



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

COURT (CHAMBER)

CASE OF BENDENOUN v. FRANCE

(Application no. 12547/86)

JUDGMENT

STRASBOURG

24 February 1994

In the case of Bendenoun v. France*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,

Mr F. GÖLCÜKLÜ,

Mr L.-E. PETTITI,

Mr R. MACDONALD,

Mr S.K. MARTENS,

Mr I. FOIGHEL,

Mr A.N. LOIZOU,

Mr M.A. LOPES ROCHA,

Mr L. WILDHABER,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 24 September 1993 and 26 January 1994,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 19 February 1993, within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 12547/86) against the French Republic lodged with the Commission under Article 25 (art. 25) by a French national, Mr Michel Bendenoun, on 9 September 1986.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1) of the Convention and Article 1 of Protocol No. 1 (P1-1).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in

* The case is numbered 3/1993/398/476. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

the proceedings and designated the lawyers who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 February 1993, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr R. Macdonald, Mr C. Russo, Mr S.K. Martens, Mr I. Foighel, Mr M.A. Lopes Rocha and Mr L. Wildhaber (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the French Government ("the Government"), the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 7 June 1993 and the Government's memorial on 16 June. On 27 August the Deputy Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

On 20 September the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 September 1993. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr B. GAIN, Head of the Human Rights Section,
Department of Legal Affairs, Ministry of Foreign Affairs,
Agent,

Mrs E. FLORENT, Judge
of the Administrative Court, on secondment to the
Department of Legal Affairs, Ministry of Foreign Affairs,

Mrs M. MERLIN-DESMARTIS, Judge
of the Administrative Court, on secondment to the
Department of Legal Affairs, Ministry of Foreign Affairs,

Mr E. BOURGOIN, Chief Inspector of Taxes,
Department of Revenue, Ministry of the Budget, *Counsel;*

- for the Commission

Mr S. TRECHSEL, *Delegate;*

- for the applicant

Mr J. BORNET, avocat,
Mr E. VUYLSTEKE, avocat, *Counsel.*

The Court heard addresses by Mr Gain, Mr Trechsel, Mr Bornet and Mr Vuyksteke and also replies to its questions.

The Government lodged several documents at the hearing.

6. As Mr Russo was unable to attend the deliberations on 26 January 1994, Mr A.N. Loizou, substitute judge, replaced him as a member of the Chamber (Rules 22 para. 1 and 24 para. 1).

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. Mr Michel Bendenoun is a French citizen who lives in Zürich and is a dealer in coins.

On 1 July 1973 he formed a public limited company under French law, ARTSBY 1881, with its head office in Strasbourg, for the purpose of dealing in old coins, objets d'art and precious stones. He owned the greater part of its capital (993 out of a total of 1,000 shares) and acted as its chairman and managing director.

As a result of his activities, three sets of proceedings - customs, tax and criminal proceedings - were brought against him, and they progressed more or less in parallel.

A. The customs proceedings

8. Between 3 June and 26 September 1975 the National Head Office of Customs Investigations (Belfort frontier zone) carried out a check on imports made by ARTSBY 1881; they were acting on information received from an anonymous informer. The main events during the investigation were that Mr Bendenoun was questioned and documents were seized (3-6 June), clients were questioned (6 June), employees and former employees of the company and an expert were interviewed (8-17 September) and Mr Bendenoun himself was arrested in Metz (26 September).

9. On the basis of the evidence thus gathered the applicant was prosecuted for various customs and exchange-control offences. A composition was reached on 6 January 1978, however, whereby Mr Bendenoun admitted the offences and paid a fine of 300,000 French francs (FRF) and the customs returned the seized items to him.

10. During the proceedings the applicant had access to all the documents in the customs file, which contained 24 reports and 353 other documents.

