# Taxation and the Right to property: case-law of the European Court of Human Rights [1]

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## Título

**La fiscalidad y el derecho de propiedad: jurisprudencia del Tribunal Europeo de Derechos Humanos**


## Resumen

El artículo ofrece una descripción general de los principios generales aplicados por el Tribunal Europeo de Derechos Humanos al examinar las quejas en virtud del Artículo 1 del Protocolo No. 1 al Convenio Europeo de Derechos Humanos sobre las medidas fiscales aplicadas por el estado. Destaca el amplio margen de maniobra otorgado a los estados en materia tributaria. El artículo describe además la prueba aplicada por el Tribunal al analizar un caso fiscal. Indica cuestiones particulares que pueden surgir en relación con elementos separados de la prueba, como el concepto de posesiones, la calidad de las normas tributarias, la carga individual y excesiva, la retroactividad de las normas, las medidas de austeridad y las garantías procesales en los procedimientos tributarios.



## Palabras clave

Tributación; derecho de propiedad; Tribunal Europeo de Derechos Humanos; medidas fiscales; procedimiento tributario.



## *Abstract*

The article gives an overview of the general principles applied by the European Court of Human Rights when examining the complaints under Article 1 of Protocol No. 1 to the European Convention on Human Rights about fiscal measures applied by the state. It emphasises the wide margin of appreciation afforded to the states in tax matters. The article further describes the test applied by the Court when analysing a tax case. It indicates particular issues that might arise in relation to separate elements of the test such as the concept of possessions, quality of fiscal laws, individual and excessive burden, retroactive legislation, austerity measures and procedural safeguards in tax proceedings.



## *Keywords*

Taxation; right to property; European Court of Human Rights; fiscal measures; tax proceedings.

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## Sumario

## 1. General principles

Article 1 of Protocol No. 1 to the European Convention on Human Rights (hereinafter – Convention), which guarantees the right to property, provides:

*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 control the use of property in accordance with the general interest or* ***to secure the payment of taxes or other contributions*** *or penalties.*

Based on the results of the agreement between the Contracting Parties, Article 1 of Protocol No. 1 guarantees not absolute, but limited ownership, leaving the state wide discretion for taking various fiscal measures. This is the only provision in the Convention which makes express reference to taxation[3]. It affords, however, a **wide margin of appreciation to the States in framing and implementing policy in the area of taxation**[4]. It is first and foremost for the national authorities to decide on the type of tax or contributions they wish to levy. Decisions in this area normally involve, in addition, an assessment of political, economic and social problems which the Convention leaves to the competence of the member States, as the domestic authorities are clearly better placed than the Convention organs to assess such problems[5].

The European Court of Human Rights (hereinafter – the Court) will therefore **respect the legislature's assessment in taxation matters unless it is devoid of reasonable foundation**[6]. In other words, the state is authorised to collect taxes as an exception to the general principle of protecting property rights, while providing guarantees against illegal and arbitrary actions of national authorities.

When analysing a particular tax case under Article 1 of Protocol No. 1, the European Court of Human Rights applies a standard approach ("test"):

(1) whether the applicant had "possessions";

(2) whether there was an interference with the right to property by the respondent state;

(3) whether the interference was lawful;

(4) whether it pursued a legitimate aim;

(5) whether a fair balance was struck between the competing public and private interests.

## 2. The concept of possessions

The Court has constantly held that the concept of "possessions" in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "possessions". The issue

3 Baker, Ph. (2000) 'Taxation and the European Convention on Human Rights', *British Tax Review*, p. 217.

4 *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, § 60, Series A no. 306-B.

5 *Musa v. Austria*, no. 40477/98, Commission decision of 10 September 1998; *Lindsay v. United Kingdom*, no. 11089/84, Commission Decision of 11 November 1986.

