



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

COURT (CHAMBER)

CASE OF MIAILHE v. FRANCE (No. 2)

(Application no. 18978/91)

JUDGMENT

STRASBOURG

26 September 1996

In the case of Mialhe v. France (no. 2)¹,

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 Rules of Court A², as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,

Mr L.-E. PETTITI,

Mr C. RUSSO,

Mr N. VALTICOS,

Mrs E. PALM,

Mr R. PEKKANEN,

Mr A.N. LOIZOU,

Mr P. JAMBREK,

Mr P. KURIS,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 28 March and 27 August 1996,

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 29 May 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 18978/91) against the French Republic lodged with the Commission under Article 25 (art. 25) by a French national, Mr William Mialhe, who also has Philippine nationality, on 16 September 1991.

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

¹ The case is numbered 47/1995/553/639. 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.

² Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

the respondent State of its obligations under Article 6 para. 1 of the Convention (art. 6-1).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in 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. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 8 June 1995, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr B. Walsh, Mr C. Russo, Mr N. Valticos, Mrs E. Palm, Mr A.N. Loizou, Mr P. Jambrek and Mr P. Kuris (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently Mr R. Pekkanen, substitute judge, replaced Mr Walsh, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

4. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the French Government ("the Government"), the applicant's lawyer 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 and the Government's memorials on 20 and 28 November 1995 respectively. On 1 February 1996 the Secretary to the Commission informed the Registrar that the Delegate did not wish to reply in writing.

On 13 December 1995 and 22 January 1996 the Commission produced the documents of 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 26 March 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr M. PERRIN DE BRICHAMBAUT, Director of Legal Affairs,
Ministry of Foreign Affairs, *Agent*,
Mr B. NEDELEC, magistrat, on secondment to the Legal Affairs
Department, Ministry of Foreign Affairs,
Mr E. BOURGOIN, Director of Taxes, Legal Department,
Ministry of the Budget,
Mr B. HACQUIN, département Director of Taxes, on secondment
to the Ministry of Justice, *Counsel*;

(b) for the Commission

Mr J.-C. SOYER, *Delegate*;

(c) for the applicant

Mr D. BAUDIN, of the Conseil d'Etat and Court of Cassation Bar,

Mr F. GOGUEL, of the Paris Court of Appeal Bar, *Counsel.*

The Court heard Mr Soyer, Mr Baudin, Mr Goguel and Mr Perrin de Brichambaut.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

6. Mr Mialhe has dual French and Philippine nationality. He was honorary consul of the Philippines in Bordeaux from 1960 to May 1983 and also looked after that country's consulate in Toulouse.

A. The origins of the case - the customs prosecution

7. On 5 and 6 January 1983 customs officers seized nearly 15,000 documents at the applicant's Bordeaux residence, on premises housing the head offices of companies he managed and the consulate of the Republic of the Philippines. This operation was part of an investigation to determine, among other things, whether the applicant and his mother were to be regarded as being resident in France.

The judicial investigation that had been commenced on a complaint lodged by the director of customs investigations alleging unlawful accumulation and holding of assets abroad ended in a judgment of the Criminal Court of 2 December 1992 in which the court ruled that the public prosecution and the proceedings for imposition of customs penalties in respect of Mr and Mrs Mialhe were barred as a result of changes in the criminal law and ordered the return of the seized documents. These were returned in January 1993.

8. Mr Mialhe challenged before the Strasbourg institutions the lawfulness of the customs seizures made pursuant to Articles 64 and 454 of the Customs Code. Those proceedings led to two judgments of the European Court of Human Rights. In the first of these it was held that there had been a breach of Article 8 of the Convention (art. 8), on the ground that the house searches and seizures made by customs officers without a judicial warrant had interfered with the private life of the applicant, his mother and his wife; and in the second, France was ordered to pay Mr Mialhe 50,000 French francs (FRF) in respect of non-pecuniary damage and FRF 60,000 for costs and expenses (see the *Mialhe v. France* (no. 1) judgments of 25

February 1993, Series A no. 256-C, and 29 November 1993, Series A no. 277-C).

B. The administrative tax-inspection proceedings

9. On 4 March 1983 the National Head Office for Tax Investigations sent the applicant notice of a full audit of his overall tax position in respect of his income for the years 1979, 1980, 1981 and 1982.

Since Mr Mialhe regarded himself as being resident for tax purposes in the Philippines, and accordingly not under an obligation to pay tax to the French State, the Revenue asked him to produce copies of his tax assessment notices in the Philippines and documents giving details of all bank accounts in his name both in France and abroad.

On 20 April 1983 Mr Mialhe replied that it was impossible for him to forward some of the documents that had been kept by the customs and which he had asked to have returned to him.