The reports were the following:

no. 73/1: questioning of Mr Bendenoun (Strasbourg, 3 June 1975);

no. 73/2: searches of the premises of ARTSBY 1881 and of Mr Bendenoun's home, and interviewing of Mr Bendenoun (Strasbourg, 3 June);

- no. 73/3: arrest of an employee of ARTSBY 1881 (Strasbourg, 3 June);
- no. 73/4: arrest of an employee of ARTSBY 1881 (Strasbourg, 3 June);
- no. 73/5: sealing of a bank strongbox (Strasbourg, 3 June);
- no. 73/6: arrest of an employee of ARTSBY 1881 (Strasbourg, 3 June);
- no. 73/7: opening of the bank strongbox (Strasbourg, 4 June);
- no. 73/8: seizure of old coins, cash and a vehicle (Strasbourg, 4 June);
- no. 73/9: interviewing of Mr Bendenoun (Strasbourg, 4 June);
- no. 73/10: interviewing of Mr Bendenoun (Strasbourg, 6 June);
- no. 73/11: interviewing of Mr Bendenoun (Strasbourg, 6 June);
- no. 73/12: interviewing of one of ARTSBY 1881's clients (Pfastatt, 6 June);
- no. 73/13: interviewing of one of ARTSBY 1881's clients (Colmar, 8 June);
- no. 73/14: interviewing of an employee of ARTSBY 1881 (Strasbourg, 8 September);
- no. 73/15: interviewing of one of ARTSBY 1881's clients (Strasbourg, 8 September);
- no. 73/16: interviewing of a former employee of ARTSBY 1881 (Strasbourg, 10 September);
- no. 73/17: interviewing of a former employee of ARTSBY 1881 (Strasbourg, 10 September);
- no. 73/18: interviewing of a numismatist (Paris, 15 September);
- no. 73/19: interviewing of a former representative of ARTSBY 1881 (Strasbourg, 17 September);
- no. 73/20: interviewing of a former chairman of ARTSBY 1881 (Strasbourg, 24 September);
- no. 73/21: arrest and interviewing of Mr Bendenoun (Metz, 26 September);
- no. 73/22: interviewing of a representative of ARTSBY 1881 (Metz, 26 September);
- no. 73/23: interviewing of Mr Bendenoun (Metz, 26 September);
- no. 73/24: interviewing of a witness (Metz, 26 September).

Mr Bendenoun received a copy of eight of them (nos. 73/1, 73/2, 73/8, 73/9, 73/10, 73/11, 73/21 and 73/23).

The 353 documents comprised a register bearing the title "Invoice control" (sealed document no. 1), seized on ARTSBY 1881's premises on 3 June 1975, and invoices and authentication certificates (sealed documents nos. 2 to 353), seized on the same day at the applicant's home.

11. At some time - according to the Government - before 31 August 1976 and pursuant to Article 1987 of the General Tax Code (which became Article L 83 of the Code of Tax Procedure on 1 January 1982), the customs sent the file to the Revenue.

B. The tax proceedings

1. Before the tax authorities

12. From 31 August to 28 September 1976 the Head Office of the Bas-Rhin Revenue carried out an inspection of ARTSBY 1881's accounts.

13. On 30 November 1976 the inspector sent two supplementary tax assessments to Mr Bendenoun as chairman and managing director of the company. One of them related to corporation tax and the other to value-added tax. They set out in detail the manner in which the inspector had determined what receipts had not been entered in the accounts and he confirmed them on 4 April 1977 after receiving comments from the applicant.

On the same date he also sent Mr Bendenoun personally a supplementary income-tax assessment, which he confirmed on 11 May 1977.

Under the supplementary assessment the applicant was required to pay an additional FRF 841,366, including FRF 422,534 in penalties. The company was required to pay additional tax and penalties amounting to FRF 157,752 and FRF 309,738 in respect of the value-added tax and FRF 270,312 and FRF 260,660 in respect of corporation tax.

14. The inspector then drew up a nineteen-page report, ending with a request that criminal proceedings should be taken against the applicant, and these were instituted on 30 November 1977 (see paragraph 25 below).

15. On 6 December 1977 ARTSBY 1881, in the person of its chairman and managing director, lodged two appeals with the Regional Commissioner of Revenue in Strasbourg in respect of the corporation tax and the value-added tax. Mr Bendenoun filed a third appeal, in his own name, concerning the income tax.

The Regional Commissioner refused the first two appeals on 20 April 1978 and the third on 3 April 1979.

2. In the administrative courts

(a) The Strasbourg Administrative Court

16. On 16 June 1978 Mr Bendenoun, acting on behalf of ARTSBY 1881, made two applications to the Strasbourg Administrative Court concerning the corporation tax and the value-added tax.

