APPLICATION N° 15117/89

Riccardo TRAVERS and 27 others v/ITALY

DECISION of 16 January 1995 on the admissibility of the application

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Article 25, paragraph 1 of the Convention *The Commission cannot examine the compatibility of a law with the Convention in the abstract A person who cannot show that he is personally affected by the law to a greater extent than any other citizen cannot claim to be a victim of a violation of the Convention*

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, sufficient and accessible

b) The burden of proving the existence of accessible and sufficient domestic remedies lies upon the State invoking the rule

c) An application for a refund is not an effective remedy in respect of the system of levying provisional tax set out in the 1973 Decree (Italy)

Article 30, paragraph 1 (a) of the Convention *Striking out of the list after withdrawal of the application*

Article 1, paragraph 1 of the First Protocol *The levying of taxes is an interference with the right guaranteed in paragraph 1, but is justified under paragraph 2*

Article 1, paragraph 2 of the First Protocol *It is for national authorities on the basis of their assessment of political economic and social needs, to decide on the levying of taxes or other contributions*

The levying of a tax or other contribution would be in violation of the right to peaceful enjoyment of possessions only if the person concerned was saddled with an intolerable burden or if his financial situation was seriously undermined

Decree imposing the system of levying provisional tax on certain independent professions

Having regard to the aim of the Decree and the lack of evidence that the applicant's financial situation was seriously undermined this system constitutes an interference which is proportionate to the aim and in accordance with the general interest

Delays in refunding tax credits are offset by the payment of interest thus striking a fair balance between the general interest and the interest of the individual and complying with the principle of proportionality

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THE FACTS

The applicants, whose names are listed in the schedule (1), are all Italian citizens They are business consultants

They are represented before the Commission by Mr Nino Raffone, a lawyer practising in Turin

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

1 *Particular circumstances of the case*

Article 25 of Presidential Decree (hereafter called PD) No 602 of 29 September 1973 provides that industrial and commercial companies and partnerships shall, on behalf of the State, make an advance deduction of tax at source from fees paid to third parties - such as consultants - in consideration of services provided to the company The rate at which the tax is deducted, formerly 13% of the fees due, has been 19% since 1 January 1989

The applicants submit that the main source of their business is from industrial and commercial companies and partnerships bound by this obligation to deduct tax at source

The applicants argue that this system is extremely onerous The manner in which it operates can be summarised as follows

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In order to prevent tax fraud, the company pays the consultant only 81% of the fees due (the remaining 19% being paid to the State) Approximately 70% of the fees are absorbed by the costs of providing the services and the remaining 11% are the consultant's earnings from which social security contributions are deducted Subsequently, when the taxpayer files his tax return, the definitive amount due in tax is calculated on the net profit (approximately 30%) and is systematically less than the amount withheld by the company to cover the tax advance (19% calculated on the gross earnings) The taxpayer is therefore owed a substantial tax rebate

Although the sum deducted at source is merely an advance on the income tax payable by the taxpayer concerned the tax rebate due under this system is not paid, on average, until five years later The applicants argue that this is tantamount to a forced loan to the State and that their professional survival is at risk

According to a calculation made by the applicants listed in the schedule (1) as Nos 1, 4, 15, and 23, their financial situation on 28 April 1992 was as follows

a) on 10 March 1992, Applicant No 1 received a letter from the Ministry of Finance informing him that he was owed a tax rebate of 5,141,000 lire (ITL) (approximately 17,700 French francs (FRF)) for 1987, plus ITL 1,361,000 (approximately FRF 4,700) in interest for late payment of the rebate this applicant also stated that he was owed a tax rebate of ITL 18,845 000 (approximately FRF 65,000) for 1989 and a rebate of ITL 11,423,000 (approximately FRF 39,400) for 1990,

b) Applicant No 4 stated that he was owed a tax rebate of ITL 7 747,000 (approximately FRF 26,700) for 1986, a rebate of ITL 8 314,000 (approximately FRF 28,650) for 1987, a rebate of ITL 8,058,000 (approximately FRF 27,800) for 1988, a rebate of ITL 11 715,000 (approximately FRF 40,400) for 1990 and finally a rebate of ITL 12,092,000 (approximately FRF 41,700) for 1990,

