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The applicability of Article 6 of the European Convention on Human Rights in disputes concerning taxes

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Abstract: *This article approaches the rather thorny issue of the applicability of Article 6 of the European Convention on Human Rights in tax proceedings. While in the early days of the Convention tax issues were absent from the caselaw of the European Court of Human Rights, from the 1980s this became a recurrent issue for the Court.*

In the first part of the paper I will deal with the earlier development of the applicability of Article 6 under its civil head. Then, I will address the caselaw of the Grand Chamber in the cases of Ferrazzini v. Italy and Jussila v. Finland, as well as the objections to these decisions and the dissenting opinions in the cases.

Since article 6 under its civil head is not applicable to tax proceedings, in the second part of the paper I will analyse the other articles in the Convention which provide a basis for hearing tax-related cases. These include Article 6 in its criminal limb, Article 1 Protocol no. 1 to the Convention, alone and in conjunction with Article 13 of the Convention.

Finally, I will address the inconsistency in the Court's caselaw and possible reasons why it has not yet decided to remedy them.

Key words: *applicability, Article 6, right to a fair trial, Ferrazzini v. Italy, Jussila v. Finland, admissibility, article 1 Protocol no. 1, article 13, European Court of Human Rights, European Convention on Human Rights.*

Aplicabilitatea articolului 6 din Convenția Europeană a Drepturilor Omului în litigiile fiscale

Rezumat: *Acest articol abordează problema spinoasă a aplicabilității articolului 6 din Convenția Europeană a Drepturilor Omului în litigiile fiscale. Deși în prima parte a existenței Convenției Europene a Drepturilor Omului acest tip de cauze nu s-au regăsit pe rolul Curții, începând cu anii 1980 acestea au devenit o problemă recurentă în fața instanței de la Strasbourg.*

În prima parte a prezentului material voi trata aplicabilitatea articolului 6 din Convenție în latura sa civilă în litigiile fiscale. Apoi, voi analiza jurisprudența din cauzele Ferrazzini c. Italiei și Jussila c. Finlandei, precum și criticile acestor hotărâri și opiniile disidente ale judecătorilor.

Deoarece articolul 6 în latura sa civilă nu este aplicabil în cauze fiscale, în a doua parte a textului voi analiza celelalte articole din Convenție și din Protocoalele Adiționale care permit formularea unei cereri admisibile în fața Curții în această materie. Între acestea se numără articolul 6 în latura sa penală, articolul 1 din Protocolul nr. 1 adițional, singur sau împreună cu articolul 13 din Convenție.

În final, voi analiza lipsa de consecvență din jurisprudența Curții și posibilele motive pentru care aceasta încă nu s-a decis să le remedieze.

Cuvinte cheie: *aplicabilitate, articolul 6, dreptul la un proces echitabil, Ferrazzini c. Italiei, Jussila c. Finlandei, admisibilitate, articolul 1 Protocolul 1 Adițional, articolul 13, Curtea Europeană a Drepturilor Omului, Convenția Europeană a Drepturilor Omului.*

INTRODUCTION

There are moments in life when the principles that guide our society are put to the test, when the old ways are no longer good enough. And so, we summon these principles and have them appear before us for trial and sentencing. Sometimes, they get away with it and live to see another day. So it was that in 2001 the notion that Article 6 of the Convention is not applicable in tax litigation was summoned before the Grand Chamber of the European Court of Human Rights.

This rule was put to the test because it implies that when taxes are challenged in court, there are no procedural safeguards against the arbitrary, no duty upon the judges to be fair and equitable. Surely a notion so criminal cannot go unpunished. It is nothing but an outdated idea that belongs to a darker time, when in the wake of the Great War, taxes were a focal point in rebuilding a shattered continent. But in the last half of a century Europe has risen from its ashes and such barbarous notions remain only as tokens in the annals of time.

But that's not what happened in 2001. In this paper we will follow the story of the inapplicability of Article 6 of the Convention in tax cases. This story is not new, on the contrary it is becoming a generational one. It is nonetheless a story of an old principle that stood under scrutiny 23 years ago and lived to tell the tale. An idea that was challenged even in 2001, but nonetheless endured.