6 *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, 23 October 1997, § 80, *Reports of Judgments and Decisions* 1997-VII.

that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a *substantive interest* protected by Article 1 of Protocol No. 1[7]. In relation to taxation the concept of possessions covers:

1) **existing property** – tax payments, tax arrears, interest accrued to the unpaid taxes, surcharges for tax offences;

2) **legitimate expectation for the emergence of property rights** – right to claim a deduction of input VAT paid to supplier or VAT refund; compensation for taxes paid in error; tax rebate; payment of interest on the amount overpaid to the treasury.

The necessary condition for a legitimate expectation to appear is compliance with the rules set by the domestic legislation; the proprietary interest has to be recognized by law. A mere hope does not amount to a legitimate expectation[8].

## 3. Interference with the property right and three rules

Taxation always constitutes an interference with the right to property because it deprives a taxpayer of his or her possessions: the amount of money to be paid in the form of fees, taxes or other contributions; sanctions for failure to comply with tax legislation; refusal of the state authorities to reimburse the amounts overpaid or erroneously paid to the treasury etc. Bearing this in mind, the Court will examine whether there has been an interference with the applicant's rights in the context of one of three distinct rules comprised in Article 1 of Protocol no. 1.[9]

**The first rule**, which is **of a general nature**, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph.

**The second rule covers deprivation of possessions** and subjects it to certain conditions; it appears in the second sentence of the same paragraph.

**The third rule** recognises that the States are entitled, amongst other things, **to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties**, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.

The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, must be construed in the light of the general principle laid down in the first rule. The Court usually examines tax cases in the light of the first rule of a general nature, although the more natural approach would be to examine them under the third rule.[10]

## 4. Lawfulness of interference

In so far as the tax sphere is concerned, the Court's well-established position is that States may be afforded some degree of additional deference and latitude in the exercise of their fiscal functions under

7 *Beyeler v. Italy* [GC], no. 33202/96, § 100, ECHR 2000-I.

8 See, for example, *Buffalo S.r.l. en liquidation v. Italy*, no. 38746/97, § 29, 3 July 2003.

9 *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 61, Series A no. 52

10 *S.A. Dangeville v. France*, no. 36677/97, § 51, ECHR 2002-III.

the lawfulness test[11]. Article 1 of Protocol no. 1 reserves the **States' power to pass whatever fiscal laws they consider desirable**, provided always that measures in this field did not amount to arbitrary confiscation[12].

**The concept of "law" comprises statutory law as well as case-law**. Clear, consistent and publicly available case-law, which is based on a reasonable interpretation of the primary legislation, may provide a sufficient basis for "lawful" interference[13]. The law is also to be understood in its substantive sense, covering not only laws enacted by the legislature but also decrees or rulings issued by the executive authorities[14].

The Court usually draws no distinction between **procedural tax laws**, that is to say laws which regulate the formalities of taxation, including the enforcement of tax debts, or **substantive tax laws** which lay down the circumstances under which tax is due and the amounts payable[15].

The existence of a legal basis in domestic law does not suffice, in itself, to satisfy the principle of lawfulness. It must have **a certain quality**, namely it must be **accessible, precise and foreseeable** in its application.

(1) Accessibility – the domestic tax provisions must be available to general public, but the Convention does not require a particular manner of publishing tax rules[16];

(2) Requirement to be precise – many laws are inevitably couched in general terms the interpretation and application of which will be settled by practice; in such case particular importance may be attached to the way in which domestic courts interpreted legal provisions;

(3) Foreseeability – the law should afford a measure of protection (minimum procedural safeguards) against arbitrary interferences by the public authorities[17].

The Court has acknowledged in its case-law that in any system there is an inevitable element of **judicial interpretation,** and it is primarily for the national courts to interpret and apply domestic law and to establish the facts of the case. However, the Court is required to verify whether the way in which the domestic law in interpreted and applied produces consequences that are consistent with the principles of the Convention[18] (*Masa Invest Group v. Ukraine* (dec.); *Khodorkovskiy and Lebedev v. Russia*).

