

**APPLICATION N° 15488/89**

**Giuseppe DELLO PREITE v ITALY**

**DECISION of 27 February 1995 on the admissibility of the application**

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**Article 6, paragraph 1 of the Convention**

- a) The right of access to a court does not imply that the successful party in domestic proceedings will necessarily be reimbursed the costs of those proceedings, unless there is evidence that these costs would constitute an impediment to access to a tribunal*
- b) Administrative proceedings lasting one year and ten months Length not excessive*

**Article 25 of the Convention and Article 1 of the First Protocol** *Administrative authorities late in complying with an order to pay interest on a tax credit (Italy) A person who has not brought "compliance" proceedings to hasten execution of an order and who has received interest covering the period of the delay cannot claim to be a victim of an infringement of the right to peaceful enjoyment of possessions*

**Article 26 of the Convention**

- a) The obligation to exhaust domestic remedies is limited to making normal use of remedies which are likely to be effective and sufficient To be effective, a remedy must be capable of redressing the impugned situation directly*
- b) Lack of legal knowledge not regarded as a factor absolving an applicant from the duty to exhaust domestic remedies*

c) *Where administrative authorities have failed to comply with a Tax Board order, which has become final, to pay interest on a tax credit (Italy), "compliance" proceedings are an effective remedy. It makes no difference that the Tax Board has failed to give the applicant an official copy of the order endorsed with authority to execute*

**Article 1, paragraph 1 of the First Protocol** *A debt can constitute a 'possession' for the creditor*

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## THE FACTS

The applicant is an Italian citizen. He was born in 1947 and lives in Genoa.

Before the Commission, he is represented by Mr Mauro Mortello, a lawyer practising in Genoa.

The facts of the case, as submitted by the parties, may be summarised as follows:

### 1 *Particular circumstances of the case*

On 3 March 1988, the applicant applied to the Turin Tax Board of First Instance, seeking interest under Article 38*bis* of Presidential Decree 633/72 on excess VAT paid by him in 1979. The principal had been repaid to him on 21 July 1986 as a result of previous proceedings. The interest amounted to 9,688,932 Italian lire (ITL), that is, approximately 33,410 French francs (FRF).

On 20 January 1989, the Tax Board found in favour of the applicant. The decision was deposited at the Board registry on 31 January 1990 and became final on 23 April 1990.

The applicant did not receive the sums awarded him and, on 20 June 1990, he requested the Secretary to the Board to "issue (him) with an official copy, endorsed with authority to execute, of the Board's decision" (il rilascio di una copia autentica, in forma esecutiva, della sentenza). In the light of Article 38 of Presidential Decree 739/81, the Secretary to the Board took the view that he or she did not have the power to "issue an execution copy for the purposes of service" (ritiene nella fattispecie di non poter provvedere alla richiesta notifica in forma esecutiva).

On 3 September 1991, the applicant requested Turin tax office to pay him the sum due. However, the tax office informed him that the requisite funds had not yet been released and that the payment would be made as soon as these were available.

On 27 January 1993, the applicant was paid the sum of ITL 12,344,000, that is approximately FRF 42,566.

2. *Relevant domestic law*

a) *Legislative provisions*

Article 38 of Presidential Decree 636/72 of 26 October 1972, as amended by Decree 739/81 of 3 November 1981, provides as follows:

*"Pubblicazione, comunicazione e notificazione della decisione* - La decisione è resa pubblica nella motivazione mediante deposito nella segreteria della commissione tributaria entro trenta giorni dalla data della deliberazione

Il segretario fa risultare l'avvenuto deposito, apponendo sulla decisione la propria firma e la data

Il dispositivo della decisione è comunicato alle parti entro dieci giorni dal deposito di cui al primo comma

La segreteria rilascia entro dieci giorni dalla richiesta della parte copia autentica della decisione; se la decisione di condanna al pagamento di somme è divenuta definitiva, ne rilascia copia in forma esecutiva. Il richiedente diverso dall'ufficio tributario deve corrispondere le spese di rilascio della copia mediante applicazione sulla domanda di marche da bollo da annullarsi a cura della segreteria. I criteri per la determinazione dell'importo da corrispondere sono stabiliti con decreto del Ministro delle finanze in base al costo del servizio.