I. THE INAPPLICABILITY OF ARTICLE 6 OF THE CONVENTION UNDER ITS CIVIL HEAD

In this part of the paper we will address the general rule of the inapplicability of Article 6 of the Convention under its civil head. In chronological order, we will first deal with the post-war period in *Section 1 – Taxation and the war.* Then, we will move on to the early caselaw of the Court in the 1980s and the Grand Chamber case of *Ferrazzini v. Italy,* in *Section 2 - Taxation and the right to a fair trial. The Conventional standard and its challenge*.

1. Taxation and the war

Taxation seems to be as old as civilization. It was well-known in Ancient Egypt almost 3.000 years ago[1] and it was well engrained in the collective memory by Jesus's famous words: "*Render unto Caesar the things that are Caesar's, and unto God the things that are God's*"[2]. It has been with us ever since and it will continue be with us for the foreseeable

[1] https://www.worldhistory.org/article/1012/ancient-egyptian-taxes--the-cattle-count/ [accessed on 24.03.2024].
[2] The Bible, Matthew 22:21.

future. While not impossible for a state to work without taxation, it might be impossible to find a practical example. It seems to be woven into the fabric of state crafting.

Moving forward in time to an era when the European Convention on Human Rights (hereinafter *"the Convention"*) was seeing the first light of day, scholars have shown that "*The world wars fundamentally altered the tax systems of most Western countries*"[3]. While in 1913 taxes rarely rose above 10 percent, during the war and in its aftermath, they surpassed 60 percent in many cases[4]. In the case of Britain, income tax provided "*42 percent of its total public revenue by the end of World War II*"[5]. It seems that families not only sacrificed a son, a father or a brother to the war machine, but also the better part of their wealth. This did not change with the end of the war, since Europe was left shattered after 6 years of methodical destruction. It was a time of reconstruction, but the budgets of European countries were stretched by the war effort and their coffers were empty. And so it was that the Marshall Plan was enacted and the United States of America loaned some 13 billion dollars "to restore the economic infrastructure of post-war Europe"[6].

The United Kingdom finished paying back its costly loans to the United States only in December 2006[7]. It was again the taxes of its citizens that raised this money, especially in the first decades after the war, when factories had been destroyed or dismembered and anything but armament and military provisions became irrelevant. No wonder then that the right to levy taxes is so closely tied to public law[8] and that states so fiercely defended their sovereign right to collect taxes. It is a question of survival in the most desperate of times.

2. Taxation and the right to a fair trial. The Conventional standard and its challenge

In his speech of 12 August 1949 in Place Kléber, Strasbourg, Winston Churchill urged Europeans to come together against tyranny and despotism[9]. It was not taxation they were worried about at the time, but "the plague", as Camus had called it.

Against this background, the Council of Europe started its mission to safeguard human rights, democracy and the rule of law. After the most sinister 6 years of war, the European Commission of Human Rights was dealing with more pressing issues, such as

[3] *S. Torregrosa-Hetland, O. Sabaté*, Income tax progressivity and inflation during the world wars in the European Review of Economic History, Vol. 26, Issue 3, August 2022, p. 311–339, https://doi.org/10.1093/ereh/heab020, also available on https://academic.oup.com/ereh/article/26/3/311/6381511.
[4] *Ibidem.*
[5] *Ibidem.*
[6] https://www.archives.gov/milestone-documents/marshall-plan#:~:text=On%20April%203%2C%201948%2C%20President,economic%20infrastructure%20of%20postwar%20Europe [accessed on 24.03.2024].
[7] https://history.blog.gov.uk/2020/12/07/whats-the-context-signing-the-anglo-american-financial-agreement-6-december-1945/ [accessed on 24.03.2024].
[8] For the public law nature of tax law, see *R. Bufan, M. Buidoso, I. Cochinţu, A. Muntean, N. Svidchi*, Tratat de drept fiscal. Vol. I. Teoria generală a dreptului fiscal [Fiscal law treaty. Volume I. The general theory of fiscal law], Ed. Hamangiu, Bucharest, 2016, p. 26.
[9] http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680698403 [accessed on 24.03.2024].

depravation of liberty[10] and lack of access to a court or a lawyer[11]. After all, the standard of protection of human rights in Europe was being raised from its lowest point. In Western European countries, well on their way to rebuilding their decimated landscapes, taxation was not at the forefront of human rights violations.