## 5. Legitimate aim

In view of the wide margin of appreciation allowed to the State in matters of economic and social policy, **fiscal measures taken by the state are presumed to be carried out in public interest**, for example:

- to secure the payment of taxes[19],

11 *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, §§ 75-83.

12 *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, § 59.

13 *Khodorkovskiy and Lebedev v. Russia,* nos. 11082/06 and 13772/05, § 881, 25 July 2013.

14 *Cantoni v. France*, 15 November 1996, Reports 1996-V, p. 1627, § 29.

15 *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, § 60.

16 *Špaček, s.r.o., v. the Czech Republic*, no. 26449/95, § 57, 9 November 1999.

17 *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 143, ECHR 2012.

18 *Masa Invest Group v. Ukraine*, no. 3540/03, 11 October 2005.

19 *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, § 606, 20 September 2011.

- to ensure the sense of social justice of the population in combination with the interest to protect the public purse and to distribute the public burden [20],
- to preserve the financial stability of the VAT system of taxation with its complex rules [21].

But in *Joubert v. France* [22] the Court found that the impugned measure was not taken in public interest because the need to protect financial interests of the State by creating conditions for reducing the number of complaints against the decisions of tax authorities was not justified.

## 6. Proportionality of interference

An interference, including the one resulting from a measure to secure payment of taxes, must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights: **there must be a reasonable relationship of proportionality between the means employed and the aims pursued** [23].

(1) **Material facet** – whether the applicant borne an excessive individual burden or his financial situation was sufficiently undermined by the impugned measure;

(2) **Procedural aspect** – implies the taxpayer's opportunity to challenge a fiscal measure in the authorised body and within an adversarial procedure;

(3) **Retrospective tax legislation** – is seen through the wide margin of appreciation afforded to the States in framing and adopting tax policies; compatibility with Article 1 of Protocol No. 1 depends on (i) the reasons for the retroactivity, and (ii) the impact of the retroactive law on the applicant.

## 7. Particular issues under Article 1 of Protocol No. 1 to the ECHR

There are some particular issues that arise under Article 1 of Protocol No. 1 to the Convention in relation to tax matters. They concern VAT cases; quality of fiscal laws; individual and excessive burden; retroactive legislation; austerity measures; and procedural safeguards in tax proceedings.

### 1. VAT cases

*Intersplav v. Ukraine*, no. 803/02, 9 January 2007

*"Bulves" AD v. Bulgaria*, no. 3991/03, 22 January 2009

*Business Support Centre v. Bulgaria*, no. 6689/03, 18 March 2010

*Euromak Metal Doo v. "The Former Yugoslav Republic of Macedonia"*, no. 168039/14, 14 June 2018

*Nazarev and Others v. Bulgaria* (dec.), nos. 26553/05 etc., 25 January 2011

*Atev v. Bulgaria (dec.),* no. 39689/05, 18 March 2014

20 *R.Sz. v. Hungary*, no. 41838/11, § 48, 2 July 2013.

21 *"Bulves" AD v. Bulgaria*, no. 3991/03, § 65, 22 January 2009.

22 No. 30345/05, §§ 62-65, 23 July 2009.

23 *M.A. and 34 Others v. Finland* (dec.), no. 27793/95, 10 June 2003.

*OOO Khabarovskaya Toplivnaya Kompaniya v. Russia (dec.)*, no. 10114/06, 19 September 2017

There are quite a few VAT cases examined by the European Court of Human Rights. The main issues that arise during their examination concern the concept of possessions, proportionality of interference and fraudulent abuse of the VAT system of taxation.

## 1. Possessions

**The rules governing the VAT system of taxation are exclusively set and regulated by the State**[24]. The companies have limited or no choice as to whether and how they would participate in the VAT system of taxation, once they enter into contractual relationships. Right to deduct the input VAT paid to the suppliers is one of the benefits allowed by the system.