10. During May 1983 the tax inspector exercised the right of inspection provided in Articles L.81 et seq. of the Code of Tax Procedure and Article 64A of the Customs Code.

At the offices of his customs colleagues he examined the 9,478 documents that had been kept and classified by the customs authorities and made copies of 1,200 to 1,300 of them.

11. On 9 February 1984 the tax inspector asked the Philippine authorities for administrative assistance as provided for in Article 26 of the Franco-Philippine Tax Convention of 9 January 1976 "for the avoidance of double taxation and prevention of fiscal evasion in relation to income tax" (see paragraph 27 below).

On 21 March 1985 he inspected 41 sheets concerning returns and annexes of the applicant and his mother for the years 1980 and 1982, 27 sheets concerning returns, appended financial statements and certificates from the accountant of the AMIBU company managed by the applicant in respect of the years 1979, 1980 and 1981, and three sheets relating to a provisional accounting statement and a bank reconciliation as at 15 September 1982.

These documents reached the Revenue's administrative headquarters in Paris on 8 November 1984.

12. At the end of the tax audit four supplementary assessments were served on Mr Mialhe: on 22 December 1983 for the year 1979, on 4 December 1984 for the year 1980, on 19 February 1985 for the year 1981 and on 12 March 1985 for the year 1982. The Revenue subsequently amended the notices in respect of the years 1979, 1980 and 1981, once on 16 July 1985, in the light of comments by the applicant, and again on 8 November 1985, to correct erroneous reasons.

13. The relevant documents to be studied for each category of proceedings - administrative, tax and criminal - were not all the same, since different tax years and bases of assessment were involved, as were failures to make returns and real-property and agricultural taxes distinct from the general income tax to which the dispute over tax residence related more particularly.

C. Appeals against the assessments to the administrative courts

14. Mr Mialhe challenged the supplementary tax assessments for the years 1979-82 in the administrative courts, which have jurisdiction in tax matters, by lodging an appeal founded partly on the non-adversarial nature of the Revenue's preparation of the case against him.

In a judgment of 12 December 1991 the Bordeaux Administrative Court held that the applicant had not proved that he had expressly asked the Revenue to produce the documents on which it had allegedly based the assessments for the years 1980, 1981 and 1982 and ordered further inquiries on this point. As to the assessment raised for the year 1979, on the other hand, the court found that the Revenue had failed to accede to an application for production made by the applicant's lawyer and accordingly remitted the additional tax sought from the applicant in the category of income from movable assets and in respect of income from undetermined sources for that year. An appeal by the Minister for the Budget regarding the remission of tax granted for the single year 1979 was dismissed by the Bordeaux Administrative Court of Appeal.

An appeal on points of law against the Administrative Court's judgment is pending before the Conseil d'Etat. The Administrative Court has not yet ruled on the merits as regards the supplementary tax assessments for the years 1980, 1981 and 1982.

15. In other proceedings brought against the Revenue by the AMIBU company, managed by the applicant, the Bordeaux Administrative Court of Appeal found that the tax assessment challenged by the company was based in part on documents seized by the customs in circumstances that had been held to be contrary to Article 8 of the Convention (art. 8). In a judgment of 15 June 1995 it allowed the company's application for remission of tax as follows:

"While the unlawfulness of the seizure, in proceedings brought under different legislation, of documents on the basis of which the Revenue, exercising its right of inspection, assessed the taxes has no effect on the lawfulness of the tax proceedings, it is such as to deprive those documents of any probative value, including inasmuch as they revealed to the Revenue that the taxpayer was in a position to have his tax assessed by the Revenue of its own motion. Where an international judicial body set up by an international treaty or agreement that has been lawfully ratified or approved has ruled that the seizure of documents did not comply with the said treaty or

agreement, the court having jurisdiction in tax matters must regard the seized documents as having no probative value ..."

D. The criminal proceedings for tax evasion

16. On 15 April 1986 the Tax Offences Board ("the CIF") gave approval for a complaint to be lodged seeking the imposition of criminal tax penalties, pursuant to Article L.228 of the Code of Tax Procedure (see paragraph 29 below).

In consequence, the Department of Revenue lodged a complaint, together with an application to join the proceedings as a civil party, against the applicant for tax evasion in respect of the years 1981 and 1982. It accused him of not having made any general tax return for 1981 and of having understated his agricultural income for 1982.

17. The Revenue annexed to its complaint some of the documents given to it by the customs authorities. It did not at that juncture append any of the documents forwarded by the Philippine authorities, although the tax inspector's summary report that had been placed in the file of the judicial investigation mentioned the correspondence between the French and the Philippine authorities.

