SECOND CHAMBER

DECISION

AS TO THE ADMISSIBILITY OF

Application No. 17888/91
by E. S.
against Switzerland

The European Commission of Human Rights (Second Chamber) sitting in private on 17 January 1995, the following members being present:

Mr. H. DANELIUS, President
Mrs. G.H. THUNE
MM. G. JÖRUNDSSON
S. TRECHSEL
J.-C. SOYER
H.G. SCHERMERS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. ŠVÁBY

Mr. K. ROGGE, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 15 January 1991 by E. S. against Switzerland and registered on 11 March 1991 under file No. 17888/91;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 5 January 1994 and the observations in reply submitted by the applicant on 14 February 1994;

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, as submitted by the parties, may be summarised as follows:

The applicant, a managing director with French and Swiss nationalities, was born in 1929. Before the Commission he is represented by Mr. E. Rusch, a lawyer practising in Zurich.

A. Particular circumstances of the case

I.

In 1983 the applicant and his wife moved from Paris to Zurich.
On 28 February 1983, the applicant's wife declared before the Zurich tax office that certain art objects among the household constituted removal goods (Übersiedlungsgut) in the value of 20,000 SFr, and requested exemption from taxes. On the same day, an official of the transport company declared before the tax office that the goods were intended for personal use (zum persönlichen Weitergebrauch bestimmt).

A control by the tax authorities revealed that there were 1,131 objects in all; that not all objects had been declared; and that some still had the price labels of the gallery in Paris run by the applicant attached. As a result, tax exemption was refused and the case passed on to the tax investigation authorities.

On 26 October 1983 the Investigation Service (Untersuchungs-dienst) of the Federal Customs Administration (Eidgenössische Zoll-verwaltung) issued a "Final Protocol". Therein, it was stated that according to an expert opinion the value of the objects amounted to 245,036 SFr, and that the turnover tax (Umsatzsteuer), 9,3 % of the imported goods, amounted to 22,788.34 SFr. It was also stated that "through his conduct <the applicant> is guilty of a contravention within the meaning of the Decree of the Federal Council on Turnover Tax of 29 July 1941" ("durch seine Handlungsweise hat sich <der Beschwerde-führer> einer Widerhandlung im Sinne des Bundesratsbeschlusses über die Warenumsatzsteuer vom 29.7.1941 schuldig gemacht").

An accompanying standard form "Explanations to the Final Protocol" indicated the offences of which the applicant was accused, and stated that, if he agreed with the content of the Protocol, he should sign and return it. The applicant had 10 days to comment thereupon. The amount of taxes to be paid (nachzuentrichten) would be determined later.

By letter of 30 November 1983 to the Tax Investigation Service the applicant contested the accusation. He pointed out that the objects were part of a private art collection and had already previously been imported into Switzerland, then exported to France.

On 18 September 1984 the Federal Tax Administration issued a penal order (Strafbescheid) convicting the applicant of a contravention of the Turnover Tax Decree and sentencing him to a fine of 11,390 SFr. The penal order referred in particular to Articles 52 and 53 of the Turnover Tax Decree (see below Relevant domestic law).

On 11 October 1984 the applicant filed an objection against the penal order.

By letter of 30 May 1985 the Federal Tax Administration replied that as the objects were still in the Zurich customs-free area, the exact amount of the taxes could not yet be determined. The value of the objects had therefore been estimated according to Article 52 para. 3 of the Decree (see below, Relevant domestic law).

The letter continued that the applicant could request a declaratory order against which he could file an appeal (beschwerdefähige Feststellungsverfügung). In this case, he should inform the tax administration within 10 days; proceedings concerning the objection against the penal order would then be suspended until a decision with binding effect on the calculation of tax had been taken (bis zum Vorliegen eines rechtskräftigen Entscheides über die Abgabenberechnung sistiert). On the other hand, if the applicant waived the right to claim a declaratory order, the tax administration would immediately proceed to the objection proceedings and examine the contested penal order.

On 29 August 1985 the applicant's lawyer acknowledged receipt of the letter and inquired as to the result of the examination of the contested penal order.

On 28 October 1985 the General Directorate of Customs (Oberzoll-direktion) of the Federal Customs Administration issued a penal order confirming the conviction and sentence of 18 September 1984. Reference was made to Articles 52 and 53 of the Turnover Tax Decree. The penal order recalled that the applicant could have requested a declaratory order if he contested the basis for the calculation of the tax evasion. As he had not done so, questions concerning the calculation of the turnover tax could no longer be examined.

II.

On 6 November 1985 the applicant requested a decision by a court.

