



# Human Rights and Taxation in Europe and the World

Edited by **Georg Kofler**  
**Miguel Poiaras Maduro**  
and **Pasquale Pistone**

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# Human Rights and Taxation in Europe and the World

## Why this book?

The increasing globalization and the restructuring of the European legal framework by the Treaty of Lisbon are important factors to suggest that the traditional separation of spheres between taxation and human rights should be revisited. This book examines the issues surrounding the impact of the Lisbon Treaty on the guarantee and enforcement of human rights in the area of EU (tax) law and explores the possible development and potential impact of human rights in the field of taxation in this age of global law.

## GREIT Conference

The book is the outcome of the fifth annual conference of the GREIT (Group for Research on European and International Taxation) hosted in Florence in 2010.

<b>Title:</b>	Human Rights and Taxation in Europe and the World
<b>Editor(s):</b>	Miguel Poiares Maduro, Pasquale Pistone et al
<b>Date of publication:</b>	October 2011
<b>ISBN:</b>	978-90-8722-111-9
<b>Type of publication:</b>	Print Book
<b>Number of pages:</b>	556
<b>Terms:</b>	Shipping fees apply. Shipping information is available on our website
<b>Price:</b>	EUR 120 / USD 160 (VAT excl.)

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**Table of contents**

**Preface** xxi

Part One  
General Issues on Taxation  
and Human Rights

**Chapter 0: General Report** 3  
*Georg Kofler and Pasquale Pistone*

Introduction 3

0.1. The EU and the European Convention on Human Rights 4

0.2. A European international tax policy for human rights? 8

0.3. Human rights, their enforcement, economic policy  
and international taxation in the era of global law 11

0.4. The era of global law and the search for constitutional pluralism 14

0.5. The impact of human rights on domestic substantive taxation 17

0.6. The impact of human rights on tax procedures and sanctions 21

0.7. The impact of human rights on tax litigation before the courts 27

Part Two  
The EU and the European Convention  
on Human Rights

**Chapter 1: The Human Rights Competence in the EU**  
**The State of the Question after Lisbon** 37  
*Samantha Besson*

1.1. Introduction 37

1.2. The EU human rights competence 40

1.2.1. The origins 41

1.2.2. The legal regime 43

1.2.2.2. The internal competence 44

1.2.2.2.1. The scope 44

1.2.2.2.2. The content 45

1.2.2.2.3. The type 46

1.2.2.2.4. The allocation 47

1.2.2.3. The external competence 48

1.2.3.	The consequences	50
1.3.	A general critique	51
1.3.1.	The theoretical critique	51
1.3.2.	The practical critique	53
1.4.	The human rights competence after the EU's accession to the ECHR	55
1.4.1.	The ECHR in the EU legal order	55
1.4.2.	The accession mandate	56
1.4.3.	The competence question	57
1.4.3.1.	The status quo proposal	57
1.4.3.2.	Theoretical plausibility	58
1.4.3.3.	Practical feasibility	60
1.5.	Conclusion	62
<b>Chapter 2: Fundamental Rights and Fundamental Boundaries in EU Law</b>		<b>65</b>
<i>Daniel Sarmiento</i>		
2.1.	Introduction	65
2.2.	In the beginning ...	66
2.3.	Underlying tensions	68
2.4.	Justifying change	71
<b>Chapter 3: EU Human Rights and the Reserved Powers of the Member States</b>		<b>75</b>
<i>Loïc Azoulay</i>		
3.1.	Introduction	75
3.2.	Implementing EU law	76
3.3.	Derogating from EU law	77
3.4.	Exercising a reserved power	79
<b>Chapter 4: The ECHR Principles as Principles of European Law and their Implementation through the National Legal Systems</b>		<b>83</b>
<i>Lorenzo del Federico</i>		
4.1.	Introduction	83
4.2.	The traditional limits and the interpretive methods to overcome the dichotomy between “civil rights” and “criminal charges”	85
4.3.	The force of expansion of the ECtHR in tax matters	87
4.4.	The ECHR principles as general principles of European law	88

4.5.	The European Court of Justice and the ECHR principles relevant in tax matters	89
4.6.	Conclusions	90

Part Three  
A European International Tax Policy  
for Human Rights?

<b>Chapter 5: The Role of Individual Rights in the Europeanization of Tax Law</b>	95
<i>Theodoros P. Fortsakis</i>	

5.1.	Introduction	95
5.2.	What do we mean by “Europeanization” of tax law?	96
5.3.	Is it necessary for tax law to be “Europeanized”?	96
5.4.	What exactly is the European dimension of individual rights in tax law?	97
5.5.	Do individual rights contribute to the “Europeanization” of tax law in a different way from that in which they contribute to other branches of law – administrative law in particular, and public law more generally?	99
5.6.	Are the autonomous status, pragmatism and empiricism of tax law obstacles to the recognition and realization of individual rights in its field?	102
5.7.	Will the “Europeanization” of tax law through individual rights influence the content of the concept of tax? Will it influence our perception of the taxpayer? Will it gradually bring about changes in our current perception of tax law?	102

<b>Chapter 6: Taking Human Rights Seriously: Some Introductory Words on Human Rights, Taxation and the EU</b>	105
<i>Daniel Gutmann</i>	

<b>Chapter 7: The Role of the EU in International Tax Policy and Human Rights Does the EU need a policy on taxation and human rights?</b>	113
<i>Cécile Brokelind</i>	

