EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Supplementary VAT assessments issued to company for failure to comply with exemption rules did not amount to a “penalty” under the Convention

In its decision in the case of **Italmoda Mariano Previti and Others v. the Netherlands** (application no. 16395/18) the European Court of Human Rights has unanimously declared the application inadmissible. The decision is final.

The applicant company had acquired goods from vendors in the Netherlands and Germany for resale to clients in Italy and had applied the “zero-rate” tariff for sales carried out in the European Union. In 2002 and 2005 the tax authorities issued supplementary tax assessments on the grounds that the company had not complied with the conditions for applying the zero-rate exemption, on account of fraudulent activity.

The Court found that the supplementary tax assessments issued to the applicant company could not be considered as amounting to a “penalty” within the meaning of Article 7 (no punishment without law) of the European Convention on Human Rights. In particular, they did not concern the imposition of tax fines but the obligation to pay reassessed tax liabilities, did not pursue a punitive aim and, although the amounts were considerable, they had been based on a standard calculation of the tax owed. The application was therefore inadmissible.

Principal facts

The applicants are a company, Schoenimport Italmoda Mariano Previti (“Italmoda”), a registered partnership created in 1994 in the Netherlands and dissolved in 2000, and four Italian and Dutch nationals, Giovanna Previti, Maurizio Previti, Stefano Previti and Maria Previti-Van Ginkel, who were born in 1971, 1973, 1969 and 1947 respectively and live in Daverio (Italy) and Bergen (the Netherlands), and who were members of the partnership.

The company acquired goods from vendors in the Netherlands and Germany for resale to clients in Italy. The applicants applied the zero-rate tariff for intra-Community supplies (sales carried out within the European Union) in respect of those goods – that is, they paid no value added tax (“VAT”) in the Netherlands, on the assumption that such resales were exempt from VAT.

In 2002 the Dutch Tax and Customs Administration (“the TCA”) notified the company that it had received information that there had been fraudulent activity in the supply chain and issued supplementary tax assessments on the grounds that the company had not complied with the conditions for applying the exemption. The company lodged an objection. A 2005 audit by the TCA found further irregularities and it issued an additional supplementary tax assessment. In 2006, following objections by the applicant company, the TCA upheld its decisions issuing additional tax assessments.

On 31 July 2006 the applicants instituted proceedings before the domestic courts, submitting, in essence, that the Dutch tax authorities had not been entitled to issue supplementary tax assessments. The Supreme Court stayed the proceedings and sought a preliminary ruling from the Court of Justice of the European Union (“the CJEU”) on whether participation in tax evasion or fraud precluded the application of the zero-rate if national law did not make provision for a refusal of the exemption.

On 18 December 2014 the CJEU handed down a preliminary ruling, finding that the EU provisions in question had to be interpreted as meaning that a taxable person was to be denied the benefits of the VAT system if she or he knew or ought to have known that she or he was participating in fraud in the context of a chain of supplies. It held that even where there was no provision under national law, national authorities were not prevented from refusing such a benefit in circumstances such as those found in the applicants' case.

In a second round of domestic proceedings, the Court of Appeal found it established that there had been a chain of transactions aimed at carrying out VAT fraud. Some of the company's partners, and therefore the company itself, had orchestrated the fraud, or at the very least been aware of it, and had either set it up or helped to carry it out. The court, while noting that the CJEU had held that the denial of VAT rights did not constitute a punitive measure, independently considered that in the light of the case-law criteria developed on that point, no punitive measure had been imposed.

On 20 October 2017, the Supreme Court summarily dismissed an appeal by the applicant company on points of law.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 4 April 2018. Comments were submitted by the Italian Government and by the Governments of the Czech Republic and the Kingdom of Spain, the European Commission and CFE Tax Advisers, who had been granted leave to intervene by the President of the Section.

Relying on Article 7, the applicants complained that the issuing of supplementary tax assessments had amounted to a "penalty" without a legal basis in national law.

The decision was given by a Chamber of seven judges, composed as follows:

Lado **Chanturia** (Georgia), *President*,
Jolien **Schukking** (the Netherlands),
Faris **Vehabović** (Bosnia and Herzegovina),
Ana Maria **Guerra Martins** (Portugal),
Anne Louise **Bormann** (Denmark),
Sebastian **Răduleţu** (Romania),
András **Jakab** (Austria),

and also Simeon **Petrovski**, *Deputy Section Registrar.*

Decision of the Court

The Court, applying the so-called *Engel* criteria, examined whether the issuing of the supplementary tax assessments constituted a "penalty" within the meaning of Article 7 of the Convention.

It firstly noted that the supplementary tax assessments in question had not been imposed following a ruling that the applicants were guilty of a criminal offence. Likewise, the assessments had not been issued pursuant to a statutory provision imposing a punishment for wrongdoing; they had been characterised under national law as administrative measures based on tax law and had been reviewed by the courts with jurisdiction in matters of taxation.

As regards the nature of the measures in question, the Court noted that they did not concern the imposition of tax fines or surcharges but the obligation to pay reassessed VAT liabilities. It found that the supplementary tax assessments, which had been issued to collect tax in respect of which the applicant company was under an obligation to pay, did not pursue a punitive aim. Rather, they had been issued on the grounds that the company had not complied with the conditions for applying the exemption from, or deduction or refund of VAT, in the context of a chain of supplies within the European Union. Moreover, the measures were the result of a tax regime that applied only to taxable persons wishing to benefit from this VAT-system.

The Court emphasised the need to prevent and curb any fraudulent abuses of the VAT-system and ultimately, to preserve the financial stability of that system in the public interest. It noted that the Court of Appeal had established that some of the company's partners, and as such the company itself, had either set up the fraud or had helped to carry it out. Such knowledge of participation in VAT fraud could not be reconciled with allowing the applicants to successfully claim their entitlement to the VAT rights in question. In that connection, the Court also noted that the CJEU had ruled that a refusal of VAT rights was an expression of the principle that rules laid down by EU law could not be relied on for abusive or fraudulent ends and had to be regarded as a consequence of the finding that the objective conditions required for obtaining those VAT rights had, in fact, not been satisfied. The Court held that, moreover, the company had not been found liable for tax obligations of persons or entities outside its power and in relation to which it had no means of monitoring or securing compliance.

As regards the degree of the severity of the measures, although the amounts of the supplementary tax issued to the company were considerable, they had been based on a standard calculation of the tax owed. The severity of the measures did not render them "criminal" within the meaning the Convention.

Based on the above considerations, the Court found that the proceedings in question did not fall within the scope of "criminal matters" within the meaning of Article 6 and for the same reason, the supplementary tax assessment issued to the company could not be considered as amounting to a "penalty" within the meaning of Article 7.

The Court therefore concluded that the application was inadmissible.

The decision is available only in English.

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