxpayer was subject to an additional personal income tax assessment of approximately EUR 39,000, and a 50% tax surcharge in the amount of EUR 19,500. She appealed against the assessment and the surcharge, the central question being whether her father had made a personal loan to her of the amount that was invested in her company and that was the basis of

3. IT: ECtHR, 12 July 2001, Application No. 44759/98, *Ferrazzini v. Italy*.
4. HU: ECtHR, 25 Nov. 2014, Application No. 51269/07, *Pakozdi v. Hungary*.

the additional charge and surcharge. The Regional Court accepted her argument, but the Supreme Court reinstated the assessment and surcharge on the basis that the father's statements could not be accepted in the absence of supporting documentary evidence. She complained of the absence of an oral hearing before the Supreme Court when it determined that the evidence of her father was inadequate.

The application of the right to a fair trial in article 6 could, of course, only apply if the surcharge involved a criminal charge. The Hungarian government argued that it did not, but the ECtHR applied the three-fold *"Engel"*[5] formula and determined that the 50% surcharge did entail a criminal charge because it was imposed as a punishment to deter reoffending and a 50% penalty without an upper limit resulted in a substantial penalty. There was nothing new in that finding.

Under article 6, there is no absolute right to a public hearing. The issue is whether, taking the proceedings as a whole, the taxpayer has received a fair trial. In this case, the burden of proof had effectively been reversed and fell on the taxpayer to bring evidence to deny the tax liability and penalty. In such a case, determining the reliability of the evidence was critical, and an oral hearing should have been held at the Supreme Court. The taxpayer had not, in fact, asked for an oral hearing, but had no reason to do so because of no apprehension that the Supreme Court would substitute its own judgment of the evidence requirements. There had, therefore, been a breach of article 6.

The taxpayer sought by way of compensation an amount equal to the tax surcharge and interest. The ECtHR considered, however, that there was no causal link between the breach of article 6 and the penalty she suffered. Instead, a relatively notional figure of EUR 7,500 was ordered by way of non-pecuniary damage.

One may take from this case the general principle that, where article 6 is engaged under its criminal head, it would usually be appropriate to hold an oral hearing where the cogency and reliability of evidence is the determining factor in the hearing at that stage, even if it is only at the level of an appellate court that the issue of credibility of evidence is determinative of the outcome.

3. Rights to Enjoyment of Property and the Margin of Appreciation

An earlier note in this series discussed the decision of the ECtHR in the case of *Bulves AD v. Bulgaria* (2009),[6] where the refusal to allow the deduction of input VAT to a taxpayer (because of the failure of his supplier to comply with VAT regulations) was held to infringe the right to enjoyment of property in article 1 of the First Protocol. The decision in *Atev v. Bulgaria* (2014)[7] raises similar issues, but comes to a different conclusion.

Once again, in this case, the taxpayer was denied the right to deduct VAT because his supplier had lost the relevant accounting records and could not prove that the input VAT had been correctly paid. The Bulgarian government raised a new argument, however, which was that a taxpayer who is denied the right to deduct input VAT could sue its supplier and seek pecuniary damages, under the law of tort set out in the Obligations and Contracts Act 1951, on the grounds of the supplier's failure to observe VAT regulations. The taxpayer had failed to do so here. The ECtHR noted that this was not a point raised in the *Bulves AD* case, and concluded that the possibility of bringing an action for compensation in tort gave the taxpayer an adequate redress if its right to deduct input tax was denied. In light of the availability of a civil action for damages, the ECtHR concluded that a fair balance had been struck between the protection of the taxpayer's rights and the demands of the general interest. Having regard to the wide margin of appreciation in tax matters, the refusal to allow the deduction of input tax did not infringe article 1 of the First Protocol. Thus, once again, the ECtHR has drawn back from its decision in *Bulves AD*.

A similar case, where the wide margin of appreciation justified a French tax rule, arose in *Rheims v. France* (2014).[8] The applicants in this case were the heirs of a deceased participator in a real estate-holding company, an SCI, which owned land in France. The land was leased out on a construction mortgage to a related company for an initial period of 30 years. The lessee constructed property on the land; the lease subsequently terminated when the land was sold by the SCI to the construction company. Under French law, when a construction lease terminates, the lessor is treated as having received income equal to the value of the construction. This was a fiscal fiction that gave rise to taxable income in the SCI, apportioned to its participator (and, after his death, to his heirs).

The heirs complained that this fiscal fiction infringed their right to the enjoyment of property; the ECtHR disagreed. The law imposing the charge was clear and accessible and could not be regarded as arbitrary or manifestly unreasonable and fell within the margin of appreciation in tax matters.

4. Religious Associations: Tax Exemptions and Tax Reductions

The interrelationship between taxation and the freedom of religion in article 9 of the ECHR has been discussed in relation to other decisions in earlier notes in this series.[9] Two recent decisions clarify the application of tax exemptions.

