

## Human Rights and Taxation in Europe and the World

Taxpayers are above all human beings. A modern view of taxation should reconcile the protection of their basic rights with the tax authorities' interest in levying sufficient taxes to fund the state activities. Human rights and taxation are thus not as mutually exclusive as they seemed after the *Ferrazzini* decision of the European Court of Human Rights. A growing number of tax issues, in particular the ones that do not directly affect the determination of the tax due, are gaining importance in the case law of the European Court of Human Rights and in case law of other courts around the world, both at national and international level, which is a good example of global law in formation. Additional issues arise in the European Union, where the Treaty of Lisbon has set a new legal framework that will guide the upcoming adoption of the directions of the European Convention on Human Rights by the European Union.

*Human Rights and Taxation in Europe and the World* comprises reports drafted on the basis of an outline developed in the framework of the EURYI research for the European Science Foundation. The book explores this largely unknown domain and sheds light on critical issues and future developments, providing tax lawyers and academics with interesting ideas for enhancing the protection of the fundamental rights of taxpayers.

The book is divided into seven parts: (i) the European Union and the European Convention on Human Rights; (ii) a European international tax policy for human rights; (iii) human rights, their enforcement, economic policy and international taxation in the era of global law; (iv) the era of global law and the search for constitutional pluralism; (v) the impact of human rights on domestic substantive taxation; (vi) the impact of human rights on tax procedures and sanctions; and (vii) the impact of human rights on tax litigation before the courts.

The book is the outcome of the fifth annual conference of the GREIT (Group for Research on European and International Taxation) and follows up on the line of research carried out in the previous books, all of which were published by IBFD.

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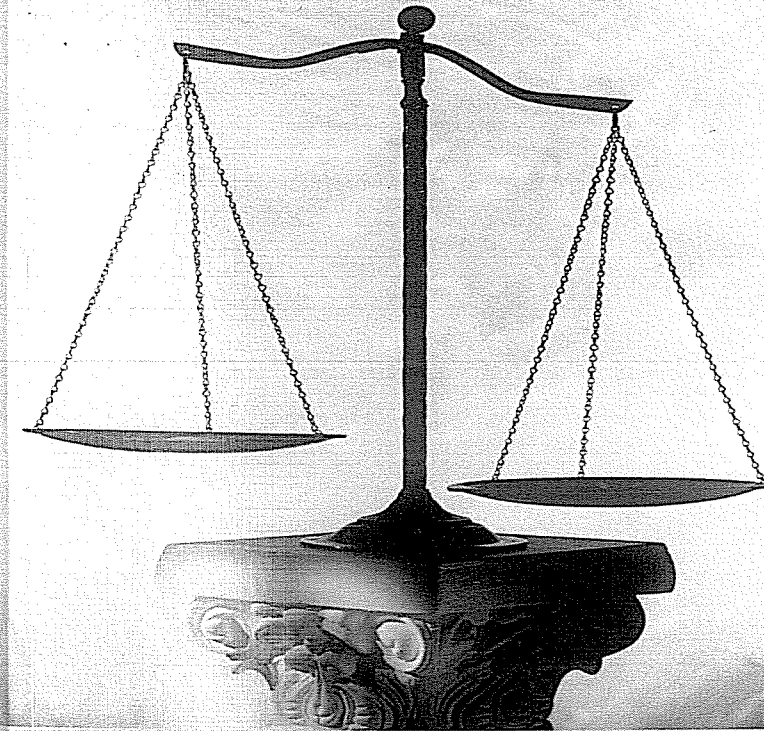
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Miguel Poiares Maduro  
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IBFD

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## Chapter 8

### Information Duties, Aggressive Tax Planning and *nemo tenetur se ipsum accusare* in the light of Art. 6(1) of ECHR

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#### 8.1. Introduction

Art. 1(1) of the First Protocol of the European Convention on Human Rights (ECHR) protects the enjoyment of property (private property) but its second paragraph expressly excludes taxes from its scope, which is understandable for those who consider that taxes constitute as such an interference with private property.<sup>1</sup> In this context, the *Ferrazzini* case<sup>2</sup> is known by tax lawyers as refusing the application of the ECHR to pure tax cases, even though there was a strong reasoned opinion by the dissenting judges.

However, as this book broadly demonstrates, taxation is not outside the scope of the ECHR and has been subject to scrutiny by the European Court on Human Rights (ECtHR) and the European Commission on Human Rights (ECnHR): namely, it has been accepted in tax cases with penalties indexed to the amount of tax (*Jussila v. Finland*)<sup>3</sup> and other “criminal charges” (*Dukmedjian*).<sup>4</sup> The legitimate purpose of national tax measures and their proportionality have been examined not only in the light of aforementioned Art. 1(1) of the First Protocol of the ECHR, but also in the light of Art. 6 of the ECHR, on the right to a fair trial, Art. 14 of the ECHR,

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1. For example, Baker, P., “Taxation and the European Convention on Human Rights”, *BTR* (2000), p. 1; on the mutual dependency of private property and taxation, Rodi, M., *Die Rechtfertigung von Steuern als Verfassungsproblem*, (1994), p. 141 et seq.; in a different sense, Murphy, L., Nagel, T., *The Myth of Ownership, Taxes and Justice*, Oxford: University Press, 2002, Chap. 2.

2. *Ferrazzini v. Italy* [GC], No. 44759/98, ECHR 2001-VII – (12.7.01).

3. *Jussila v. Finland* [GC], No. 73053/01, ECHR 2006-XIV – (23.11.06).

4. *Dukmedjian v. France*, No. 60495/00 (Sect. 2) (fr) – (31.1.06).

on the prohibition of discrimination, Art. 8 of the ECHR, on the right to respect for private and family life, and also Art. 9 of the ECHR, on the freedom of thought, conscience and religion.<sup>5</sup>

This chapter analyses the compatibility of information and clarification duties, such as those provided under an Advance Pricing Agreement and those related to tax planning schemes and activities aimed at obtaining tax advantages, with the right to a fair trial foreseen in Art. 6 of the ECHR. In the latter context, the Portuguese regime on aggressive tax planning and information duties and the aforementioned right to a fair trial is discussed as a case study. As we mention below, the right to silence and the right not to incriminate oneself (*nemo tenetur se ipsum accusarem* or *nemo tenetur*) are included in Art. 6(1) of the ECHR, and therefore the object and scope of *nemo tenetur*, and to what extent coercive information duties may be compatible with it, is discussed here in the light of the case law of the ECtHR and the ECtHR.

