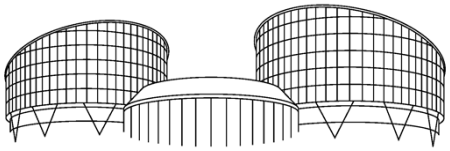

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Application no. 75292/10
OTHYMIA INVESTMENTS BV
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 16 June 2015 as a Chamber composed of:

Josep Casadevall, *President,*
Luis López Guerra,
Ján Šikuta,
Kristina Pardalos,
Johannes Silvis,
Valeriu Griţco,
Iulia Antoanella Motoc, *judges,*

and Marialena Tsirli, *Deputy Section Registrar*,

Having regard to the above application lodged on 10 November 2010,

Having regard to the observations submitted by the respondent Government and by the applicant company respectively,

Having deliberated, decides as follows:

THE FACTS

1. The applicant company, Othymia Investments B.V., is a limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) incorporated under the law of the Netherlands and having its statutory seat in Rotterdam. The applicant company was represented by Mr L.E.C. Neve, a tax consultant practising in Rotterdam. The Netherlands Government ("the Government") were represented by their Agent, Mr R.A.A. Böcker, of the Ministry of Foreign Affairs.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant company, may be summarised as follows.

1. The decision to provide information to the Spanish tax authorities

3. On 14 December 2007 the Deputy Minister of Finance (*Staatssecretaris van Financiën*) gave notice (*kennisgeving*) to the applicant company of the fact that he had been requested by the Spanish tax authorities to provide them with information on the relations, the links and transactions between the applicant company and a certain company in Spain as well as information on the bank accounts and the activities of the applicant company with a certain bank.

4. In the notice sent to the applicant company, the Deputy Minister stated that he had complied with this request on 18 August 2007 and 29 November 2007 respectively, pursuant to section 1(1) of the International Assistance (Levying of Taxes) Act (*Wet op de internationale bijstandsverlening bij de heffing van belastingen*); as appropriate, Article 4 of Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation; and, as appropriate, Article 28 of the Convention on the prevention of double taxation between Spain and the Netherlands.

5. The notice, which had been sent pursuant to section 5(2) of the International Assistance (Levying of Taxes) Act, listed the information and the enclosures sent to the Spanish tax authorities. They included the shareholders' register *(register van aandeelhouders*) of the applicant company; the annual accounts (*jaarrekeningen*) of the applicant company for 2003 and 2004; bank statements; two e-mails; correspondence and other documents concerning the establishment of a certain company; a statement concerning the owners of shares in a certain company; and documents that concerned the sale of shares. Part of the information sent had been gathered in the course of an investigation into the applicant company carried out by the Netherlands Tax and Customs Administration (*Belastingdienst*) in August 2006 which had been announced to the applicant company beforehand.

2. The administrative and judicial proceedings

6. On 17 December 2007 the applicant company lodged an objection (*bezwaar*) against the Deputy Minister of Finance's decision to provide the Spanish tax authorities with the requested information. It argued that the provisions stated by the Deputy Minister in his notice could not be relied on as a legal ground for his decision.

7. After a hearing had been held in the objection proceedings, the applicant company argued additionally that its privacy of correspondence

had been violated by the provision of the documents in issue to the Spanish tax authorities.

8. On 29 August 2008 the Deputy Minister dismissed the applicant company's objection. Its argument in relation to the violation of the right to respect for correspondence was rejected because, firstly, the inquiry had been carried out to provide information under the International Assistance (Levying of Taxes) Act and not under the General Act on State Taxes (*Algemene wet inzake rijksbelastingen*); secondly, the applicant company had not invoked its right to privacy of correspondence during the inquiry in 2006; and lastly, the correspondence did not concern the applicant company.