However, in the 1980s the European Commission of Human Rights ruled on several cases and decided that litigation concerning the restitution of taxes, the determination of taxes or procedures relating to taxes were not "civil" rights and Article 6 of the Convention was not applicable under its civil head[12]. Later, in the 1990s, the European Court of Human Rights (hereinafter "*the Court"*) established that the "pecuniary" criterion is not enough for Article 6 in its civil limb to be applicable, especially when the contested right or obligation is based on fiscal legislation[13]. In other words, tax law is an area where the state still enjoys a wide margin of appreciation, and the pecuniary stake of the proceedings is not enough to pull the matter within the scope of Article 6 of the Convention.

In 2001, the Court seems to have firmly drawn a line in the Grand Chamber case of *Ferrazzini v. Italy*[14]. It decided that the European society's representation of taxation has not evolved as such to include it in the field of application of Article 6 in its civil limb. The Court considered 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*"[15]. Following this line of reasoning, the Court later declared as inadmissible an application in which a private company sued the local tax authorities, in a litigation which concerned the compensation of reciprocal obligations[16].

However, in 2011 not all judges were convinced that tax law falls outside the scope of the civil limb of Article 6 of the Convention[17]. Six members of the Grand Chamber panel signed a dissenting opinion arguing for a change of perspective and the expansion of the application of Article 6 under its civil head[18]. Their arguments ring true even today.

Firstly, the dissenting judges questioned if the caselaw of the Court at the time allowed for a clear distinction between "civil" and "non-civil" rights and obligations. The question was of course rhetorical, since the examples offered are heterogenous and the

[10] See, *e.g. Lawless v. Ireland (no. 3)*, application no. 332/57, judgement of 1 July 1961, published in A3 or *Neumeister v. Austria*, application no. 1936/63, judgment of 27 June 1968, published in A8. All European Court (or Commission) of Human Rights decisions referenced in this paper are available on https://hudoc.echr.coe.int.

[11] See *Golder v. The United Kingdom,* application no. 4451/70, judgement of 21 February 1975, published in A18.

[12] *C. Bîrsan*, Convenția Europeană a Drepturilor Omului. Comentariu pe articole. Ediția 2 [European Convention on Human Rights. Commentary by article. 2nd Edition], Ed. C.H. Beck. Bucharest, 2010, p. 402; *G.A. Lazăr*, Contestația împotriva deciziei de impunere fiscală în lumina Convenției Europene a Drepturilor Omului [Challenging tax decisions in the light of the European Convention on Human Rights] in R.R.D.P. [Romanian Private Law Review] no. 6/2015, p. 113 *et seq*.

[13] *C. Bîrsan,* op. cit., p. 403.

[14] *Ferrazzini v. Italy*, application no. 44759/98, judgment of 12 July 2001, published in Reports of Judgments and Decisions 2001-VII.

[15] *Ferrazzini v. Italy,* par. 29.

[16] *C. Bîrsan*, op. cit., p. 403-404, the case of *Ghepardul S.R.L. v. Romania*, application no. 29268/03 and other decisions quoted in the first footnote.

[17] See also *C. Bîrsan*, op. cit., p. 403, footnote no. 5.

[18] See *Ferrazzini v. Italy*, dissenting opinion of Judge Lorenzen, joined by Judges Rozakis, Bonello, Strážnická, Bîrsan and Fischbach, par. 1-9.

conclusion becomes self-evident. Against this uncertainty, they proposed that the unclear limit be abandoned.