## 8.2. Taxation of real and net income and cooperation duties

The second half of the 20th century has been characterized by the requirement of cooperation duties of the taxpayer as a condition for both assessment of real income as opposed to presumptive income and for applying the net taxation principle – without fulfilment of cooperation duties, it is not possible for the mass tax administration to achieve real taxation. In other words, cooperation duties and taxation of real and net income are two faces of the same coin.<sup>6</sup> In this context, compliance costs within the OECD and the EU have since increased on a continuous basis<sup>7</sup> and their fairness, proportionality, compatibility with the freedom to carry on a private and

5. On the ECHR and taxation, see also in *Legal Remedies in European Tax Law*, Pistone, P. (ed), (IBFD, 2009): La Scala, A.E., “The Taxpayer’s Human Rights in the Examination of the European Court of Human rights”, pp. 495-506; Gutmann, D., “The European Convention on Human Rights, a Tool to Ensure the Efficiency of EC Law”, pp. 487-493; Attard, R., “Revoking the Irrevocable: The Need to give Taxpayers an Effective Protection of Rights Granted by the EC Treaty Even in the Case of Final Non-Appealable Acts”, pp. 528-536; Baker, P., “Some Comments on European Tax Law and Human Rights”, pp. 539-540.

6. Tipke, K., Lang, J., *Steuernrecht*, (2010), p. 20. Auf., § 21, pp. 1002-1004; § 22, pp. 1113-1114.

7. Obermair, C. and Weninger, P., “General Report”, in Lang, M. et al., *Tax Compliance Costs for Companies in an Enlarged European Community*, pp. 17-54 and other reports therein; Evans, C., “T Annex One: Taxation Compliance and Administrative

business activity has to be assessed in light of national constitutions and of EU law (in the latter case, see for example, although some more directly than others: *Futura*,<sup>8</sup> *Scorpio*,<sup>9</sup> *Truck Center*,<sup>10</sup> *Kieffer*)<sup>11</sup>

In recent decades, the struggle of companies of OECD Member states to remain competitive in the world economy combined with aggressive tax planning in the global context has given rise to a corresponding aggressive introduction of more cooperation and information duties.<sup>12</sup> The boundaries of those cooperation and information duties as well as of their use by the tax administrations through exchange of information between states have to be carefully assessed, in order to comply with the rule of law.

## 8.3. Cooperation and information duties and their boundaries in a rule of law state

One of the main issues in a rule-of-law state and from the viewpoint of human rights is whether a criminal offence and the respective legal process to apply to it can be derived from information obtained through legal duties complied with by the taxpayer: this is the case where the taxpayer thoroughly cooperates with the tax officials during an audit; the case of transfer pricing documentation for associated companies unveiling the company’s business organization, strategy and flow of transactions for the purposes of negotiating an advance pricing agreement;<sup>13</sup> the case of information and documentation requested to associated companies in the context of a mutual agreement procedure or tax arbitration by contracting

Costs: An Overview”, in Lang, M. et al., *Tax Compliance Costs for Companies in an Enlarged European Community*, pp. 447-468.

8. ECJ 15 May 1997, C-250/95, *Futura*.

9. ECJ, 3 October 2006, C-290/04, *Scorpio*.

10. ECJ, 22 December 2008, C-282/07, *Truck Center*.

11. ECJ, 25 June 1997, C-114/96, *Kieffer*.

12. See Arts. 26 and 27 of the OECD Model Tax Convention on Income and on Capital; the Tax Information Exchange Agreements and the Model Agreement developed by the OECD Global Forum Working Group on Effective Exchange of Information; the New EU Directive 2011/16/EU, 15 February 2011, on Administrative Cooperation in the Field of Taxation and Repealing Directive 77/799/EEC Directive; and the Mutual Assistance Directive on Recovery of Claims relating to taxes, duties and other measures 2010/24/EU of 16 March 2010.

13. Resolution of the Council and of the representatives of the governments of the Member States, meeting within the Council, on a Code of Conduct on transfer pricing documentation or associated enterprises in the European Union, 20 June 2006, No. 9738/06.

states aimed at eliminating double taxation;<sup>14</sup> the case of information and communication of “all relevant facts” in order to get a binding ruling on the interpretation of a certain tax regime or a tax benefit at the national level; and, as in the recent Portuguese regime on aggressive tax planning, is the case of information, communication and clarification of any tax planning schemes (2008). The latter covers information duties relating to tax planning schemes or actions either suggested by a tax intermediary or carried on by the taxpayer on his own initiative and the corresponding penalties in the case of non-compliance with those duties. The regime inspired by the Canadian, UK and US systems<sup>15</sup> does not have precedent in the Portuguese system, and is clearly related to the need to counter aggressive and multinational tax planning and may be discussed both in the light of the constitution and the ECHR.

In general, information and communication duties on tax matters also raise issues on their compatibility with the freedom of carrying on private and entrepreneurial activities recognized as constitutional fundamental rights in rule of law states, but this analysis is outside the scope of this chapter, since we will concentrate on the compatibility of these duties at the ECHR level.

At least in the civil law tradition, a tension exists in this respect between the principles of investigation of the relevant facts (*Untersuchungsprinzip*) and of the true facts (*materielle Richtigkeit der Sachaufklärung, princípio da verdade material*) and *nemo tenetur*. The former two principles characterize the public law field and are aimed at guaranteeing the principle of legality, and they imply that the tax administration is not limited by what the taxpayer has brought to a procedure, but it has to actively search for facts in order to correctly apply the law.<sup>16</sup> In contrast, *nemo tenetur* recommends a safe harbour and corresponding separation of audit departments and the ones that will apply any administrative penalties or represent the tax authorities’ revenue interests in court.<sup>17</sup>

14. Code of Conduct for the effective implementation of the Arbitration Convention (90/436/EEC of 23 July 1990), 2 and 3.

15. Preamble of the Decree-Law No. 29/2008, of 25 February 2008.

16. Tipke, K., Lang, J., *Steuerrecht*, (2010), p. 986 et seq.

17. Palao Taboada, C., *El Derecho a no autoinculparse en el ámbito tributario*, Pamplona: Civitas, Arazandi, 2008, pp. 55-73. See also, Del Federico, L., “I principi della Convenzione Europea dei Diritti dell’Uomo in materia tributaria”, *Rivista di diritto finanziario e scienza delle finanze* (2010), pp. 206-227.