7.1.	Introduction	113
7.2.	Which human rights may a taxpayer invoke?	115

7.3.	The role of the OECD protecting taxpayers' rights	119
7.4.	The role of the EU in protecting taxpayers' rights	122
7.5.	Concluding remarks	126

Part Four  
Enforcement, Economic Policy  
and International Taxation

<b>Chapter 8: Information Duties, Aggressive Tax Planning and <i>nemo tenetur se ipsum accusare</i> in the light of Art. 6(1) of ECHR</b>	131
<i>Ana Paula Dourado and Augusto Silva Dias</i>	

8.1.	Introduction	131
8.2.	Taxation of real and net income and cooperation duties	132
8.3.	Cooperation and information duties and their boundaries in a rule of law state	133
8.4.	Art. 6 ECHR and the right to a fair trial	135
8.5.	Different legal solutions to comply with <i>nemo tenetur</i> : The case of advance pricing agreements	141
8.6.	The Portuguese tax regime on information, communication and clarification duties	143
8.7.	Object and scope of the duties to communicate, inform and clarify the tax administration in the light of Art. 6(1) ECHR	144
8.7.1.	Scheme or action and tax advantage	144
8.7.2.	Promoters and users of tax schemes or actions	146
8.7.3.	Cooperation duties vs offences and penalties	147
8.8.	The legal guarantees of <i>nemo tenetur se ipsum accusare</i>	149
8.9.	Cooperation duties and the duty of professional secrecy	150
8.10.	Concluding remarks	151

<b>Chapter 9: Is there a Need for International Enforcement of Human Rights in the Tax Area?</b>	153
<i>Servaas van Thiel</i>	

9.1.	Introduction	153
9.2.	Does international law have an impact in the area of taxation?	155
9.2.1.	International law is often ignored by tax lawyers, but...	155

9.2.2.	International law legitimizes the exercise of tax jurisdiction	156
9.2.3.	International law is instrumental in relations between tax jurisdictions	157
9.3.	Does international law have a normative impact in the area of taxation?	159
9.4.	Which substantive norms of international law could have an impact on tax jurisdiction of states?	164
9.4.1.	International customary law	164
9.4.2.	International economic law	166
9.5.	Could international human rights norms have an impact in the area of taxation?	169
9.6.	Is there a need for international enforcement of international human rights norms that could have an impact in the area of taxation?	174
9.7.	Conclusions	181

## Part Five

### The Era of Global Law and the Search for Constitutional Pluralism in Taxation

<b>Chapter 10: Global Law and the Search for Constitutional Pluralism</b>	<i>Frans Vanistendael</i>	185
10.1.	Introduction	185
10.2.	Worldwide tax trends towards uniformity	186
10.2.1.	The long march of VAT/GST	186
10.2.2.	Dominance of model tax conventions and the arm's length pricing principle	187
10.2.3.	A trend towards transparency through exchange of information	188
10.2.4.	The trend towards general anti-abuse or anti-avoidance provisions (GAAP)	189
10.2.5.	Is there a common language moving towards global law in international taxation?	191
10.3.	Global solutions for global problems	192
10.3.1.	Globalization of problems	192
10.3.2.	The new nature of global tax problems	193
10.3.3.	Structures for global decision-making	194
10.4.	A cluster of regional structures as solution?	195

10.4.1. The EU as a regional solution	195
10.4.2. Could the EU structure be used as a building brick in the G-20 cluster?	196
10.5. Conclusion	197
<b>Chapter 11: The Fundamental Human Rights as European Law Principles: Their Development through the ECHR Principles and the Constitutional Traditions Common to the Member States</b>	199
<i>Agostino Ennio La Scala</i>	
<b>Chapter 12: The Foreign Account Tax Compliance Act and Notice 2010-60</b>	211
<i>H. David Rosenbloom</i>	
12.1. Introduction	211
12.2. Withholding requirements with respect to certain payments made to foreign financial institutions and other foreign entities	212
12.3. Definition of “financial institution”	212
12.3.1. Certain financial institutions treated as not financial entities	213
12.3.2. Insurance companies	214
12.3.3. US branches of FFIs	215
12.4. Requirements imposed on FFIs to avoid 30% withholding	215
12.4.1. Participating FFIs	215
12.4.2. Deemed-compliant FFIs	216
12.4.3. Entities described in Sec. 1471(f)	217
12.5. Requirements imposed on NFFEs to avoid withholding	218
12.6. Effective date	218
12.7. Conclusion	219
<b>Chapter 13: Global Tax Governance: Work in Progress?</b>	221
<i>Jan Wouters and Katrien Meuwissen</i>	
13.1. Introduction	221
13.2. The contribution of the G-20: A high-level deliberative forum	222
13.2.1. G-20 summits in relation to the financial crisis	222
13.2.2. The G-20 and tax policy	223
13.2.3. Legitimacy of the G-20 as a global actor	226

13.3.	The contribution of the OECD: Leading actor on international tax cooperation	227
13.3.1.	The OECD and fiscal policy	227
13.3.2.	Tax analysis and tax dialogue: International cooperation	229
13.3.3.	Standards of transparency and exchange of information	229
13.3.4.	OECD/Council of Europe Convention on Administrative Assistance	231
13.3.5.	The OECD's legitimacy	232
13.4.	The contribution of the UN: Development and good governance in tax	234
13.4.1.	UN Model Tax Convention	234
13.4.2.	Monterrey and Doha: good governance, tax and development	235
13.5.	The IMF: Technical analyser and advisor	238
13.5.1.	The IMF and tax policy	238
13.5.2.	Technical expertise regarding fiscal policy measures	239
13.5.3.	Fiscal transparency	241
13.5.4.	The IMF's legitimacy	242
13.6.	The WTO: The SCM Agreement	244
13.6.1.	The SCM Agreement in general	244
13.6.2.	Influence on tax policy: The <i>US-FSC</i> case	245
13.6.3.	Interplay between domestic and international level	247
13.7.	Concluding remarks	248