The investigating judge raised this point with the tax inspector, who referred back to his central authorities and subsequently told the judge that his authorities had hesitated to produce in criminal proceedings documents which the ordinary judicial authorities could not have procured for themselves. At the judge's request, the inspector added to the file the documents from the Philippines provided by his authorities, that is to say the only documents concerning Mr Mialhe in respect of the offences charged. The documents not placed in the file related either to Mrs Mialhe and the AMIBU company - and neither of these was implicated - or, in respect of the defendant, to the years 1980 and 1982, which the proceedings for failure to make a tax return were not concerned with.

18. On 6 May 1988 the investigating judge committed the applicant for trial at the Bordeaux Criminal Court on a charge of having fraudulently evaded, in part, assessment and payment of income tax for the years 1981 and 1982 "by having failed to make certain category-specific returns (in respect of income from movable assets, 'RCM', and industrial and commercial profits, 'BIC', Article 92 of the General Tax Code) within the prescribed time-limits (in respect of 1981) and by having omitted from his returns (for 1981 and 1982) part of his income from farming and real property, thus deliberately concealing in his overall returns part of the sums liable to tax".

1. In the Bordeaux Criminal Court

19. Before any defence on the merits Mr Mialhe filed submissions in which he sought to have the Revenue's complaint and the judicial investigation proceedings declared null and void. He argued that the customs seizures were null and void, that the adversarial principle had not been respected by the Revenue and that the latter, in particular during the judicial investigation, had withheld documents from the judicial authorities and made false statements.

He himself filed certain documents that he had been able to obtain from the Philippine authorities: the French tax authorities' request to their Philippine opposite numbers, the Philippine authorities' reply indicating that Mr and Mrs Mialhe had been resident for tax purposes in the Philippines for 1980 and 1982, information concerning the AMIBU company, untranslated bank documents, a certificate by a registered accountant to the effect that Mr Mialhe's tax return for 1982 had been made in good faith, a statement of his income and expenditure for 1982, an amortisation table for 1981, a statement of his income for 1981, the tax return he made in the Philippines for 1981 and a tax return for 1982.

20. On 11 January 1989 the Criminal Court gave its judgment.

It began by dismissing all Mr Mialhe's preliminary objections.

As regards the first of those, it pointed out that on an appeal by the applicant concerning the lawfulness of the seizures, the Court of Cassation had upheld a judgment of the Paris Court of Appeal in which that court had said that "the customs officials did not exceed their powers and that there was no manifest, deliberate violation of a personal freedom"; the customs seizures were covered by paragraph 2 of Article 8 of the Convention (art. 8-2) and the seized documents had been lawfully made available to the Revenue.

It dealt with the second objection as follows:

"... on account of the principle that tax and criminal proceedings are independent, the [criminal] courts cannot rule on the nullity of tax proceedings. The only exception to this principle is provided in Article L.47 of the Code of Tax Procedure ... This Article provides that proceedings shall be null and void where a notice of audit does not mention that the taxpayer has the right to be assisted by an adviser of his own choosing. As the defendant does not dispute that this information was given to him, he cannot rely on any other argument in order to obtain from the criminal courts a declaration that the tax proceedings are null and void."

As to the last objection, the court found, in the light of the documents produced by the applicant at the hearing, that the letters and documents exchanged by the French and Philippine authorities were not in the file and it held:

"... The failure to place in the file some documents of importance to the accused's defence, which had been sought in their entirety by the investigating judge, amounts to a breach of his rights.

That breach of the rights of the defence cannot, however, have the consequence that the earlier proceedings were a nullity.

By producing these documents at the hearing, the accused was able to explain their content and have them submitted to adversarial argument. The breach of his rights did not therefore have the effect of prejudicing his interests."

21. Ruling on the question whether Mr Mialhe was under an obligation to make a return in France of his category-specific income and whether he had with fraudulent intent evaded paying that tax for the year 1981, the court held that the applicant was resident for tax purposes in France at the time, both under French law and under the Franco-Philippine Convention. In order to determine whether there had been fraudulent intent, it relied among other things on a manuscript document written by Mr Mialhe that was reproduced in the tax-audit report and on the applicant's conduct in producing only at the hearing his full return for 1981, which had been submitted to the tax inspector with the figures whited out.

As to the undeclared income from farming and real property for the years 1981 and 1982, the court found that the applicant had lent money to himself through the bank accounts of his companies and subsequently deducted from his agricultural income the interest charges and exchange losses. He thus realised a tax loss for those years and legally exported his capital by means of the repayments.