9. On 23 September 2008 the applicant company appealed against the decision claiming, *inter alia*, that its right under Article 8 of the Convention had been violated because there had been no legal basis for the provision of the information to the Spanish tax authorities. It further argued that it might suffer damage as a result of the Deputy Minister's decision, that it would need a judicial decision in order to submit a claim for compensation, and that it had incurred legal costs in relation to the proceedings.

10. On 29 April 2009 the Dordrecht Regional Court (*rechtbank*) declared the appeal inadmissible. It held that the applicant company had no standing because it had not substantiated that it had suffered any loss as a result of the Deputy Minister's decision to supply the information to the Spanish tax authorities.

11. On 4 May 2009 the applicant company lodged a further appeal with the Administrative Jurisdiction Division (*Afdeling bestuursrechtspraak*) of the Council of State (*Raad van State*) arguing, among other things, that it had an interest in the examination of the lawfulness of the inquiry because the forwarding of its correspondence to the Spanish tax authorities constituted an interference of Article 8 of the Convention for which there had been no legal basis and the necessity of which in a democratic society was open to serious doubt. The applicant company suggested that this claim warranted an examination on the merits by a judicial authority.

12. Additionally, the applicant company argued that not only had prior judicial examination of the Deputy Minister's decision been impossible, owing to the fact that for "urgent reasons" the notice had been given to the applicant company after the implementation of the Spanish request, but the Regional Court's judgment had also made retrospective judicial examination impossible. This lack of an effective remedy appropriate to its complaint under Article 8 of the Convention, so it argued, constituted a violation of Article 13 of the Convention.

13. On 16 June 2010 the Administrative Jurisdiction Division of the Council of State dismissed the applicant company's arguments and upheld the judgment of the Regional Court. In relation to the alleged violation of Article 8 of the Convention it held that the mere fact that the applicant company wanted a judgment of principle on the issue did not constitute a

sufficient interest. It further held that the applicant company had neither substantiated any pecuniary damage nor specified any non-pecuniary damage allegedly suffered as a result of the Deputy's Minister's decision. The requirement of actual harm did not impinge on the applicant company's rights to the point of violating Article 13 of the Convention.

B. Relevant domestic law and practice

1. The International Assistance (Levying of Taxes) Act

14. At the relevant time, the International Assistance (Levying of Taxes) Act, as applicable to the case before the Court, read as follows:

Section 1

"1. The provisions of this Act serve the interest of complying with obligations flowing from Directives of the Council of the European Union and other international and interregional legal arrangements for the provision of mutual assistance in the levying of taxes, as well as interest thereon and administrative sanctions and fines connected therewith. ..."

Section 5

"1. At the request of a competent authority, Our Minister [of Finance] may decide to provide them with information which they request and which may serve for the levying of taxes within the meaning of section 1, as well as the interest or the administrative sanctions and fines connected therewith.

2. Our Minister shall notify the person from whom the information originated and who is resident or located in the Netherlands of his decision to comply with the request for information. In so doing, Our Minister shall identify the competent authorities who have made the request and specify the information that will be provided.

...

4. Unless urgent reasons have given rise to it, the implementation of the request for information shall not take place within ten days after the date that notice ... is given.

5. When urgent reasons have given rise to it, Our Minister may ... implement the request for information before the person from whom the information originated has been notified. In this case, notice shall be given as soon as possible but not later than four months after the implementation of the request."

Section 8

"1. Our Minister shall, if necessary, give instructions for an official of the Tax and Customs Administration to make investigations for the purpose of providing information as referred to in [section 5] ..."

Section 13

"1. Our Minister shall provide no information if:

a. the provision thereof does not flow from obligations under [Council Directive 77/799/EEC] or other obligations under international and interregional law;

b. *ordre public* of the Netherlands State opposes it; ...”

2. Official instructions

15. In its relevant parts, the Instruction on mutual international assistance in the levying of taxes (*Voorschrift internationale wederzijdse bijstand bij de heffing van belastingen*) promulgated on behalf of the Deputy Minister of Finance by the Director General of the Tax and Customs Administration (*directeur-generaal Belastingdienst*) (Official Gazette (*Staatscourant*) of 30 May 2002, no. 100, page 9) reads as follows:

“**1. Introduction**

...

