



FIELD COURT TAX CHAMBERS

Multinational Companies and their Rights under the European Convention on Human Rights in Tax Cases

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OUTLINE OF PRESENTATION

- An introduction to the European Convention on Human Rights (ECHR)
- Companies and their Rights under the ECHR
- The ECHR and Taxation
- Multinational Companies and their Rights under the ECHR in Tax Cases
 - Article 6: Right to a fair trial
 - Article 1, First Protocol: right to enjoyment of property
 - Article 8: Right to privacy
 - Article 14: Prohibition of discrimination
- Some concluding comments
 - Standard setting for tax administrations – a new departure
 - The IFA General Report 2015



1) INTRODUCTION TO THE ECHR

- Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4th November 1950
 - *Travaux preparatoires* and tax
- Council of Europe – 47 Members
- Supervised by European Court of Human Rights (“ECtHR”)
- All Members recognise right of individual petition
- Over 600 tax cases since the 1980s



2) COMPANIES AND THEIR RIGHTS UNDER THE ECHR

- Companies as “victims” under the ECHR:
 - Art 34 ECHR: “The Court may receive applications from any person, non-governmental organisations or group of individuals claiming to be the victim of a violation ...”
 - Art 1 ECHR: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”
 - “Everyone”; “No one”
- Explicit inclusion of companies:
 - Art 1, First protocol: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions....”
- Sunday Times v. UK (no. 1) (1979) 2 EHRR 245 – Art. 10 (Freedom of expression)



2) COMPANIES AND THEIR RIGHTS UNDER THE ECHR

- Rights definitely enjoyed by companies:
 - Article 6: right to a fair trial
 - Article 7: no punishment without law
 - Article 8: right to respect for private and family life
 - Article 9: freedom of ... religion
 - Article 10: freedom of expression
 - Article 13: right to an effective remedy
 - Article 14: prohibition of discrimination
 - Article 1, First Protocol: protection of property



2) COMPANIES AND THEIR RIGHTS UNDER THE ECHR

- Rights definitely **NOT** enjoyed by companies:
 - Article 2: right to life
 - Article 3: prohibition of torture
 - Article 9: freedom of thought, conscience
 - Article 12: right to marry



2) COMPANIES AND THEIR RIGHTS UNDER THE ECHR

- Some case law:

- Pressos Compania Naveira SA v Belgium (1996) 21 EHRR 301 – Art 6
- Sunday Times v. UK (nos 1 and 2) – Art 10
- Naviflora Sweden v. Sweden (appln 14369/88) – Art 8
- Societe Colas Est v. France – Art 8
- Church of Scientology v. Sweden (appln 7805/77) – Art 9



2) COMPANIES AND THEIR RIGHTS UNDER THE ECHR

- Some references:
 - Van den Muijsenbergh and Rezai; “Corporations and the European Convention on Human Rights” (2011)
 - Marius Emberland; *The Human Rights of Companies* (Oxford 2006)
 - www.thehumanrightsofcompanies.com
- Note: separate discussion of corporations and their responsibility for human rights violations



3) THE ECHR AND TAXATION

- Very little discussion of a theory of the protection of taxpayers' rights – lack of attention under the ECHR
- The notion of human rights as limits to what states may do to those affected by its actions
- The increasing contact between people and revenue authorities
- The increasing powers given to revenue authorities – the “Al Capone Syndrome” – the need for safeguards
- The alternative argument based on utility – improving taxpayer cooperation and confidence



4) MULTINATIONAL COMPANIES AND THEIR RIGHTS UNDER THE ECHR IN TAX CASES

- Art. 6 – right to a fair trial
- Art. 1, First Protocol – protection of property
- Art. 14 – prohibition of discrimination
- Art. 8 – right to respect for private and family life

- Note: all these articles apply to companies
- Will these rights apply differently to companies – e.g. balance of interests?
- Note: multiple issues: Yukos v. Russia (14902/04)



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...