The court concluded that Mr Mialhe had personally put in place fraudulent arrangements designed to evade liability to and payment of tax in France. It sentenced him to three years' imprisonment, of which six months were to be served immediately, and a fine of FRF 150,000. Extracts from the judgment were ordered to be published in the French Official Gazette and in the daily newspapers *Le Monde*, *Le Figaro* and *Sud-Ouest*.

2. In the Bordeaux Court of Appeal

22. The defendant appealed and in the Bordeaux Court of Appeal reiterated the three objections of nullity already raised, stating as to the last of them that:

"... although he ha[d] been able to obtain a number of withheld documents by seeking them from the Philippine authorities, he ha[d] been unable to inspect most of the documents attached to the correspondence, he still [did] not know what they contained and ha[d] been unable to give explanations concerning them; in particular, he ha[d] not been able to refer to the withheld documents before the Tax Offences Board; ..."

23. The Court of Appeal gave judgment on 7 June 1989.

It joined the objections to the merits and dismissed them, referring "in the case of the first two applications for a declaration of nullity that were reiterated but not strongly argued" to the reasoning of the Criminal Court.

The last objection, concerning the withholding of documents and the false statements, it dismissed as follows:

"These documents should have been handed over but provide no information that could have any bearing on the decision of the court below or of this court: for the most part they did not concern Mialhe or the period in question, 1981; ... the documents not filed were of no relevance to the case and, at all events, were produced at the hearing in the court below and examined adversarially on that occasion; the same reasoning, except for the adversarial examination of the documents, applies to the Tax Offences Board; moreover, at first instance no application was made for a declaration that the proceedings before the Board were null and void.

As regards the very large number of other documents handed over but not placed in the file, their existence, alleged by [the applicant], has not been proved and they cannot be taken into account in any way."

24. On the merits the court held, as to the first offence of failure to declare income for 1981, that the applicant was a French resident for tax purposes under French law alone, as the Franco-Philippine Convention did not operate in the instant case since there was no conflict between the two sets of national legislation. The court pointed out that the Revenue's calculations had been based on documents signed in France by Mr Mialhe, which it listed. The court held that he had had fraudulent intent from a scrutiny of notes by him that had been seized and were in the file and documents that he had placed in it himself, which showed that notwithstanding his alleged status as Philippine resident and citizen, he had not discharged his obligation to declare his world income in the Philippines either.

The Court of Appeal, which upheld the Criminal Court's judgment in its entirety, sentenced the defendant to three years' imprisonment, of which ten months were to be served immediately, and a fine of FRF 250,000.

3. In the Court of Cassation

25. Mr Mialhe lodged an appeal on points of law, which was dismissed by the Court of Cassation (Criminal Division) on 18 March 1991.

The judgment read as follows:

"As to the second ground of appeal, based on the breach of Article 8 (art. 8) of the ... Convention ...

...

The ground must therefore fail;

As to the third ground of appeal, based on a breach of ... Article 6 (art. 6) of the ... Convention ...

...

Firstly, the accused merely raised, in the court of trial before any defence on the merits, an objection of nullity going to the lawfulness of the supplementary tax assessment proceedings, which, as they are purely administrative, are irrelevant to the criminal proceedings.

That being so, the first limb of the ground of appeal, which raises for the first time before the Court of Cassation the objection based on the alleged nullity of the proceedings before the Tax Offences Board gave its opinion, is inadmissible under Article 385 of the Code of Criminal Procedure.

Secondly, as a ground for refusing to allow the objection that the ordinary criminal proceedings were a nullity on account of the Revenue's withholding of documents useful to the defence, the Court of Appeal noted that under the Franco-Philippine Tax Convention of 9 January 1976, the French authorities sought administrative assistance from the Philippine authorities. The accused maintained that 71 documents were sent to the French authorities in this way.

The accused, who had been able to obtain some of these documents, produced them at the hearing in the Criminal Court.

After studying these documents, the Court of Appeal found that they were of no relevance to the case, most of them not concerning [William] Mialhe or the period referred to in the charge. At all events, they were produced at the hearing in the Criminal Court and examined adversarially on that occasion. The Court of Appeal added that the existence of the other documents allegedly sent and not placed in the file had not been proved.

In ruling as it did, the Court of Appeal, which based its judgment only on the documents produced at the hearing, provided a legal basis for its decision.

The second limb of the ground of appeal must likewise fail."

26. The applicant was committed to prison on 18 March 1991 and was released on licence on 21 July of the same year. He was placed under judicial supervision until 8 November 1991.