c) Applicant No 15 submitted that on 10 April 1992, she was still waiting for a rebate of aggregate tax credits of ITL 67,775 000 (approximately FRF 233,700) for the period 1985-1990,

d) Applicant No 23 stated that he was owed a tax rebate of ITL 5 938,000 (approximately FRF 20,500) for 1986, a rebate of ITL 5,409,000 (approximately FRF 18,650) for 1987, a rebate of ITL 10,795 000 (approximately FRF 37,200) for 1988, a rebate of ITL 9,537,000 (approximately FRF 32 900) for 1989 and finally a rebate of ITL 8,680,000 (approximately FRF 29,900) for 1990

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2 *Relevant domestic law*

Article 41 of P D No 602 of 1973 provides that the tax office dealing with the taxpayer's affairs must automatically refund the taxpayer should it emerge that the advance withheld at source exceeded the total tax due

Articles 44 and 44*bis* of this Decree also provide that on refunding the tax credit, the relevant tax office must pay the taxpayer interest on the sums refunded, at the rate of 9% per annum

Articles 37 and 38 of P D No 602 of 1973 provide, *inter alia*, that in the event of a clerical error, of duplication or total or partial non-liability for tax, the taxpayer in question may apply to the relevant tax office for a rebate These provisions stipulate that in the event that no reply is received from the tax authorities within 90 days of submission of the application, the taxpayer may challenge this failure to respond - which under Italian law counts as a rejection of the application by appealing to the Tax Board ("Commissione tributaria")

COMPLAINTS

The applicants allege a violation of Article 1 of Protocol No 1

They complain firstly that the percentage of tax deducted in advance is unreasonable They submit in particular that the amount deducted from their gross earnings actually corresponds to a deduction of 60% of their net profit They argue, among other things, that this system has forced many of them to change their work methods and, in some cases, even to change profession

They further complain of long delays by the tax authorities in refunding their tax credits

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 11 March 1989 and registered on 15 June 1989

On 30 November 1992, the Commission decided to give notice of the application to the respondent Government and to invite them to submit observations in writing on the admissibility and merits of the application

The Government submitted their observations on 19 May 1993 and the applicants replied on 19 July 1993

In a letter of 17 November 1994, the applicants' lawyer informed the Commission that the applicants listed in the schedule (1) as Nos 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27 and 28 intended to withdraw their application

(1) Not published

THE LAW

1 In so far as the application was introduced by the applicants listed in the schedule (1) as Nos 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27 and 28, the Commission notes that it was informed by a letter from the applicants' lawyer dated 17 November 1994 that the above mentioned applicants intended to withdraw their application

The Commission concludes under Article 30 para 1 (a) of the Convention that the above mentioned applicants no longer intend to pursue their application

The Commission further considers that as far as these applicants are concerned there is no particular aspect concerning respect for human rights as defined in the Convention requiring the Commission to continue its examination of the application under Article 30 para 1, *in fine*, of the Convention

The Commission therefore decides, pursuant to Article 30 para 1 of the Convention, to strike the application out of its list of cases in so far as it concerns the above-mentioned applicants

2 As regards the other applicants, i e those listed in the schedule (1) under Nos 1, 4, 15 and 23, they complain firstly of the provisional taxation system as such They also complain that the tax office dealing with their affairs has not yet refunded the tax credits payable following the deduction of the advance tax on their income and has thus violated Article 1 of Protocol No 1 to the Convention which reads as follows

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest to secure the payment of taxes or other contributions or penalties "

3 The Government object to the application at the outset on the ground that the applicants have failed to exhaust domestic remedies They argue that the applicants could have applied to the tax office dealing with their affairs for a refund under Articles 37 and 38 of PD No 602 of 1973 and that, failing a reply, they could have challenged the rejection by appealing to the Tax Board

The applicants dispute this argument They submit that the remedy referred to by the Government is ineffective, as the Tax Board has no power to decide claims for refunds, moreover, a complaint to the Tax Board regarding the delay in refunding the tax credits would be bound to fail