The relevant international agreements are: the bilateral tax treaties, ..., Council Directive 77/799/EEC (also referred to hereafter as ‘the Mutual Assistance Directive’), ... and the bilateral Memoranda of Understanding between the Netherlands and the various treaty partners. ...

1.1. Definition

Mutual assistance in the levying of taxes is the aggregate of possibilities of administrative cooperation between treaty partners. The exchange of fiscal information is a part of that. Carrying out investigations for each other’s taxation, permitting officials onto each other’s territory and the setting up of joint controls for internationally operating enterprises are other forms.

The provision of ‘assistance in levying taxes’ (*heffingsbijstand*) is regulated in the Netherlands by the International Assistance (Levying of Taxes) Act.

...

3.4. Directive 77/799/EEC

[European Economic Community] Council Directive of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the fields of direct taxation and indirect taxation (77/799/EEC, as amended by the Directives of 6 December 1979 (79/1070/EEC) for value-added tax and of 25 February 1992 (92/12/EEC) for excise duties), is part of Community, or European Union, legislation (...). The aim of the Mutual Assistance Directive is to strengthen cooperation between the tax authorities of the EU Member States in order better to counter international tax evasion and tax fraud. In the Netherlands, the Mutual Assistance Directive is implemented in the International Assistance (Levying of Taxes) Act. ...

...

5. The provision of data on the basis of the International Assistance (Levying of Taxes) Act

The possibility of obtaining information goes hand in hand with the duty to provide information, whether on request, automatically or spontaneously.

The agreements which create those duties as regards direct taxes and income tax (*inkomstenbelasting*) are ...

- the bilateral treaties;

...

- the Mutual Assistance Directive 77/799/EEC;

...

The International Assistance (Levying of Taxes) Act provides for the provision of information on request, the automatic provision of information, the spontaneous provision of information and the presence of officials in another country within the framework of a (simultaneous) bookkeeping investigation.

The International Assistance (Levying of Taxes) Act sets out in what cases, on what conditions and in what way the Netherlands Tax and Customs Administration provides these forms of assistance. The point of departure in each case is the scope of the treaty obligations existing in a given treaty relationship. Without an international obligation the Netherlands cannot provide [such] assistance (...).

5.1.1. Speediness and time-limits

In view of the time-limits for tax adjustments, which exist also in other states, it is important to deal with a foreign request for information as speedily as possible. Speedy handling of the request by the Netherlands will also increase the willingness of the foreign competent authority to deal with Netherlands requests rapidly. The same applies to the back-reporting of results. It is therefore important that a request for information from abroad is answered within eight weeks after it is received at the Tax and Customs Administration unit (*Belastingdiensteenheid*). In urgent cases, the aim is to reply within four weeks. ...

5.1.5. Notification

If the information can be given, the International Bureau of the Fiscal Intelligence and Information Service (*Fiscale Inlichtingen- en Opsporingsdienst*, 'FIOD') will prepare a notification for the interested party on the basis of section 5(2) of the International Assistance (Levying of Taxes) Act. If there is no fraud or urgency, the interested party will be informed of the information to be provided before this is done. Provision of the information will be suspended for ten days from the date of the notification. In this context, 'interested party' means only the person from whom the information derives and who is resident or based in the Netherlands.

By means of this notification, the interested party is informed of the decision to provide information concerning them to a foreign competent authority and a description of the information to be provided is given. An objection and an appeal are possible against this notification.

An objection and/or an appeal can result in the information to be provided, or actually provided, to be corrected. A request for a provisional measure can suspend the provision of the information to the foreign authority (...).

...

6.2. Mandate to the Director General of the Tax and Customs Administration

The Deputy Minister of Finance has appointed the Director General of the Tax and Customs Administration to act in his name as the competent authority ... and to decide in his name on the basis of section 5 of the International Assistance (Levying of Taxes) Act (the provision of information on a request from abroad), ..."