## 8.4. Art. 6 ECHR and the right to a fair trial

Art. 6 of the ECHR provides for the right to a fair trial and according to it,

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights: ... (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

Even if Art. 6 does not expressly refer to the right to silence in criminal proceedings and to the right not to incriminate oneself (*nemo tenetur*), the ECnHR and the ECtHR have recognized those rights as international standards closely connected with the right to a fair trial (for simplification reasons, we will be broadly referring to *nemo tenetur*, including in it the right to silence).<sup>18</sup>

Although according to settled jurisprudence of the ECnHR and of the ECtHR, Art. 6 does not apply to ordinary tax proceedings,<sup>19</sup> it does apply if those proceedings involve the determination of civil rights or of any criminal charge. Thus, some tax cases have been examined by the ECtHR in the light of Art. 6, implying scrutiny of the *nemo tenetur se ipsum accusare* (*J.B. (31827/96)*),<sup>20</sup> the right to a court (*Ravon*),<sup>21</sup> lengthy judicial proceedings (*Synnelius*),<sup>22</sup> and legal aid (*Barsom and Varli*).<sup>23</sup>

18. Baker, P., “Taxation and the European Convention on Human Rights”, p. 10 et seq., especially pp. 20-21; Frommel, S., “The European Court of Human Rights and the Right of the Accused to Remain Silent: Can It be Invoked by Taxpayers?”, *BTR* (1994), pp. 598-634; *Saunders v. United Kingdom* (1996) 23 E.H.R.R., p. 313; Lee, N., *Revenue Law – Principles and Practice*, in Lee, N., 25th edn., Tottel Publishing Ltd, West Sussex, 2007, pp. 1413-1431.

19. ECnHR: *AX and BX v. Germany, X v. Belgium*, n. 673/59; *A, B, C and D v. Netherlands, 1904/63; X v. Belgium, 2145/64; Kappa Kanzlei und Buröbetriebs GmbH v. Austria, 37416/97; EctHR: Vidacar S.A. and Opergrup S.L. v. Spain* (dec.), Nos. 41601/98 and 41775/98, ECHR 1999-V – (20.4.99).

20. *J.B. v. Switzerland*, No. 31827/96 (Sect. 2), ECHR 2001-III – (3.5.01).

21. *Ravon and Others v. France*, No. 18497/03 (Sect. 3) (fr) – (21.2.08).

22. *Synnelius and Edsbergs Taxi AB v. Sweden* (friendly settlement), No. 44298/02 (Sect. 3) (Eng) – (30.6.09).

23. *Barsom and Varli v. Sweden* (dec.), No. 40766/06 and 40831/06, ECHR 2008 – (4.1.08).

As we have mentioned above, information and other cooperation tax duties within the tax assessment procedure or even previous to it are legally enforceable duties strongly connected to taxation of real income and to net taxation, and the non-observation of those legal duties is often typified as an administrative offence and leads to penalties. Since some information obtained through the exercise of those cooperation duties may moreover lead to administrative or criminal penalties, the role of *nemo tenetur* in the context of Art. 6(1) ECHR has to be determined.

In the *Funke v. France* case,<sup>24</sup> the French Customs officers searched the taxpayer's house and seized documents on the basis of which they asked the taxpayer to provide them with copies of statements of his overseas bank accounts, which he refused to do. For that refusal the taxpayer was charged with a criminal offence – he was convicted and fined – and the taxpayer alleged breach of Arts. 6(1) and 8 (right to respect for private and family life). The ECtHR found that there was a breach of Art. 6(1), since “the special features of Customs law cannot justify such an infringement of the right to anyone ‘charged with a criminal offence’, within the autonomous meaning of this expression in Article 6, to remain silent and not to contribute to incriminate itself” (Para. 44).<sup>25</sup> In *Abas v. Netherlands* (ECnHR, No. 27943/95), a taxpayer and applicant claimed that he had ceased to reside in the Netherlands and that he had moved to Ireland. The Netherlands tax inspector wrote to the applicant seeking further information, but since the applicant replied that he resided in Ireland the tax authorities searched the applicant's family home and seized a number of documents on the basis of which it was decided he was still resident in the Netherlands. He was convicted of fraud and tax evasion, seemingly on the basis of answers to the letter to the tax inspector. The ECnHR analysed whether or not the criminal proceedings had commenced at the time the tax inspector wrote to the applicant or later when his family home was searched; it concluded that it was on the basis of the latter facts that the applicant's situation was “substantially affected” by the investigation and that Art. 6(1) of the ECHR was applicable. The investigation by the tax inspector, previous to the home search, was considered to be part of an investigation for tax purposes.<sup>26</sup>

From the case law of the ECnHR and of the ECtHR, we can derive the following: the right to silence and the *nemo tenetur* may raise difficult issues

24. *Funke v. France* – 256-A (25.2.93).

25. Id. and Baker, P., “Taxation and the European Convention on Human Rights”, p. 20.

26. Baker, P., id., pp. 20-21.

for the administration of taxes, since information and cooperation duties are an integral part of tax systems in rule of law states: administration of taxes per se involves disclosure of information by the taxpayer (see again, *Funke v. France*, 10828/84).

However, where a criminal charge is involved, the right to silence and *nemo tenetur* may apply, and the exact moment when the situation of a taxpayer becomes “substantially affected” has to be determined, so that Art. 6 comes into play. That moment starts where the purposes of the investigation are no longer exclusively connected with tax purposes, but with punitive ones.

Moreover, although *nemo tenetur* is only applicable to criminal charges, it must be stressed that definition of a criminal charge is broad and it is settled case law that it implies the verification of three criteria (the *Engel* criteria):<sup>27</sup> (i) how the national law at stake characterizes the offence; (ii) the nature of the latter; and (iii) its seriousness. The *Engel* criteria are not cumulative but the weight given to one or another has varied according to the specific cases under analysis. In any case, the first criterion seems to only be the point of departure and is far from decisive. For example, the meaning of criminal charge is not limited to a formal criterion, and high penalties or “substantial fiscal penalties” as described in *Bendenoun*,<sup>28</sup> may turn out to be criminal penalties for the purposes of Art. 6(1).

In *Bendenoun*, the ECtHR weighed the three *Engel* criteria and concluded that the penalties applied to Ms Bendenoun have a substantial criminal nature, on the grounds that the tax surcharges were “intended not as pecuniary compensation for damage but essentially as a punishment to deter reoffending” and they were “imposed under a general rule, whose purpose is both deterrent and punitive. Lastly, in the instant case the surcharges were very substantial.” Para. 47 of the *Bendenoun* case reads as follows:

47. In the instant case the Court does not underestimate the importance of several of the points raised by the Government. In the light of its case-law, and in particular of the previously cited *Öztürk* judgment, it notes, however, that four factors point in the opposite direction.

In the first place, the offences with which Mr Bendenoun was charged came under Art. 1729 para. 1 of the General Tax Code (see paragraph 34 above). That provision covers all citizens in their capacity as taxpayers, and not a given group with a particular status. It lays down certain requirements, to which it

27. *Engel and Others v. the Netherlands* – 22 (8.6.76).

28. *Bendenoun v. France* – 284 (24 February 1994).

attaches penalties in the event of non-compliance. Secondly, the tax surcharges are intended not as pecuniary compensation for damage but essentially as a punishment to deter reoffending. Thirdly, they are imposed under a general rule, whose purpose is both deterrent and punitive.