On 7 June 1979 he made a further application to the same court, this time in his own name, challenging the supplementary tax assessment on his income.

17. The Revenue annexed to its two sets of pleadings dated 5 April 1979 four customs reports (nos. 73/9, 73/10, 73/16 and 73/17 - see paragraph 10

above) and two letters from ARTSBY 1881 dated 30 May 1975 and June 1976.

18. On 29 May 1979 Mr Bendenoun's lawyer sent two identically worded letters to the President of the court. They read as follows:

"On 17 April 1979 you kindly forwarded to me the Regional Commissioner of Revenue's pleadings of 5 April 1979.

These pleadings refer several times to a file opened on Mr Michel Bendenoun, the chairman and managing director of the ARTSBY company, by the customs authorities.

Six documents from that file are annexed to the Revenue's pleadings.

It would seem essential for the whole of the file to be sent to the court and the undersigned.

The scale of the customs investigation was very large indeed and a number of reports, whose existence has not been mentioned by the authorities, are directly relevant to the present dispute.

..."

On 29 June 1979 the President of the court wrote to the Strasbourg public prosecutor to this end:

"For the purposes of preparing for trial a case concerning tax files relating to the ARTSBY company, I should be obliged if you would kindly produce to the Administrative Court the file on Mr Bendenoun, the chairman and managing director of the company. A number of reports are directly relevant to the case, and the National Head Office of Customs Investigations has informed me that the file in question was sent to you on 15 April 1978..."

In a letter of 11 July 1979 the public prosecutor replied as follows:

"... I am unable to send you the file opened on Michel Bendenoun in connection with the criminal investigation on charges of tax evasion.

I would point out that the Revenue is a civil party to the criminal proceedings and therefore may, since it has access to the case file, apply for a copy of it if it sees fit.

..."

19. On 19 July 1979 counsel for the applicant wrote again to the President of the court:

"...

... [my] request was not for production of the tax-evasion file but of a customs file which has not been the subject of any judicial investigation involving the Strasbourg public prosecutor's office as a composition was reached between Mr Bendenoun and the customs authorities.

...

I would add that production is being sought at my request and not at that of the Revenue, since it is precisely the Revenue that is relying on documents from the customs investigation, and unless he has been able to inspect the customs file in its entirety Mr Bendenoun cannot make any sensible comments."

20. On 9 December 1980 Mr Bendenoun's lawyer sent another letter to the President of the court:

"...

To date, I have ... not been able to study the customs file.

The Revenue, however, relies on certain reports taken from a large mass of reports.

I should therefore be obliged if you would let me know how I am to be able to study the whole customs file.

I should also be glad if you would kindly extend the time allowed me for submitting comments until the customs file has been made available to me, as requested as early as 1979."

The President of the Administrative Court sent the public prosecutor a letter dated 30 December 1980 in which he said:

"For the purposes of preparing for trial a case concerning tax files on the ARTSBY company, I should be obliged if you would kindly produce to the Administrative Court the documents relating to the customs file on the criminal investigation into Mr Bendenoun, the chairman and managing director of the company.

This customs file is directly relevant to the tax case, which is before the Administrative Court also."

The request went unanswered.

21. On 30 November 1981 the Administrative Court delivered three judgments in which it dismissed ARTSBY 1881's and Mr Bendenoun's applications.

It did not mention the decisions given in the case by the criminal courts (see paragraphs 28 and 30 below).

(b) The Conseil d'État

22. On 1 March 1982 Mr Bendenoun, acting on his own behalf and on behalf of ARTSBY 1881, appealed to the Conseil d'État against the three Administrative Court judgments.

23. In supplementary pleadings filed on 1 July 1982 he set out the following ground of appeal:

"Although the tax authorities made ample use of items in the customs file which in their view showed that the supplementary assessments in issue were justified, while ignoring those which clearly would have provided grounds for setting them aside, they deliberately decided not to meet the appellant's requests to inspect that customs file in its entirety.

...

Compliance with the adversary principle precludes accepting an argument which the opposing side cannot be aware of and which thus cannot be sensibly challenged by them."