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The Commission observes that the exhaustion of domestic remedies rule laid down in Article 26 of the Convention requires that recourse be had only to accessible and sufficient remedies, i e those capable of providing redress for their complaints Furthermore, it is for the Government raising the contention to indicate the remedies which, in their view, were available to the persons concerned (see Eur Court H R, De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no 12, p 33, para 60)

The Commission notes in this regard that the Government have not given any examples of decisions to support their argument that the remedy they refer to is effective This remedy appears to apply only in the event of a clerical error, whereas the system of deducting advance tax at source, and the resulting tax rebates, derive from application of the law itself and in particular from Decree No 602 of 1973, Article 41 of which provides that the tax office dealing with the taxpayer's affairs shall refund the taxpayer automatically in the event that the advance deducted exceeds the total tax due

The Commission therefore considers that the remedy in question cannot be deemed to be an effective remedy in this case This objection cannot therefore be upheld

4 In reply to the applicants' complaint regarding the system of deducting tax at source, the Government argue that this system enables the State to take more effective action to combat tax fraud The Government also argue that if the tax office dealing with the taxpayer's affairs finds a tax credit, it automatically makes a refund, plus interest at the rate of 9% per annum

The applicants observe that although this system of deducting tax may well be very effective with regard to tax fraud, it affects not only tax evaders, but also, and to a disproportionate degree, an entire category of self employed professionals They argue that, in practice, the system of which they complain extorts a loan to the State at a far lower rate of interest than a freely negotiated loan, since the rate of interest payable on tax rebates is less than the rate paid to government bondholders who are, moreover, at liberty to sell their bonds

The Commission recalls firstly that any individual, non governmental organisation or group of individuals may lodge a application with the Commission in so far as such individual, non governmental organisation or group of individuals claims to be a victim of a violation by one of the High Contracting Parties of the rights recognised in the Convention The only circumstances in which the Commission has power to examine whether rules of domestic law are compatible with the Convention is in a concrete case and not in the abstract (see, e g No 11045/84 Dec 8 3 85 D R 42 p 247)

Thus the Commission will only examine complaints by applicants in so far as the legislation in question affects them personally. The Commission recalls the case-law of the European Court of Human Rights which establishes that the term "victim", in the context of Article 25, denotes the person directly affected by the act or omission in issue (see Eur Court H R , Eckle judgment of 15 July 1982, Series A no 51, p 30, para 66). The Commission notes here that the applicants have all submitted detailed evidence of their financial situation and the rebates owed to them by the tax authorities which, on 28 April 1992, had still not been refunded.

The Commission recalls the principle that taxation is an interference with the rights guaranteed in Article 1 para 1 of Protocol No. 1, but that this interference is justified under the second paragraph of that Article which provides expressly for an exception in respect of taxes or other contributions (see No. 11089/84, Dec 11.11.86, D.R. 49 p. 181).

The Commission observes, however, that despite this, an issue of this nature does not escape the Commission's power of review, since the Convention organs must ensure that Article 1 of Protocol No 1 has been correctly applied.

The Commission recalls that "the second paragraph of Article 1 of Protocol No 1 has to be construed in the light of the general principle set out in the first sentence of that Article" It follows that the interference in question should strike a "fair balance" between "the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights the concern to achieve this balance is reflected in the structure of Article 1 as a whole , and hence also in the second paragraph There must be a reasonable relationship of proportionality between the means employed and the aims sought to be realised" (see Eur. Court H R , Tre Traktorer AB judgment of 7 July 1989, Series A no. 159, p 23, para 59, see also James and Others judgment of 21 February 1986, Series A no. 98, pp 29 and 34, paras. 37 and 50, and Sporrong and Lönnroth judgment of 23 September 1982, Series A no 52, p 26, para. 69). Consequently, "the financial liability arising out of the raising of tax or contributions may adversely affect the guarantee secured under this provision if it places an excessive burden on the person or the entity concerned or fundamentally interferes with his or its financial position" (see No. 13013/87, Dec. 14.12.88, D.R. 58 pp. 163, 186).