II. RELEVANT INTERNATIONAL AND DOMESTIC LAW

A. The Franco-Philippine Convention of 9 January 1976

27. At Kingston on 9 January 1976 the French and Philippine Governments signed a convention "for the avoidance of double taxation and prevention of fiscal evasion in relation to income tax". Article 26 ("Exchange of information") provides:

"1. The competent authorities of the Contracting States shall exchange such information (being information which is at their disposal under their respective tax administrative practices and those which may be procured by special inquiry) as is necessary for the carrying out of this Convention and of the domestic laws of the Contracting States concerning taxes covered by this Convention, in particular, for the

prevention of fraud or evasion of such taxes. Any information so exchanged shall be treated as secret and shall not be disclosed to any persons or authorities other than those (including a court or administrative body) concerned with the assessment, collection, or enforcement in respect of taxes which are the subject of the Convention or with the prosecution, claims and appeals relating thereto.

2. In no case shall the provisions of paragraph 1 be construed so as to impose on one of the Contracting States the obligation:

(a) to carry out administrative measures at variance with the laws or the administrative practices of that or of the other Contracting State;

(b) to supply particulars which are not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(c) ..."

B. The Code of Tax Procedure

28. Administrative tax-inspection proceedings are governed by the Code of Tax Procedure. By Article L.47 of that code,

"A full audit of the overall tax position of a natural person in regard to income tax or an audit of accounts cannot be undertaken unless the taxpayer has been informed of it by the sending or handing over of a notice of audit.

Such a notice must specify the years in respect of which the audit is to be made and expressly mention, failing which the proceedings will be null and void, that the taxpayer has the right to be assisted by an adviser of his own choosing.

In the event of an unannounced inspection for the purpose of identifying physical features of the business or establishing the existence and state of the books, the notice of an audit of the accounts shall be handed over at the beginning of the search operation. A thorough scrutiny of the books may only begin after the taxpayer has been given a reasonable time to seek the assistance of an adviser."

The courts with jurisdiction in tax matters, which in the case of direct taxes are the administrative courts, are competent in principle to deal with irregularities in administrative tax-inspection proceedings. They ensure that the safeguards afforded to taxpayers are complied with. Thus "a final decision by a criminal court cannot prevent a taxpayer from arguing before a court with jurisdiction in tax matters that the audit which gave rise to the impugned tax assessments was irregular" (Conseil d'Etat, 9 April 1986, no. 22691, *Revue de jurisprudence fiscale*, June 1986, no. 625).

29. Article L.228 of the Code of Tax Procedure provides:

"To be admissible, complaints seeking the imposition of criminal penalties in respect of direct taxes, value-added tax and other turnover taxes, registration fees, land registry fees and stamp duty must be lodged by the administrative authorities after approval from the Tax Offences Board.

The Board shall consider the cases submitted to it by the Minister of Finance. The taxpayer shall be given notice of the application to the Board, which shall invite him to send it, within thirty days, any information it considers necessary.

The Minister shall be bound by the Board's opinions."

The Revenue is not required by any provision of statute or of regulations to institute criminal proceedings in respect of the offences referred to in Article 1741 of the General Tax Code (Conseil d'Etat, 5 November 1980, *Droit fiscal* 1981, p. 365).

The CIF was set up under the Act of 29 December 1977 in order to afford taxpayers fresh safeguards and it is made up of six senior members of the Conseil d'Etat (judges of the administrative courts) and six senior members of the Court of Audit (judges of the financial courts). Parliament absolutely excluded the possibility of the CIF being a court of first instance. It refused to allow the CIF's opinions to contain reasons, in order to avoid influencing the ordinary courts. As long as there is no breach of due process, a taxpayer accused of tax evasion may not challenge in the criminal courts the lawfulness of the administrative proceedings which took place prior to the CIF's favourable opinion; the criminal court must only establish the existence and date of that opinion (Court of Cassation, Criminal Division, 2 December 1985, *Recueil Dalloz Sirey* ("DS") 1986, p. 489).

The only function of the criminal courts that hear tax-evasion cases is to punish the offence. The Court of Cassation has held:

"... Criminal proceedings instituted under Article 1741 of the General Tax Code and the administrative proceedings for establishing the tax base and the scope of tax are in their nature and purpose different and independent from each other ... the function of courts which try criminal cases under Article 1741 is limited to determining whether the defendant evaded or attempted to evade tax by reprehensible subterfuges in respect of sums exceeding the statutory allowance."

(Criminal Division, 9 April 1970, DS 1970, p. 755)

Article L.47 provides that any breach of its provisions shall entail a nullity of the proceedings "without any distinction being made between administrative proceedings and criminal proceedings ... Since the latter proceedings may be based on findings made by the inspectors in the books and documents held by a taxpayer, compliance with the requirements of [Article L.47] is an essential safeguard of the rights of the defence, which it is for the criminal courts to ensure are respected" (Court of Cassation, Criminal Division, 4 December 1978, *Venutolo*, DS 1979, p. 90). However, "it is not within the jurisdiction of the criminal courts to assess the lawfulness of the tax proceedings ... The criminal courts' response to failure to comply with the provisions of Article L.47, in that it departs from the general principle of the separation of administrative and ordinary courts, must be based on a strict construction and accordingly cannot be extended

beyond the cases to which the statute expressly meant to limit it" (Court of Cassation, Criminal Division, 9 May 1983, DS 1983, p. 621).