2. [presumption of innocence]

3. Everyone charged with a criminal offence has the following minimum rights:

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;”



Article 6: *Right to a fair trial – applicability in tax matters*

“ 1. In the determination of his **civil rights and obligations or of any criminal charge** against him,...”

- Autonomous, Convention meaning
- Many continental European countries recognise administrative/public law as separate from civil or criminal law



Article 6: *Right to a fair trial – applicability in tax matters*

- **Does not apply to ordinary proceedings for the determination of a tax liability: X v. France (9908/82) and many, many others**
- **Confirmed in Ferrazzini v Italy (44759/98), 12th July 2001 – Grand Chamber (11 : 6)**



Article 6: *Right to a fair trial – applicability in tax matters*

- Will apply to tax cases which are properly characterised as involving “the determination of civil rights and obligations” or “a criminal charge”



EXAMPLE: “CIVIL RIGHTS AND OBLIGATIONS” AND TAX CASES

- Ravon v. France (18497/03) – search of premises by revenue agents – sanctity of the domicile
- Applied in Compagnie Des Gaz De Pétrole Primagaz v. France (29613/08)
- Andre v. France (18603/03) – search of lawyers’ premises



“CRIMINAL CHARGE” AND TAX MATTERS

- For Convention purposes, may include administrative penalties
- ECtHR applies a 3-factor test (the “Engel” criteria):
 - 1) is the matter criminal according to domestic legal system
 - 2) the nature of the offence, and/or
 - 3) the nature and degree of severity of the penalty
- Administrative, financial penalties often used in tax cases



“CRIMINAL CHARGE” AND TAX MATTERS

- Bendenoun v. France (12547/86) (100% penalty for *manoeuvres frauduleuses*)
- AP, MP & TP v. Switzerland (19958/92)
- JJ v. Netherlands (21351/93)
- Vaesteberga Taxi AB v. Sweden (36985/97) (20% penalty)
- Jussila v. Finland (73053/01) – (10% tax surcharge)
- Conclusion: tax-geared penalties for negligent/fraudulent conduct will generally involve a criminal charge



Article 6: Right to a fair trial – applicability in tax matters

- Summary:
 - Article 6 will not apply under its civil head to most ordinary tax disputes relating to the liability or quantum of tax
 - Article 6 will only apply under its civil head if the matter is properly characterised as a dispute concerning civil rights and obligations
 - Article 6 will apply under its criminal head to virtually all cases involving a tax-geared penalty or surcharge for careless / fraudulent conduct



Article 6: *Right to a fair trial – the rights guaranteed*

Rights in all cases:

- Right to a court
 - E.g. Ravon
 - No right to an oral hearing: Lehtinen v. Finland (32993/02) – issues of credibility
- Right to an independent and impartial tribunal
 - Yukos (14902/04)
- Right to a determination within a reasonable time – large number of cases – c. 300 cases
 - What is a determination within a reasonable time?



Article 6: *Right to a fair trial – the rights guaranteed*

Additional rights in criminal cases

- Presumption of innocence – onus on revenue authorities
- Legal aid (in principle)
- Right of silence
 - Abas v. Netherlands (27943/95)
 - Funke v. France (10828/84)
 - JB v. Switzerland (31827/96)
 - Chambaz v Switzerland (11663/04)
- Non-heritability of fines
 - AP, MP & TP v. Switzerland (19958/92)



Summary on Art. 6

- Not applicable to ordinary disputes over liability / amount of tax
 - Applies (under its criminal head) to most cases involving a penalty
 - Applies to the entire proceedings
 - Most significant is the reasonable time requirement
-
- No particular reason to anticipate a different application to companies



Article 1, First Protocol: *Protection of property*

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. ...

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary .. to secure the payment of taxes or other contributions or penalties.”