5. *See* NL: ECtHR, 8 June 1976, Application Nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, *Engel*.
6. BG: ECtHR, 22 Jan. 2009, Application No. 3991/03, *Bulves AD v. Bulgaria*. This is discussed in P. Baker, *Some Recent Cases from the European Court of Human Rights*, 49 Eur. Taxn. 6, pp. 326-327 (2009), Journals IBFD, with a short update provided in P. Baker, *Some Recent Tax Decisions from the European Court of Human Rights*, 51 Eur. Taxn. 6, p. 253 (2011), Journals IBFD.
7. BG: ECtHR, 18 Mar. 2014, Application No. 39689/05, *Atev v. Bulgaria*.
8. FR: ECtHR, 21 Jan. 2014, Application No. 32492/08, *Rheims v. France* (only available in French).
9. *See* FR: ECtHR, 30 June 2011, Application No. 8196/05, *The Association of Jehovah's Witnesses v. France*, discussed in P. Baker, *Some Recent Decisions of the European Court of Human Rights on Tax Matters*, 52 Eur. Taxn. 6, pp. 309-310 (2012) Journals IBFD. *See also* the discussion of the application of a French tax exemption to associations regarded as cults in P. Baker, *Some*

First, in the case of *The Church of Jesus Christ of Latter-Day Saints v. United Kingdom* (2014)[10] the United Kingdom granted two levels of exemption from local business rates for religious buildings. Where the building was used for public worship it was entitled to a 100% exemption: where, however, the building was used by a religious organization but not open to public worship, the exemption was limited to 80%. A Mormon temple in Preston in Lancashire had some parts of the building open to general members of the public, but the main part of the temple was only accessible to members of the religious group and, in practice, only those who were granted the right of access. The church complained of a breach of article 9 combined with the freedom from discrimination in article 14. The ECtHR noted that exactly the same rule applied to other religious groups, such as the Church of England, where private chapels or other places not open to the public only enjoyed the 80% reduction. The Court concluded that there was no breach of the Convention since the difference in treatment had a reasonable and objective justification.

The position in Hungary under legislation introduced in 2011 was somewhat different, however. In the case of *Magyar Kereszteny Menonita Egyhaz & Others v. Hungary* (2014),[11] a number of religious organizations challenged their treatment in Hungary, including the unavailability of a tax rule under which they were entitled to receive 1% of the income tax. Following the fall of communism, the Hungarian government had allowed a large number of religious organizations to register as churches and receive these benefits. By legislation introduced in 2011, however, the treatment was limited to a small number of recognized churches, all others being relegated to the position of associations. This included: the Mennonite church; evangelical and autonomous congregations; and several Jewish and Buddhist organizations. They complained of a breach of the right to freedom of religion in article 9 and the right to freedom of expression in article 11. The ECtHR emphasized, in a lengthy decision discussing widely the rules for government recognition of churches, the duty of the state to remain neutral and impartial in exercising its regulatory power in the sphere of religious freedom. The Court concluded that the Hungarian system, which gave the option of recognition only through a parliamentary (and hence political) process, failed to meet the duty of neutrality with regard to different religious communities. There was a breach of article 11 read in the light of article 9.

The churches and other religious organizations that had been de-recognized had claimed substantial sums in respect of the economic and tax benefits that they had been denied. The Court concluded that this raised complex issues of compensation, to be reserved for a separate decision (if not agreed by the Hungarian government in the meantime).

5. Confidentiality, Freedom of Speech and Taxpayer Information

In some countries within the Council of Europe there is a long tradition of open disclosure of taxpayer information. The case of *Anttila v. Finland* (2014)[12] raises, but without deciding, certain issues connected with the publication of this taxpayer information. The applicant was the editor-in-chief of a magazine, and one of two shareholders and chairman of the board of two companies, one of which published the magazine. The magazine reprinted information about the taxable income and assets of certain individuals, which was publicly available in Finland: the information was organized according to geographical areas of the country. The second company offered an SMS-service under which, in response to a request, details of an individual's tax payments and assets could be obtained.

The Finnish Data Protection Ombudsman sought to prevent publication of the magazine and the availability of the SMS-service on grounds that it breached private confidentiality. The taxpayer argued, however, that the activity was one of journalism and fell within article 10 of the ECHR and the freedom of expression.[13] The ECtHR concluded that it was not appropriate to determine this case because the applicant, even though he was editor-in-chief of the magazine, a shareholder and chairman of the board of the companies, was not the victim of the alleged breach; the victims were the two companies concerned. The possible application of article 10 was not, therefore, resolved. The case illustrates, however, some of the difficult issues where confidential taxpayer information is publicly available under the laws of a particular country and the possible scope of journalistic use of that information. With greater access by revenue authorities to taxpayer information, the balance with the right to privacy, and the limits of journalistic usage, become more important. It would be helpful to have a decision that clarified that balance.

Recent Decisions of the European Court of Human Rights on Tax Matters, 53 Eur. Taxn. 8, pp. 394-395 (2013) Journals IBFD.

10. UK: ECtHR, 4 Mar. 2014, Application No. 7552/09, *The Church of Jesus Christ of Latter-Day Saints v. United Kingdom*.
11. HU: ECtHR, 8 Apr. 2014, Application No. 70945/11 and eight others, *Magyar Kereszteny Menonita Egyhaz & Others v. Hungary*.
12. FI: ECtHR, 19 Nov. 2013, Application No. 16248/10, *Anttila v. Finland*.
13. It should be noted that the same companies involved in this case were also parties to litigation before the ECJ in FI: ECJ, 16 Dec. 2008, Case C-73/07, *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*, ECJ Case Law IBFD; which concerned the compatibility of the activities of the companies with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data, OJ L 281 (1995), EU Law IBFD.