24. The Conseil d'État dismissed the appeals in three judgments on 28 May 1986.

The reasons given for the one concerning value-added tax for the period from 1 July 1973 to 31 December 1975 (no. 40482) were worded as follows:

"The lawfulness of the judgment appealed against

It appears from the pre-trial preparations that the applicant company was put in a position to inspect all the documents in the file that were likely to have a bearing on the resolution of the dispute, including the customs reports establishing the existence of concealed receipts. That being so, the ground of appeal alleging that the judgment at first instance was unlawful because the 'ARTSBY 1881' company was unable, during the course of the proceedings at first instance, to inspect all the documents in the customs file must be rejected.

The lawfulness of the assessment procedure and the burden of proof

It appears from the pre-trial preparations that in June 1975 the customs seized invoices for a total of FRF 1,676,710 at the home of Mr Bendenoun, the chairman and managing director of the public limited company 'ARTSBY 1881', which trades in old coins and nearly all of whose capital was owned by Mr Bendenoun from 1974 onwards. It appears from the findings of fact made by the Colmar Court of Appeal in a judgment that was given in criminal proceedings on 13 May 1981 and has become final (findings which are binding erga omnes) that Mr Bendenoun, 'who did not have sufficient financial resources personally to carry out' the transactions recorded in the invoices seized at his home, 'deliberately decided, with the aim of evading tax on part of the company's receipts, to conceal about 25% of the company's turnover by not entering it in the company's books and taking care to keep the copies of the relevant invoices at home...'. These findings establish that the bookkeeping of the 'ARTSBY 1881' company was not reliable. That being so, the Revenue was legally entitled to rectify of its own motion the figure of the company's turnover for the period from 1 July 1973 to 31 December 1974. It is consequently for the company to show that the basis taken by the Revenue for making the disputed assessments was too high.

The amount of the assessments

...

The penalties

The applicant company intended, by means of a systematic process of concealment, to evade payment of value-added tax on transactions made in 1974 and 1975. The authorities were therefore entitled to regard it as having been guilty of deception and subsequently to increase the tax due by 200% as provided in Articles 1729 and 1731 of the General Tax Code taken together."

The same reasoning was adopted in the other two judgments (nos. 40480 and 40481).

C. The criminal proceedings

1. The judicial investigation

25. By means of two applications made on 30 November 1977 the Head Office of the Bas-Rhin Revenue lodged a complaint against Mr Bendenoun with the Strasbourg public prosecutor's office. The applications were accompanied by a series of supporting documents.

26. On 3 March 1978 the investigating judge instructed the police to obtain the customs file. This was received on 19 April 1978 and contained copies of the 24 reports, sealed document no. 1 drawn up by officials of the National Head Office of Customs Investigations and the 352 other sealed documents in a hardback file. The whole customs file remained at the court throughout the judicial investigation and counsel for the accused had access to it on each occasion that his client was questioned (12 January 1978, 8 February 1978 and 12 February 1980) and again before the trial.

27. On 21 May 1980 the public prosecutor applied for Mr Bendenoun to be committed for trial.

2. The trial and the appeals

(a) The Strasbourg Criminal Court

28. On 21 November 1980 the Strasbourg Criminal Court delivered two judgments (nos. 6776/80 and 6780a/80) concerning the accused, the first in his capacity as chairman and managing director of ARTSBY 1881 (corporation tax and value-added tax), the second in his personal capacity (income tax). In each judgment he was given a suspended sentence of fifteen months' imprisonment for tax evasion, both sentences to run concurrently, and was ordered to be imprisoned for one year in the event of non-payment of the sums owed.

(b) The Colmar Court of Appeal

29. Mr Bendenoun appealed against these judgments to the Colmar Court of Appeal. In his submissions he complained that the documents relating to the customs proceedings were no longer in the file.

30. In two judgments on 13 May 1981 (nos. 615/81 and 616/81) the Criminal Division of the Court of Appeal upheld the decisions of the trial court and also sentenced Mr Bendenoun to a fine of FRF 30,000.

In the first judgment it dismissed the ground of appeal based on the fact that documents were missing from the file:

"...