## Part Six

### The Impact of Human Rights on Domestic Substantive Taxation

<b>Chapter 14:</b>	<b>Accounting Disclosure of Tax Liabilities, Fair Trial and Self-incrimination: Should the European Commission endorse IFRS in the light of European Human Rights?</b>	253
	<i>Raymond Luja</i>	
14.1.	Introduction	253
14.2.	The European Commission's role in accountant standard setting	256
14.3.	Disclosure of legal and tax positions: IAS 12 and IAS 37	257

14.4. US developments: International Revenue Announcement 2010-9	261
14.5. Producing physical evidence: The <i>Allen</i> decision and the <i>Saunders</i> judgment	263
14.6. Conflict of interest: Reliable accounting vs effective legal protection	268
14.7. Concluding remarks	269
<b>Chapter 15: Case Law of the European Court of Human Rights on VAT Refund and its Importance for the Russian Judicial System</b>	<b>273</b>
<i>Elena Variychuk</i>	
15.1. Introduction	273
15.2. VAT refund in ECtHR case law	274
15.2.1. Concept of “possessions” under Art. 1 of the First Protocol	274
15.2.2. Three distinct rules of Art. 1 of the First Protocol	276
15.2.3. Fair balance between the demands of the public interest and the protection of the right to peaceful enjoyment of possessions	277
15.3. Importance of the ECtHR positions on VAT refund for Russian court practice	280
15.3.1. The role of the ECtHR case law in the Russian legal system	280
15.3.2. Implementation of the ECtHR positions on VAT refund in Russia	281
<b>Chapter 16: The Impact of Human Rights on Domestic Substantive Taxation – the German Experience</b>	<b>285</b>
<i>Joachim Englisch</i>	
16.1. Introduction	285
16.2. Human dignity	287
16.3. Equality in taxation	288
16.3.1. Tax fairness and tax equity	288
16.3.2. Consistency of the system and proportionality of exceptions	290
16.3.3. Non-discrimination	294
16.4. Freedom rights	295
16.4.1. Multifaceted significance in substantive taxation	295

16.4.2. The prohibition of excessive tax burdens in particular	298
16.4.3. Deductions, allowances or exemptions for “indispensable” expenditure, especially related to marriage and family life	300
16.5. Conclusion	302
<b>Chapter 17: Substantive Impact of the Canadian Charter of Rights and Freedoms on Income Taxation</b>	303
<i>Martha O’Brien</i>	
17.1. Introduction	303
17.2. The Charter framework	304
17.3. Sec. 15: Equality rights	305
17.4. Equality and taxation	307
17.4.1. Discrimination on the basis of sex	308
17.4.2. Marital or family status	311
17.4.3. Sexual orientation	314
17.4.4. Citizenship	315
17.4.5. Miscellaneous cases	318
17.5. Recognition versus redistribution	321
17.6. The Charter and procedural issues in tax law	322
17.6.1 Double jeopardy	322
17.6.2. The protections from self-incrimination and from unreasonable search and seizure	324
17.7. Conclusions	325
<b>Chapter 18: Black Fella Land: White Fella Tax Changing the CGT Implications of Aboriginal/Native</b>	327
<i>Julie Cassidy</i>	
18.1. Introduction	327
18.2. Part I conclusions as to the CGT nature of aboriginal/Native title	330
18.3. CGT Issues	334
18.4. Recognition of aboriginal/Native title	335
18.5. Conferral of aboriginal/Native title on prescribed body corporate	339
18.6. Succession of aboriginal/Native title	342
18.7. Extinguishment of aboriginal/Native title (and incidental rights)	343

18.7.1. Extinguishment of aboriginal/Native title (and incidental rights) and CGT Event A1	343
18.7.2. Extinguishment of aboriginal/Native title and CGT Event C1	345
18.7.3. Extinguishment of statutory rights and CGT Event C2	346
18.7.4. ILUAs and similar contractual arrangements and CGT Events D1, C2 and H2	347
18.7.5. Taxation Ruling TR 95/35	350
18.8. Conclusion	351

**Chapter 19: Minimum Vitalis and the Fundamental Right  
to Property as a Limit to Taxation in Colombia** 353  
*Natalia Quiñones Cruz*

19.1. Introduction	353
19.2. From the Spanish crusade for gold to the Constitution of 1991	354
19.3. <i>Minimum vitalis</i> , justice, equality, proportionality and the prohibition of confiscation	356
19.4. The case of communal property and indigenous rights as a limitation to taxation	360
19.5. Conclusions	363

**Chapter 20: Confiscatory Effects of Having Two Capital  
Transfer Taxes in South Africa** 365  
*Jennifer Roeveland*

Part Seven  
The Impact of Human Rights on  
Tax Procedures and Sanctions

**Chapter 21: The Impact of the European Convention on Human  
Rights on Tax Procedures and Sanctions with  
Special Reference to Tax Treaties and the  
EU Arbitration Convention** 373  
*Guglielmo Maisto*