The Commission further recalls that it is in the first instance for the national authorities to decide on the type of tax or contributions they wish to levy Decisions in this area normally involve, in addition, an assessment of political, economic and social problems which the Convention leaves to the competence of the member States, for the domestic authorities are clearly better placed than the Commission to assess such problems (see No 11089/84, aforementioned Dec., p. 202) The member States therefore have a wide margin of appreciation in this area

The Commission observes that the system of deducting tax advances was adopted mainly out of a concern to combat the problem of tax fraud effectively It is

true that this system creates a substantial burden for taxpayers, which appears to be exacerbated by the delay in receiving tax refunds from the tax authorities The Commission does not consider, however, that the applicants have proved that such a burden seriously undermined their financial situation

The Commission therefore considers that the system of deducting tax being challenged by the applicants did not result in a sufficiently disproportionate or wrongful interference with the applicants' possessions to amount to a violation of Article 1 of Protocol No 1

This part of the application is therefore manifestly ill-founded within the meaning of Article 27 para 2 of the Convention

5 As regards the delays in refunding the tax credits, the Government argue that Decree No 602 of 1973 provides for the automatic refund of tax credits and payment of interest at 9% per annum at the time of the refund, which, they argue, is sufficient to strike a fair balance between the general interest and that of the individuals subject to the system in question

The Government also refer to various measures intended to eliminate the disadvantages for taxpayers resulting from the tax authorities' past delays in refunding the tax credits in question The Government refer in particular to the possibility introduced by Law No 66 of 1992, of using the next tax return to set off credits and liabilities resulting from personal income tax (known in Italy as *imposta sul reddito delle persone fisiche*, hereinafter referred to as IRPEF) and local income tax (known in Italy as *imposta locale sui redditi* hereinafter referred to as ILOR) as well as any credit from preceding years against advances or tax due The Government stress finally that the simplification of the procedures relating to employees will enable the tax authorities to devote their efforts to the independent professions so as to accelerate the refund procedures

The applicants submit that the fact that the State pays taxpayers 9% interest at the time of refunding the tax lends force to their argument that the system they are challenging is tantamount to a forced loan to the State on less favourable terms than a freely negotiated loan

The applicants further contend that taxpayers in their category cannot benefit from the set off option referred to by the Government because, for this category of taxpayer, local income tax (ILOR) has been replaced by municipal property tax (known in Italy as *imposta comunale sugli immobili*, ICI), which cannot be set off The applicants also argue that the set off option is in any event of limited use because the credit always exceeds the liabilities and it accumulates from year to year

The Commission observes first of all that the impugned system does result in a substantial burden on the taxpayer and that the delay caused by the tax authorities in refunding tax credits appears to exacerbate this

The Commission notes, however, that Articles 44 and 44*bis* of Decree No. 602 of 1973 provide that the authorities must pay interest on refunds at the rate of 9% per annum

Having regard to the fact that the system being challenged, although onerous, does not appear to have seriously undermined the applicants' financial situation, the Commission considers that the delays complained of appear to be offset by the interest payments made on the refunds The Commission therefore considers that payment of this interest strikes a "fair balance" between the requirements of the general interest and the need to protect the fundamental rights of the individual, by reaching a reasonable relation of proportionality between the means employed and the aim sought to be achieved

The Commission further notes that pursuant to Law No 66 of 1992, the next tax return may henceforth be used to set off credits and liabilities resulting from personal income tax (IRPEF) and local income tax (ILOR) and any credit from preceding years against advances or tax due

The Commission therefore considers that this complaint must be rejected as manifestly ill-founded pursuant to Article 27 para 2 of the Convention

For these reasons, the Commission,

DECIDES TO STRIKE THE APPLICATION OUT OF ITS LIST, unanimously, as regards the applicants listed under Nos 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27 and 28 in the schedule (1),

DECLARES THE APPLICATION INADMISSIBLE as regards the applicants listed under Nos 1, 4, 15 and 23 in the schedule (1),

- unanimously, regarding the complaint relating to the tax system as such,
- by a majority, regarding the complaint that Article 1 of Protocol No 1 was violated by the delay in refunding the tax credits owed to the applicants

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(1) Not published