(d) knowledge of [the documents in the customs file] is in no way necessary or even helpful for the discovery of the truth, since the statements lawfully obtained from the accused during the present proceedings and the documents that he himself submitted at the trial provided ample evidence in respect of the sole difficulty on which his guilt depends; and

(e) the rights of the defence have thus not been prejudiced in any way."

(c) The Court of Cassation

31. Mr Bendenoun appealed on points of law against the two judgments. In particular, he alleged that the rights of the defence had been infringed in that the customs file had not been put before the Court of Appeal.

32. The Court of Cassation dismissed his appeals in two judgments on 24 May 1982. It rejected the ground of appeal just referred to in the following terms, identical in both judgments:

"...

In finding Bendenoun guilty of fraudulently evading assessment or payment of taxes, the Court of Appeal stated that the defendant did not 'dispute the existence of the invoices discovered'; that it was thus 'unnecessary to be acquainted with all the documents in the customs proceedings'; that it was apparent from the facts established in the judicial investigation that Bendenoun had evaded the payment of corporation tax by the ARTSBY 1881 company by concealing taxable sums exceeding the statutory allowances; and that the defendant's explanation that the transactions in question had been effected in the course of a private, unregistered business as a dealer in coins were unacceptable owing to the circumstances set out and analysed by the court below.

Given these findings and statements, which adequately and consistently show that all the ingredients of tax evasion - as regards both the actus reus and the mens rea - have been made out against Bendenoun, and seeing also that it is apparent from this that the court below based its decision solely on evidence which was put before it during the trial and was the subject of adversarial argument before it in accordance with the provisions of Article 427 of the Code of Criminal Procedure and did not in any way infringe the rights of the defence, the grounds of appeal, which merely attempt to call in question the unfettered discretion of the courts below to assess this evidence, must fail."

II. RELEVANT DOMESTIC LAW

33. Chapter II of the General Tax Code is entitled "Penalties". Section I of it ("Common Provisions") deals with "tax penalties" and "criminal penalties".

A. Tax penalties

1. The system applicable at the material time

34. The system of tax penalties established in the Law of 27 December 1963, which was applied in the instant case, contained a large number of rates, which varied according to the tax concerned, the nature and seriousness of the offence and the procedure adopted for revising the initial assessment.

Only three provisions of the General Tax Code need be cited here:

Article 1728

"Where a natural or legal person or an association under an obligation to make a tax return or sign some other document indicating the amounts or other information needed for the calculation of the base or for the assessment or payment of one of the taxes, duties, charges, dues or other sums established or collected by the Department of Revenue declares or causes to appear a taxable amount or tax information that is insufficient, inaccurate or incomplete or makes insufficient payment, the amount of tax evaded shall be increased either by the compensation for late payment provided for in Article 1727, in the case of the payments, taxes or charges listed in that Article, or by interest for late payment calculated in the manner laid down in Article 1734.

..."

Article 1729 para. 1

"... where it cannot be accepted that the tax debtor acted in good faith, the taxes corresponding to the offences defined in Article 1728 shall be increased by:

30% if the amount of tax evaded does not exceed half the amount of tax actually payable;

50% if the amount of tax evaded is greater than half the tax actually payable; and

100%, irrespective of the amount of the tax evaded, if the tax debtor has been guilty of deception."

Article 1731

"As regards turnover and similar taxes, registration fees, stamp duty, land registry fees and taxes similar to those fees and that duty, wages tax, apprenticeship tax, employers' contributions to the financing of in-service vocational training and income-tax deductions, the shortcomings, inaccuracies or omissions referred to in Article 1728 shall entail, where it cannot be accepted that the tax debtor acted in good faith, a tax fine equal to double the amount of the surcharges provided for in Article 1729 and, like those surcharges, determined according to the amount of tax evaded.

The amount of that tax shall be assessed, where turnover and similar taxes are concerned, by treating separately each of the periods taken into account for the basis of income-tax assessment and, where appropriate, the inspected part of the current financial year."

35. Imprisonment may be ordered in the event of non-payment. Article 1845 bis of the General Tax Code - which became Article L 271 of the Code of Tax Procedure on 1 January 1982 - provides:

"Failure to pay the taxes referred to in Article 1844 bis may, notwithstanding any legal challenges or non-contentious applications for remission or reduction, entail imprisonment for default as laid down in Part VI of Book V of the Code of Criminal Procedure. The President of the tribunal de grande instance shall decide, where necessary, to order such imprisonment and shall determine its length. Imprisonment for default shall be enforceable immediately.