The necessary condition for a legitimate expectation to appear is **compliance with the rules set by the domestic legislation**: the proprietary interest has to be recognized by law.

**1. Right to claim a deduction of input VAT paid to supplier** is a legitimate expectation.

• In *"Bulves" AD v. Bulgaria* the applicant company had complied fully and in time with the VAT rules set by the State, had no means of enforcing compliance by its supplier and had no knowledge of the latter's failure to report the VAT. It could therefore justifiably expect to be allowed to deduct the input VAT it had paid to its supplier[25].

• Similar approach taken in *Atev v. Bulgaria*, where the authorities refused to recognise the applicant's right to have input VAT deducted on account of his supplier's failure to discharge his own VAT-reporting obligations[26].

• *In Nazarev and Others v. Bulgaria* (the first application) the Court had doubts to whether the applicant had a legitimate expectation that he would be allowed to deduct VAT owing to his failure to exercise special diligence required of VAT registered persons by verifying whether his suppliers had a valid VAT registration.

**2. VAT refund** is a proprietary interest recognized by law.

• In *Intersplav v. Ukraine* the Court noted that the dispute did not concern the particular amount of a VAT refund or of compensation for the delay, but **the applicant's general entitlement under the law to VAT refunds and compensation**. Having met the criteria and requirements established by the domestic legislation, the applicant could reasonably expect the refund of the VAT it had paid in the course of its business activities, as well as compensation for any delay. Prior judicial review of a claim is not required to validate eligibility for a refund[27].

• In *Khabarovskaya Toplivnaya Kompaniya v. Russia* the Court had to assess whether the applicant had a legitimate expectation to obtain the VAT refund on the basis of the domestic law provisions, as interpreted by the domestic courts. The Court reviewed their findings and found that (i) the applicant company has not satisfied one of the necessary conditions to benefit from VAT refund, that is the reality of transactions with suppliers; (ii) the suppliers' invoices contained false addresses and unclear information about these companies' managers; (iii) the suppliers failed to comply with their VAT reporting obligations. The domestic courts' decisions were not arbitrary or manifestly unreasonable;

24 *"Bulves" AD v. Bulgaria*, no. 3991/03, § 56, 22 January 2009.

25 § 57.

26 §§ 21 and 26.

27 § 31.

the applicant therefore did not satisfy certain conditions in order to benefit from VAT refund. Conclusion: **no legitimate expectation of the VAT refund**, complaint was declared inadmissible [28].

## 2. Proportionality of interference

In "*Bulves" AD* the Court established its approach to analysing the proportionality of the interference in similar cases. It found that the interference was disproportionate as a result of a **rigid interpretation of the relevant legislation by the domestic authorities, in that the refusal of VAT deduction was automatic and without adequate review of relevant factors**, such as:

**(i)** the timely and full discharge by the applicant company of its VAT reporting obligations;

**(ii)** the applicant company's inability to secure compliance by its supplier with its VAT reporting obligations;

**(iii)** the fact that there was no fraud in relation to the VAT system of which the applicant company had knowledge or the means of obtaining such knowledge [29].

Applying this approach, in "*Bulves" AD* the Court held that the applicant company had no power to monitor, control or secure compliance by its supplier with its VAT reporting, filing and payment obligations. It was placed in a **disadvantaged position** by having no certainty as to whether, in spite of its own full compliance, it would be able to deduct the input VAT it had paid to its supplier.

• In *Atev v. Bulgaria* the Court found that (i) the applicant had complied diligently with the VAT provisions; (ii) the tax authorities imposed the burden of the supplier's failure to maintain his accounting records entirely on the applicant who had no power to secure the supplier's compliance with his VAT reporting obligations; (iii) there was no indication that there was any fraud in relation to the VAT system of which the applicant had knowledge or the means of obtaining such knowledge [30]. A similar rigid approach was applied to the applicant as in "*Bulves" AD*. But the Court accepted in that case **a more rigid approach applied by the authorities towards diligent traders with the aim of securing the collection of taxes**. The applicant's situation was further balanced by the possibility to seek and obtain compensation from his supplier within the framework of civil proceedings for damages. The complaint was therefore declared manifestly ill-founded [31].

• In *Nazarev and Others v. Bulgaria* the applicants' complaints about the authorities' refusals to deduct the input VAT paid to suppliers were declared inadmissible because **the domestic authorities had carried out a thorough and individualised review of the relevant circumstances**. Another important finding: the system of cross-checks and inspections by the tax authorities is justified by the need to preserve the financial stability of the VAT system.

## 3. Fraudulent abuse of the VAT system of taxation

• **The attempts to abuse the VAT system of taxation need to be curbed**; it may be reasonable for domestic legislation to require special diligence by VAT-registered persons in order to prevent such abuse.

• When Contracting States possess information about such an abuse by a specific individual or entity, **they can apply appropriate measures to prevent or stop such abuses** [32].

28 §§ 60-70 and 75-76.

29 §§ 67-70.

30 § 31.

31 §§ 34-37.

32 *Intersplav v. Ukraine*, § 38.

• But **in the absence of any indication of direct involvement by an individual or an entity in fraudulent abuse of a VAT chain of supply, the authorities cannot penalise such individual** or an entity by refusing his/its rights to a VAT refund or deduction of input VAT[33].

## 2. Quality of fiscal laws

*Špaček, s.r.o., v. the Czech Republic*, no. 26449/95, 9 November 1999

*OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, 20 September 2011

*Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, 25 July 2013

*Masa Invest Group v. Ukraine* (dec.), no. 3540/03, 11 October 2005

### 1. Accessibility

• In *Špaček, s.r.o. v. the Czech Republic* the Court found that the Rules and Regulations issued by the Ministry of Finance could not constitute binding legislative or regulatory instruments owing to the lack of their official publication. However, the term 'law' is to be understood in its substantive sense and **the Convention contains no specific requirements as to the degree of publicity to be given to a particular legal provision**[34].

• It is not the Court's task to express a view on the appropriateness of the methods chosen by the legislature of a Contracting State, or to decide on whether the manner of publishing tax and accounting principles is compatible with the requirements of national law. **Its task is confined to determining whether the methods applied by the Contracting State are in conformity with the Convention.**

• In the particular circumstances of the case, the Court found that Špaček SW, when changing from single to double-entry book-keeping, had been aware of the way in which the Ministry of Finance published its accounting principles and could easily have sought information about any possible transitional provisions, **if necessary with the advice of specialists**[35].

### 2. Requirement to be sufficiently precise

Many laws are inevitably couched in general terms, the interpretation and application of which will be settled by practice. Attaining absolute precision in the framing of laws, especially in the sphere of taxation, is impossible[36].

• In the case of *Masa Invest Group v. Ukraine* the Court considered that **the domestic courts' decisions imposing 20% VAT rate on the applicant's transactions were substantiated and based on law**. Moreover, the applicant had a full opportunity to defend its interests and put forward all necessary evidence and arguments.

• On the contrary, in *Khodorkovskiy and Lebedev v. Russia* the Court held that **neither the primary legislation in force nor the case-law allowed for the imposition of civil liability for unpaid company taxes on the applicants who were company's executives**. Therefore, the recovery of these taxes in favour of the tax service was made by the district court in an arbitrary fashion and contrary to Article 1 of Protocol No. 1 to the Convention[37].

33 *"Bulves" AD v. Bulgaria*, § 70.

34 § 5.

35 § 59.

36 *Timinskiy v. Russia* (dec.), no. 74947/01, 11 September 2007.

37 § 885.

### 3. Foreseeability

The law should enable a person or a company to foresee the consequences of his/her or its conduct.