Lastly, in the instant case the surcharges were very substantial, amounting to FRF 422,534 in respect of Mr Bendenoun personally and FRF 570,398 in respect of his company (see paragraph 13 above); and if he failed to pay, he was liable to be committed to prison by the criminal courts (see paragraph 35 above).

Having weighed the various aspects of the case, the Court notes the predominance of those which have a criminal connotation. None of them is decisive on its own, but taken together and cumulatively they made the “charge” at issue a “criminal” one within the meaning of Art. 6(1), which was therefore applicable. The third and last criterion in *Bendenoun* raises doubts on the characterization of the penalties set out under the Decree-Law on Aggressive Tax Planning. Moreover, the nature of the offence is the decisive criterion as to whether there was a criminal charge, even if the penalty is not “substantial” (*Jussila v. Finland*, cited above).

The doctrine of the ECnHR and the ECtHR on the right to silence and *nemo tenetur* does not seem to go as far as Sec. 393 of the German *Steuerstrafgesetz*, according to which it is forbidden to apply coercive measures in an administrative tax procedure if there is a risk of self-incrimination, which can occur because the auditing department coincides with the department that investigates tax offences.<sup>29</sup> That coincidence of departments is itself understood as *affecting* the position of the taxpayer *substantially*.

The Spanish literature as well contends that although it is not necessary that tax auditing and tax offences investigation departments are separated in order to guarantee *nemo tenetur*, wherever they are not separated, the only way to ensure the aforementioned principle is to recognize the right to silence and to non-self incrimination by the taxpayer, without distinguishing whether only fiscal aims are at stake.<sup>30</sup>

29. See Kohlmann, G., *Strafprozessuale Verwertungsverbote als Schranken für steuerrechtliche und strafrechtliche Ermittlungen der Fahndungsbehörden*, FS für Klaus Tipke, Otto Schmidt, Köln, 1995, p. 492.

30. Palao Taboada, C., *El Derecho a no autoinculparse en el ámbito tributario*, pp. 59-62.

The prevailing opinion emerging from the *R v. Allen* case (2001),<sup>31</sup> a decision of the House of Lords in the UK,<sup>32</sup> is in this respect even more strict than the one resulting from *Funke v. France* and *Abas v. Netherlands*. In *R v. Allen*, the taxpayer had been investigated for tax fraud, under the s 20(1) and the so-called *Hansard* procedure, the latter of which permitted the board to accept a money settlement instead of instituting criminal proceedings (this decision was at the discretion of the board), even if the taxpayer had fully confessed to tax fraud. In *Allen*, the taxpayer provided the Revenue with false information. He was subsequently charged with the criminal offence of cheating the public revenue. In court he argued that the information required from him, under the *Hansard* procedure and the s 20(1) notice, was a breach of *nemo tenetur*, violating his right to a fair trial under Art. 6 of the ECHR.

The issue was whether a breach of Art. 6 occurred where the Revenue obtained information from the taxpayer under the *Hansard* procedure and the Revenue subsequently used this information against the taxpayer. According to Lord Hutton, in his opinion on the issue, “[t]he state, for the purpose of collecting tax, is entitled to require a citizen to inform it of his income and to enforce penalties for failure to do so, the s 20(1) notice requiring information cannot constitute a violation of the right against self-incrimination.” However, “[i]f, in response to the *Hansard* Statement, the appellant had given true and accurate information which disclosed that he had earlier cheated the Revenue and had then been prosecuted for that earlier dishonesty, he would have had a strong argument that the criminal proceedings were unfair and an even stronger argument that the Crown should not rely on evidence of his admission...” Instead of determining the exact moment where the position of the taxpayer becomes *substantially affected*, Lord Hutton considered the *Hansard* procedure to potentially lead to a breach of the right to silence and *nemo tenetur*.

As a result of Lord Hutton’s opinion and the appeal, the *Hansard* procedure has been amended and is now clarified in the Code of Practice 9 (COP 9). According to the new procedure, the taxpayer is obliged to give full cooperation during the investigation – allowing full access to facilities for investigation into his affairs and for examination of the books, documents or any information found relevant by the board, and only if he does not cooperate does he remain at risk of prosecution. Moreover, the Revenue

31. *Allen, R v.* (2001) UKHL 45 (11 October 2001).

32. See the description and discussion of the case in Lee, N., *Revenue Law – Principles and Practice*, pp. 1429-1431.



issued guidance to the investigation staff, so that the right to silence and to non-self-incrimination is assured. Accordingly, the Revenue staff has to thoroughly inform the taxpayer that he has to fully cooperate and provide the requested information and that if he does not comply with those duties, he will be subject to penalties; what the formal powers are that can be used if the taxpayer does not want to cooperate with the Revenue staff; to what extent voluntary cooperation may be taken into account in calculating the penalty; and the fact that if there is no agreement, information or documents provided during the enquiry may be used in any appeal proceedings.<sup>33</sup>

The case was then ruled on by the ECtHR (*Allen v. the United Kingdom*)<sup>34</sup> and the Court decided that the *nemo tenetur* cannot be interpreted in the sense that it grants a general immunity connected to actions aimed at circumventing an investigation by the tax authorities. According to the Court,

The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent in the context of criminal proceedings and the use made of compulsorily obtained information in criminal prosecutions. It does not per se prohibit the use of compulsory powers to require persons to provide information about their financial or company affairs (see the above mentioned Saunders judgment, where the procedure whereby the applicant was required to answer the questions of the Department of Trade Inspectors was not in issue). In the present case, therefore, the Court finds that the requirement on the applicant to make a declaration of his assets to the Inland Revenue does not disclose any issue under Article 6 § 1, even though a penalty was attached to a failure to do so. The obligation to make disclosure of income and capital for the purposes of the calculation and assessment of tax is indeed a common feature of the taxation systems of Contracting States and it would be difficult to envisage them functioning effectively without it.<sup>35</sup>

All in all, the critical aspect is to determine the moment where the criminal proceedings start, since from that moment on, the guarantees contained in Art. 6(1) are applicable. As we mentioned above, it follows from both the *Abas v. Netherlands* and the *Allen v. the United Kingdom* cases that, according to the ECtHR, criminal proceedings commence when a person is substantially affected by those proceedings. If information is requested merely for tax purposes, the right to silence and *nemo tenetur* are not applicable.

Taking into account the difficulties the taxpayer may face in realizing the exact moment where he can invoke Art. 6(1) – the moment when a

33. See Lee, N., *id.*

34. *Allen v. the United Kingdom* (dec.), No. 76574/01, ECHR 2002-VIII – (10.9.02).