PROCEEDINGS BEFORE THE COMMISSION

30. Mr Mialhe applied to the Commission on 16 September 1991. Relying on Article 6 of the Convention (art. 6), he complained firstly of a breach of the principle of equality of arms during the administrative phase of the proceedings, before the CIF gave its opinion, and secondly of a breach of the rights of the defence during the trial.

31. The Commission declared the application (no. 18978/91) admissible on 6 April 1994. In its report of 11 April 1995 (Article 31) (art. 31), it expressed the opinion by eleven votes to two that there had been a breach of Article 6 para. 1 (art. 6-1). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment³.

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

32. In their memorial the Government asked the Court to "dismiss all the applicant's complaints".

AS TO THE LAW

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

33. Mr Mialhe complained that he had not had access to all the documents held by the Revenue and that this had contravened the principle of equality of arms during the administrative stage before the Tax Offences Board (CIF) gave its opinion and had infringed the rights of the defence during the criminal trial. He relied on Article 6 para. 1 of the Convention (art. 6-1), which provides:

³ Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-IV), but a copy of the Commission's report is obtainable from the registry.

"In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing ... by an independent and impartial tribunal ..."

A. The Government's preliminary objections

34. Before the Court the Government reiterated the three objections they had already raised before the Commission. The first of these was that the application was incompatible *ratione materiae* with the Convention inasmuch as it related to the supplementary tax assessment proceedings; the second, that domestic remedies had not been exhausted in respect of the supplementary tax assessment proceedings and the procedure of consulting the CIF; and the third, that the applicant was not a victim in respect of the complaint that the documents seized by the customs had not been produced.

They maintained, firstly, that the application contained two separate complaints. The Court could not entertain the first of these since it concerned the administrative supplementary tax assessment stage and the Revenue's refusal to hand over documents seized by the customs, a refusal which had allegedly made it impossible for Mr Mialhe to meet the requests for proof or to respond to the supplementary tax assessment notices. The Commission had, the Government continued, unjustly dealt with the different sets of proceedings together notwithstanding that they were independent of each other. The administrative tax-inspection proceedings, disputes over which came within the jurisdiction of the administrative courts that were currently dealing with another identical complaint of Mr Mialhe's concerning failure to produce documents during the supplementary tax assessment proceedings, were not covered by Article 6 of the Convention (art. 6); they were unconnected with the administrative proceedings before the CIF, whose opinion, though certainly a mandatory prerequisite for lodging a criminal complaint of tax evasion, was not binding on the authorities and still less on the courts.

Furthermore, as the Court of Cassation had declared inadmissible the ground of appeal relating to the procedure of consulting the CIF, the Commission should have dismissed that part of the application.

Lastly, the applicant had never sought to obtain any of the documents seized by the customs relating to the years concerned in the present case; he could not therefore complain of a refusal by the authorities.

In short, the Court had to deal solely with the criminal proceedings that ended with the Court of Cassation's judgment of 18 March 1991 whereby Mr Mialhe's conviction for tax evasion became final.

35. According to the Delegate of the Commission, the CIF's favourable opinion, without which no application could be made to the criminal courts, had had a decisive bearing on the outcome of the criminal trial, and Mr Mialhe had properly exhausted domestic remedies by alleging in the national courts that all the proceedings that had taken place before the CIF's

opinion was given were null and void. The proceedings before the CIF ought, under the Court's case-law in the *Imbrioscia v. Switzerland* case (judgment of 24 November 1993, Series A no. 275), to afford the safeguards required by Article 6 of the Convention (art. 6).

36. The applicant stated that his complaint of failure to respect the adversarial principle referred only to the procedure of consulting the CIF, which was decisive for the subsequent criminal trial. He was not for the time being attacking the proceedings relating solely to tax, which had not yet been concluded in the administrative courts. He added that he had continually asked for the seized documents.

37. The Court notes at the outset that the administrative supplementary tax assessment proceedings are currently pending before the Conseil d'Etat as the court which hears appeals on points of law (see paragraph 14 above). To that extent, the objection of incompatibility *ratione materiae* and, in so far as it relates to those proceedings, the objection that domestic remedies have not been exhausted are devoid of purpose.

