

## APPLICATION N° 36118/97

Bruno TADDEI v/ FRANCE

DECISION of 29 June 1998 on the admissibility of the application

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### Article 6, paragraph 1 of the Convention:

- a) *Applicable to tax proceedings at the end of which the applicant was ordered to pay penalties for acting in bad faith, since those penalties made the case against him a criminal one (reference to the Bendenoun judgment)*
- b) *The condition of access to a court is satisfied if an administrative authority which does not comply with the requirements of Article 6 para 1 of the Convention is subject to subsequent control by a judicial body which has full jurisdiction and provides the guarantees of this provision*

*In the instant case, following the imposition on the applicant of fiscal penalties for acting in bad faith, the matter was dealt with on the merits by two courts with power to overturn the tax authorities' decision and set the penalties aside, so that the requirement of access to a court was satisfied. The mere fact that the courts were not in a position to adjust the level of the penalties (which are fixed by statute) cannot lead to a different conclusion since the law ensures that the penalty is proportionate to the offence and to the circumstances of the case*

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### THE FACTS

The applicant, born in Nice in 1935, is a French national. He is retired and lives in Paris. He is represented before the Commission by Mr Philippe Stucker, a barrister practising in Paris.

The facts, as submitted by the applicant, may be summarised as follows

A *The particular circumstances of the case*

The applicant was an adviser on legal and tax affairs. An audit of his professional accounts was carried out for the years 1985 to 1987. On 13 June 1988 he was sent in accordance with adversarial procedure supplementary value added tax (hereinafter 'VAT') assessments in the sum of 126 554 French francs (FRF) plus penalties of FRF 68,070 for acting in bad faith.

On 12 January 1989 the applicant appealed to the tax authorities against the revised assessment and the related penalties. He argued *inter alia* that the imposition of the tax surcharges was unjustified. His appeal was dismissed on 29 June 1989.

On 28 July 1989 the applicant brought proceedings in Paris Administrative Court for remission of the supplementary VAT and the penalties.

Paris Administrative Court gave judgment on 2 June 1993 dismissing his application. Regarding the penalties for bad faith, the court held:

Whereas firstly Article 6 para 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms applies only to proceedings before a tribunal determining a criminal charge or civil rights and obligations, the submission that the authorities have breached those provisions must therefore be dismissed as ineffective,

Whereas secondly, the purpose of the penalties referred to in Article 1729 of the General Tax Code is to punish wrongful conduct: it is therefore neither an error of law nor a misuse of power for the tax authorities to refer to the fact that a tax payer is a legal and tax adviser where the point at issue is whether or not he has intended to evade tax.

Whereas, lastly Mr Taddei in his dual capacity as Chairman of the Board of Directors of the public limited company FEAL and owner of the premises rented to that company could not have been unaware that the rent invoiced to it was deducted from the company's profits or that the value added tax ("VAT") on it was deductible from the VAT payable by the company even if he was not entering the said rent as a non commercial receipt in his personal accounts and was not paying VAT on it to the Treasury: the authorities thus established that the applicant had acted in bad faith.

The applicant appealed. He submitted in his grounds of appeal that the authorities had failed to make out bad faith. He alleged in this respect that his right to a fair trial and his defence rights within the meaning of Article 6 of the Convention had been infringed.

Paris Administrative Court of Appeal gave judgment on 27 April 1995 dismissing the applicant's appeal. Regarding the penalties for bad faith, the court held:

“... Whereas, secondly, the ground of appeal based on a violation of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Liberties is ineffective since that provision is in any event applicable only to proceedings before the courts;

Whereas, thirdly, the documents on the case file show that the tax auditor gave reasons for his decision to impose the relevant penalties on Mr Taddei;

Whereas, lastly, Mr Taddei, in his dual capacity as Chairman of the Board of Directors of FEAL and owner of the premises rented to that company, could not have been unaware that the company deducted from its profits the rent it paid to Mr Taddei; as stated above, he did not pay the tax which he had himself entered on the invoices he made out to the company; the authorities thus established that the applicant had acted in bad faith; in reaching that conclusion, they were entitled to refer to Mr Taddei's profession as legal and tax adviser.