Article 1, First Protocol: *Protection of property*

- Taxation is *prima facie* an interference with the enjoyment of possessions
- Taxation is expressly provided for under the second paragraph
- Even so, taxes are subject to Convention scrutiny on various grounds (see next slides)
- States have a **wide margin of appreciation** in the choice of forms of taxation
- Often raised with Art. 14 (*Prohibition of discrimination*)



Article 1, First Protocol: *Protection of property*

- Grounds for scrutiny
 - Legal certainty
 - Not imposing an excessive and individual burden
 - Not disproportionate
 - Fair balance between interests of the community and protection of individual rights



Article 1, First Protocol: *Protection of property*

- Legal certainty - “Subject to the conditions provided for by law”
 - Spacek sro v. Czech Republic (26449/95)
 - Shchokin v Ukraine (23759/03)
 - Yukos (14902/04)
- Imposing an excessive and individual burden
 - Wasa Liv v. Sweden (13013/87)
 - NKM v Hungary (66529/11)
 - Gall v Hungary (49570/11)
 - RSz v Hungary (41838/11)



Article 1, First Protocol: *Protection of property*

- Retrospective legislation:
 - ABCD v. UK (8531/79)
 - Agurdino SRL v. Moldova (7359/06)
- Disproportionate legislation
 - Bulves AD v. Bulgaria (3991/03) – non-deductibility of input VAT
- No reason to anticipate a different application to companies (except in respect of individual burden)



Article 14: *Prohibition of discrimination*

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”



Article 14: and taxation

- Non-free-standing non-discrimination article – must be combined with another Convention right
- Clearly applies to taxation by combination with Article 1 of the First Protocol
- Discrimination: the application of different treatment to persons in objectively similar positions
- Can be justified if has a legitimate objective and not disproportionate
- States have a wide margin of appreciation in tax matters



Art. 14: tax cases

- Darby v. Sweden (11581/85) - residence
- Van Raalte v. Netherlands (20060/92) - men
- McGregor v. UK (30548/96) - women
- Crossland v. UK (36120/97) - men
- PM v. UK (6638/03) – unmarried couples
- Burden v. UK (13378/05) - siblings
- Courten v. UK (4479/06) – homosexual couples
- Glor v Switzerland (13444/04) – military service tax
- Cases all concern individuals – harder to see application to companies



Art. 8: Right to respect for private and family life

- “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of ... the economic well-being of the country...”



Art. 8: Right to respect for private and family life

- X (Hardy-Spirlet) v. Belgium (8904/82)
- Funke etc. v. France (10828/84)
- Tamosius v. UK (62002/00)
- Bernh Larsen Holdings AS v Norway (24117/08) – shared server
- Companies also enjoy the right to privacy; interference must be justified in the same way as for individuals; there may be a different balance in a democratic society between the rights of the company and the interests of society



5) SOME CONCLUDING COMMENTS

- Multinational companies and their rights under the ECHR in tax cases
- The same rights apply as for individuals
- A growing number of cases involve companies
- There may be slight differences in the application of rights



5) SOME CONCLUDING COMMENTS

- Standard setting for revenue authorities
- UN-inspired standard setting in many other areas – e.g. police, prisons, courts
- Virtually no similar process for revenue authorities
- The need to start the process



5) SOME CONCLUDING COMMENTS

- IFA General Report; *The Practical Protection of Taxpayers' Fundamental Rights* (100B Cahiers de Droit Fiscal International, 2015)

International Fiscal Association

2015 Basel Congress

cahiers de droit fiscal international

VOLUME 100B Offprint

The practical protection
of taxpayers'
fundamental rights



1938-2015



The IFA General Report

- Background: practical protection
- 12 areas: identifying taxpayers and communicating; issuing assessments; confidentiality; normal audits; more intensive audits; review and appeals; criminal and administrative sanctions; enforcement of taxes; cross-border procedures; legislation; revenue practice and guidance; institutional framework



The IFA General Report

- Methodology – branch reports
- List of minimum standards / best practices
- The questionnaire
- Results



Practical protection of Taxpayers' Rights in the various countries

- Luxembourg – 48
- Norway – 48
-
- UK – 29
- Sweden – 29
- Venezuela – 24
- Russia – 18
- Singapore – 18



What further can be done?

- Monitoring group
- No complacency
 - Erosion of protection with regard to exchange of information and notification / rights to challenge
- Oppose further erosion



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