APPLICABILITY OF THE RIGHT TO A FAIR TRIAL UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS TO TAX PROCEEDINGS

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Abstract: *The article deals with the European taxpayers' right to a fair trial as determined by the case-law of the European Court of Human Rights. The right to a fair trial is laid down in Article 6 of the European Convention on Human Rights and Fundamental Freedoms and can be invoked by everyone in the determination of their civil rights and obligations or of any criminal charge against them. Given the framework set out positively in that provision, it was the ECtHR from which it had been anticipated to provide detailed clarifications on how precisely litigations on tax matters should fall within the scope of Article 6, para. 1 ECHR. In that respect, the article aims at giving a cursory overview on the enforceability of the right to a fair trial in tax proceedings, revealing thus its "civil" and "criminal" heads applicable to tax cases, and touches in the end upon the close relationship that exists between Article 6, para. 1 and Article 13 of the Convention.*

Key Words: *Taxpayers, Right to a Fair Trial, case-law, European Court of Human Rights and Fundamental Freedoms, ECtHR, European Convention on Human Rights, ECHR;*

The obvious disequilibrium between the state authorities' powers and the taxpayers' safeguards[1] makes sufficiently clear why since the early nineties tax law becomes increasingly perceivable in light of the European Convention on Human Rights and Fundamental Freedoms (hereinafter ECHR/the Convention), even though it is much more the law on tax procedures that has been most affected than regimes on taxation themselves.[2] Key role for emergence of that

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[1] P.-J. Ciaudo, Les déficits des droits de la défense dans les procédures fiscales [Deficiencies of the rights of defence in the fiscal procedures]. Droit et Patrimoine, n° 79, Feb. 2000. Cited in: T. Masson, La protection du contribuable à travers la Convention européenne des droits de l'homme: une nouvelle considération des droits de la défense? [The taxpayer's protection across the European Convention on Human Rights: a fresh consideration of the rights of defence?], Fiscalité Européenne et Droit International des Affaires, n° 131, 2002.

[2] In that sense, J.-F. Flauss, Sanctions fiscales et Convention européenne des droits de l'homme [Fiscal sanctions and European Convention on Human Rights], Revue française de finances publiques, n° 65, Mar. 1999, p. 77 et seq. Cited in: ibid. See in addition on the origin of Article 6 wording and the preparatory work the historical reminder of M. Salvia, Procédures fiscales et droits processuels garantis par la Convention européenne des droits de l'homme [Fiscal

phenomenon plays the most frequently invoked right in Strasbourg[3] to a fair trial which includes an entire set of procedural safeguards, namely the rights to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law, to cross-examination, to be informed promptly and in detail in a language which each litigant understands of the nature and cause of criminal charges brought against them etc.[4] In principle, in order to ensure effective protection of the right to a fair trial, the ECtHR embeds the use of a broad interpretation of that safeguard and, accordingly, a narrow interpretation of the restrictions on the derived guaranteed rights.[5] However, the Court is of the view that "there may exist "pecuniary" obligations vis-à-vis the State or its subordinate authorities which, for the purpose of Article 6 para. 1 (art. 6-1), are to be considered as belonging exclusively to the realm of public law and are accordingly not covered by the notion of "civil rights and obligations". Apart from fines imposed by way of "criminal sanction", this will be the case, in particular, where an obligation which is pecuniary in nature derives from tax legislation or is otherwise part of normal civic duties in a democratic society".[6] By the same token as that in the case Ferrazzini v. Italy,[7] with which tax experts are well familiar, the Court expressly bars from application in tax matters Art. 6 of the Convention – the most frequently vindicated article by applicants[8] within tax litigations, ruling that "tax matters still form part of the hard core of public-authority prerogatives, with the public nature

proceedings and procedural rights guaranteed by the European Convention of Human Rights], Petites affiches n° 80, 6 July 1994.

[3] V. Berger, La jurisprudence de la Cour européenne des droits de l'homme et le droit fiscal [The case-law of the European Court of Human Rights and tax law], Droit fiscal n° 24, 17 June 2010, p. 7. The author testifies that the safeguards provided by Article 6-1 have been found excessive by some governments which in the 1980s made an attempt, without success, to elaborate an "exempting protocol" ["protocole soustractionnel" in French], in the words of Marc-André Eissen, Registrar of the Court at that time. The idea in their minds was to introduce an Article 6 bis, noticeably less binding than Article 6, which might be applicable in various domains, among which taxation and customs.

[4] G. Marino, Limitation of Administrative Penalties by the European Convention of Human Rights and the EU Charter of Fundamental Rights. European Association of Tax Law Professors, 2015 Milan Congress on "Surcharges and Penalties in Tax Law", p. 9.