Secondly, relying on the same idea, they argued that the Court was being inconsistent, by allowing under the umbrella of Article 6 cases concerning the restitution of taxes, where the tax decision had already been annulled and cases concerning social security funds, but not traditional tax litigation[19].

Thirdly, they held that Member States have no discretionary power in the field of taxation and that in democratic countries taxation is "*based on the application of legal rules and not on the authorities' discretion*". Therefore, the criterion of "public law" is weakened and, in reality, it does not differ from other forms of litigation against a public authority.

Fourthly, the dissenting judges argued that at the time of the drafting of the Convention, tax decisions could not be challenged before civil courts, while in modern times most legal systems allow it.

Fifthly, Article 6 of the Convention grants procedural safeguards, which should be equally recognized for litigants in tax proceedings.

Lastly, they argued that the Court's caselaw conceded that proceedings concerning tax fines and surcharges fall under the criminal limb of Article 6 of the Convention, underlining the lack of coherence in the majority's view.

In our opinion, all these arguments raise fair points and show that the matter is still unresolved. Even so, the Court has not yet allowed for the reconsideration of its conclusion in *Ferrazzini v. Italy*, even though these counterarguments were not addressed by the majority, at least not in the text of the decision. And with them looming like bad omens, the application of Article 6 in tax proceedings is like a fugitive on the run: only sure of their fleeting victory and their escape from the clutches of the law, but always afraid of what tomorrow might bring.

II. THE SUBTERFUGE FOR THE APPLICATION OF THE CONVENTION IN TAX PROCEEDINGS

Since we concluded that Article 6 of the Convention is not applicable in its civil limb, in this part of the paper we will address the other Conventional statutes which may yet allow for the analysis of an application relating to tax proceedings. Firstly, we will analyse the applicability of Article 1 of Protocol no. 1 and Article 13 of the Convention, with particular reference to the text of the Convention, which expressly mentions taxation, and the caselaw of *S.A. Dangeville v. France* and *Eko-Elda AVEE v. Greece* in *Section 1 - The backdoor: Article 1 of Protocol no. 1 and Article 13 of the Convention.*

We will then move on to see what is the national standard in the application of the right to due process in tax litigation in *Section 2 - Romanian law and the right to a fair trial in tax proceedings.* After, we will tackle the applicability of Article 6 in its criminal head in *Section 3 - Surcharges and the application of Article 6 of the Convention in its criminal limb.*

[19] Which led a Romanian author to state that he doesn't understand anything from this inconsistent caselaw. He argued that there is no difference between the obligation of the state to reimburse an individual for taxes wrongfully collected and the obligation of the individual to pay those taxes. He further underlined the lack of rigor in labelling litigation about the validity and amount of taxes as concerning "the sovereignty of the state", while litigation concerning the restitution of taxes would be labelled as "civil". *See R. Chiriță*, Dreptul la un proces echitabil [Right to a fair trial], Ed. Universul Juridic, Bucharest, 2008, p. 108.

Finally, we will deal with the inconsistencies in the Court's approach and its caselaw in *Section 4 - The irreconcilable nature of tax proceedings.*

1. The backdoor: Article 1 of Protocol no. 1 and Article 13 of the Convention

Intuitively perhaps, since taxation implies a toll on one's fortune, applicants migrated towards Article 1 of Protocol no. 1 to the Convention, which protects property in a general sense[20]. Afterall, this conventional statute expressly mentions taxation in its second paragraph: "*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*".

For example, in *S.A. Dangeville v. France*[21], the Court found a violation of Article 1 of Protocol no. 1, noting that the *Conseil d'État* refused to grant the applicant a refund on VAT, based on the Sixth Council Directive of the European Communities. The applicant's property rights were violated since the interference did not satisfy the requirements of the general interest and that the interference with the applicant's enjoyment of its property was disproportionate[22]. In another case, *Eko-Elda AVEE v. Greece*[23], the Court found a violation of the right enshrined in Article 1 of Protocol no. 1 because the Greek courts did not award the applicant interest to compensate the company for the delay in the payment of a tax credit to which it was entitled.

If the applicant's right of property was violated, Article 13 of the Convention demands that they have an effective remedy within the national system to address this violation. In the application this conventional statute, for this remedy to be effective it must be both accessible and adequate[24]. Article 13 of the Convention "borrows" some of the most important safeguards provided by Article 6, such as the reasonable length of proceedings[25] and the independence of domestic tribunals.

As such, the inapplicability of Article 6 of the Convention is partly circumvented and at least some of the core procedural rights become effective in tax litigation. This "covert protection" shows how, in effect, taxation does not escape the scrutiny of the Court, even though it may elude the application of Article 6 in its civil limb. Coupled with the application of the criminal limb of Article 6 when dealing with surcharges, conventional protection on tax litigation is in fact relatively broad and the Court knows it. This is why it issued a factsheet entitled "Taxation and the ECHR"[26], which opens by noting: "*A number of applicants rely on the European Convention on Human Rights to challenge the rules and procedures of the Contracting States in tax matters, and the methods used by tax-authority*

[20] *G.A. Lazăr*, op. cit., p. 123 *et seq*.
[21] *S.A. Dangeville v. France*, application no. 36677/97, judgment of 16 April 2002, published in Reports of Judgments and Decisions 2002-III.
[22] See *R. Attard, P.P. de Albuquerque,* Taxation at the European Court of Human Rights, Ed. Wolters Kluwer, The Netherlands, 2013, section 1.1.
[23] *Eko-Elda AVEE v. Greece*, application no. 10162/02, judgment of 9 March 2006. See R. Attard, P.P. de Albuquerque, *op. cit,* section 1.1.
[24] *B. Sălăjan-Guțan*, Protecția europeană a drepturilor omului [European Protection of Human Rights], Ed. Hamangiu, Bucharest, 2018, p. 239; G.A. Lazăr, *op. cit*., p. 117-118.
[25] *G.A. Lazăr*, op. cit., p. 122-123; *C. Bîrsan*, op. cit., p. 940-943.
[26] https://www.echr.coe.int/documents/d/echr/fs_taxation_eng [accessed on 24.03.2024].

officials". It then goes on to state that these applications are based on other articles of the Convention, such as Article 1 of Protocol no. 1, but also Article 6 – under its criminal limb.

In my opinion, this "covert protection" is yet another argument in favour of abandoning the *Ferrazzini* caselaw. After all, the flaming sword placed at the east of the garden of Eden, which turns in every direction, keeps everyone away from the tree of life, without exception[27].

2. Romanian law and the right to a fair trial in tax proceedings

In *Ferrazzini v. Italy,* the Court held that "*In comparison with the position when the Convention was adopted, those developments [on the nature of lax proceedings – Ed.] have not entailed a further intervention by the State into the "civil" sphere of the individual's life*"[28]. In other words, things have not changed sufficiently across Europe to justify that the Court takes another step further, another bite from the sovereignty of the Member States. However, this conclusion is merely stated by the Grand Chamber. On other occasions, the Court took note of the changes in the legal systems of the Member States and updated its caselaw accordingly.

In this Section, we aim to address the provoking and unspeakable notion that, without the protection of the Convention, across Europe tax proceedings are bereft of any fair trial treatment, that access to justice may be barred, that there is no reasonable time requirement, that the judgments rendered by administrative courts in tax litigation may be unreasoned and its judges may not be independent or objective. This outlandish notion is what might be expected of a system that cannot afford the procedural safeguards of Article 6 to proceedings concerning tax law.

However, in Romania, the right to a fair trial is also enshrined in art. 21 par. (3) of the Constitution, which states that "*parties have the right to due trial and the resolution of their case in a reasonable time*". This text is applicable to all litigation, including tax proceedings. Legal scholars have shown that the Romanian Constitutional Court verified on several occasions whether the mechanism by which tax decisions are challenged at the national level complies with due process standards. The Constitutional Court changed its caselaw and declared the legal statutes unconstitutional because they were not aligned with the standards of a fair trial. As such, the Government Ordinance no. 13/1999 was replaced and the new legislation was deemed compliant with due process national and international standards[29]. Other authors have shown that the European Court of Human Rights sanctioned various transgressions concerning the right to due trial between 1996 and 2003 and so the Constitution was amended to include the right to a fair trial[30].

Article 6 of the Civil procedure code also enshrines the right to a fair trial, in an optimal and predictable time. This statute provides that all proceedings shall be dealt with equitably, by an independent, impartial and lawfully established tribunal. Tax proceedings are also subject to the statutes of the Civil procedure code and therefore, the safeguards of

[27] The Bible, Genesis 3:24.
[28] *Ferrazzini v. Italy*, § 29.
[29] *C. L. Popescu*, Impactul dreptului la un proces echitabil asupra procedurii fiscale [The impact of the fair and equitable standard on tax proceedings] in R.D.C. [Commercial Law Review] no. 3/2001, p. 105-106.
[30] *B. Selejan-Guțan* in *I. Muraru, E. S. Tănăsescu* (coord.), Constituția României. Comentariu pe articole. Ediția 2 [The Romanian Constitution. Commentary by article. 2nd Edition], Ed. C.H. Beck., Bucharest, 2019, p. 163.

Article 6 of the Convention are presently applicable in this type of litigation. One must also concede that in the legal system of Romania at this time the notion of "fair trial" is not different from that found in the system of the Convention. The notion of "fair trial" was rather alien before 1989. As a young democracy and member of the Council of Europe only since 1994, Romania fully adopted the Conventional standard of a fair and equitable trial. Thus, in Romanian courts, the procedural rights guaranteed by Article 6 of the Convention are to be applied as such[31]. While this remains a great victory for the protection of human rights in Romania, it certainly does not mean that this standard is always applied and respected. For those cases where things go wrong, the intervention of the Court remains paramount.

3. Surcharges and the application of Article 6 of the Convention in its criminal limb

While the application of Article 6 in its civil limb remains set in the *Ferrazzini v. Italy* standard as far as tax proceedings are concerned, the application of its criminal limb, like a rebel child, found its own way. In *Bendenoun v. France*[32], the applicant was the owner of an antiques store in Strasbourg. He was investigated by the tax and customs authorities, which imposed upon him surcharges in the amount of 422.534 francs and upon his company in the amount of 570.398 francs. Deciding on the applicability of Article 6 in its criminal limb, the Court used four criteria[33]:

a) the general applicability of the surcharges – the Court held that the surcharge was provided by Article 1729 para. 1 of the General Tax Code of France, covering "*all citizens in their capacity as taxpayers, and not a given group with a particular status*".

b) the punitive nature of the surcharge – the Court noted that the surcharge did not amount to "*pecuniary compensation for damages, but essentially as a punishment to deter reoffending*".

c) the surcharge was imposed under "*a general rule, whose purpose was both deterrent and punitive*".

d) the substantial character of the surcharge - 422.534 francs for the applicant and 570.398 francs for his company was considered very substantial, and "*if he failed to pay, he was liable to be committed to prison by the criminal courts*".

Taken cumulatively, the Court concluded that these criteria amounted to a "criminal charge" within the meaning of Article 6 paragraph 1 of the Convention[34].

This caselaw was later upheld, and in 2006 the issue was taken before the Grand Chamber in the case of *Jussila v. Finland*[35], which concerned a Finnish national who owned a car repair shop. After a tax investigation, authorities found deficiencies in the payment of VAT and obliged the applicant to pay tax surcharges amounting to 10% of the reassessed tax

[31] *Ibidem.* It should also be noted that this is the case in other European legal systems as well. For example, art. 111 of the Italian Constitution provides the right to due process and expressly refers to "all court trials". Similarly, the Belgian Constitution provides for publicity of trials, the reasoning of all decisions or the independence of judges in articles 148, 149, 151. Here too the Constitutions refers to "all judgments" [*tout judgement*].

[32] *Bendenoun v. France*, application no. 12547/86, judgment of 24 February 1994, published in A284.

[33] *Idem,* § 47. See also *R. Chiriță*, op. cit., p. 255.

[34] See also *C. Bîrsan*, op. cit., p. 421.

[35] *Jussila v. Finland*, application no. 73053/01, judgment of 23 March 2006.

liability. In determining the applicability of Article 6 in its criminal limb, the Court used the same criteria referenced above and decided with a majority that the surcharge amounted to a "criminal charge"[36].

In *Jussila v. Finland*, the two partly dissenting opinions do not challenge the law, but its application to the facts of the case. *Ferrazzini v. Italy* is referenced with courtesy to its merits and the standard is not contested. It appears that *Jussila* was not the time or the place to either challenge the *Ferrazzini* standard or to try to bridge the gap between tax proceedings and surcharges.

Up until the present day, the Court maintained this line of reasoning as far as the applicability of Article 6 in tax proceedings is concerned. In the case of *Melgarejo Martinez de Abellanosa v. Spain*[37]*,* it briefly noted *ex officio* that "*as regards the civil limb of Article 6, it is not applicable to the assessment of tax and the imposition of surcharges*"[38]. Even though the reasoning in *Jussila v. Finland* was not itself lengthy, in subsequent caselaw it seems to have taken the path of the well-stablished jurisprudence, with even less emphasis on the application of the Engel criteria. In § 25 of *Melgarejo Martinez de Abellanosa v. Spain,* the Court held that the surcharge imposed on the applicant was "*not intended as pecuniary compensation for damage but as a punishment to deter reoffending, which means that, in nature, its purpose was deterrent and punitive*". It further held that "[this] *element alone suffices to establish the criminal character of the offence*", but nonetheless briefly touches on the last criterion, namely the severity of the penalty.

It is thus clear that the caselaw of the Court was still settling in the era between *Bendenoun v. France* and *Jussila v. Finland*. In the case of the latter judgment, the dissenting opinion underlined the unconvincing use of the Engel criteria, noting that the 308 euros surcharge was hardly "substantial" and certainly not "very substantial", as opposed to the former judgment against France[39]. In *Melgarejo Martinez de Abellanosa v. Spain,* on the other hand, the severity of the penalty is not even considered necessary for the determination of the criminal charge. We should also note that the legal qualification of the offence in the national legislation never really carried any weight, which means that currently, the existence of a "criminal charge" and the application of Article 6 in its criminal limb is based on the sole criterion of *the punitive and deterrent nature of the surcharge*. The qualification of the offence was of course crucial, since it allowed the Court to analyse the issue of the divergent judgments issued for the applicant and his siblings and the lack of reasoning in the judgment issued by the *Audiencia Nacional.* On the latter complaint, the Court found a violation of Article 6 of the Convention.

4. The irreconcilable nature of tax proceedings

In the light of the preceding arguments, is appears that at the present time the applicability of Article 6 in the Court's caselaw concerning tax proceedings is fairly straightforward. On the one hand, the *Ferrazzini* standard stands the test of time and has

[36] *M.A. Grau Ruiz*, Decisions of the ECHR affecting domestic laws in the financial and tax field in Lex ET Scientia. Juridical Series, no. XVIII, Vol. 1/2011, p. 12.
[37] *Melgarejo Martinez de Abellanosa v. Spain,* application no. 11200/19, judgment of 14 December 2021.
[38] *Idem,* § 24.
[39] *Jussila v. Finland*, § 10 of the partly dissident opinion of judges Costa, Cabral Barreto and Mularoni, joined by judge Caflisch.

been upheld religiously: Article 6 in its civil limb is not applicable to tax proceedings. On the other hand, surcharges are criminal in nature and entail the application of Article 6 in its criminal limb, a jurisprudence that now stands for more than 20 years.

But one cannot be satisfied with this state of affairs – the ancillary nature of surcharges must mean that they follow the principal, and the principal (*i.e.* traditional tax litigation) is stubbornly deprived of conventional protection. It is a rule of law as long as time that *accessorium principali sequitur*, but the Court's caselaw seems to be wilfully ignorant of it. More recently, some authors challenged the norm and dared to suggest that in exceptional cases, the accessory might maintain some sort of liberty from its master in the field of conventional mortgages[40]. But the specifics of Romanian national civil law are far detached from the founding principles guiding the caselaw of the Court, which remains and should remain tributary to European concepts which enjoy a broad application across the legal systems of the Member States. And so, the *Ferrazzini – Jussila* dichotomy is still at odds with our common understanding of the foundational principles of law.

Beyond this inconsistency lies the other issue we already addressed, which is the "backdoor protection" offered by Article 1 of Protocol no. 1 coupled with Article 13 of the Convention, the hidden passage which brings at least some of the procedural safeguards of Article 6 to tax proceedings.

What might seem even more puzzling is that the Court shows no intention of departing from the *status quo.* Both the *Ferrazzini* and *Jussila* standards have been conscientiously confirmed in subsequent caselaw with no meaningful opposition. The Court acknowledges that it deals with plenty of tax law issues and allows it to slip through the cracks. However, it takes a very strong stance on the applicability of Article 6 in its civil limb, going so far as to remind everyone *ex officio,* in recent caselaw, that this conventional statute does not see eye to eye with tax proceedings.

CONCLUSION

"Taxation" as a keyword in the caselaw of the Court started its rise to popularity in the 1980s and seems to have peaked in the 2000s. Starting out at the outskirts of the Convention, it worked its way up to one of the most debated and impactful decisions ever rendered by the Court: in the same year when it cemented the inapplicability of Article 6 in its civil limb in *Ferrazzini*, it awarded the Yukos Russian company 1.866.104.634 euros plus tax in damages, the biggest compensation ever awarded by the Strasbourg Court[41].

Its judgment on the admissibility of the Yukos application paints a very clear picture of the many articles of the Convention that relate to tax proceedings: Article 6 of the Convention – criminal limb, Article 1 of Protocol no. 1, taken alone and in conjunction with Articles 1, 7, 13, 14 and 18 of the Convention. One might even argue that taxation is not a marginal issue in Strasbourg, but quite a central one. This conclusion is currently supported by the abundant caselaw, by the issuing of a factsheet on taxation to guide applicants and by the academic studies that keep researching and uncovering the subject.

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[40] *R. Rizoiu*, Accesoriul poate transforma principalul? Despre natura bunului ipotecat [Can the accessory transform the principal? Study on the nature of the mortgaged goods] in R.R.D.P. [Romanian Review of Private Law] no. 3/2015.

[41] Case of *Oao Neftyanaya Kompaniya Yukos v. Russia*, application no. 14902/04, judgment of 20 September 2011 and just satisfaction awarded on 31 July 2014.

Perhaps the Court's idiosyncratic approach to the applicability of the right to a fair trial in tax proceedings only bolsters its appeal. It boldly declares it inapplicable to anyone who might bring a tax case to Strasbourg, but quietly allows passage for those who know "the password". In recent times, however, it does seem that the password has become quite well-known.

At the same time, the Court's predicament in deciding the unrestricted applicability of Article 6 to tax litigation may be understood. After all, it has found again and again a Conventional foundation for restraining ever further the Member States' discretionary powers. Maybe this is the public compromise the Court must make, knowing fully well that it refuses to hear only a fraction of the tax cases, namely those who can still be labeled as "the hard core of public-authority prerogatives"[42].

Stuck between Scylla and Charybdis, the Court chose the lesser evil: the lack of consistency in its *ratione materie* approach to the admissibility of tax litigation. The greater evil being, of course, the alienation of the Member States and the dissolution of any meaningful difference between "civil" and "non-civil" rights. In other words, fully accepting jurisdiction over tax proceedings would still be legally controversial, and it might not be the right time for the Court to exchange one objectionable approach with another. In the current state of European affairs, however, it might not be long before the Strasbourg Court will once again summon this principle to be judged and sentenced. And this time around, the outcome might be different.

[42] *Ferrazzini v. Italy*, § 29.