The second objection, that domestic remedies have not been exhausted as regards the procedure of consulting the CIF, has already been considered by the Commission, which decided to dismiss it. The Court sees no reason to depart from the Commission's analysis and dismisses it likewise.

The third objection, that the applicant was not a victim, goes to the merits of the case, and the Court therefore joins it to them.

B. The merits of the complaint

38. In Mr Mialhe's view, Article 6 (art. 6) had the consequence that the Revenue could base its prosecutions only on information that had been obtained fairly. Yet all the documents used against him to determine his place of principal residence - which was at the heart of the case - had been found among documents that had been seized unlawfully and related to his or his family's private life. He had not had access to them to defend himself during the administrative proceedings, up to and including the CIF's decision.

Essentially, the applicant said he was the victim of the consequences of the original breach of Article 8 of the Convention (art. 8) found by the Court in the *Mialhe* (no. 1) judgment; the prosecuting authorities had rendered his criminal conviction unfair, based as it was almost exclusively on the documents seized by the customs in circumstances held to have been contrary to the Convention.

Moreover, it was only at the stage of the judicial investigation in the criminal proceedings, on an order from the investigating judge, that the Revenue had placed in the file the documents it had obtained from the Philippine authorities, and then only some of them. Mr Mialhe had made an oral request to the judge to obtain all these documents. While he had himself

been able to procure some of them from the Philippine authorities, he did not have a key document, the letter in which the Philippine authorities recognised his status as a Philippine resident.

By producing only the documents that supported its submissions to the trial court, the Revenue had therefore deprived him of the means of proving that he was resident for tax purposes in the Philippines and infringed the rights of the defence. The trial court had, moreover, acknowledged that documents had indeed been withheld.

39. The Commission accepted Mr Mialhe's submissions in substance. It pointed out that he had not been in a position to make useful submissions to the CIF on account of the refusal to hand over to him prosecution documents obtained by the customs in circumstances condemned by the European Court. Furthermore, the failure to produce all the documents supplied by the Philippine authorities had deprived the applicant of a fair trial.

40. In the Government's submission, the seized documents were passed on by the customs to the Revenue in accordance with national statutory provisions, and there was nothing at the time to warrant regarding those documents as having been seized unlawfully under French law. Moreover, in its judgment of 6 December 1995 in a leading case the Conseil d'Etat by implication invalidated the approach adopted in the applicant's favour by the Bordeaux Administrative Court of Appeal (see paragraph 15 above), as there was no "contamination by procedural defects" in respect of documents lawfully made available to the Revenue by the judicial authorities where the documents had subsequently been declared null and void by the criminal courts. Furthermore, Mr Mialhe, the Government said, had never sought production of the documents seized in respect of the relevant proceedings and supplementary tax assessment years. He had asked only for the documents from the Philippine assistance file.

Contrary to the Commission's findings on the consultation procedure prior to the lodging of a complaint for tax evasion, the Government continued to maintain that the CIF was a non-judicial body. It had been established to afford taxpayers new procedural safeguards and limited the discretion previously enjoyed by the Minister, who was now bound where an opinion was to the effect that a complaint should not be lodged. It ruled on the advisability of prosecution, and its opinion, which was purely advisory, could not in any circumstances be regarded as tantamount to a judgment at first instance in regard to the taxpayer.

As to the Philippine documents, the Government submitted that their existence had never been concealed and that the only ones relevant to the case had eventually been placed in the case file. The courts, which had considered the reasons put forward by the authorities to explain why they had not been produced, had based their judgments on grounds of fact and of law.

The applicant had been able to present argument on the whole of the file, which also contained other documents, and as he had enjoyed equality of arms at the trial, he had not found himself at a disadvantage.

41. The Court notes, firstly, that the documents seized by the customs were passed on by them to the Revenue in May 1983 (see paragraph 10 above). Three years later the Revenue lodged a complaint alleging tax evasion against Mr Mialhe, whom it accused of having fraudulently omitted to declare his general income for 1981 and of having understated his agricultural income for 1982 (see paragraph 16 above). It had already served supplementary tax assessments on him, on 19 February 1985 in respect of the year 1981 and on 12 March 1985 in respect of the year 1982 (see paragraph 12 above).

The applicant now complained that he had not been given the documents seized by the customs in breach of Article 8 of the Convention (art. 8) so that he could contest the fraud charges by proving that he was resident for tax purposes in the Philippines, both during the criminal proceedings and during the preceding stage before the CIF.

The Court points out that the Mialhe (no. 1) judgment on the merits was given on 25 February 1993, that is to say after the customs had passed documents on to the Revenue.