Le parti hanno facoltà di provvedere direttamente alla notificazione della decisione e, in tal caso, hanno l'obbligo di depositare l'originale notificato presso la segreteria della commissione tributaria, la quale ne rilascia ricevuta. In caso di concorso di più comunicazioni o notificazioni alla stessa parte, vale ad ogni effetto la comunicazione o la notificazione eseguita per prima."

(Translation)

*"Publication, issue and service of decisions.* - The grounds of a decision shall be made public by being deposited at the office of the Secretary to the Tax Board within 30 days from the date on which the deliberations took place

The Secretary shall certify that the decision has been deposited by signing and dating it

Within ten days of the deposit referred to in the first paragraph, the parties shall be given notice that the decision has been deposited

The Secretary's office shall issue an official copy of the decision within ten days of a request from one of the parties. If a decision ordering payment of a sum of money has become final, the copy shall be endorsed with authority to execute. Any party other than the tax office who requests a copy shall pay the costs of issue by endorsing the request with tax stamps which shall be cancelled by the Secretary's office. The method of calculating such costs shall be established by decree of the Minister of Finance and shall be based on the cost of providing the service.

The parties may have the decision served directly. In this event, they must deposit one copy thereof endorsed with a certificate of service at the office of the Secretary to the Tax Board which shall issue a receipt therefor. Where a document is served on the same party more than once, or where the same party receives more than one copy of a notice from the Board, the earliest service or notice shall prevail.

Article 38bis, paragraph 1 of Presidential Decree 633/72 of 26 October 1972, which deals with repayment (albeit without referring specifically to interest), provides as follows

*'Esecuzione dei rimborsi* - I rimborsi previsti nell'art. 30 qualora nel termine di due anni dalla data di presentazione della dichiarazione annuale non sia stato notificato avviso di rettifica o accertamento ai sensi dell'art. 54 e del secondo comma dell'art. 55 devono essere eseguiti entro tre mesi dalla notificazione per la parte riconosciuta dall'ufficio ed entro tre mesi dalla definizione dell'accertamento per la parte residua. Sulle somme rimborsate si applicano gli interessi in ragione del 12 per cento annuo, con decorrenza dal novantesimo giorno successivo a quello in cui è stata presentata la dichiarazione.

(Translation)

*Repayments* - Where no notice of adjustment or inspection under Articles 54 and 55 paragraph 2 has been served within two years from the date on which the annual return was filed, repayments under Article 30 shall be made within three months from the end of that period. Where a notice of adjustment or inspection has been served, the repayment shall be made within three months from service thereof in the case of the amount which the tax office acknowledges [as having been overpaid] and within three months from completion of the inspection in the case of any remaining amounts. Interest on the sums to be repaid shall accrue at the rate of 12% per annum from the ninetieth day following the date on which the annual return was filed.

b) Outline of case-law

Apulia Regional Administrative Court, in a judgment (No 801) of 5 December 1987 and the *Consiglio di Stato* (the Supreme Administrative Court), in a judgment (No 740) of 3 October 1990 (hereinafter "judgment No 740"), have ruled on the question whether citizens entitled to be refunded in respect of a tax overpayment could bring "compliance" proceedings in the administrative courts. Apulia Regional Administrative Court held that the administrative courts had no jurisdiction in this field since Tax Boards are not part of the ordinary court system, so that only the *Consiglio di Stato* had jurisdiction to hear such "compliance" proceedings.