35. *Id.*, p. 5 (Law).

taxpayer is “substantially affected” – we hereby contend that the law or the tax administration must inform the taxpayer when the information voluntarily provided may be subsequently used in a criminal proceeding against him, the latter, in line with the guidance provided by the UK Revenue after the *R. v. Allen* case. This is the best way to achieve *nemo tenetur*, but if the taxpayer is not informed of the consequences that may result from his cooperation, any information provided or documents made available by him during a tax procedure and for fiscal purposes may not be used for the purposes of criminal charges.

### 8.5. Different legal solutions to comply with *nemo tenetur*: The case of advance pricing agreements

Taking the former conclusions into account, and accepting that the right to silence and *nemo tenetur* under Art. 6(1) of the ECHR are at stake when the taxpayer’s position is “substantially affected” (*Abas v. Netherlands*), let us take the example of advance pricing agreements in order to analyse the different ways of complying with Art. 6(1) of the ECHR.

Let us assume that a taxpayer applies for an advance pricing agreement (APA) (which by definition, after entering into force, will apply to the future tax years or to not yet assessed tax years). Let us also assume that before accepting entering into negotiations, the tax administration initiates an audit regarding the assessment of taxes due in previous tax years. Let us further assume that according to an internal ruling, audits take place every time there is an application for an APA procedure. If, during the audit, the relevant information is provided by the taxpayer in full compliance with his cooperation duties, but potentially leading to a criminal procedure, we have to ask at which stage *nemo tenetur* applies.

It has thus to be determined whether *nemo tenetur* requires that once an APA is requested, no audit may take place. This would be the ideal solution from the perspective of the taxpayer and we can call it the safest harbour. However, it is not necessary to opt for this solution from the perspective of *nemo tenetur*, since audits are not criminal procedures and neither do they imply the latter nor the application of criminal charges (see *Abas v. Netherlands* referred to above).

The second possibility is whether the tax administration department negotiating APAs has to be separated from the audit department and is forbidden to communicate the information obtained in the APA procedure to the



audit department in order for *nemo tenetur* to be respected. This solution has been adopted in Spain<sup>36</sup> and is recommended in general by the Spanish literature,<sup>37</sup> and does constitute a safe harbour, while not impeding the audit department in exercising its functions and using all legal instruments foreseen in order to check if the taxpayer has been fulfilling his tax duties.

However, even though the taxpayer would feel more confident if there was a separation between the department competent to negotiate APAs and the auditing and the investigation departments, *nemo tenetur* does not necessarily require their separation. Thus, in case the department exercises both or all the functions, the issue is whether *nemo tenetur* implies that any information obtained during the APA procedure and potentially implying criminal charges cannot be used in the latter process. It follows from the previous paragraphs that this solution is required wherever the function of a tax department is to both directly collect information from the taxpayer for a correct assessment of taxes and participate in proceedings that may lead to a criminal charge from the moment at which that the position of the taxpayer is “substantially affected”, namely because the information is requested under the threat of a penalty (see the *Abas vs. Netherlands* case and the *R. v Allen* case, and Art. 12 of the Portuguese Regime on Aggressive Tax Planning<sup>38</sup> discussed below). Moreover, the taxpayer in that case may refuse to grant any information (right to silence and *nemo tenetur*).<sup>39</sup>

As a conclusion, we claim in this respect, in line with the ECtHR and the ECtHR case law, that any information obtained during the APA procedure or after it is known that it will take place can be used for a correct assessment of taxes (*Saunders v. UK*<sup>40</sup> and *Allen v. UK*),<sup>41</sup> in order to comply with the legality principle, the investigation principles of the relevant and of the true facts (the right to silence and *nemo tenetur* cannot be invoked), but not for purposes of applying a penalty.

36. Palao Taboada, C., *El Derecho a no autoinculparse en el ámbito tributario*, pp. 55-73; see also, pp. 73-127.

37. See Herrera Molina, P., “Los Derechos a guardar silencio y a no delcarar contra sí mismo en el procedimiento inspector. Comentario y traducción de la Sentencia del Tribunal Europeo de Derechos Humanos de 17 de diciembre de 1996, *Saunders v. United Kingdom*”, *Impuestos* (1997), p. 1075 et seq.; *Fiscalidade de los actos ilícitos (La Antijuridicidad en los supuestos de hecho de la obligación tributaria)*, Madrid: IEF, 2003.

38. Decreto-Lei No. 29/2008, 25 February.

39. In this sense, Palao Taboada, C., *El Derecho a no autoinculparse en el ámbito tributario*, pp. 62-63.

40. *Saunders v. the United Kingdom* – Rep. 1996-VI, fasc. 24 (17.12.96).

41. *Allen v. the United Kingdom* (dec.), No. 76574/01, cit.

Another important aspect to consider is that *nemo tenetur* has to be assured by the tax legislator as well, since not only does it have to correctly foresee the right to a fair trial, the presumption of innocence and *nemo tenetur*, but also to avoid interest rates for non-compliance or late compliance (as indemnity) being hidden penalties. Interest either aims simply restoring legality – putting the administration back in the situation in which it would have been, if the taxpayer had acted lawfully – or at compensating for consequential loss. It cannot be a hidden penalty and therefore interest rates should not exceed the market interest rates for indemnities.

## 8.6. The Portuguese tax regime on information, communication and clarification duties

Let us now take the case of the Portuguese Tax Regime on Aggressive Tax Planning, and analyse it in the light of Art. 6(1) of the ECHR. Decree-Law No. 29/2008, of 25 February, creates a heavy burden of information cooperation duties by the promoters of tax schemes or by the users (taxpayers) towards the tax administration. Tax planning schemes suggested to clients or other interested entities and described under Art. 4(1) of the Decree-Law have to be reported by the promoters (Arts. 7 and 9) and users (Art. 10) of the tax planning.<sup>42</sup>

In the preamble, the regime is justified as a means to reinforce a more efficient combating of tax avoidance and tax evasion following best international practices.<sup>43</sup> Entities suggesting, promoting and commercializing such schemes are called “tax intermediaries”. In the Seoul Declaration of September 2006, as a result of a meeting among tax administrations promoted by the OECD, tax intermediaries have been linked to “unacceptable practices of reducing taxation”. Those tax intermediaries are obliged to communicate, inform and give further clarification of promoted tax schemes and activities to the tax administration. Non-compliance with that information duty is subject to penalties under Art. 17 et seq. of the aforementioned Decree-Law.

42. See, as an example of the analysis of the Regime by tax practitioners in Portugal, Castro Silva, F., Cassiano Neves, T., “Planeamento fiscal abusivo: o caso português no contexto internacional”, *Revista de Finanças Públicas e Direito Fiscal* (2008), pp. 121-147 et seq.