21.1. Introduction	373
21.2. The application of Art. 6 ECHR to pre-judicial and post-judicial tax litigation stages	376
21.2.1. Pre-judicial tax litigation stage	376
21.2.2. Post-judicial tax litigation stage	377

21.2.3.	Issues of potential conflict of procedural tax rules with the ECHR	379
21.2.3.1.	Presumptions established by law	379
21.2.3.2.	Retroactive application of procedural rules	380
21.3.	Art. 8 ECHR	381
21.4.	Art. 1 of the Protocol to the ECHR	384
21.5.	The ECHR and the international tax conventions and EC directives on exchange of information, assistance in collection, mutual agreement procedures and arbitration	386
21.5.1.	Exchange of information	386
21.5.2.	Mutual agreement procedures	387
21.5.3.	Arbitration	390
21.5.4.	Assistance in collection	392
21.6.	Conclusion	394
 <b>Chapter 22: The Classification of Tax Disputes, Human Rights Implications</b>		 397
<i>Robert Attard</i>		
22.1.	The controversial <i>Ferrazzini</i> judgment	397
22.1.2.	Perverse conclusion	398
22.1.3.	<i>Ferrazzini</i> eroded	400
22.2.	The classification of tax disputes; Baker's "Engel criteria"	401
22.3.	Developments after Baker 2000	402
22.4.	An illustration of the application of the Engel criteria: The case of <i>Paykar Yev Haghtanak Ltd v. Armenia</i>	403
22.5.	Recent Finnish cases – One step further	405
22.6.	Further implications of the classification of tax surcharges as criminal charges	406
22.7.	Conclusions, hope for the future	409
 <b>Chapter 23: A New Vision on Exercising Taxing Powers and the Right to Fair Trial in Judicial Tax Procedures under Art. 6 ECHR</b>		 411
<i>Menita Giusy De Flora</i>		
23.1.	Towards a new vision of the relationship between tax authorities and taxpayers in respect of the levying of taxes	411
23.2.	The impact of the new vision on Art. 6 ECHR	414
23.3.	The approach of the European Court of Justice to the protection of taxpayers' rights	420
23.4.	Conclusions	422

<b>Chapter 24: Taxpayer's Rights as Human Rights During Tax Procedures</b>	425
<i>Roberto Cordeiro Guerra and Stefano Dorigo</i>	
24.1. Introduction	425
24.2. The taxpayer's protection during tax procedures according to the European Convention of Human Rights	428
24.3. The practice of the European Court of Human Rights	430
24.4. The protection of individuals in tax matters according to international agreements and within the EU	434
24.5. The relevance of customary international law	438
24.6. Conclusions	443
<b>Chapter 25: Tax and Fundamental Rights in EU Law: Procedural Issues</b>	445
<i>Richard Lyal</i>	
25.1. Introduction	445
25.2. Direct tax	448
25.3. Indirect tax	450
25.4. Procedural rights	453
25.5. Conclusion	457
<b>Chapter 26: The Concept of Criminal Charges in the European Court of Human Rights Case Law</b>	459
<i>Cristina Mauro</i>	
26.1. Introduction	459
26.2. Why should we bother?	460
26.3. What are the implications?	465
26.4. Which criteria?	469
Part Eight The Impact of Human Rights on Tax Litigation before Courts	
<b>Chapter 27: Case Law-Based Anti-Avoidance Measures and Principles of Human Rights Protection</b>	477
<i>Adam Zalasiński</i>	
27.1. General remarks	477
27.2. The concept of case law-based anti-avoidance measures	478

27.2.1.	The notion of tax avoidance	478
27.2.2.	Approaches to prevent tax avoidance	481
27.2.3.	Methodology of application of anti-avoidance measures vs determining the tax liability	483
27.3.	The principles of human rights protection that may serve as the standard of assessment of case law-based anti-avoidance measures	483
27.4.	Conclusion	487
 <b>Chapter 28: The Impact of the Right to a Fair Trial on Tax Evidence: An EU Analysis</b>		 489
<i>Gianluigi Bizioli</i>		
28.1.	Introduction	489
28.2.	The right to a fair trial as international custom	490
28.3.	The right to a fair trial and the ECHR	493
28.3.1.	General remarks	493
28.3.2.	Art. 6 of the ECHR and taxation	494
28.3.3.	The right to a fair trial and the issue of evidence	497
28.4.	The right to a fair trial and EU law	499
28.4.1.	The situation before the entry into force of the Treaty of Lisbon	499
28.4.2.	The role of the EU Charter on Fundamental Rights in the development of the right for an effective remedy and a fair trial after Lisbon	502
28.5.	Conclusion	504
 <b>Chapter 29: The Protection of Human Rights and Its Impact on Tax Litigation from a Russian Perspective</b>		 505
<i>Danil V. Vinnitskiy</i>		
29.1.	Introduction	505
29.2.	Levels of protection of human rights: The approach of the Russian Federation	506
29.2.1.	National level of the protection of human rights	507
29.2.2.	Supranational level of the protection of human rights	507
29.2.3.	Correlation of national and supranational levels in protection of human rights	509
29.3.	The impact of remedies in human rights protection in tax disputes	513
29.3.1.	The right of protection as an expression of the right to fair trial (Art. 6 of the ECHR)	513
29.3.1.1.	Right to fair trial	513