C. Relevant European Union law

1. Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the fields of direct taxation and indirect taxation

16. As relevant to the case before the Court, and as in force at the time of the events complained of, Council Directive 77/799/EEC of 19 December 1977 provided as follows:

Article 1
General provisions

"1. In accordance with the provisions of this Directive the competent authorities of the Member States shall exchange any information that may enable them to effect a correct assessment of taxes on income and on capital.

2. There shall be regarded as taxes on income and on capital, irrespective of the manner in which they are levied, all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the disposal of movable or immovable property, taxes on the amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation."

Article 2
Exchange on request

"1. The competent authority of a Member State may request the competent authority of another Member State to forward the information referred to in Article 1 (1) in a particular case. The competent authority of the requested State need not comply with the request if it appears that the competent authority of the State making the request has not exhausted its own usual sources of information, which it could have utilized, according to the circumstances, to obtain the information requested without running the risk of endangering the attainment of the sought after result.

2. For the purpose of forwarding the information referred to in paragraph 1, the competent authority of the requested Member State shall arrange for the conduct of any enquiries necessary to obtain such information."

Article 4
Spontaneous exchange of information

"1. The competent authority of a Member State shall without prior request forward the information referred to in Article 1 (1), of which it has knowledge, to the competent authority of any other Member State concerned, in the following circumstances:

(a) the competent authority of the one Member State has grounds for supposing that there may be a loss of tax in the other Member State;

(b) a person liable to tax obtains a reduction in or an exemption from tax in the one Member State which would give rise to an increase in tax or to liability to tax in the other Member State;

(c) business dealings between a person liable to tax in a Member State and a person liable to tax in another Member State are conducted through one or more countries in such a way that a saving in tax may result in one or the other Member State or in both;

(d) the competent authority of a Member State has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises;

(e) information forwarded to the one Member State by the competent authority of the other Member State has enabled information to be obtained which may be relevant in assessing liability to tax in the latter Member State.

2. The competent authorities of the Member States may, under the consultation procedure laid down in Article 9, extend the exchange of information provided for in paragraph 1 to cases other than those specified therein.

3. The competent authorities of the Member States may forward to each other in any other case, without prior request, the information referred to in Article 1 (1) of which they have knowledge."

Article 5
Time limit for forwarding information

"The competent authority of a Member State which, under the preceding Articles, is called upon to furnish information, shall forward it as swiftly as possible. If it encounters obstacles in furnishing the information or if it refuses to furnish the information, it shall forthwith inform the requesting authority to this effect, indicating the nature of the obstacles or the reasons for its refusal."

Article 6
Collaboration by officials of the State concerned

"For the purpose of applying the preceding provisions, the competent authority of the Member State providing the information and the competent authority of the Member State for which the information is intended may agree, under the consultation procedure laid down in Article 9, to authorize the presence in the first Member State of officials of the tax administration of the other Member State. The details for applying this provision shall be determined under the same procedure."

2. Relevant case-law of the Court of Justice of the European Union

17. In its judgment of 22 October 2013 (*Jiří Sabou v Finanční ředitelství pro hlavní město Prahu* (Case No. C-276/12), "the *Sabou* judgment"), the Grand Chamber of the Court of Justice of the European Union held as follows:

"38. The Court has previously ruled that observance of the rights of the defence is a general principle of European Union law which applies where the authorities are minded to adopt a measure which will adversely affect an individual (see [Case C-349/07 *Sopropé* [2008] ECR I-10369], paragraph 36). In accordance with that principle, the addressees of decisions which significantly affect their interests must therefore be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision (see, *inter alia*, C‑32/95 *P Commission v Lisrestal and Others* [1996] ECR I‑5373, paragraph 21, and *Sopropé*, paragraph 37). The authorities of the Member States are subject to that obligation when they take decisions which come within the scope of European Union law, even though the European Union legislation applicable does not expressly provide for such a procedural requirement (see *Sopropé*, paragraph 38, and Case C‑383/13 *PPU G and R* [2013] ECR, paragraph 35).