• In *OAO Neftyanaya Kompaniya Yukos v. Russia* the Court considered that the Constitutional Court's decision of 2005 represented a reversal and departure from the well-established practice of the commercial courts. There was no clear guidance to the applicant company in 2000 that taxpayers acting in bad faith could face unfavourable legal consequences (as established by the Constitutional Court in 2005). The Court found a violation of Article 1 of Protocol no. 1 on account of **the change in interpretation of the rules on the statutory limitation period** resulting from the above-mentioned decision [38].

### 3. Individual and excessive burden

*Joubert v. France*, no. 30345/05, 23 July 2009

*N.K.M. v. Hungary*, no. 66529/11, 14 May 2013

*R.Sz. v. Hungary*, no. 41838/11, 02 July 2013

*Cacciato v. Italy* (dec.), no. 60633/16, 16 January 2018

*Guiso and Consiglio v. Italy* (dec.), no. 50821/06, 16 January 2018

*Imbert de Trémiolles v. France* (dec.), nos. 25834/05 and 27815/05, 4 January 2008

Within the proportionality test the Court will analyse whether a taxpayer borne an excessive individual burden or his/her/its financial situation was sufficiently undermined by the impugned measure. **The mere fact that the tax rate is very high does not *per se* give rise to a breach**; the Court will examine the applicant's financial situation.

• In the case of *Imbert de Trémiolles v. France* the applicants complained that their assets were subject to the wealth tax provided for in the General Tax Code. The Court took into account that (i) the wealth tax was payable by individuals whose net taxable assets exceeded a certain value; (ii) it has been introduced as a solidarity tax, to serve the public interest by financing the part of the minimum welfare benefit; (iii) the wealth tax had not actually caused the applicants' assets to diminish, as their own declarations showed a substantial increase. In view of margin appreciation which the States were afforded in this sphere, the Court found that the **payment of this tax had not affected the applicant's financial situation seriously enough for the measure to be considered disproportionate** or an abuse of a State's right to secure the payment of taxes and other contributions.

• On the contrary, in case of *R.Sz. v. Hungary*, the Court found that the 98% tax rate on the severance pay in part exceeding €11,900 entailed an excessive and individual burden on the applicant's side. The Court specified that the applicant had suffered a substantial deprivation of income in a period of presumable considerable personal difficulty owing to the termination of his employment [39] (similar findings in *N.K.M. v. Hungary* where the applicant complained about imposition of a 52% tax on her severance pay [40]).

38 §§ 563-575.

39 §§ 54-62.

40 §§ 65-76.

• In *Cacciato v. Italy*[41] *and Guiso and Consiglio v. Italy*[42] **the imposition of the 20% tax** on the compensation for the expropriation of land was within the authorities' margin of appreciation and **had not led to** the compensation awards being effectively nullified or **to undue financial hardship for the applicants**.

• In *Joubert v. France* the Court considered that **an individual and excessive burden had been placed on the applicants on account of the impossibility to complain about the illegality of tax authorities' measures to the courts** (on the basis of the relevant legal provision). Moreover, they had been deprived of a possession which they might have expected to have reimbursed (supplementary tax imposed on capital gains resulting from the sale of shares in a company).

Interestingly, in the case *Michel Bourgès-Maunoury, Marie-Louise Heintz v Direction des services fiscaux d'Eure-et-Loir* concerning the compatibility with the European Union primary law of a national provision on the procedure for calculating a wealth tax, Advocate General of the Court of Justice Cruz Villalón reiterated that the principle that **rules governing tax law and the exercise of fiscal power must not have confiscatory effects** is a "well-known and widely-recognised idea"[43].

## 8. Retroactive legislation

*A, B, C and D v. the United Kingdom*, no. 8531/79, Commission decision of 10 March 1981

*National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, no. 21319/93 and 2 others, 23 October 1997

*Di Belmonte v. Italy*, no. 72638/01, 16 March 2010

*N.K.M. v. Hungary*, no. 66529/11, 14 May 2013

*Arnaud and Others v. France*, nos. 36918/11 and 5 others, 15 January 2015

*M.A. and 34 Others v. Finland* (dec.), no. 27793/95, 10 June 2003

*Di Belmonte (no. 2) v. Italy* (dec.), no. 72665/01, 3 June 2004

*Huitson v. the United Kingdom* (dec.), no. 50131/12, 13 January 2015

Retrospective legislation is not as such prohibited by Article 1 of Protocol No. 1. **The public interest may override the interest of the individual** in knowing his or her tax liabilities in advance (wide margin of appreciation of the State).