43. See the discussion in Larin, G.N., Duong, R., Jacques, M., “Policy forum: responses to aggressive tax planning – a study framework”, *56 Canadian Tax Journal* (2008), p. 147.

Aggressive tax planning seems to be presented in the preamble of the Decree-Law as equivalent to tax abuse (the latter covering both avoidance and evasion) by means of an “or”: “the phenomenon of aggressive tax planning or abusive...” The legal regime is justified as a means to restore the integrity and justice of the tax system, reduce the perverse effect of discouraging the so-far compliant taxpayer to fulfil his or her tax obligations and reduce the enormous administrative costs in auditing. The legal regime is also presented as a means to regulate the activity of tax intermediaries.

It is clear that the foreseen information duties aim at helping the tax administration (and courts) to control correct compliance with tax obligations and have a deterrent effect on tax avoidance and tax evasion behaviour in the aforementioned context of aggressive tax planning.

The regime can be compared to a cautionary yellow light, where promoters and taxpayers know that determining the limits of legitimate tax planning is among the priorities of the tax administration’s actions and that they will have to actively contribute to identifying the boundaries of legitimate tax planning. It may indeed have persuasive effects in respect of some schemes and dealing with some entities located in low-tax territories, especially where no bilateral exchange of information is carried on.

It may also facilitate exchange of information among tax administrations, leading to spontaneous exchange of information whenever tax planning schemes involve Portugal, a country identified as a tax haven, and another country with which Portugal exchanges information under a treaty provision, or merely Portugal and another country with which Portugal exchanges information under a treaty provision.

## 8.7. Object and scope of the duties to communicate, inform and clarify the tax administration in the light of Art. 6(1) ECHR

### 8.7.1. Scheme or action and tax advantage

Art. 1 of the Decree-Law provides that there are “duties to communicate, inform and clarify the tax administration” of any tax proposed schemes or adopted actions that aim exclusively or mainly at obtaining tax advantages in order to combat abusive tax planning. Art. 3 defines those concepts and whereas tax planning is defined in a neutral way (any scheme or action potentially or effectively leading to a tax advantage by the taxpayer), tax

advantage seems in turn to imply tax abuse or even tax evasion: reducing, eliminating or postponing the tax due or obtaining a tax benefit that would not have been achieved, in total or partially, without recourse to such scheme or action.

Although “reducing, eliminating or postponing the due tax” and “recourse to scheme or action” seem to imply that the advantage does not result from a legal gap *stricto sensu*, there is, however, no reference to “artificial schemes” or “abusive schemes”, and it is therefore unclear that only avoidance or evasion schemes are included in its scope.

Art. 4 of the Decree-Law also has a broad scope, by explicitly enumerating some typical tax planning schemes and actions subject to its regime: the participation in the scheme or action of an entity subject to a tax-privileged regime (entity resident in a territory identified in the list of privileged tax regimes approved by regulation of the Minister of Finance; or entity not taxed under income tax or corporate income tax, even if its residence country is not identified in the aforementioned list); the participation of a totally or partially exempt entity; involvement of financial or insurance operations that may lead to recharacterization of income, such as leasing, hybrids, derivatives or other financial instruments; the use of losses; and any other schemes or actions including a disclaimer in respect of the promoter of the scheme.

Taking the aforementioned regime in account, it may, on the one hand, be problematic from the viewpoint of the constitutional freedom to private activity and entrepreneurship that the legislator can go as far as to require that promoters or taxpayers report schemes or actions that are legal (i.e., compatible with the tax law and taking advantage of genuine legal gaps) and part of legitimate tax planning, as opposed to abusive planning.

On the other hand, if only abusive (avoidance and evasion) schemes were covered by the Decree-Law, at least the ones that are identifiable as such by any tax intermediary or taxpayer, the regime would prove to be inefficient, potentially mean a breach to professional secrecy, or in case of tax evasion lead to self-incrimination. In fact, both the promoter and the taxpayer may be charged for tax fraud, and a criminal charge against the former depends on whether his scheme or action fulfils the legally foreseen conditions of the tax fraud crime. In the case of avoidance, the regime would also imply that the promoter or the taxpayer would inform the tax administration that a specific or the general anti-abuse rule should be applied. If application of an anti-abuse rule leads to an additional tax assessment and an additional

amount of tax due, the taxpayer will be also subject to payment of interest, which is not a penalty as long as it broadly corresponds to the market interest.

However, if only abusive (avoidance and evasion) schemes were covered by the Decree-Law, one of two undesirable results would occur: either the obligation of communicating, informing and clarifying with respect to the tax administration would not be fulfilled, and the promoters or the taxpayer would prefer to incur the risk of being detected by the tax administration (leading to the inefficacy of the regime, since it aims at compulsory information provision and communication of schemes and actions); or there would be an issue of (self)incrimination as long as this information could be used by the tax administration in criminal proceedings (and an issue related to *nemo tenetur*).

As we mentioned above, the broad terms of the preamble and the use of aggressive tax planning as a synonym for abuse (“aggressive tax planning or abusive”) also work in favour of a blurred broad meaning of tax planning. And since tax advantage in the Decree-Law is defined in a sufficiently vague way, we can conclude that tax planning and aggressive tax planning have a broad scope: the whole range of tax advantages, either compatible with the law or possibly leading to either tax avoidance or evasion and the concomitant penalties.

The Decree-Law may also have a preventive function, signalling that tax promoters and taxpayers have to pay attention to the promoted and/or schemes or actions used and carefully verify whether they constitute abuse or evasion even if they can rely upon the right to silence and *nemo tenetur*.

### 8.7.2. Promoters and users of tax schemes or actions

A promoter is defined as any entity that in the exercise of its activity provides any type of tax advice about the tax situation or fulfilment of tax obligations in the tax field and relating to clients or third parties, gratuitously or by way of consideration (Art. 5(1) of the DL). Credit institutions and other financial institutions, tax auditors, practitioners, law firms, solicitors, solicitors' firms and tax accountants are mentioned as examples of tax promoters (Art. 5(2) of the DL).

However, a practitioner, a solicitor, a law or solicitor's firm in the context of assessment of the tax situation of the taxpayer, as well as legal consultants,

in the context of defending or representing a client in or in connection with a judicial process, are not promoters for the purposes of the regime (Art. 6(1) of the DL). This exclusion is relevant for the analysis of the compatibility of this regime with the duty of professional secrecy.

Besides the promoters, users of the tax planning scheme or action are bound to communicate it themselves to the General Director of Taxes whenever such scheme or communication has not been suggested or known by a promoter and whenever the promoter is neither resident in the Portuguese territory nor disposes of a permanent establishment therein (Art. 10 of the DL).

The role granted by the Decree-Law to promoters – tax intermediaries as the preamble calls them - means that tax planning becomes a triangular relationship, involving promoter, beneficial taxpayer and the tax administration and ceases to be a private relationship. Non-compliance with that information duty is subject to penalties under Art. 17 et seq. of the aforementioned Decree-Law.

### 8.7.3. Cooperation duties vs offences and penalties

Taking into account the above regime, the critical issue lies in whether any further responsibility may be derived by the compliance with those information duties, for example because the Tax General Director demands an audit of the tax planning scheme promoter or user and such audit leads to a suspicion that a criminal charge may be applicable. In other words, do the aforementioned information duties foreseen in Arts. 7, 8 and 9 lead to self-incrimination and to a breach of professional secrecy?

It makes sense to raise this question since, beyond the above duties, the Portuguese tax legislation does not clearly distinguish auditing competences from the ones that initiate a process aimed at determining an offence and corresponding penalties, namely, criminal ones.<sup>44</sup> In fact, and leaving aside the aggressive tax planning regime, it is not clear that in general, the Portuguese legislation creates a safe harbour for the taxpayer in respect of cooperation duties and the administrative procedures leading to

44. See on the *nemo tenetur* principle and the Portuguese administrative and criminal offences processes, Silva Dias, A. and Costa Ramos, V., *O Direito à não auto-inculpação (nemo tenetur se ipsum accusare) no processo penal e contra-ordenacional português*, Coimbra, 2009, especially Chap. III, pp. 43-67, on the tax regimes (tax assessment, audit and investigation processes).

the application of penalties. In fact, the tax administration has broad auditing powers the exercise of which is aimed at achieving the “relevant and true facts” (Art. 58 of the General Tax Law). They cover the access and examination of any elements that may reveal the tax situation of audited taxpayer (Arts. 28 and 29 Nos. 1 and 2 of the Complementary Regime of Tax Auditing, (CRTA)); the inquiry within the criminal process (Art. 40 of the General Regime on Tax Offences (GRTO)); the instruction and application of penalties within the administrative offences process (Arts. 57(1) and 69(2) GRTP, and 62 (3)(j) CRTA); and preventive measures such as the seizure of any documentation or other elements that constitute evidence of the tax situation and the closing of any installation (Art. 30(1)(a) and (b) CRTA). The cooperation duties in the context of the aforementioned procedures and process are compulsory and compliance with them may facilitate imposition of an administrative penalty or even criminal penalty if the tax administration detects omissions or errors in the relevant tax documentation. Since, as we mentioned above, the ECtHR has adopted a substantive approach regarding “criminal charge”, the compliance of the cooperation duties foreseen in the Decree-Law on Aggressive Tax Planning may lead to the collection of evidence that may later result in application of an “administrative” or a criminal offence, the former of which is not of a purely administrative nature. In fact, in the Portuguese system, tax administrative offences are governed by Decree-Law No 433/82, of 27 October, and they are similar to the German *Ordnungswidrigkeiten*, in the sense that both the Penal Code and the Penal Process Code are applicable as subsidiary law. For national law purposes, they differ from criminal offences, basically because pecuniary penalties cannot be converted into prison sentences. In this context, as contended above, the best way to achieve both the necessity of effectively implementing cooperation duties and respecting *nemo tenetur* would be the legal and factual separation of the auditing and the penalty processes. The taxpayer could in that case be sure that any information derived from the exercise of his cooperation duties would only be used for fiscal purposes.

Taking into account the conclusions we reached in the previous paragraphs, in the case of a scheme or action potentially leading to a criminal charge, the right to silence and *nemo tenetur* (Art. 6(1) of the ECHR) come into play wherever the position of the promoter or the taxpayer may be “substantially affected” by the information provided. In other words, whenever, the tax authorities request information from the taxpayer, the amount and the nature of which mean that the taxpayer is suspected of having committed an offence, they are no longer acting as auditors, but as authorities in a criminal process. Cooperation duties are in this case a disguise for the tax

administration to obtain evidence from the taxpayer, and Art. 6(1) of the ECHR comes into play.<sup>45</sup>

We can also deduce from the previous paragraphs that if a scheme or action is already identified clearly by law, regulation or ruling, or by settled case law, as tax evasion, *nemo tenetur* is at stake and the taxpayer may invoke it (and the right to silence). However, in the specific case of the Decree-Law on Aggressive Tax Planning, Art. 12 of the DL assures that information provided in that respect may not be used for applying criminal charges, and this will also imply that any information provided by a promoter or a taxpayer, potentially leading to a criminal charge, may not be transmitted by the Portuguese Tax Administration under a bilateral or multilateral mutual assistance agreement. But if transmitted, the recipient state may not make use of it (Art. 6(1) of the ECHR applies again).

### 8.8. The legal guarantees of *nemo tenetur se ipsum accusare*

We have claimed that in the case where it is clear that a scheme or action implies a criminal charge, the right to silence and *nemo tenetur* apply. However, non-compliance with the information duties will lead to the application of the foreseen tax penalties (Arts. 17-20 of the Decree-Law on Aggressive Tax Planning). Taking into account the *Bendenoun* case, an issue on *nemo tenetur* could only be raised if the penalties foreseen in the DL were considered to be criminal charges themselves.

In the case of violation of communication and information duties by a company (either a promoter or a user), a penalty may amount in certain cases to EUR 100,000 and to the violation of a clarification duty by a company (either a promoter or a user) may amount to EUR 50,000. In this respect, we could discuss whether the three *Engel* criteria mentioned above and the “substantial fiscal penalties” as defined in *Bendenoun* case are fulfilled.

We hereby argue that application of a penalty under Art. 17 of the Decree-Law never leads to an infringement of the right to a fair trial. On the one hand, Art. 12 of the Portuguese Decree-Law on Aggressive Tax Planning excludes from all responsibility any information provided in the fulfilment of the legal obligations foreseen in that same regime (and that information

45. *Id.*, pp. 56-57 (51-60).

does not constitute violation of a duty of confidentiality), and, on the other hand, if the taxpayer neither complies with those information duties nor pays the penalty amounts under Art. 17, he is not liable to be sentenced to prison by the criminal courts. *Nemo tenetur* cannot be invoked for purposes of justifying non-compliance with cooperation duties, the fulfilment of which is safeguarded by *nemo tenetur*: the right to a fair trial is always guaranteed.

We therefore exclude that the penalties foreseen in the Decree-Law on Aggressive Tax Planning may themselves constitute criminal charges. In other words, the Decree-Law therefore means, in contrast to the general Portuguese regime summarized above, that any information provided in its context may only be used to assure compliance with tax law, but excludes the use of that information for the purpose of applying tax penalties (and therefore also criminal charges).