..."

2. The current system

36. Law no. 87-502 of 8 July 1987, of later date than the facts of the case, set up a new system which applies to offences common to all taxes and combines two features: interest for late payment at the single rate of 0.75% per month, payable irrespective of any penalty; and specific increases designed to punish the main offences relating to the tax base or the collection of tax.

Article 1729 para. 1 of the General Tax Code now reads as follows:

"Where the tax return or other document shows a tax base or information used for the assessment of tax that is insufficient, inaccurate or incomplete, the amount of tax due from the taxpayer shall be increased by the interest for late payment ... and by 40% if the taxpayer's bad faith has been established or by 80% if he has been guilty of deception or abuse of process ..."

Article 1731 now provides:

"1. Any delay in the payment of taxes, duties, charges, dues or any other sums payable to the Department of Revenue or late payment to the Treasury (*comptables directs du Trésor*) of sums due in respect of the wages tax referred to in Article 1679 or in respect of the deduction at source referred to in Article 1671 B shall entail payment of the interest provided for in Article 1727 and a surcharge of 5% of the amount whose payment has been delayed.

2. Such interest shall be reckoned from the first day of the month following the filing of the return or of the document in which the taxpayer acknowledged his debt or, failing those, receipt of the tax demand issued by the accounting officer.

3. The surcharge provided for in paragraph 1 above shall not apply where the return or other document referred to in Article 1728 that is filed late is accompanied by payment of the sums due.

4. For all sums payable without any prior return being made, interest shall be reckoned from the first day of the month following the one in which the sum should have been paid until the last day of the month of payment."

B. Criminal penalties

1. The system applicable at the material time

37. The applicant was prosecuted under two provisions of the General Tax Code, as worded before 1 July 1978:

Article 1741

"... anyone who fraudulently evades assessment or payment in whole or in part of the taxes with which this Code is concerned, or attempts to do so, whether by deliberately omitting to make his return within the prescribed time, or by deliberately concealing part of the sums liable to tax, or by arranging his insolvency or obstructing the collection of tax by other subterfuges, or by acting in any other fraudulent manner, shall be liable, independently of the applicable tax penalties, to a fine of between FRF 5,000 and FRF 30,000 and to imprisonment for a term of between one and five years or to only one of those two penalties ...

..."

Article 1743

"The penalties provided for in Article 1741 shall also apply to:

1. Anyone who knowingly fails to make entries or cause entries to be made or who makes inaccurate or false entries or causes such entries to be made in the daybook and the balance-sheet book, ... or in the documents which take their place.

..."

2. The current system

38. Article 1741 has been amended only in that the maximum amount of the fine has been raised to FRF 500,000.

Article 1743 remains unchanged.

PROCEEDINGS BEFORE THE COMMISSION

39. Mr Bendenoun applied to the Commission on 9 September 1986. Relying on his right to a fair trial (Article 6 para. 1 of the Convention) (art. 6-1) in the criminal and administrative courts, he complained that he had not

had access to the whole of the customs file, whereas the Revenue had sent to the administrative courts certain evidence against him. He alleged also that there had been a breach of his right to the peaceful enjoyment of his possessions (Article 1 of Protocol No. 1) (P1-1) in that, as a result of the various national decisions, he had had to pay substantial sums to the French State.

40. On 6 July 1990 the Commission declared the complaint relating to the proceedings in the criminal courts inadmissible and the remainder of the application (no. 12547/86) admissible. In its report of 10 December 1992 (made under Article 31) (art. 31), it expressed the opinion by ten votes to two that there had been a breach of Article 6 para. 1 (art. 6-1) and, unanimously, that it was unnecessary to consider the case also under Article 1 of Protocol No. 1 (P1-1). The full text of the Commission's opinion and of the partly dissenting opinion contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT

41. In their memorial the Government requested the Court to hold

"that the provisions of Article 6 (art. 6) of the European Convention ... do not apply to this case;

in the alternative, that France has not infringed the principle of equality of arms on account of the facts which gave rise to Mr Bendenoun's application".