Extract from judgment No 801

"Conclusivamente, ( ), deve essere riconosciuta la competenza del Consiglio di Stato in tema di esecuzione al rimborso di crediti erariali "

(Translation)

'In conclusion, ( ) it must be recognised that the *Consiglio di Stato* has jurisdiction over the enforcement of repayment of tax credits "

Extract from judgment No 740

In conseguenza della cennata evoluzione giurisprudenziale, il ricorso per ottemperanza ha assunto nell'attuale sistema della giustizia amministrativa la funzione di rimedio a carattere generale, idoneo ad assicurare l'adempimento da parte della Pubblica Amministrazione degli obblighi nascenti da qualsiasi giudicato. E poiché non è dato dubitare della natura giurisdizionale delle Commissioni tributarie e delle loro pronunce, il ricorso per ottemperanza deve ritenersi esperibile anche per le decisioni di tale giudice. Ciò tanto più dal momento che le decisioni del giudice tributario non possono contenere pronunce di condanna, ma sono essenzialmente sentenze di accertamento circa l'esistenza e la misura dell'obbligazione tributaria e talora di annullamento e l'ordinamento non prevede uno specifico strumento di esecuzione di tale tipo di decisione. '

"( ) In secondo luogo, proprio con l'invocata sentenza No 1074 del 1988 le Sezioni unite della Cassazione, ribadendo il proprio precedente orientamento (sent 9 marzo 1981 No 1299), hanno affermato la promuovibilità, in via alternativa o cumulativa con l'ordinaria esecuzione forzata, del giudicato di ottemperanza anche per le sentenze di condanna al pagamento di somme di danaro

Peraltro, presupposti necessari e sufficienti per l'esperibilità del ricorso per ottemperanza sono la presenza di una pronuncia giurisdizionale passata in cosa giudicata e l'inadempimento, anche parziale, dell'Amministrazione agli obblighi nascenti dal giudicato "

(Translation)

'As a result of the above mentioned developments in case-law, 'compliance' proceedings have come to be used in the present system of administrative law as a general remedy which can be used to enforce any kind of judgment against a public authority. And since there can be no doubt about the judicial nature of Tax Boards and their decisions, 'compliance' proceedings must be considered as potentially applicable even to those decisions *a fortiori* given that tax court decisions cannot include coercive orders but are essentially declaratory of the existence and scope of a charge to tax or (in some cases) quash an earlier decision, and also given that the legal system does not provide for a specific method of enforcing such decisions.'

"( ) Secondly, in the very judgment cited above, No 1074 of 1988, the Court of Cassation sitting in plenary, reaffirming their previous case law (judgment of 9 March 1981 No 1299), held that it was possible to bring 'compliance' proceedings either as an alternative to or in addition to ordinary enforcement proceedings, even in relation to judgments ordering the payment of a sum of money

Furthermore, 'compliance' proceedings may be brought only if there is a judicial decision which has become final and the administrative authorities have failed even partially, to comply with their obligations under that decision "

## COMPLAINTS

The applicant alleges a violation of Article 6 of the Convention, in that he was not given a hearing within a reasonable time in the context of the proceedings commenced on 3 March 1988 and in that he was obliged to bear the costs of the proceedings, which constituted an impediment to his right of access to a tribunal. He considers that there has also been a violation of the principle of the right to a fair hearing, since he was not paid the interest awarded to him by the Board until 27 January 1993

## PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 26 June 1989 and registered on 30 September 1989

On 30 November 1992, the Commission decided to give notice to the Italian Government of the application and to invite them to submit observations in writing on its admissibility and on the merits of the complaints relating to the length of the proceedings commenced on 3 March 1988 before the Tax Board. The Commission also decided to give the Government notice of these complaints as raising an issue under Article 1 of Protocol No. 1.

The observations of the respondent Government were submitted on 7 June 1993. They dealt only with Article 6 para. 1 of the Convention.

The applicant's observations in reply were submitted on 22 September 1993.