[5] See S. Guinchard, Convention européenne des droits de l'homme et procédure civile [European Convention of Human Rights and civil proceedings], Dalloz, Dec. 2012. See namely ECtHR, 17 Jan. 1970, Delcourt v. Belgium, App. n° 2689/65, para. 25.

[6] ECtHR, 9 Dec. 1994, Schouten and Meldrum v. the Netherlands, App. n° 19005/91 and 19006/91, para. 50.

[7] See the case in sum, Press release, ECtHR 524, 12 July 2001.

[8] F. Sudre and C. Picheral, La diffusion du modèle européen du procès équitable [The spreading of the European model of a fair trial], La documentation française, Paris, 2003, p. 7. Cited in: G. Rusu, Le juge communautaire et l'applicabilité de l'article 6 de la Convention européenne des droits de l'homme [The Community judge and the applicability of Article 6 of the European Convention on Human Rights], p. 1. [online]
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of the relationship between the taxpayer and the community remaining predominant".[9] In relation to Article 1 of Protocol n° 1 the Court supplements that the "tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer".[10] Therefore, "[t]he principle according to which the autonomous concepts contained in the Convention must be interpreted in the light of present-day conditions in democratic societies does not give the Court power to interpret Article 6 § 1 as though the adjective "civil" (with the restriction that that adjective necessarily places on the category of "rights and obligations" to which that Article applies) were not present in the text".[11] That case corroborates the solid ground of the settled case-law established until 1973, according to which Art. 6 ECHR does not apply in principle to ordinary tax procedures.[12] It is interesting to be noted that the explicit statements by the ECtHR, namely that Art. 6, para. 1 ECHR does not apply to ordinary tax procedures, are much more seldom than the cases of implicit practice to that effect, and that is so even though the vast majority of tax litigations brought to the attention of the Court relies on that article.[13] To this day the ECtHR follows its traditional line, which is clearly reminded in the case Vidacar SA and Opergrup S.L. v. Spain: "[…] 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 .[[14]] 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

[9] ECtHR, 12 July 2001, Ferrazzini v. Italy, App. n° 44759/98, para. 29. See Ph. Baker, The Decision in Ferrazzini: Time to Reconsider the Application of the European Convention on Human Rights to Tax Matters, Kluwer Law International, Intertax, vol. 29, 2001, p. 360 et seq.; For a recent confirmation of the Ferrazzini judgment, see ECtHR, 20 Dec. 2016, App. n° 18700/09, Lindstrand Partners Advokatbyra AB v. Sweden, para. 110. – CE, 8th et 3rd ch., 19 Sept. 2016, App. n° 383781; M. Perron: JurisData n° 2016-019535; Dr. fisc. 2016, n° 50, comm. 654, concl. R. Victor, Cited in: L. Ayrault, Droit fiscal européen des droits de l'homme: chronique de l'année 2016 [European fiscal law of human rights: chronicle of the year 2016]. Droit fiscal, n° 9, 2 Mar. 2017, p. 191; J. Maia, Illusions et promesses de l'application à la matière fiscale de la Convention européenne des droits de l'Homme [Illusions and promises over the application to tax matters of the European Convention on Human Rights], RJF 2002.

[10] ECtHR, Ferrazzini v. Italy, supra.

[11] Ibid. para. 30.

[12] The first judgment where the Commission clearly states that Article 6 does not apply to tax law, the latter being part of public law, is by the way X v. Belgium, App. n° 2145/64, 1st Oct. 1965. See Ph. Baker, Taxation and the European Convention on Human Rights, British Tax Review, 2000, p. 10. As to the "settled case-law" Baker QC refers to the judgment X. v. Belgium, 5 Feb. 1973 App. n° 5421/72.

[13] Ph. Baker, Taxation and the European Convention…, op. cit., p. 11.

[14] References made by the Court: « 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 ».

"criminal penalty", this will be the case, in particular, where an obligation which is pecuniary in nature derives from tax legislation [15]".[16] Thus, the ECtHR dismisses "this part of the applications […] as being incompatible ratione materiae with the Convention".[17]

In any event, there are two exceptions where procedures arising from fiscal matters can be interpreted in the sense that they imply judicial rulings "involving "the determination of […] civil rights and obligations" or of "any criminal charge"" under the terms of Article 6, para. 1 of the Convention.[18] Therefore, Art. 6 ECHR is applicable when tax litigations contain a punitive element – not on account of the presence therein of civil rights and obligations but since the procedures at issue are considered to be of a criminal nature.[19] The other exception comprises legal disputes related to claims for restitution of paid fiscal debts.[20] According to the Court "both sets of restitution proceedings [citations omitted] were private-law actions and were decisive for the determination of private-law rights to quantifiable sums of money" and at the same time „[t]his conclusion is not affected by the fact that the rights asserted in those proceedings had their background in tax legislation and the obligation of the applicant societies to account for tax under that legislation [21]".[22] To that second group of exceptions should also be added litigations

[15] References made by the Court: « 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, § 41 ».