39. The question arises as to whether the decision of a competent authority of a Member State to request assistance from a competent authority of another Member State and the latter's decision to examine witnesses for the purposes of responding to that request constitute acts which, because of their consequences for the taxpayer, make it necessary for him to be heard.

40. All the Member States which submitted observations to the Court argued that a request for information by one Member State sent to the tax authorities of another Member State does not constitute an act giving rise to such an obligation. They rightly consider that, in tax inspection procedures, the investigation stage, during which information is collected and which includes the request for information by one tax authority to another, must be distinguished from the contentious stage, between the tax authorities and the taxpayer, which begins when the taxpayer is sent the proposed adjustment.

41. Where the authorities gather information, they are not required to notify the taxpayer of this or to obtain his point of view.

42. A request for assistance made by the tax authorities under Directive 77/799 is part of the process of collecting information.

43. The same applies to the reply made by the requested tax authorities and the inquiries carried out to that end by those authorities, including the examination of witnesses.

44. It follows that respect for the rights of the defence of the taxpayer does not require that the taxpayer should take part in the request for information sent by the requesting Member State to the requested Member State. Nor does it require that the taxpayer should be heard at the point when inquiries, which may include the examination of witnesses, are carried out in the requested Member State or before that Member State sends the information to the requesting Member State.

45. None the less, there is nothing to prevent a Member State from extending the right to be heard to other parts of the investigation stage, by involving the taxpayer in various stages of the gathering of information, in particular the examination of witnesses.

46. Accordingly, the answer to the first and second questions is that European Union law, as it results in particular from Directive 77/799 and the fundamental right to be heard, must be interpreted as not conferring on a taxpayer of a Member State either the right to be informed of a request for assistance from that Member State addressed to another Member State, in particular in order to verify the information provided by that taxpayer in his income tax return, or the right to take part in formulating the request addressed to the requested Member State, or the right to take part in examinations of witnesses organised by the requested Member State."

and ruled as follows:

"1. European Union law, as it results in particular from Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums, as amended by Council Directive 2006/98/EC of 20 November 2006, and the fundamental right to be heard, must be interpreted as not conferring on a taxpayer of a Member State either the right to be informed of a request for assistance from that Member State addressed to another Member State, in particular in order to verify the information provided by that taxpayer in his income tax return, or the right to take part in formulating the request addressed to the requested Member State, or the

right to take part in examinations of witnesses organised by the requested Member State.

2. Directive 77/799, as amended by Directive 2006/98, does not govern the question of the circumstances in which the taxpayer may challenge the accuracy of the information conveyed by the requested Member State, and it does not impose any particular obligation with regard to the content of the information conveyed."

3. The Accession Treaty of 1985

18. Spain joined the European Communities on 1 January 1986 in accordance with the provisions of an Accession Treaty signed on 12 June 1985. The parties to the Accession Treaty, in addition to the Kingdom of Spain (by this time the successor to the State of Spain) were the existing Member States (including the Kingdom of the Netherlands) and the Portuguese Republic.

19. Appended to the Accession Treaty was an Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties, which, in its relevant part, provides as follows:

Article 2

"From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions of the Communities before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act."

D. Relevant international law

20. At the time of the events complained of, and in its relevant part, the Convention between the Government of the Kingdom of the Netherlands and the Government of the State of Spain for the avoidance of double taxation with respect to taxes on income and on capital (*Tractatenblad* (Netherlands Treaty Series) 1971, no. 144), provided as follows (official and authoritative English text):

Article 28

"1. The competent authorities of the States shall exchange such information (being information which such authorities have in proper order at their disposal) as is necessary for the carrying out of this Convention. Any information so exchanged shall be treated as secret and shall not be disclosed to any persons or authorities other than those concerned with the assessment or collection of the taxes which are the subject of this Convention.