Moreover, in order to ensure *nemo tenetur*, if there is any suspicion of tax evasion and criminal charge after fulfilment of cooperation duties, the taxpayer may ask to become a formal suspect for committing a tax crime, and will then benefit from the corresponding rights, namely the right to a fair trial, the right to silence and the right to refuse self-incrimination.

Being granted the status of formal suspect, the taxpayer may refuse to provide any further information or clarification to the tax administration, and consequently to be involved in any self-incrimination. The right to silence implies that no unfavourable consequences can derive therefrom. The right to silence and *nemo tenetur* are reinforced in Art. 63(4) of the General Tax Law and Art. 89(2)(c) of the Code on Administrative Procedure, which is applicable as subsidiary law to tax law. Thus, although *nemo tenetur* is not guaranteed in an optimal manner by the tax legislation when considered globally, because there is a link between the auditing and the process leading to the application of penalties, it is possible to call upon a regime that guarantees *nemo tenetur*, and in the case of the Aggressive Tax Planning Regime, Art. 12 of the DL assures the latter.

## 8.9. Cooperation duties and the duty of professional secrecy

A final issue that may be raised is whether the right to silence may also include those persons and entities that are subject to professional secrecy, such as practitioners, accountants, law and accountancy firms, consultancy firms, etc.

In *Ordre des Barreaux Francophones et Germanophone et al.*,<sup>46</sup> the European Court of Justice (ECJ) held that the obligations of information and of cooperation with the authorities for combating money laundering, and falling on “independent legal professionals”, as laid down in Art. 6(1) of Council Directive 91/308/EEC of 10 June 1991,<sup>47</sup> did not infringe the right to a fair trial as guaranteed by Art. 6 of the ECHR and Art. 6(2) EU. Those duties compelled lawyers to inform the competent authorities of all relevant facts they may come across that may indicate money laundering, especially in the financial and immovable property sectors. According to the ECJ, such duties are not incompatible with EU law, as long as they are not imposed on practitioners in the course of a judicial process. Similarly, Art. 6 of the Portuguese Aggressive Tax Planning Regime excludes from the information, communication and clarification duties, promoters assessing the tax situation of a client, representing the client in the course of a judicial process or in connection with it, and therefore seems to safeguard in a satisfactory way the duty of professional secrecy and the right to silence.

## 8.10. Concluding remarks

In the previous sections we analysed the compatibility of information and clarification duties, such as those provided under an advance pricing agreement and those related to tax planning schemes and activities aimed at obtaining tax advantages, with the right to a fair trial foreseen in Art. 6 of the ECHR. We took as point of departure the right to silence and the right not to incriminate oneself or *nemo tenetur* in Art. 6(1) of the ECHR, and debated their object and scope, and to what extent coercive information duties may be compatible with it, in light of the case law of the ECnHR and the ECtHR.

We argued that *nemo tenetur* does not necessarily require separation between audit and investigation departments. However, in case a department exercises both or all the functions, *nemo tenetur* implies that any information obtained during a tax procedure and potentially implying criminal charges cannot be used in the latter process, from the moment on that the position of the taxpayer is “substantially affected”, namely because the information is requested under the threat of a penalty (*Abas vs. Netherlands* and *R. v Allen*, and Art. 12 of the Portuguese Regime on Aggressive Tax Planning, discussed above).

46. C-305/05, of 26 June 2007.

47. Cf. Art. 35(1) and (2), of Portuguese Law 25/2008 of 5 June.

Protection after the taxpayer's position is substantially affected implies, still in line with the ECnHR and the ECtHR case law, that any information obtained during a tax procedure or after it is known that such a procedure will take place, can be used for a correct assessment of taxes (*Saunders v. UK*,<sup>48</sup> and *Allen v. UK*<sup>49</sup>), in order to comply with the legality principle and the principles of investigation of the relevant and of the true facts (the right to silence and *nemo tenetur* may not be invoked), but not for purposes of applying a penalty.

In other words, whenever the tax authorities request the information from the taxpayer, the amount and the nature of which mean that the taxpayer is suspected of having committed an offence, they are no longer acting as auditors, but as authorities in a criminal process. Cooperation duties are in this case a disguise for the tax administration to obtain evidence by the taxpayer, and Art. 6(1) of the ECHR comes into play.

We can also derive from the previous paragraphs that if a scheme or action is already identified clearly by law, regulation or ruling, or by settled case law, as tax evasion, *nemo tenetur* is at play and the taxpayer may invoke it (and the right to silence).

We moreover highlighted the fact that *nemo tenetur* has also to be assured by the tax legislator, since not only does it have to guarantee the right to a fair trial, the presumption of innocence and *nemo tenetur*, but also prevent interest rates for non-compliance or late compliance (as indemnity) from being hidden penalties.

48. *Saunders v. the United Kingdom* – Rep. 1996-VI, fasc. 24 (17.12.96).

49. *Allen v. the United Kingdom* (dec.), No. 76574/01, cit.

## Chapter 9

### Is there a Need for International Enforcement of Human Rights in the Tax Area?

Servaas van Thiel\*

#### 9.1. Introduction

The central question of this paper – whether we need to have international mechanisms in place to ensure the enforcement of human rights of taxpayers – does not immediately appeal to tax lawyers as very relevant for day-to-day practice. One reason is that tax lawyers are largely unaware of the role which international law could have (or actually has) in the area of taxation, which after all is considered one of the sovereign powers in which states do not accept any interference from outside. A second reason is that it is not immediately clear to tax lawyers how human rights law might relate to tax law, in particular not if human rights law is perceived in a very traditional sense as covering the prohibition of state interference with such basic notions as the freedom of speech or organization, and the prohibition of torture and imprisonment without trial. Thirdly, certain basic procedural rights, which also have a human rights flavour, are often guaranteed by the constitutions of states<sup>1</sup> and therefore do not appear to the tax lawyer to require any international enforcement mechanisms.<sup>2</sup>

More in general, tax lawyers, including international tax lawyers, have the tendency to regard their area of the law very much as a *sui generis* area that has its very own concepts and methods and is a priori unrelated to any other areas of national and international law. In particular, tax treaties are regarded as purely interstate and *sui generis*, the negotiation and conclusion of which are beyond the influence of both international law and private parties. An interesting illustration of this virtually blind autofocus

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1. See van Thiel, S. (ed.), *The Confédération Fiscale Européenne at 50 years: Commemorative book issued on the occasion of the 50th anniversary of the CFE with a special focus on taxpayer rights and taxpayer charters*, Brussels: DATEV, 2009, p. 332.

2. As is clear from other contributions to this volume, however, there is an increasing awareness of the importance in tax procedures of the procedural rights guaranteed by the European Convention on Human Rights (ECHR).