42. Counsel for the applicant asked the Court to

"(a) hold that there has been a violation of Article 6 para. 1 (art. 6-1) of the Convention in the instant case;

(b) hold that the applicant did not have a fair trial;

(c) hold, under Article 50 (art. 50) of the Convention and by way of just satisfaction, that the French Government should not seek to recover the tax (tax due and penalties) set out in the Revenue's letter of 23 October 1984 ... and hold that the French Government should repay to the applicant all the sums that he has paid, directly or indirectly, to the French Treasury on the basis of the aforementioned assessments; and

(d) hold that, by way of just satisfaction under the head of non-pecuniary damage, the French Government should pay the applicant a sum of FRF 100,000 and, in costs and expenses, a sum of FRF 141,500".

* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 284 of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION

43. Mr Bendenoun complained that he had not had a fair trial in the administrative courts in respect of the tax surcharges that had been imposed on him. He relied on Article 6 para. 1 (art. 6-1) of the Convention, which provides:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Applicability of Article 6 para. 1 (art. 6-1)

44. The applicant and the Commission were agreed in considering that Article 6 para. 1 (art. 6-1) was applicable in the instant case.

45. The Government maintained the opposite. In their submission, the proceedings in issue did not relate to a "criminal charge" as the tax surcharges imposed on Mr Bendenoun bore all the hallmarks of an administrative penalty within the meaning of the Court's case-law (see the *Engel and Others v. the Netherlands* judgment of 8 June 1976 and the *Öztürk v. Germany* judgment of 21 February 1984, Series A nos. 22 and 73).

This observation applied, firstly, to the classification in French law. The General Tax Code classed the increases in question with the "tax penalties" and not with the "criminal penalties" (see paragraphs 33 and 34 above). The same was true of the nature of the offence. The conduct of which the applicant stood accused was defined as "deception" ("*manoeuvres frauduleuses*") and not as "evasion" ("*soustraction frauduleuse*"); the Conseil d'État regarded the former offence as a tax offence and the latter as a criminal offence. The nature and degree of severity of the penalty were not such as to suggest a different conclusion. The surcharges were imposed by the Revenue, under the supervision of the administrative courts, and not by a criminal court; they were calculated on the basis of the supplementary tax assessment and were therefore directly proportional to the tax originally evaded; they were not an alternative to a custodial penalty and never entailed any loss of rights; they remained payable by the heirs in the event of the taxpayer's death; and they were not covered by the rules on reoffending, aiding and abetting, consecutive and concurrent sentences or the making of entries in the criminal records.

46. As regards the general aspects of the French system of tax surcharges where the taxpayer has not acted in good faith, the Court

considers that, having regard to the large number of offences of the kind referred to in Article 1729 para. 1 of the General Tax Code (see paragraph 34 above), Contracting States must be free to empower the Revenue to prosecute and punish them, even if the surcharges imposed as a penalty are large ones. Such a system is not incompatible with Article 6 (art. 6) of the Convention so long as the taxpayer can bring any such decision affecting him before a court that affords the safeguards of that provision.

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 Article 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 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" in issue a "criminal" one within the meaning of Article 6 para. 1 (art. 6-1), which was therefore applicable.

48. This conclusion makes it unnecessary for the Court to have regard to the supplementary tax assessments (see paragraphs 13 and 34 above), on which moreover those who appeared before the Court placed very little emphasis.

B. Compliance with Article 6 para. 1 (art. 6-1)

49. The applicant complained of an infringement of the adversarial principle. While the Revenue had carefully chosen, unilaterally, the incriminating documents and produced them to the administrative courts, he himself had not had access to the whole of the file compiled by the customs, which included not only the reports but also the information on which they were based. The failure to hand over a copy, which had repeatedly been sought from the Revenue and the Strasbourg Administrative Court (see

paragraphs 18-20 above), had prevented him from identifying exculpatory facts and, in particular, from having the anonymous informer who had given rise to the proceedings called as a witness and examined.