29.3.1.2.	Burden of proof	514
29.3.1.3.	Limitations to the right of property	514
29.3.1.4.	Ne bis in idem	515
29.3.1.5.	Legal interpretations	515
29.3.2.	A per-category overview of the impact of ECtHR judgments on tax litigation in Russia	516
29.3.2.1.	Disputes on penalties	516
29.3.2.2.	VAT refunds	517
29.3.2.3.	Interest on repayments of tax	518
29.3.3.	Selected issues in the pending ECtHR <i>Yukos</i> case	518
29.4.	Conclusion	519

**Chapter 30: Fair Trial Rights on Taxation: The European and Inter-American Experience** 521  
*César Alejandro Ruiz Jiménez*

30.1.	Introduction	521
30.2.	Human rights and tax law	522
30.2.1.	Influence of human rights on tax matters	524
30.2.1.1.	Right to liberty and security of person	524
30.2.1.2.	Right to privacy in life, home and correspondence	525
30.2.1.3.	Prohibition of discrimination	526
30.2.2.	Influence of taxation on human rights	527
30.2.2.1.	Tax equity	527
30.2.2.2.	Tax legality	528
30.2.2.3.	Ability to pay (tax proportionality)	528
30.2.2.4.	Certainty of tax obligations	528
30.3.	Right to fair trial	529
30.3.1.	European system of human rights	529
30.3.2.	Art. 6 of the ECHR	530
30.3.2.1.	Civil rights	531
30.3.2.1.1.	Tre Traktörer Aktiebolag v. Sweden	531
30.3.2.1.2.	Editions Periscope v. France	532
30.3.2.1.3.	Schouten and Meldrum v. Netherlands	532
30.3.2.1.4.	S. v. Austria	532
30.3.2.1.5.	Buildings Societies v. United Kingdom	533
30.3.2.2.	Criminal charges	533
30.3.2.2.1.	Bendenoun v. France	534
30.3.2.2.2.	Paul Smith v. United Kingdom	535

30.3.3. Relevant jurisprudence	535
30.3.3.1. Right to a fair and public hearing	535
30.3.3.1.1. J.J. v. Netherlands	535
30.3.3.1.2. H. B. v. Switzerland	536
30.3.3.2. Right to be sentenced within a reasonable time	536
30.3.3.2.1. H. H. v. Netherlands	537
30.3.3.2.2. Hozee v. Netherlands	537
30.3.3.2.3. Skandinavisk Metallförmedling AB v. Sweden	538
30.3.3.3. Right to an independent and impartial tribunal	538
30.3.3.3.1. S. v. Austria	539
30.3.3.4. Right to presumption of innocence	539
30.3.3.4.1. S. M. v. Austria	539
30.3.3.4.2. A. P., M. P. and T. P. v. Swiss and E. L., R. L., and J. O.- L., v. Swiss	540
30.3.3.5. Right to not incriminate oneself	540
30.3.3.5.1. Funke v. France	540
30.3.3.5.2. Maximilian Abas v. Netherlands	541
30.3.3.5.3. J. B. v. Switzerland	541
30.3.3.6. Right to a defence	542
30.3.4. Inter-American system of human rights	542
30.3.4.1. Art. 8 of the Inter-American Convention	542
30.3.4.2. Current application in the Inter-American system of human rights	544
30.4. Future of the right to a fair trial in tax matters	546
30.4.1. Right of access to justice	548
30.4.2. Right to privacy	548
30.4.3. Right to be silent	548
30.4.4. Right to defence	549
<b>List of Authors and Editors</b>	<b>551</b>

## The Classification of Tax Disputes, Human Rights Implications

Robert Attard\*

### 22.1. The controversial *Ferrazzini* judgment

On 12 July 2001, in the case of *Ferrazzini v. Italy*, the European Court of Human Rights<sup>1</sup> (ECtHR) reached the following conclusion:

29. [T]he Court considers that tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant. Bearing in mind that the Convention and its Protocols must be interpreted as a whole, the Court also observes that Article 1 of Protocol No. 1, which concerns the protection of property, reserves the right of States to enact such laws as they deem necessary for the purpose of securing the payment of taxes (see, *mutatis mutandis*, *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, judgment of 23 February 1995, Series A no. 306-B, pp. 48-49, § 60). Although the Court does not attach decisive importance to that factor, it does take it into account. It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer.

The case of Giorgio Ferrazzini was a case over a tax assessment which took 14 years to conclude. In essence, Giorgio Ferrazzini argued that the length of the proceedings relating to the determination of the issue had exceeded a “reasonable time” contrary to Art. 6(1) of the European Convention on Human Rights (ECHR). The ECtHR declared the complaint admissible but held, 11 votes to 6, that Art. 6(1) of the ECHR does not apply to tax disputes because tax disputes are not civil rights and obligations to which Art. 6 applies. The decision of the ECtHR in *Ferrazzini* implies that in a tax dispute a litigant does not have a right to a fair hearing under Art. 6 of the ECHR (“the *Ferrazzini dictum*”).<sup>2</sup>

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1. Application No. 44759/98.

2. A right which enshrines the right of access to court, justice within a reasonable time, right to a public hearing and right to a fair and impartial tribunal.

### 22.1.2. Perverse conclusion

The conclusions reached by the ECtHR in *Ferrazzini* were heavily criticized. Philip Baker was very vociferous in his criticism.<sup>3</sup>

The decision in *Ferrazzini* was tainted by a very strong dissenting opinion. In his dissenting opinion, Giovanni Bonello, the Maltese judge, did not mince words. He pointed out that, “2. The Convention does not contain any definition of what is meant by ‘civil rights and obligations’”.