Of the private letters and personal documents referred to in the judgment, those which were used for the judicial investigation in the criminal proceedings had been annexed to the summary tax-audit report filed by the Revenue in support of its complaint (see paragraph 17 above). At the investigating judge's request, the Revenue added documents from the Philippines (see paragraph 17 above). All those documents were in the criminal case file, to which the applicant had access.

42. Admittedly, that file did not contain all of the documents provided by the Philippine authorities (see paragraphs 11 and 17 above). However, the documents relevant to the criminal case were added to the file during the judicial investigation, at the request of the investigating judge alone.

On this point the Criminal Court held (see paragraph 20 above):

"... The failure to place in the file some documents of importance to the accused's defence, which had been sought in their entirety by the investigating judge, amounts to a breach of his rights.

[It] cannot, however, have the consequence that the earlier proceedings were a nullity. By producing these documents at the hearing, the accused was able to explain their content and have them submitted to adversarial argument. The breach of his rights did not therefore have the effect of prejudicing his interests."

The Court of Appeal held (see paragraph 23 above):

"These documents should have been handed over but provide no information that could have any bearing on the decision of the court below or of this Court: for the most part they did not concern Mialhe or the period in question, 1981; ... the documents not filed were of no relevance to the case and, at all events, were produced

at the hearing in the court below and examined adversarially on that occasion; the same reasoning, except for the adversarial examination of the documents, applies to the Tax Offences Board; ...

As regards the very large number of other documents handed over but not placed in the file, their existence, alleged by [the applicant], has not been proved and they cannot be taken into account in any way."

By himself filing some of the documents from the Philippines (see paragraph 19 above), Mr Mialhe had the possibility of establishing the genuineness of his links with the Philippines. Such evidence, however, was relevant only to the first offence of failure to declare his general income for the year 1981, as the second offence concerned agricultural and land income that he had declared in France.

43. It is not for the Court to substitute its view for that of the national courts which are primarily competent to determine the admissibility of evidence (see, among other authorities, the *Schenk v. Switzerland* judgment of 12 July 1988, Series A no. 140, p. 29, para. 46). It must nevertheless satisfy itself that the proceedings as a whole were fair, having regard to any possible irregularities before the case was brought before the courts of trial and appeal and checking that those courts had been able to remedy them if there were any (see the *Imbrioscia* judgment previously cited, p. 14, para. 38).

44. The Court points out that in the instant case the ordinary courts did, within the limits of their jurisdiction, consider the objections of nullity raised by Mr Mialhe and dismissed them.

Furthermore, it appears clearly from their decisions that they based their rulings - among other things as to residence for tax purposes - solely on the documents in the case file, on which the parties had presented argument at hearings before them, thereby ensuring that the applicant had a fair trial. The failure to produce certain documents during the procedure of consulting the CIF or in the criminal proceedings therefore did not infringe Mr Mialhe's defence rights or the principle of equality of arms (see, among other authorities, the *Bendenoun v. France* judgment of 24 February 1994, Series A no. 284, p. 22, para. 53).

45. The Court notes, besides, that before the CIF the taxpayer may, within thirty days of the application to it, communicate any information he deems necessary.

When it is consulted on the advisability of lodging a complaint for the offences referred to in Article 1741 of the General Tax Code, the CIF gives an opinion which is binding on the Minister (Article L.228 of the Code of Tax Procedure - see paragraph 29 above).

The criminal courts - the Criminal Court and the Court of Appeal - have unfettered discretion to assess the facts of an alleged fraud and may acquit.

The fact that there are no adversarial proceedings before the CIF gives its opinion may in some cases give rise to a fear that the taxpayer will find

himself in a more difficult position. Nevertheless, only the preliminary intervention of an advisory body is concerned. In the instant case there was a judicial investigation and no direct summons.

Furthermore, the criminal proceedings that were set in motion following the Revenue's complaint were conducted at two levels of jurisdiction - first instance and appeal - and this enabled Mr Mialhe, to whom it was further open to lodge an appeal on points of law, to present argument on the prosecution evidence and the charges against him.

46. In conclusion, the proceedings in issue, taken as a whole, were fair. There has therefore been no breach of Article 6 para. 1 (art. 6-1).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that the objection of incompatibility *ratione materiae* with the Convention and the objection that domestic remedies have not been exhausted, in so far as the latter relates to the administrative supplementary tax assessment proceedings, are devoid of purpose;
2. Dismisses the objection that domestic remedies have not been exhausted as to the procedure of consulting the Tax Offences Board;
3. Joins to the merits the objection that the applicant is not a victim and dismisses it;
4. Holds that there has been no breach of Article 6 para. 1 of the Convention (art. 6-1).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 September 1996.

Rudolf BERNHARDT
President

Herbert PETZOLD
Registrar