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

a. to carry out administrative measures at variance with the laws or the administrative practice of that or of the other 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 State;

c. to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy."

COMPLAINTS

21. The applicant company complained under Article 13 taken alone and in conjunction with Article 8 of the Convention. Basing its complaint on the premise that the investigation and the transfer of the resulting information to the Spanish tax authorities constituted an unwarranted interference with its rights under Article 8, it argued that it had not had access to an effective remedy. Its complaints were the following:

(a) The Administrative Jurisdiction Division of the Council of State had dismissed the applicant company's appeal for lack of pecuniary damage, thus applying a restriction not recognised in Netherlands domestic law;

(b) The Deputy Minister of Finance had authorised the transfer of tax information concerning the applicant company without prior notification, arbitrarily citing "urgent reasons" and denying the applicant company access to relevant documents, thus undermining the applicant company's position in the subsequent proceedings;

(c) The Administrative Jurisdiction Division had disregarded the applicant company's interest in protecting the privacy of its personal data.

THE LAW

22. The applicant company complained that it had not had access either to a procedure capable of preventing the disclosure of tax-related information to the Spanish authorities before it took place or to effective review *ex post facto*. It relied on Article 13 in conjunction with Article 8 of the Convention. These provisions read as follows:

Article 8

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society

in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Government disputed the applicant company's position.

1. Argument before the Court

23. In the Government's submission, the provision of tax information concerning the applicant company to the Spanish authorities was based on the national legislation implementing Council Directive 77/799/EEC. That Directive provided for mutual assistance in tax matters between European Union Member States with a view to securing for each Member State the correct assessment of taxes on income and capital.

24. The said Directive had been implemented in Netherlands law by the International Assistance (Levying of Taxes) Act, which – unlike the Directive itself – provided for notification to be given when information was exchanged. Prior notification was the rule, unless there were compelling reasons militating against it; for example, a suspicion of tax fraud. The applicant company, in the Government's submission, had been suspected of international tax fraud.

25. If prior notification was not given, damage to the taxpayer concerned might result from the provision to the requesting authority of inaccurate information. In that event, a procedure for review *ex post facto* was available through which to claim compensation. In the event, the applicant company had made use of it, but had never claimed either that the information provided to the Spanish authorities was inaccurate or that it had suffered damage as a result.

26. The applicant company's starting point was that the Deputy Minister had not been entitled to provide the company's tax information to the Spanish tax authorities without prior notification. It argued that the matter was governed by Article 28 of the Convention between the Government of the Kingdom of the Netherlands and the Government of the State of Spain for the avoidance of double taxation with respect to taxes on income and on capital, which bilateral treaty in its submission took precedence over Council Directive 77/799/EEC. Article 28 of that treaty nowhere authorised the Netherlands tax authorities to make investigations, but only to exchange information which they had "in proper order at their disposal". The violations alleged under Article 13 flowed from the failure of the Netherlands administrative tribunal to address this issue.

27. Transfer of its tax information having taken place without prior notification, the applicant company considered in the first place that the interference with its rights under Article 8 of the Convention constituted, in and of itself, harm entitling it to a decision of the competent tribunal *ex post facto*. It was not a requirement that the harm suffered be pecuniary in nature. The decision to the contrary given by the Administrative Jurisdiction Division of the Council of State therefore constituted a restriction on access to a court, from which it followed that the remedy available was ineffective.

28. In the second place, the Deputy Minister's failure to give prior notice of his intention to provide the applicant company's tax information to the Spanish authorities and the withholding of certain documents fundamentally undermined the procedural equality of the parties in any subsequent proceedings by prejudging the outcome. The criterion "urgent reasons" set out in section 5(5) of the International Assistance (Levying of Taxes) Act was imprecise and its use unforeseeable.

29. In the third place, the applicant company argued that the domestic administrative tribunals had failed to strike a proper balance between its fundamental rights and any interest served by the exchange of information with the Spanish authorities.

30. On 22 October 2013, after the application had been communicated to the respondent Government, the Grand Chamber of the Court of Justice of the European Union gave its *Sabou* judgment (see paragraph 17 above). The applicant and respondent parties were invited to comment on the relevance of this judgment to the present case.

31. The Government considered that the *Sabou* judgment confirmed their position that Council Directive 77/779 did not require prior notice to be given to an interested party before information was transferred to the foreign tax authority. Nor indeed did it require *ex post facto* review. In providing for both, though subject to conditions, the International Assistance (Levying of Taxes) Act was, in this respect, supererogatory.

32. The applicant company asked the Court to distinguish the present case from *Sabou*. The *Sabou* case had concerned a taxpayer resident in the requesting State. In contrast, the applicant company was situated in the requested State, that is, the State in which the investigation was to be carried out at the request and for the benefit of the requesting State. Although the taxpayer could challenge the actions of the tax authorities in his country of residence, it was unlikely that any review was available that would cover investigations by the requested State.

2. The Court's assessment

33. The applicant company complained only about the lack of an effective remedy. It relied on Article 13 taken alone and together with Article 8.

34. Article 13 requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress (see *Klass and Others v. Germany*, 6 September 1978, § 64, Series A no. 28). However, Article 13 cannot reasonably be interpreted so as to require a remedy in domestic law in respect of any supposed grievance under the Convention that an individual may have, no matter how unmeritorious his complaint may be: the grievance must be an arguable one in terms of the Convention (see, among many other authorities, *Boyle and Rice v. the United Kingdom*, 27 April 1988, § 52, Series A no. 131, and *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, § 58, ECHR 2000-IV; more recently, *Nada v. Switzerland* [GC], no. 10593/08, § 208, ECHR 2012; *A. v. the Netherlands* (dec.), no. 60538/13, § 61, 12 November 2013, and *Rukavina v. Croatia*, (dec.), no. 770/12, § 75, 6 January 2015).

(a) Whether the applicant company had an "arguable claim" under Article 8 of the Convention

35. The Court must therefore first determine that the applicant company's substantive complaint under Article 8 was "arguable" before it can consider whether there has been a violation of Article 13.

36. The applicant company's position is that the undertaking of an investigation by the Netherlands Tax and Customs Administration at the request of their Spanish opposite numbers, followed by the transfer of the information thus obtained to the Spanish tax authorities without its prior knowledge, constituted an unwarranted interference with its rights under Article 8.

37. The Court is prepared to accept that there has been interference with the applicant company's rights under Article 8 (see *Société Colas Est and Others v. France*, no. 37971/97, § 42, ECHR 2002-III, and *Bernh Larsen Holding AS and Others v. Norway*, no. 24117/08, § 106, 14 March 2013). Such interference will constitute a violation of that Article unless it is "in accordance with the law", pursues one or more of the "legitimate aims" set out in the second paragraph, and is "necessary in a democratic society".

38. The applicant company's essential argument, as the Court understands it, was that the transfer of its tax information to the Spanish tax authorities without its prior knowledge was not "in accordance with the law" because the bilateral arrangement in place did not admit of the investigation by which this information was obtained.

39. The Court notes at the outset that the applicant company can derive no comfort from Article 28 of the 1971 Convention between the Government of the Kingdom of the Netherlands and the Government of the State of Spain for the avoidance of double taxation with respect to taxes on income and on capital (see paragraph 20 above). In becoming a Member

State of the European Communities, Spain committed itself to the entire *acquis communautaire*, including Council Directive 77/799/EEC (see paragraphs 18 and 19 above). The parties to the pertinent international instrument, the 1985 Accession Treaty, include all States then Member States of the European Community including the Netherlands. Whether or not it be correct that Article 28 of the 1971 bilateral treaty opposes investigations by the respondent Party for the purpose of providing information to the Spanish tax authorities as the applicant company argues, the Court therefore finds, consistently with Article 30 § 3 of the Vienna Convention on the Law of Treaties, that that provision is superseded by Council Directive 77/799/EEC.