[16] ECtHR, Vidacar SA and Opergrup S.L. v. Spain, 20 Apr. 1999, App. n° 41601/98 and 41775/98.

[17] Ibid. See also in that vein Guy Giraud v. France, App. n° 33850/96; Claus Simon v. Germany, App. n° 33681/96; Ephrem and Huguette Passet v. France, App. n° 38434/97; Louis Maury v. France, App. n° 36858/97; M-TP v. France, App. n° 41545/98; and Camille Gantzer v. France, App. n° 43604/98. All cited in: Ph. Baker, Should Article 6 ECHR (Civil) Apply to Tax Proceedings? Intertax, vol. 29, 2001, p. 206.

[18] Art. 6 ECHR. See Ph. Baker, Taxation and the European Convention…, op. cit. See what "civil rights and obligations" and "criminal charge" do mean according to the CJEU, G. Rusu, Le juge communautaire et l'applicabilité …, op. cit., p. 5-11.

[19] ECtHR, 24 Feb. 1994, Bendenoun v. France, App. n° 12547/86 and ECtHR, 3 May 2001, J.B. v. Switzerland (App. n° 31827/96). Cited in: M. Kuijer, The Blindfold of Lady Justice - Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR. Chapter "Applicability of Article 6 ECHR", Wolf Legal Publishers 2004; See on the application of those two heads within French law, V. Fraissinier-Amiot, L'article 6 § 1 de la Convention européenne des droits de l'Homme et la matière fiscale: l'influence des conceptions européennes sur les législations internes (2e partie) [Article 6 § 1 of the European Convention on Human Rights and tax matters: the impact of the European conceptions on the internal legislations (2nd part)], Les Nouvelles Fiscales, 2011, p. 1072.

[20] M. Kuijer, The Blindfold of Lady Justice…, op. cit. See besides on the notion of "right" within the meaning of Article 6-1, ECtHR [GC], 3 Apr. 2012, Boulois v. Luxembourg, App. n° 37575/04; and the analysis of S. Platon, Précisions sur la notion de « droit » au sens de l'article 6§1 CEDH [Clarifications on the notion of "right" within the meaning of Article 6§1 ECHR], [online]. Published: 4 June 2012.
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[21] References made by the Court: "see, mutatis mutandis, the Editions Périscope v. France judgment of 26 March 1992, Series A no. 234-B, p. 66, § 40".

[22] ECtHR, National & Provincial Building Society et al. v. the United Kingdom, 23 Oct. 1997, App. n° 21319/93, 21449/93, 21675/93, para. 97. See as well: ECtHR, 26 Mar. 1992, Éditions Périscope v. France, App. n° 11760/85,

revolving around social security contributions,[23] as well as claims for reparation of damages caused by tax authorities[24] and requests for cancellation of operated taxations,[25] albeit all those cases originate ultimately from tax matters.[26] Undoubtedly, the social security contributions do not constitute fiscal proceeds, but by their obligatory nature they are sufficiently close to taxes so that a compromise with that consideration to be let through. The conclusions that could be drawn from such an analogy will not necessarily be devoid of value for comparative purposes. Thus, Art. 6 ECHR does not apply to cases where "the public nature of the relationship between the individual and the community"[27] is predominant, that means cases which concern straight taxation matters.[28]

As a preliminary point, it should not in any way be argued that Art. 6 "has no application to pre-trial proceedings"[29] and must be borne in mind that it "may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions".[30]

It should also be taken into consideration with regard to Art. 13 of the Convention that when the requirements of Art. 6, para. 1 ECHR imply the full panoply of safeguards applicable to judicial proceedings, those guarantees are stricter than the exigencies under Art. 13 ECHR, which in that case find themselves absorbed.[31] According to the ECtHR "[i]n such cases there is no legal interest in re-examining the same subject-matter of complaint under the less stringent requirements of Article 13".[32] Thus, in the fiscal case Loncke v. Belgium[33] the ECtHR states, as a first step, in the light of Art. 6, para. 1 ECHR that "the decision on inadmissibility for failure to be paid a deposit

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and EComHR, 20 Oct. 1992, D.C. v. Italy (App. n° 13120/87). Cited in: M. Kuijer, The Blindfold of Lady Justice…, op. cit.

[23] ECtHR, Schouten and Meldrum v. the Netherlands, supra.

[24] ECtHR, Éditions Périscope v. France, 26 Mar. 1992, supra.

[25] ECtHR, case Filippello v. Italy, 24 Oct. 1995, App. n° 25564/94.