Bonello, who besides being Malta’s leading lawyer on human rights is also a leading historian, studied the historical evolution of Art. 6 and concluded that the *Ferrazzini* dictum was the result of a misreading of the term “civil rights”. He pointed out that,

3. In order to understand the present case-law and the possible need to revise it, it is in my opinion essential to recall the historical background for introducing the concept “civil” into Article 6 § 1 – a concept which is not found in the English text of the corresponding Article 14 of The International Covenant on Civil and Political Rights. Article 8 of the American Convention on Human Rights, on the contrary, expressly covers tax disputes (“rights and obligations of a civil, labour, fiscal or any other nature”).

The travaux préparatoires relating to Article 6 of the Convention – closely linked to those of Article 14 of the Covenant – demonstrate in my opinion the following: (1) it was the intention of the drafters to exclude disputes between individuals and governments on a more general basis mainly owing to difficulties at that time in making a precise division of powers between, on the one hand, administrative bodies exercising discretionary powers and, on the other hand, judicial bodies; (2) no specific reference was made to taxation matters, which are normally not based on a discretion but on the application of more or less precise legal rules; (3) the exclusion of the applicability of Article 6 should be followed by a more detailed study of the problems relating to “the exercise of justice in the relations between individuals and governments”; accordingly, (4) it seems not to have been the intention of the drafters that disputes in the field of administration should be excluded forever from the scope of applicability of Article 6 § 14. Against that background it is understandable that the Convention institutions, in the first years after the Convention came into force, applied Article 6 § 1 under its civil head on a restrictive basis in respect of disputes between individuals and governments. On the other hand, it is hard to accept that the travaux préparatoires, dating more than fifty years

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3. Baker, P., “The Decision in *Ferrazzini*: Time to Reconsider The Application of the European Convention on Human Rights to Tax Matters”, available at [http://www.taxbar.com/documents/Ferrazzini\\_Philip\\_Baker.pdf](http://www.taxbar.com/documents/Ferrazzini_Philip_Baker.pdf).

back and partly based on preconditions that have not been fulfilled or are no longer relevant should remain a permanent obstacle to a reasonable development of the case-law concerning the scope of Article 6 – in particular in areas where there is an obvious need to extend the protection granted by that Article to individuals. The present case-law clearly demonstrates in fact that the Convention institutions have not felt bound to maintain a restrictive attitude, but have extended the applicability of Article 6 § 1 to a considerable number of relationships between individuals and governments, which originally must have been held to be excluded.

Bonello proceeded to give a long illustrative list of disputes involving the government where the ECtHR had conceded an application of Art. 6.<sup>4</sup> Bonello emphasized that in his opinion Art. 6 applied to tax

4. “The following examples could be mentioned to illustrate what disputes between individuals and governments the Court has so far held to be covered by the civil head of Art. 6:

(a) proceedings concerning expropriation, planning decisions, building permits and, more generally, decisions which interfere with the use or the enjoyment of property (see, for example, *Sporrong Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52; *Ettl and Others v. Austria*, *Erkner and Hofauer v. Austria*, and *Poiss v. Austria*, judgments of 23 April 1987, Series A no. 117; *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Series A no. 171-A; and *Mats Jacobsson v. Sweden* and *Skärby v. Sweden*, judgments of 28 June 1990, Series A no. 180-A and B);

(b) proceedings concerning a permit, licence or other act of a public authority, which forms a condition for the legality of a contract between private persons (see, for example, *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13);

(c) proceedings concerning the grant or revocation of a licence by a public authority which is required in order to carry out certain economic activities (see, for example, *Bentham v. the Netherlands*, judgment of 23 October 1985, Series A no. 97; *Pudas v. Sweden*, judgment of 27 October 1987, Series A no. 125-A; *Tre Traktörer AB v. Sweden*, judgment of 7 July 1989, Series A no. 159; and *Fredin v. Sweden* (no. 1), judgment of 18 February 1991, Series A no. 192);

(d) proceedings concerning the cancellation or suspension by a public authority of the right to practise a particular profession, etc. (see, for example, *König v. Germany*, judgment of 28 June 1978, Series A no. 27, and *Diennet v. France*, judgment of 26 September 1995, Series A no. 325-A);

(e) proceedings concerning damages in administrative proceedings (see, for example, *Editions Périscope v. France*, judgment of 26 March 1992, Series A no. 234-B);

(f) proceedings concerning the obligation to pay contributions to a public security scheme (see, for example, *Feldbrugge v. the Netherlands*, judgment of 29 May 1986, Series A no. 99, and Deumeland, cited above);

(g) proceedings concerning disputes in the context of employment in the civil service, if “a purely economic right” was asserted, for instance the level of salary, and “administrative authorities’ discretionary powers were not in issue” (see, for

disputes because Art. 6 impinged on the pecuniary interests of citizens. He argued that Art. 6 is a procedural guarantee which should apply also in tax disputes,

It is not open to doubt that the obligation to pay taxes directly and substantially affects the pecuniary interests of citizens and that, in a democratic society, taxation (its base, payment and collection as opposed to litigation under budgetary law) is based on the application of legal rules and not on the authorities' discretion. Accordingly, in my view Article 6 should apply to such disputes unless there are special circumstances justifying the conclusion that the obligation to pay taxes should not be considered "civil" under Article 6 § 1 of the Convention.

### 22.1.3. *Ferrazzini* eroded

The *Ferrazzini* judgment made a lot of noise and was perceived as a controversial decision. However, in reality the undesirable decision in *Ferrazzini* was neither the first nor the last in a long number of similar judgments.<sup>5</sup> Four years after the ECtHR ruled in *Ferrazzini*, in February 2004, the *Ferrazzini* judgment was confirmed in *Jussila v. Finland*.<sup>6</sup> The *Ferrazzini* dictum seems to stand on solid ground but the firm ground on which it is supposed to rest on reminds the author of a glacier in an age of global warming. The strength of the despised *Ferrazzini* dictum is melting down. The *Ferrazzini* dictum is being eroded.

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instance, *De Santa v. Italy*, judgment of 2 September 1997, Reports of Judgments and Decisions 1997-V). If, on the other hand, "the economic aspect" was dependent on the prior finding of an unlawful act or based on the exercise of discretionary powers, Art. 6 was held not to be applicable (see, for instance, *Spurio v. Italy*, judgment of 2 September 1997, Reports 1997-V). In this respect the case law of the Court has later been changed (see point 6 below on the judgment of 8 December 1999 in *Pellegrin v. France*). It is true, however, – as stressed by the majority – that in other situations the Court has held that Art. 6 is not applicable to disputes between individuals and governments, (see, inter alia, *Pierre-Bloch v. France*, judgment of 21 October 1997, Reports 1997-VI, p. 2223, concerning the right to stand for election, and *Maaouia v. France*, no. 39652/98, ECHR 2000-X, concerning decisions regarding the entry, stay and deportation of aliens)."

5. Similar conclusions were reached by ECtHR in the 1960s in *X. v. Belgium* the 1960. By 1973 the ECtHR spoke of *X v. Belgium* as "jurisprudence constant". In 1999 ECtHR expressly held that fundamental human rights do not apply to ordinary tax proceedings (*Vidacar SA and Opergrup SL v. Spain*).

6. Application 00073053/2001. In the case, the Court held that "As regards the tax inspections, the Court notes that it has been established in its case law that tax matters fall outside the scope of civil rights and obligations pursuant to Article 6 of the Convention."

One practical consequence of this decision is likely to be a further extension of the criminal aspects of Art. 6 to tax proceedings. The European Court has already established that the determination of a liability to substantial penalties for incorrectly completed tax returns involves the determination of a criminal charge, and all the criminal guarantees in Art. 6 will then apply. The issue of which tax penalties involve a criminal charge is gradually being clarified. There may also be a tendency in some countries for taxpayers to ask for the determination of their tax liability and the determination of any penalties to be considered at the same court hearing: in those circumstances, the Court has held that it is not possible to separate out the different parts of the proceedings and that Art. 6 applies to the entire proceedings. One of the bizarre consequences of the decision in *Ferrazzini* is that Art. 6 will apply in those countries where penalties and liability to tax are determined at the same time, but not in those countries where the determinations are separate.

Baker analysed decisions of the ECtHR up to 2000 and concluded that,

It now seems clearly established, therefore, that a tax-geared penalty can entail a criminal charge, and that the issue of liability to penalties of 25% or higher has been regarded as involving the determination of a criminal charge.<sup>11</sup>

In the eyes of the ECtHR a tax case which involves a tax penalty of 25% of endangered tax or higher is deterrent and punitive and changes the nature of a tax dispute from that of a pure tax dispute subject to the restrictive *Ferrazzini* dictum to a dispute of criminal law nature subject to Art. 6. The 2007 case of *Paykar Yev Haghtanak Ltd v. Armenia*<sup>12</sup> is a perfect illustration of such a line of thought.

## **22.4. An illustration of the application of the *Engel* criteria: The case of *Paykar Yev Haghtanak Ltd v. Armenia*<sup>13</sup>**

*Paykar Yev Haghtanak Ltd* was involved in a dispute with the Tax Inspectorate over a tax assessment which included a surcharge. The applicant lost its case but when it tried to appeal to the national court of last instance, its appeal was returned on the grounds that applicant (which was bankrupt) had not paid a court fee. The applicant company complained that it had been unlawfully denied access to the Court of Cassation and that Art. 6 (fair hearing) had been infringed. The point at issue was, in the light of the

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11. *Id.*, Baker, P., p. 30.

12. Application No. 21638/03, 20 December 2007.

13. *Id.*

judgment in *Ferrazzini*, whether Art. 6 applied to the case in point. The issue revolved around a matter of classification. Art. 6 does not apply (in terms of *Ferrazzini*) to pure tax disputes but still applies to disputes over a criminal charge. The crux of the issue was whether the Armenian tax surcharge amounted to “a criminal charge” for the purposes of Art. 6. The ECtHR held that the surcharges attached to the assessment in dispute were deterrent and punitive. Furthermore, penalties were substantial and were up to 43%. The ECtHR concluded that the case in point was not a pure tax dispute subject to the *Ferrazzini* dictum but it was a case over a criminal charge to which all the guarantees of Art. 6 applied. The ECtHR found that applicant had been denied access to Court in violation of Art. 6.

The Court reiterates at the outset that tax disputes fall outside the scope of civil rights and obligations under Article 6, despite the pecuniary effects which they necessarily produce for the taxpayer (see, among other authorities, *Ferrazzini v. Italy* [GC], no. 44759/98, § 29, ECHR 2001 VII). However, when such proceedings involve the imposition of surcharges or fines, then they may, in certain circumstances, attract the guarantees of Article 6 under its “criminal” head. The present case concerns proceedings in which the applicant company was found to be liable to pay profit tax, VAT and simplified tax plus additional surcharges and fines. It remains therefore to be determined whether Article 6 can be applicable to the proceedings in question under its “criminal” limb.