40. As is reflected in paragraph 1(1) of the International Assistance (Levying of Taxes) Act itself and sub-paragraph 3.4 of the Instruction on mutual international assistance in the levying of taxes (see paragraph 15 above), Council Directive 77/799/EEC was transposed into Netherlands domestic law by the International Assistance (Levying of Taxes) Act. That being so, the Court finds that the interference in issue has an adequate statutory basis and is thus "in accordance with the law".

41. The Court does not doubt that the aim of ensuring that taxes are paid is a legitimate one for the purposes of Article 8 § 2, namely the economic well-being of the country (see *Bernh Larsen Holding AS*, cited above, § 135, and *Rousk v. Sweden*, no. 27183/04, § 135, 25 July 2013). In the Court's opinion, this is so even though the taxes concerned be due to Spain, the economies of the European Union Member States forming a unified whole.

42. The final question is whether the interference in issue could properly be considered "necessary in a democratic society". The Court will consider it in the light of the interpretation given by the Court of Justice of the European Union to Council Directive 77/799/EEC.

43. The Court of Justice of the European Union, in its *Sabou* judgment, drew a distinction between the "investigation" stage of tax proceedings, in which information may be obtained from the tax authorities of other European Union Member States, and the "contentious" stage, which started when the taxpayer was sent the proposed adjustment and became entitled to what the Court of Justice of the European Union referred to as the "rights of the defence" (*loc. cit.*, paragraph 40). A request for information under Council Directive 77/799/EEC was part of the investigation and did not require either the requesting State or the requested State to inform the taxpayer (*loc. cit.*, paragraphs 41-43).

44. While it may well be that the applicant company is not the "taxpayer" and therefore not directly concerned by the *Sabou* judgment, that distinction cannot be decisive. For its part, the Court has accepted, in the context of "the interests of national security" and "public safety" and "the prevention of crime", that investigative methods may have to be used

covertly (see, among other authorities, *Klass*, cited above, § 48; *Malone v. the United Kingdom*, 2 August 1984, § 81, Series A no. 82; and *Leander v. Sweden*, 26 March 1987, § 66, Series A no. 116), even against persons who are not themselves objects of investigation or surveillance (see *Greuter v. the Netherlands* (dec.), no. 40045/98, 19 March 2002; and by implication, *Weber and Saravia v. Germany* (dec.), no. 54934/00, ECHR 2006-XI, and *Liberty and Others v. the United Kingdom*, no. 58243/00, 1 July 2008). It considers that the same applies in matters of taxation: it cannot be a requirement of Article 8 of the Convention that prior notice of lawful tax investigations or exchanges of tax-related information be given to all persons potentially implicated.

45. The Court must therefore find that the applicant company had no "arguable claim" under Article 8.

(b) The Court's decisions under Article 13 of the Convention

46. It follows from the conclusion set out in paragraph 45 above that Article 13 cannot be construed in the sense that the applicant company was entitled to receive prior notice of the transfer of tax information to the Spanish authorities. To that extent, the application is accordingly incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

47. For the remainder, the Court notes, firstly, that the applicant company's complaints that the Administrative Jurisdiction Division restricted the possibility of awarding compensation to pecuniary damage only and had disregarded its privacy interests (paragraph 21 above, under (a) and (c)) lacks a basis in fact (see paragraph 13 above); and secondly, that the applicant company had the benefit of *ex post facto* review at two instances before administrative tribunals meeting the requirements of Article 6 of the Convention. Any remaining complaints under Article 13 are accordingly manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 9 July 2015.

Marialena Tsirli
Deputy Registrar

Josep Casadevall
President