[26] Ph. Baker, Should Article 6 ECHR…, op. cit., p. 209. The author distinguishes three types of "erosion" of the Ferrazini principle – 1) claims for compensations, for refund of surcharges and for annulment of taxations; 2) disputes relating to the payment of social security contributions; 3) litigations dealing with penalties in the wake of tax offences. As the author himself notes, in multiple states the distinction between obligations relating to the payment of social security contributions and for taxes is quite narrow, the cases dealing with social security contributions are worth to be examined next to the disputes of a purely fiscal nature.

[27] See the dissenting opinion of M. Ryssdal on the case of the ECtHR of 29 May 1986, Deumeland v. Germany. Cited in: M. Salvia, Procédures fiscales et droits processuels garantis par la Convention…, op. cit.

[28] M. Salvia, Procédures fiscales et droits processuels garantis par la Convention…, op. cit. In the author's view, having regard to the aim and object of the Convention's text, it is the only possible reading of Article 6.

[29] ECtHR, Salduz v. Turkey, 27 Nov. 2008, App. n° 36391/02, para. 50.

[30] Ibid.

[31] ECtHR, judgment of 26 Oct. 2000, Kudla v. Poland, App. n° 30210/96, para. 146. See as well the judgment Brualla Gómez de la Torre v. Spain, 19 Dec. 1997, App. n° 26737/95, para. 41.

[32] ECtHR, Kudla v. Poland, supra, para. 146.

[33] ECtHR, judgment of 25 Sept. 2007, Loncke v. Belgium, App. n° 20656/03.

constituted a disproportionate measure in view of the protection of tax authorities' interests and that the effective access of the applicant to the appellate court was thus impeded",[34] and, as a second step, that "Art. 6-1 constitutes a lex specialis in relation to Article 13, the requirements of which being absorbed by those of Article 6-1"[35] and, therefore, that "once the applicant's grievance being examined under Art. 6-1 […] it does not need also in the present case to examine it under Article 13".[36] The judges indicate however that there is no overlap between Art. 6 and Art. 13 ECHR, and, hence, no absorption where "the alleged Convention violation that the individual wishes to bring before a "national authority" is a violation of the right to trial within a reasonable time, contrary to Article 6 § 1".[37] In that respect it is stressed that "[t]he question of whether the applicant in a given case did benefit from trial within a reasonable time in the determination of civil rights and obligations or a criminal charge is a separate legal issue from that of whether there was available to the applicant under domestic law an effective remedy to ventilate a complaint on that ground".[38] In the cases dealing with the second legal issue the application relying on Art. 13 ECHR needs to be examined separately, notwithstanding that Art. 6, para. 1 could also be invoked and considered.[39] In that connection it is important that "Article 13 […] establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights"[40] and, thus, "the right of an individual to trial within a reasonable time will be less effective if there exists no opportunity to submit the Convention claim first to a national authority; and the requirements of Article 13 are to be seen as reinforcing those of Article 6 § 1, rather than being absorbed by the general obligation imposed by that Article not to subject individuals to inordinate delays in legal proceedings".[41] The ECtHR rules for that purpose that "the correct interpretation of Article 13 is that that provision guarantees an effective remedy before a national authority for an alleged breach of the requirement under Article 6 § 1 to hear a case within a reasonable time".[42] In fact, the case Kudla carries out a jurisprudential reform that ends the previous practice which excluded necessarily any judicial review under Art. 13 when Art. 6, para. 1 was applied in the judgment,

[34] Ibid., para. 52.
[35] Ibid., para. 53.
[36] Ibid. The Court refers namely to its judgment Kudla v. Poland [GC], supra, para. 146.
[37] ECtHR, Kudla v. Poland, supra, para. 147.
[38] Ibid.
[39] Ibid., para. 149.
[40] Ibid., para. 152.
[41] Ibid.
[42] Ibid., para. 156.

without any further clarification provided on whether those two legal grounds had had actually an identical object.[43] The case on customs matters Kapetanios and others v. Greece[44] clearly exhibits a judicial review both on Art. 6, para. 1 and on Art. 13 of the Convention, the Court finding them both to be violated.[45] A similar example provides also the case De Clerck v. Belgium.[46] In any event, readers could obtain a faithful notion of the reasonable nature of tax procedures time or of the time of procedures connected to taxation from the case-law dedicated to Art. 6, para. 1 ECHR.

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[43] Ibid., paras. 147 and 148. In connection with the jurisprudential turnaround, see E. Putman, La sécurité juridique ne donne pas de droit acquis à une jurisprudence figée [The legal certainty does not give an achieved right to a fixed case-law], Revue Juridique Personnes et Famille, 2009, p. 11.
[44] ECtHR, 30 Apr. 2015, Kapetanios et al. v. Greece, App. n° 3453/12, 42941/12 and 9028/13.
[45] Ibid., paras. 91-100.
[46] ECtHR, judgment of 25 Sept. 2007, De Clerck v. Belgiun, App. n° 34316/02.

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