Such interference may be justified if technical shortcomings in that existing legislation require reparation. This may be the case, for example, when taxpayers have tried to profit from a loophole in the law (a 'windfall') and the new regulation purports to prevent this (*National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*).

• In *Arnaud and Others v. France* the Court considered that **retroactive liability of French nationals residing in Monaco to wealth tax** (i) had intended to combat tax evasion, namely the settling of French nationals in Monaco with the sole aim of avoiding wealth-tax liability in respect of their assets located outside France, and (ii) had not imposed an excessive burden on the applicants who

41 §§ 26-32.

42 §§ 45-50.

43 Case C-558/10, *Michel Bourgès-Maunoury, Marie-Louise Heintz v Direction des services fiscaux d'Eure-et-Loir,* 12 Dec 2011, OJ C-46, 12, Opinion of AG Villalón.

had been provided with prior information enabling them to anticipate the effects of the retrospective application of law[44].

• In *Huitson v. the United Kingdom* the Court accepted that **the State was entitled to legislate retroactively** in order to prevent the applicant from misusing the double taxation treaty between the UK and the Isle of Man in such a way as to reduce his effective income tax rate to a very low percentage, cutting his expenses and securing for him an unfair advantage over commercial competitors. Moreover, the applicant did not have to bear an individual or excessive burden because he was properly informed and advised to pay the income tax that was properly due, but he chose not to do so[45].

• But in *Di Belmonte v. Italy* the Court considered that **the applicant had borne an excessive burden on account of tax liability arising out of delays by authorities in complying with the court order to pay compensation for expropriation**. Prior to the entry into force of the law, compensation for expropriation had not been taxable, but after the entry (which was more than 7 months after the date the judgment awarding compensation became final) the applicant had to pay 20% tax. The compensation would not have been subject to the tax provided for the new tax legislation if the judgment awarding it had been complied with properly and timely[46].

• However, in *Di Blmonte (no. 2) v. Italy* **the retrospectivity of the tax legislation was deemed not disproportionate because of the brevity of the time that had passed between the taxable event** (the fact of a judgment awarding the applicant compensation for expropriated property becoming final) **and the entry into force of the legislation in issue** (20 days), and also because of the relatively limited financial impact of the tax in issue (20% of the property value).

**Taxation at a considerably higher tax rate than that in force when the revenue in question was generated can arguably be regarded as an unreasonable interference** with rights protected by Article 1 of Protocol No. 1.

• In *M.A. and Others v. Finland* the Court found that (i) the retrospective enactment of legislation was aimed at pre-empting the unintended application of a more favourable tax rate to gains resulting from the exercise of stock options before the due date originally set, and (ii) the measure had not imposed an excessive burden on the applicants, taking into account the maximum percentage of the tax levy (60% for ordinary income) and the fact that the levy, which in part was a reflection of the very high general income level of the applicants, was based on real profits made from the sale of the stock options.

## 1. Austerity measures

*Da Silva Carvalho Rico v. Portugal* (dec.), no. 13341/14, 1 September 2015

*P. Plaisier B.V. and Others v. the Netherlands* (dec.), no. 46184/16 and 2 others, 14 November 2017

**The Court had considered austerity measures, some of them highly intrusive, taken by Contracting Parties in response to the financial crisis that has beset Europe since 2008, not violating Article 1 of Protocol No. 1.** It stressed that the countries were entitled to take far-reaching measures to bring the economy back into line with their international obligations. Their margin was even wider when the issues involved an assessment of the priorities as to the allocation of limited State resources. The only issue that arises in these cases is **whether the applicant was imposed an individual and excessive burden**[47].