33. The Court reiterates that the concept of “criminal charge” within the meaning of Article 6 is an autonomous one (see *Janosevic*, cited above, § 65). In determining whether an offence qualifies as “criminal”, three criteria are to be applied: the legal classification of the offence in domestic law, the nature of the offence and the degree of severity of the possible penalty (see *Engel and Others v. the Netherlands*.... The second and third criteria are alternative and not necessarily cumulative: for Article 6 to apply by virtue of the words “criminal charge”, it suffices that the offence in question should by its nature be “criminal” from the point of view of the Convention, or should have made the person concerned liable to a sanction which, by its nature and degree of severity, belongs in general to the “criminal” sphere (see *Janosevic*, cited above, § 67). The minor degree of the penalty, in taxation proceedings or otherwise, is not decisive in removing an offence, otherwise criminal by nature, from the scope of Article 6 (see *Jussila*, cited above, § 35, where the Court found Article 6 to be applicable even when the surcharge imposed amounted to only 10 per cent of the tax due).

34. Turning to the first criterion, the surcharges and fines in the present case were imposed in accordance with various tax laws and are not classified as criminal. This is, however, not decisive (*ibid.*, § 37).

35. As regards the second criterion, the Court notes that the relevant provisions of the Law on Taxes and the Law on Value Added Tax are applicable to

all persons – both physical and legal – liable to pay tax and are not directed at a specific group. Furthermore, the surcharges and the fines are not intended as pecuniary compensation for any costs that may have been incurred as a result of the taxpayer’s conduct. The purpose pursued by these measures is to exert pressure on taxpayers to comply with their legal obligations and to punish breaches of those obligations. The penalties are thus both deterrent and punitive.

36. The Court considers that the above is sufficient to establish the criminal nature of the offence (ibid., § 38). It would, nevertheless, also point out that in the present case the applicant company had quite substantial penalties imposed on it: the fines ranging from 10 to 50 per cent and the surcharges for the period of delay cumulatively amounting from about 5 to 43 per cent of the tax due.

37. In the light of the above, the Court concludes that the proceedings to which the applicant company was a party can be classified as “criminal” for the purposes of the Convention. It follows that Article 6 applies.

## 22.5. Recent Finnish cases – One step further

In the cases quoted in Baker 2000 and in the *Paykar Yev Haghtanak Ltd* case mentioned above, the ECtHR concluded that a tax surcharge was a criminal charge because of the amount of the tax surcharge. The ECtHR seems to have given a lot of weight to the fact that the Armenian tax surcharge ran at the rate of 34%. A year later, in two cases decided on the same day, the ECtHR went even a step further. The ECtHR came up with a sweeping statement that tax surcharges are, for the purposes of the ECHR, criminal charges without going into the details of the percentage of the charge imposed.

In the case of *Hannu Lehtinen v. Finland*<sup>14</sup> decided on 22 July 2008, the applicant complained, in the course of a tax dispute involving a tax surcharge, about the refusal of the Finnish Administrative (Tax) Court to hold an oral hearing and to hear testimony from the applicant and three witnesses proposed by him.

The applicant claimed a violation of Art. 6 ECHR (fair hearing) and the ECtHR decided in his favour.

Article 6 is applicable under its criminal head to tax surcharge proceedings (see *Jussila v. Finland*, § 38). Regarding the parties’ differing views on the role

14. Application No. 32993/02.

or impact of the taxation procedure as regards criminal proceedings, the Court notes that under Finnish practice the imposition of a tax surcharge does not prevent criminal charges being brought for the same conduct. That is, however, done in separate proceedings before a criminal court.

In view of the Administrative Court's firm conclusion that an oral hearing could be dispensed with, the Court considers that it is not necessary to examine separately whether the rights of the defence were violated by reason of the court's refusal to hear oral evidence.

The ECtHR reached the same conclusion in the case of *Kallio v. Finland*:<sup>15</sup>

Article 6 is applicable under its criminal head to tax surcharge proceedings (see *Jussila v. Finland*, cited above, § 38)....

50. In the present case the Administrative Court was called upon to examine the case as regards both the facts and the law. The applicant disputed the facts upon which the imposition of tax surcharges was founded, requesting an oral hearing of witness evidence in order to elucidate the relevant events. The Administrative Court had to make a full assessment of the case. The crucial question concerned the clarification of the facts and the credibility of the statements of the applicant and the four witnesses who had allegedly been involved in the relevant activities. Nevertheless, the Administrative Court decided, without a public hearing, to uphold the decision. The Court finds that, in the circumstances of the present case, the question of the credibility of the written statements could not, as a matter of fair trial, have been properly determined without a direct assessment of the evidence given in person by the applicant and by the witnesses proposed.

51. There has accordingly been a violation of Article 6 § 1 of the Convention as regards the refusal to hold an oral hearing in the Administrative Court.

## **22.6. Further implications of the classification of tax surcharges as criminal charges**

The classification of tax surcharges as penalties of a criminal nature was a major breakthrough. The relevance of such a classification is not restricted to the movement which is gradually eroding the *Ferrazzini dictum*. The ECtHR's treatment of tax surcharges as criminal charges is relevant even in areas which fall outside the strict parameters of tax controversies. The classification of a tax surcharge as a criminal penalty becomes relevant in the context of the presumption of innocence and the non-heritability of criminal charges. A statement made in the ECtHR's decision in the 2007 case of

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15. Application No. 40199/02, 22 July 2008.





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