Whereas, in the circumstances, the penalties added to the tax due from Mr Taddei must be confirmed;

Whereas it follows from the foregoing considerations that Mr Taddei's submission that Paris Administrative Court erred in law in dismissing his claim cannot succeed; ...”

The applicant appealed on points of law to the *Conseil d'Etat*. In his grounds of appeal he reiterated his previous submission that Article 6 of the Convention had been infringed.

In a judgment of 3 July 1996 the *Conseil d'Etat* Committee for Screening Appeals for Admissibility refused the applicant leave to appeal, ruling that none of the grounds of appeal was admissible.

**B** *Relevant domestic law*

Article 1729 of the General Tax Code

“1 Where the tax return or other document referred to in Article 1728 shows a tax base or information used for assessing the tax that is insufficient, inaccurate or incomplete, the amount of tax due from the tax-payer shall be increased by the interest for late payment referred to in Article 1727 and by 40% if the tax-payer's bad faith has been established or by 80% if he has been guilty of deception or abuse of process within the meaning of Article L 64 of the Code of Tax Procedure

2 Late-payment interest shall cease to accrue on the last day of the month in which the tax payer is notified of the supplementary tax assessment or, if the supplementary tax is to be paid in instalments, on the last day of the month in which the final instalment is due

3 If there has been an abuse of process, all parties to the document or agreement shall be jointly and severally liable to pay the late payment interest and the surcharge ”

**COMPLAINT**

The applicant submits that the penalties for bad faith which were imposed on him amount to criminal penalties following the principle laid down in the case of *Bendenoun v France* (Eur Court HR, judgment of 24 February 1994, Series A no 284)

He complains that these criminal penalties are imposed by the authorities and not subjected to sufficient control within the meaning of Article 6 of the Convention by the administrative courts on appeal

He complains that if the administrative courts decide that a tax-payer has acted in bad faith and confirm that penalties must be imposed, they are obliged to maintain the level applied by the authorities and cannot adjust the amount of the penalties according to the particular circumstances of the case

**THE LAW**

The applicant invokes Article 6 para 1 of the Convention, the relevant part of which provides

“In the determination of any criminal charge against him, everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law ”

The Commission considers that the penalties for bad faith imposed on the applicant made the “charge” in issue a “criminal” one within the meaning of Article 6 of the Convention, which was therefore applicable (see Eur. Court HR, the *Bendenoun v. France* judgment of 24 February 1994 cited above, p. 20, para. 47).

The Commission recalls that a penalty in criminal proceedings must be imposed by a tribunal that offers the guarantees required by Article 6. If the administrative decision being challenged does not itself satisfy the requirements of that Article, it must be subjected to subsequent control by a “judicial body that has full jurisdiction” and, *inter alia*, the power to quash in all respects, on questions of fact and law, the decision of the body below (see, *mutatis mutandis*, Eur. Court HR, *Öztürk v. Germany* judgment of 21 February 1984, Series A no. 73, pp. 21-22, para. 56; *Schmautzer v. Austria* judgment, Series A no. 328-A, p. 39, para. 39).

In the instant case the Commission notes that the applicant’s appeal against the authorities’ decision to impose penalties on him for bad faith was dealt with on the merits by two courts. Those courts had the power to quash, on questions of fact and law, the decision being appealed with respect to the penalties; they thus had the power to set the penalties aside if they found that the authorities had failed to establish with sufficient certainty that the applicant had acted in bad faith. The courts duly examined, in the light of the facts and the applicable law, whether a lack of good faith as alleged by the authorities had indeed been established. They held that it had.

It is true that the courts examining the case could not adjust the level of the penalties imposed for bad faith since that level is stipulated in Article 1729 of the General Tax Code cited above. Nevertheless, that Article provides that the amount of the penalties is calculated on the basis and as a percentage of the amount of the supplementary tax imposed, according to whether there has been “bad faith” or “deception”.

The Commission is of the view that, in doing so, the law itself provides and allows for the penalty to be proportionate to the offence and to the particular circumstances of the case.

In these circumstances, the Commission considers that the applicant had access to a “tribunal” within the meaning of Article 6 para. 1 of the Convention, a tribunal which had sufficient jurisdiction to rule on the “merits of the criminal charge” against him.

It follows that the application is manifestly ill-founded and must be rejected pursuant to Article 27 para. 2 of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.