50. The Commission reached the same conclusion. Admittedly, it did not ascertain whether the documents in the customs file were such as to prove or disprove Mr Bendenoun's "guilt" and declined to speculate as to what might have been the outcome of the proceedings complained of if the whole of that file had been available to the applicant. It nevertheless made one finding, namely that the applicant could plausibly argue that the documents in question contained information to support his case and, in particular, to contradict the statements made in the reports produced by the Revenue. It also noted that the President of the Administrative Court twice made an unsuccessful request to the Strasbourg public prosecutor to produce the customs file (see paragraphs 18 and 20 above).

51. The Government submitted that, on the contrary, neither at first instance nor on appeal did Mr Bendenoun find himself at a disadvantage vis-à-vis the Revenue.

The Strasbourg Administrative Court had ruled on the merits of the case in the light of the parties' observations and of the documents in its possession. Being of the view that sufficient information was available to it, it had not made any interlocutory order that the customs file should be produced. The President's approaches to the public prosecutor's office could not take the place of such an order, especially as they did not issue from the trial bench and ultimately amounted to forwarding the requests of counsel for the applicant.

The Revenue had annexed to its pleadings in the Administrative Court proceedings four reports of interviews by customs officers - two with Mr Bendenoun and two with former employees of ARTSBY 1881 responsible for invoicing - and the applicant had been able to challenge them. On the other hand, the Revenue had refrained from adducing ten reports containing incriminating evidence, not to mention seven others which provided no useful information on tax matters. The Revenue could not, therefore, be accused of having made a selection to the prejudice of the applicant and of the rights of the defence. As to the concealed invoices that had been seized at his home, Mr Bendenoun had made them out himself and was therefore apprised of their existence and content; furthermore, he had had access to them in the criminal proceedings and had acknowledged that they corresponded to the Revenue's description of them as relating to sales of coins.

The Conseil d'État had held the proceedings at first instance to have been lawful, and it too had considered it unnecessary to order production of the customs file. It had found the available information to be sufficient, corroborated as it was by the findings of fact made in the criminal

proceedings by the Colmar Court of Appeal in its judgments of 13 May 1981 (see paragraph 30 above) - findings that were binding *erga omnes*.

52. The Court points out, firstly, that the applicant's allegations are relevant only in so far as the proceedings in the administrative courts related to the merits of the accusation of tax evasion which gave rise to the tax surcharges. The Court's task is therefore limited to ascertaining whether there was a failure to respect equality of arms or, more generally, the rights of the defence in so far as the determination of Mr Bendenoun's guilt was concerned.

It must be noted further that the documents whose production the applicant complained he had sought in vain were not among those relied on by the tax authorities. In order to establish Mr Bendenoun's guilt, they made use only of four reports (see paragraph 17 above) - mentioned by the Government - in which the applicant acknowledged his customs offences. The complaint therefore relates to documents that were not in the file produced to the administrative courts and were not ones on which the applicant's adversary relied (see, *mutatis mutandis*, the Schuler-Zgraggen v. Switzerland judgment of 24 June 1993, Series A no. 263, p. 18, para. 52).

The Court does not rule out that in such circumstances the concept of a fair trial may nevertheless entail an obligation on the Revenue to agree to supply the litigant with certain documents from the file on him or even with the file in its entirety. However, it is necessary, at the very least, that the person concerned should have given, even if only briefly, specific reasons for his request.

Mr Bendenoun sought production in full of a fairly bulky file. The evidence before the Court does not show that he ever put forward any precise argument to support his contention that, notwithstanding his admission of the customs offences and his admissions during the criminal investigation, he could not counter the charge of tax evasion without having a copy of that file. This omission is all the more detrimental to his case as he was aware of the existence and content of most of the documents and he and his counsel had had access to the complete file, at any rate during the criminal investigation (see paragraph 26 above).

53. In conclusion, it does not appear from the information available to the Court that the failure to produce documents infringed the rights of the defence or the principle of equality of arms. There has therefore not been a breach of Article 6 para. 1 (art. 6-1).

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 (P1-1)

54. In the proceedings before the Commission the applicant also relied on Article 1 of Protocol No. 1 (P1-1).

He made no further reference to this in the proceedings before the Court, which does not consider that it must deal with the issue of its own motion.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that Article 6 para. 1 (art. 6-1) of the Convention applies in the instant case and that there has been no breach of it;
2. Holds that it is unnecessary to deal with the case under Article 1 of Protocol No. 1 (P1-1).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 February 1994.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar