

ROMANIAN TAX PROVISIONS INCONSISTENT WITH THE RIGHT TO A FAIR TRIAL

COSMIN FLAVIUS COSTAŞ

Faculty of Law, University Babeş-Bolyai Cluj-Napoca, Romania

Abstract:

In the last few years, a large number of tax provisions have been adopted in Romania and incorporated mainly in the new Fiscal Code. Unfortunately, in some cases the legislator did not pay attention to the relevant provisions of the European Convention of Human Rights, especially those enshrined in article 6, concerning the right to a fair trial. In this respect, at the time being we can conclude that a number of Romanian tax provisions are inconsistent with the right to a fair trial and may pose serious problems for the Romanian state before the European Court of Human Rights.

1. As the European Court of Human Rights (ECHR) has often said, the right of a fair trial enshrined in Article 6 of the European Convention of Human Rights¹ and in Article 21 par. 3 of the Romanian Constitution reflects the fundamental principle of the rule of law in a democratic society². The right to a fair does not apply to proceedings referring to revenue law which concern the extent of the obligation to pay taxes³, but it applies where a tax-related dispute involves civil rights⁴ or when a fiscal penalty is imposed⁵.

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¹ For general considerations on the right to a fair trial, see Renucci, J.-F., *Traité de droit européen des droits de l'homme*, Paris: Librairie Générale de Droit et de Jurisprudence, 2007, 1135 pages, ISBN 978-2-275-02329-8, p. 351 - 478; Sudre, Fr., *Droit européen et international des droits de l'homme*, Paris: Presses Universitaires de France, 2006, 786 pages, ISBN 978-2-13-055880-4, p. 318-386; Ehlers, D. (ed.), *European Fundamental Rights and Freedoms*, Berlin: De Gruyter Recht, 618 pages, ISBN 978-3-89949-446-4, p. 160-169; Chiriță, R., *Convenția europeană a drepturilor omului. Comentarii și explicații*, volume I, București: C.H. Beck, 2007, 505 pages, ISBN 978-973-115-047-5, p. 233-440.

² *Inter alia*, ECHR, Judgement of 26 April 1979, *Sunday Times v. United Kingdom*, par. 55.

³ ECHR, Judgement of 12 July 2001, *Ferrazzini v. Italy*, par. 29.

⁴ See, for example, ECHR, Judgement of 23 October 1997, *National and Provincial Building Society and others v. the Netherlands* (recovery of overpaid corporate income tax).

⁵ In this respect, the leading case is ECHR, Judgement of 24 February 2004, *Benedoun v. France*. For example, the right to a fair trial is applicable, considering its “criminal” side, for the surcharges imposed by the tax authorities

2. The Court held that an excessive impediment of the access to the court, such as the imposition of a fee for lodging an action to the amount of an average annual salary, is incompatible with Art. 6 par. 1 of the Convention⁶. This is particularly the point where Romania encounters serious problems, as it has suffered a number of convictions before the European Court. Of course, the leading case on that matter is *Weissman and others v. Romania*⁷, where the Court held that a stamp duty of EUR 323,264 (approximately 1% of the value of the goods reclaimed) is an excessive obstacle for access to a court incompatible with Art. 6 par. 1. Although this was only the first case to be heard in Strasbourg⁸, the Romanian Government did not provide any remedy for this particular inconsistency so far. Therefore, the Romanian legislation related to stamp duties is incompatible with the right to a fair trial as long as:

- the stamp duties are determined based on criteria which do not relate to the financial possibilities of the applicants and are particularly high for any litigant;
- although the claimant may apply for an exemption of the stamp duties to the tax authorities, there is no case-law able to suggest that such claims are successful;
- failure to pay the stamp duties results into annulment of the action brought before the Court;
- this particular mechanism impairs the very essence of the right of access to a court⁹.

In our opinion, this matter can be brought to an end if one of the following solutions would be envisaged: all the costs and fees are to be determined at the end of the trial and are due by the party that eventually lost the trial; based on a thorough and effective investigation of the administrative authorities or of the court, parties that cannot pay their stamp duties are exempted from the payment of taxes; judges are entitled to grant exemption of stamp duties if there is a

amounting to some 10% of the tax liability (ECHR, Grand Chamber, Judgement of 23 November 2006, *Jussila v. Finland*, par. 38).

⁶ ECHR, Judgement of 19 June 2001, *Kreuz v. Poland*, par. 61. For further thoughts on this case, see Kutyl, Fr., *Justice pénale et procès équitable*, volume I, Bruxelles: Larcier, 2006, 849 pages, ISBN 978-2-8044-2249-3, p. 346-347.

⁷ ECHR, Judgement of 24 May 2006, *Weissman and others v. Romania*.

⁸ See also ECHR, Judgement of 25 January 2007, *Iorga v. Romania*; ECHR, Judgement of 11 October 2007, *Larco and others v. Romania* (failure to pay taxes of some 90,000 euros); ECHR, Judgment of 7 February 2008, *Beian v. Romania* (No. 2) – failure to pay taxes of some 330 euros, while the joint income of the plaintiff and his wife was approximately 119 euros.

⁹ Minea, M. Șt., Costăș, C.F., *Dreptul finanțelor publice. Drept fiscal*, București: Wolters Kluwer România, 2008, 484 pages, ISBN 978-973-1911-09-0, p. 368.

good chance of success for the claim brought before the court; a maximum ceiling for stamp duties is established for every type of litigation.

3. The right to a fair trial implies not only the right to a judge and the right to obtain a reasoned judicial decision, but also the right to the execution of such a judicial decision, as far as this decision is final and binding. As the European Court has often said, „the right to a court” would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party¹⁰. Therefore, states are required to take all the necessary steps in order to ensure the effective execution of final and binding judicial decisions, including those in the tax field or where financial consequences are involved.

At this point, one must notice that the Romanian legislation concerning the execution of judicial decisions concerning public authorities and institutions is problematic. To be more specific, according to the provisions of the Government Ordinance no. 22/2002¹¹, the party that obtained a final and binding judicial decision imposing on a public authority or institution to pay a sum of money could obtain the execution of such a decision only if the respective amount was contained in the budget of the public entity. In other words, such a party would have to wait for the execution of the judgment until the public entity approved a budget that contained enough money in order to satisfy the claim. Government Ordinance no. 22/2002 also provided that public authorities and institutions could not be subject to a forced execution for such claims, since the public goods and revenues are excepted from such an execution. Surprisingly, the Romanian Constitutional Court upheld this position¹².

Following the extensive criticism of the Romanian doctrine¹³, Law no. 110/2007¹⁴ introduced new rules on this matter. According to these rules, public authorities and entities are obliged to take all the necessary steps in order to pay the amounts claimed, as long as a final binding

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¹⁰ For the leading decision, see ECHR, Judgement of 19 March 1997, *Hornsby v. Greece*, par. 40.

¹¹ Published in Official Journal no. 81 of 1 February 2002.

¹² Amongst many others, see Decision no. 202 of 4 July 2002, Official Journal no. 805 of 6 November 2002; Decision no. 444 of 20 November 2003, Official Journal no. 871 of 8 December 2003; Decision no. 529 of 11 October 2005, Official Journal no. 1025 of 18 November 2005.

¹³ See, for example, Chiriță, R., *Convenția europeană a drepturilor omului. Comentarii și explicații*, p. 285-286.

¹⁴ Published in Official Journal no. 300 of 5 May 2007.

decision is presented. If the respective public entity fails to do so within a prescribed term of 6 months, the creditor is entitled to obtain the forced execution of the judicial decision, following the provisions of the Romanian Code of Civil Procedure.

Although such a regulation is a sure step ahead, we do believe that there is still no sufficient evidence that the new provisions offer an effective remedy for the execution of binding judicial decisions, where a public authority and institution is involved as debtor. In this respect, we find it necessary to provide for other mechanisms as well: the possibility of the creditor to have his claim introduced in the next budget, without prior approval of the Parliament, the local authorities or the institution itself (as far as local budgets are concerned, this solution was possible in the 1940s); the imposition of a surcharge for the public authorities for the time elapsed before the moment when the claim is introduced and the moment when the judicial decision is executed; the possibility of the creditors to claim the non-fiscal revenues of the public authorities (revenues from civil or commercial contracts, from concession contracts and so on) in order to have their debts repaid.

It must be noted that some better solutions were found where the execution of judicial decisions of the administrative courts are concerned. According to the provisions of Law no. 554/2004¹⁵, a binding decision of an administrative court must be complied with in the term established by the judge or no later than 30 days from the moment the decision became final (article 24 par. 1). If this obligation is not respected, anyone can ask the court to impose a fine of 20% of the minimum monthly wage per day on the head of the public authority or institution, up to the moment where the decision is executed entirely. Following such a decision, if the execution of the initial judicial decision is still pending, there is an offence of failure to comply with judicial decisions, which is punished by a fine of up to EUR 3,000 or by imprisonment of 6 months to 3 years.

4. A particular disposition of the Romanian Fiscal Code might pose additional problems as far as the right to obtain the execution of a judicial decision is concerned. In the case of the judicial apportionment of a building or land, the parties obtain a judicial decision recognising their right of property for the whole or for a portion of the respective good. Of course, if the good is entirely attributed to one party, the other party is generally entitled to a sum of money or to another

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¹⁵ Published in Official Journal no. 1154 of 7 December 2004, with the subsequent changes.

equivalent compensation. In this case, according to article 77¹ of the Romanian Fiscal Code, the party that obtains the sum of money (assimilated to the seller of a building or of land) has to pay the tax on the income obtained from the transfer of property. Furthermore, the new owner of the building or land must register his right with the Land Register Authority, in order to have his right of property fully protected. At this point, a tricky tax provision holds that the Land Registered Authority is entitled to refuse such registration as long as the proof that income tax has been paid is not presented (article 77¹ par. 6 Romanian Fiscal Code, *in fine*). The purpose of such a provision is clearly that of ensuring the payment of income tax to the state budget.

In our view, such a provisions is clearly inconsistent with the right to a fair trial and also unconstitutional with reference to article 21 of the Romanian Constitution. At least two arguments can sustain this conclusion:

- the party that asks for the registration of the right of property asks for the execution of a final binding judicial decision; in this respect, according to the *Hornsby* jurisprudence, the state authorities must refrain from making such a judicial decision ineffective;

- the fact that income tax has not been paid is not attributable to the new owner, as he has no obligation to pay tax, while a proof of the payment is quite difficult to obtain by the party that did not pay the tax and had no obligation whatsoever to do so¹⁶.

Therefore, we believe that the provision of article 77¹ par. 6 of the Romanian Fiscal Code must be abrogated at once.

5. The Romanian doctrine has often claimed that the obligation to comply with a previous and compulsory litigation procedure before the tax authorities (article 202 and the following of the Romanian Code of Fiscal Procedure), prior to having the case heard by a „court” within the meaning of the European Convention of Human Rights, is contrary to the right of access to justice¹⁷. Despite the jurisprudence of the Romanian Constitutional Court on this matter¹⁸, we

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¹⁶ See also Costaş, C.F., *Instanța judecătorească - percepător fiscal?*, in *Dreptul* no. 2/2007, p. 70 – 82; Minea, M. Șt., Costaş, C.F., *Dreptul finanțelor publice. Drept fiscal*, p. 36.

¹⁷ Deleanu, I., *Tratat de procedură civilă*, volume I, București: C.H. Beck, 2007, 897 pages, ISBN 978-973-115-100-7, p. 87; Popescu, C.-L., *Frauda la Constituție realizată de Legea nr. 174/2004 pentru aprobarea O.G. nr. 92/2003 privind Codul de procedură fiscală, prin calificarea expresă a procedurii fiscale drept procedură administrativă*, in *Curierul judiciar* no. 7-8/2004, p. 196-206; Dascălu, D., Alexandru, C., *Explicațiile teoretice și practice ale Codului de procedură fiscală*, București: Rosetti, 2005, 581 pages, ISBN 973-8378-97-4, p. 496.

believe that such a procedure is a clear and unjustified restriction of the right of access to justice, at least for the following reasons:

- based on the criteria established by the European Court of Human Rights, such procedures are to be considered special jurisdictions;
- article 21 par. 4 of the Romanian Constitution clearly states that such procedures are optional;
- there is little proof that the tax authorities are inclined to reform their decisions, in the favour of the taxpayer claiming that such decisions are illegal;
- the compulsory character of such procedures can also affect the right to a judgement within a reasonable time, also recognised by article 6 par. 1 of the European Convention and article 21 par. 3 of the Romanian Constitution.

Under these circumstances, we do agree with the majority of the Romanian doctrine on the fact that the Romanian legislator should make the necessary changes to the Code of Fiscal Procedure and eliminate this restriction as soon as possible.

6. Article 6 par. 2 and 3 of the European Convention of Human Rights grant to the persons facing a „criminal charge” special guarantees: recognition of the presumption of innocence, the right of silence, rights and facilities of the defense and so on. On the contrary, the relevant provisions of the Romanian Code of Fiscal Procedure are rather shy when it comes to the same solution.

In our view, this deficiency is caused by the fact that the Romanian legislator and the tax authorities do not consider fiscal procedure is covered by the right to a fair trial. On the contrary, based on the *Benedown* jurisprudence, we believe that the criteria are met in order to consider that there is a „criminal charge” involved¹⁹ and that article 6 is applicable in certain cases (for

¹⁸ Decision no. 409 of 12 October 2004, Official Journal no. 1063 of 16 November 2004; Decision no. 478 of 9 November 2004, Official Journal no. 69 of 20 January 2005.

¹⁹ There are four criteria which are taken into account in order to decide whether article 6 is applicable: the tax provisions must concern all the citizens and not only a particular group; the surcharges are not meant to ensure the compensation of the losses incurred by the public budget, but to discourage a similar conduct; the fiscal sanctions are based on a general legal text with a repressive aim; the amount of the fiscal sanctions is considerable (ECHR, Judgment of 24 February 1994, *Benedown v. France*).

example, as far as the tax surcharges of 0,1% for day of delay are concerned²⁰). Therefore, the taxpayers should be granted the special guarantees provided for by the European Convention.

One example might prove helpful at this point. According to article 10 of the Romanian Code of Fiscal Procedure, the taxpayer has a general obligation to cooperate with the tax authorities. Further special provisions oblige the taxpayer to provide all the necessary information at the request of the tax authorities, free of charge (article 52 par. 1) or to facilitate the access of the authorities on the premises (article 57). These obligations are clearly at odds with the right not to contribute to the self-incrimination²¹ or with the right of silence²² recognised by the European Court of Human Rights within the context of the right to a fair trial.

For these reasons, we believe that the Romanian legislator should act quickly and provide for the guarantees enshrined in article 6 paragraphs 2 and 3 of the European Convention when a „criminal charge” in the tax field is involved. Especially, the above-mentioned guarantees should be granted in all cases where evidence collected in the administrative procedures (such as the tax procedures) is to be used in forthcoming criminal procedures²³.

7. Based on the examples highlighted above, we can conclude that the Romanian legislator has a lot of work to do in order to make certain tax provisions compatible with the right to a fair trial, as interpreted by the European Court of Human Rights. In this respect, particular consideration must be paid to the case-law of the European Court, while a comparative analysis of other states legislation might prove helpful as far as the chosen solutions are concerned. Of course, if the

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²⁰ As far as the tax surcharges are concerned, the French doctrine underlined the fact that certain difficulties might arise in respect of the right of the fair trial as long as the amount of the surcharges is greater than the amount of the legal interest rate (Flauss, J.-F., *Sanctions fiscales et Convention européenne des droits de l'homme*, in *Revue Française des Finances Publiques*, 1999, p. 77 – 100). The European Court of Human Rights reached a similar conclusion in some cases (for example, ECHR, Judgement of 3 December 2002, *Boofzheid v. France*; ECHR, Judgement of 15 October 2002, *Vieziez v. France*).

According to article 120 par. 7 of the Romanian Code of Fiscal Procedure, the level of the surcharges for failure to pay taxes within the prescribed time limit is set at 0,1% for every day of delay. Therefore, an annual surcharge of 36,5% is considerably greater than the legal interest rate of 10-14% and it is not solely meant to ensure the compensation of the losses incurred by the state or local budgets.

²¹ ECHR, Judgement of 24 November 1993, *Imbrioscia v. Switzerland*.

²² ECHR, Judgement of 17 December 1996, *Saunders v. United Kingdom*.

²³ See Kutu, Fr., *Justice pénale et procès équitable*, p. 525-558; Mateuț, Gh., Ionescu, D., *Inadmisibilitatea utilizării ca mijloc de probă în procesul penal a proceselor-verbale și a actelor de constatare obținute în procedurile administrative de control*, in *Caiete de drept penal* no. 1/2005, p. 11-40.

Romanian Government and Parliament fail to do so, it is for the judges to apply the European Convention directly, based on articles 11 and 20 of the Romanian Constitution, in order to protect the fundamental rights of taxpayers.