On 5 April 1994, the Commission decided to put certain questions to the parties to ascertain whether "compliance" proceedings could, on the facts, be considered as a domestic remedy which should be exhausted in order to enforce the decision.

The parties submitted their replies in letters dated 10 and 27 June, 21 July and 14 November 1994.

## THE LAW

1. The applicant complains of the length of the proceedings which commenced on 3 March 1988 before the Tax Board.

According to the applicant, the length of the proceedings does not comply with the "reasonable time" requirement and therefore violates Article 6 para. 1 of the Convention. The Government dispute this claim.

The Commission notes that the substantive proceedings commenced on 3 March 1988 and ended on 31 January 1990. These proceedings lasted more than one year and ten months.

As regards this complaint, and to the extent that the allegations have been supported and it is competent to entertain them, the Commission has found no appearance of a violation of the rights and freedoms guaranteed by the Convention or its Protocols.

It follows that this complaint must be rejected pursuant to Article 27 para. 2 of the Convention.

2. As to the length of time taken for the decision to be enforced, the Commission notes that the parties differ as to whether there is a domestic remedy within the meaning of Article 26 of the Convention whereby the decision could be enforced.

In the Government's view, it follows from judgment No. 801 of 1987 of the Apulia Regional Administrative Court and from judgment No. 740 of 1990 of the *Consiglio*

*di Stato* that the applicant could have taken "compliance" proceedings at any time from 23 April 1990, that is, from the date on which the Tax Board's decision became final

The Government consider that there can be no doubt as to the accessibility of an appeal to the *Consiglio di Stato*. As regards the effectiveness of such a remedy, the Government point out that the *Consiglio di Stato* has the power (which it used in the case resulting in judgment No 740) to appoint an "ad hoc commissioner", whose task is to implement the decision in lieu of the administrative authorities if the failure to comply continues

The Government state that, contrary to the applicant's assertions, judgment No 740 establishes that "compliance" proceedings may be brought whether the judgment to be enforced is purely declaratory or contains a coercive order. The Government cite numerous cases predating the introduction of the application, in which it was held that it was possible to bring "compliance" proceedings where the administrative authorities failed to comply with a decision, rendered by an impartial judicial body, which had become final. The Government point out that the applicant has not disputed the judicial nature of Tax Boards.

As for the applicant's other arguments, the Government note that the jurisprudence of the Convention organs does not require that a remedy must be capable of being used without the help of a lawyer. The Government add that it is invalid to draw a distinction between remedies created by legislation and remedies arising out of case-law along the lines that the former are accessible and the latter inaccessible, given that it may be just as difficult to find out the content of a statute as that of case-law, while in certain systems - such as the common law system - principles developed through case-law are of prime importance.

For his part, the applicant argues that the Government did not raise the question of "compliance" proceedings in their observations precisely because they considered that such proceedings were not applicable in the present case. Given that judgment No 740 postdated the introduction of the present application, the applicant submits that there was at that time no other remedy he could use to enforce the decision.

Moreover, he considers that "compliance" proceedings are not applicable in his case as judgment No 740 concerned a declaratory judgment (*decisione di accertamento*) rather than a coercive order (*decisione di condanna*). He also points out that judgment No 740 dealt with a set of facts governed by the legislation in force before November 1981, which did not permit Tax Boards to make coercive orders. In the case of coercive orders, the successful party has only to obtain an execution copy of the decision in order to be able to require the administrative authorities to pay him the amount due. The applicant considers that this remedy is appropriate and should be exhausted where there is a coercive order and that, having regard to the differences between the two cases, judgment No 740 does not establish that a remedy was available in the instant case.



Alternatively, in the applicant's view, compliance proceedings do not constitute an accessible, effective and specific remedy. In evidence of this he points to the fact that its applicability to the situation in question is not expressly laid down in legislation but rather has evolved through case law. He considers that such proceedings cannot be brought unless the applicant is familiar with the case-law and that even a lawyer cannot be aware of every development in case law, given the number of different branches of the law. For this reason, he considers that such proceedings require too much technical knowledge to be regarded as accessible. He notes that, for an appeal to the *Consiglio di Stato*, legal representation is compulsory.