44 §§ 28-32.

45 §§ 29-35.

46 §§ 42-47.

47 *P. Plaisier B.V. and Others v. the Netherlands*, §§ 72-76 and 82.

• In *P. Plaisier* the Court considered that levy of high-wages tax surcharge on employers in response to sovereign debt crisis was not disproportionate, in particular, because it was for the State to choose the best solution for dealing with the economic problem [48].

• In *Da Silva Carvalho Rico* the Court examined the temporary extraordinary solidarity contribution which reduced the applicant's pension income by 4,6%, which was introduced to reduce public spending and achieve medium-term economic recovery. It considered that the applicant had not suffered a substantial deprivation of income, and that the measure was temporary. Moreover, it was not for the European Court to decide whether alternative measures could have been envisaged in order to reduce the State budget deficit and overcome the financial crisis [49].

## 2. Procedural safeguards in tax proceedings

*AGOSI v. the United Kingdom*, no. 9118/80, 24 October 1986

*Hentrich v. France*, no. 13616/88, 22 September 1994

*S.A. Dangeville v. France*, no. 36677/97, 16 April 2002

*Jokela v. Finland*, no. 28856/95, 21 May 2002

*Rousk v. Sweden*, no. 27183/04, 25 July 2013

Although the second paragraph of Article 1 of Protocol No. 1 contains no explicit procedural requirements, the Court must consider whether the applicable procedures were such as to enable, amongst other things, reasonable account to be taken of the degree of fault or care of the taxpayer or, at least, of the relationship between his conduct and the breach of the law. Besides, procedural criterion implies that **the procedures in question should afford the taxpayer a reasonable opportunity of putting his case to the responsible authorities**. In ascertaining whether these conditions were satisfied, a comprehensive view must be taken of the applicable procedures [50].

• In the case of *Jokela v. Finland* the applicants unsuccessfully challenged the market value of their property, on the basis of which the inheritance tax was calculated. The Court considered, inter alia, that **since the applicants enjoyed the benefit of adversarial court proceedings, the fixing of the inheritance tax did not exceed the State's wide margin of appreciation in this field** [51].

• In *Hentrich v. France* the Court considered that as a selected victim of the exercise of the right of pre-emption by the state, **the applicant had borne and individual and excessive burden which could have been rendered legitimate only if she had had the possibility** – which was refused her – **of effectively challenging the measure taken against her**. The "fair balance" was therefore upset.

• In *Dangeville v. France* the Court held that **an inability to obtain the reimbursement of overpaid tax** in respect of which the domestic authorities acknowledged that it had been paid in violation of the applicable substantive law **gave rise to a violation**. Both the negation of the applicant company's claim against the State and the absence of domestic procedures affording a sufficient remedy to ensure the protection of the applicant company's right to peaceful enjoyment of possessions upset the fair balance [52].

48 §§ 84-98.

49 §§ 43-45.

50 *AGOSI v. the United Kingdom*, § 55.

51 § 60.

52 § 61.

• In *Rousk v. Sweden* enforcement measures in the context of tax proceedings which were not automatically suspended when a debtor appealed against them were considered acceptable and falling within the State's wide margin of appreciation. However, **these proceedings must be accompanied by procedural safeguards to ensure that individuals are not put in a position where their appeals are effectively circumscribed and they are unable to protect their interests effectively**[53]. In particular, there should be a reasonable degree of communication between the public authorities involved, allowing for protection of the taxpayers' rights.

## 9. Conclusion

This palette of cases shows that various issues might arise under Article 1 of Protocol No. 1 in relation to tax matters. While the wide margin of appreciation of the State in adopting and framing its fiscal policy is recognised by the Court, it is indispensable that measures taken in respect of taxpayers are not illegal and arbitrary, the assessment to be given in each particular case.

53 § 117.