In summary, he submits that compliance proceedings were not applicable in his case and that, accordingly, there were no remedies available to have the decision enforced.

The Commission recalls that Article 26 of the Convention requires only the exhaustion of such remedies as relate to the breaches of the Convention alleged and at the same time can provide effective and efficient redress (No 13669/88, Dec 7 3 90 D R 65 p 245). Moreover, only a remedy which provides direct protection of the right whose violation is alleged can be considered effective (No 13251/87, Dec 6 3 91, D R 68 p 137).

The Commission recalls that an applicant and far less a lawyer cannot justifiably plead ignorance of legislation or case law in order to relieve himself from exhausting a domestic remedy (see, *mutatis mutandis*, No 1211/61, Dec 4 10 62, Yearbook 5 p 224). The Commission notes that it is clear both from the case law cited by the Government, which predated the introduction of the application and from the case law referred to in judgment No 740 that compliance proceedings may be brought even in relation to an order for the payment of a sum of money provided that it is contained in a judicial decision which has become final and that the administrative authorities have failed, even partially to comply with their obligations under that decision.

Consequently, and even if the applicant was not aware of the administrative court judgment No 801 of 1987, the Commission considers that compliance proceedings could reasonably be considered as an accessible, effective and specific remedy capable of forcing the administrative authorities to comply with the Tax Board's decision and to pay the applicant the sums due to him.

The Commission observes that the Government have not supplied information as to why the Tax Board did not issue the applicant with an official execution copy of the decision. Without this copy, implementation of the decision is left to the goodwill of the defendant authority, unless the applicant takes compliance proceedings.

In these circumstances the Commission considers that compliance proceedings constituted the appropriate domestic remedy for the applicant to bring in order to enforce the Tax Board's decision.

The Commission notes that, since the applicant failed to bring "compliance" proceedings, he has not, strictly speaking, commenced any enforcement proceedings. Therefore he cannot complain of their alleged length.

The Commission therefore concludes that this complaint is manifestly ill-founded and must be rejected pursuant to Article 27 para 2 of the Convention.

3 The complaint concerning the late payment of interest due was raised by the applicant under Article 6. However, the Commission considers that it should be examined under Article 1 of Protocol No 1, since it essentially alleges an infringement of the right to peaceful enjoyment of possessions.

The Commission notes that the national court found that the applicant was entitled to receive a certain sum by way of interest. The Commission recalls that it has already accepted that a debt can constitute a possession for the creditor within the meaning of Article 1 of Protocol No 1 (see, *inter alia*, No 7742/76, Dec 4 7 78, D R 14 p 146).

The Commission further notes that the Government have not submitted any observations as to whether Article 1 of Protocol No 1 is applicable or has been complied with.

Firstly, the Commission points out that the applicant could have brought "compliance" proceedings in order to force the administrative authorities to pay him the monies owed more quickly. Secondly, the Commission observes that the applicant did receive the sum due on 27 January 1993 and that this sum included statutory interest.

The Commission therefore considers that the applicant cannot in this context claim to be a victim, within the meaning of Article 25 of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para 2 of the Convention.

4 Finally, as regards the applicant's complaint that his right of access to a tribunal was impeded contrary to Article 6 of the Convention, in that he was obliged to bear the costs of the proceedings despite the fact that he had been successful, the Commission observes that the right of access to a tribunal does not prescribe that the successful party in the domestic proceedings must be reimbursed his costs. Moreover, the applicant has not shown that these costs were so high as to constitute such an impediment (see, *mutatis mutandis*, No 20684/92 Aires v Portugal, Dec 2 3 94, unpublished).

The Commission therefore concludes that this complaint is also manifestly ill-founded and must be rejected pursuant to Article 27 para 2 of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.