By letter of 8 September 1987 the General Directorate of Customs transmitted to the Public Prosecutor's Office (Staatsanwaltschaft) of the Canton of Zurich a bill of

indictment (Anklageschrift) requesting the punishment of the applicant on account of a contravention under Articles 52 and 53 of the Turnover Tax Decree.

The bill of indictment was transmitted to the Zurich District Court (Bezirksgericht) on 15 September 1987.

On 25 September 1987 the District Court communicated the case for observations to the applicant and the General Directorate of Customs.

On 19 November 1987 the Zurich District Court refused to admit the indictment. The Court found that, as no definite decision had been taken as to the amount of tax due by the applicant, Article 73 para. 1, second sentence, of the Administrative Criminal Code (Verwaltungs-strafrechtsgesetz) excluded an indictment (see below, Relevant domestic law).

On 28 December 1987 the General Directorate of Customs filed an appeal with the Zurich Court of Appeal (Obergericht) which on 9 August 1988 quashed the decision of the District Court. The Court of Appeal found in particular that following the letter of 30 May 1985 the applicant had failed to request a declaratory order on the calculation of the tax due; thus, he had acknowledged the calculation of 26 October 1983.

The applicant's public law appeal (staatsrechtliche Beschwerde) against this decision was rejected by the Federal Court (Bundesgericht) on 3 November 1988 as being premature.

III.

Proceedings were then resumed before the Zurich District Court which on 22 December 1988 convicted the applicant of a contravention under Article 52 para. 1 of the Turnover Tax Decree and sentenced him to a fine of 11,390 SFr.

On 27 April 1989 the Zurich Court of Appeal confirmed this decision.

The applicant filed a plea of nullity (Nichtigkeitsbeschwerde) which the Federal Court dismissed on 12 September 1990, the decision being served on the applicant on 20 October 1990.

The Federal Court dealt in particular with the applicant's submission that no definite decision had been taken as to the amount due by him, and that for this reason the criminal courts were not competent to convict him. The Court found that, while Article 73 of the Administrative Criminal Code contained a lacuna (Lücke) in this respect, the applicant had in fact waived his right to claim a declaratory order concerning calculation of the amount due. Had he requested this, he could have contested inter alia the value estimated by the authorities. As he failed to do so, the amount calculated in the Final Protocol of 26 October 1983 became definite.

B. Relevant domestic law

According to Article 41ter para. 1 (a) of the Swiss Federal Constitution (Bundesverfassung) the Federation is competent to claim turnover tax. Article 8 para. 1 of the transitional provisions of the Federal Constitution states that all provisions concerning turnover tax which were in force on 31 December 1981 continue to remain applicable, though the provision states the amount of turnover tax to be paid.

The Turnover Tax Decree was enacted by the Federal Council (Bundesrat) on 29 July 1941.

Article 52 para. 1 of the Turnover Tax Decree states that whoever evades tax inter alia by means of not declaring goods or keeping them confidential will be punished by a fine of up to five times the amount of the evaded tax. Para. 3 states that if the exact amount of tax evasion cannot be determined, the amount must be fixed on the basis of an estimation.

Article 53 states that for the rest the rules on customs contraventions (Zollwiderhandlungen) apply.

Article 73 of the Administrative Criminal Code (Verwaltungs-strafrechtsgesetz) concerns the institution of criminal proceedings before courts. Para. 1, second sentence, states that "as long as there is no decision with definite legal effect as to the duty underlying the criminal proceedings to pay, or to pay back an amount, or if the duty has not been acknowledged by means of unconditional payment, no indictment may take place" ("solange über die Leistungs- oder Rückleistungspflicht, die dem Strafverfahren zugrunde liegt, nicht rechtskräftig entschieden oder sie nicht durch vorbehaltlose Zahlung anerkannt ist, unterbleibt die Überweisung").

COMPLAINTS

1. Under Article 6 para. 1 of the Convention the applicant complains of the length of the proceedings. In his application form submitted on 4 March 1991 he stated in this respect:

<Translation>

"Alleged criminal offence: 24.2.1983. Until today no decision on the tax obligation. Nevertheless punishment in the year 1989 (decisions of the Court of Appeal of 27 April 1989, of the Federal Court of 12 September 1990). The question is permitted how far this is compatible with Article 6 para. 1 of the Convention: 'Everyone is entitled to a ... hearing within a reasonable time' and that within this time-limit there is actually a

judgment. It is completely absurd not to have the tax obligation determined until 1991, and yet happily to punish for tax evasion."

<Original>

"Angeblicher Straftatbestand: 24.2.1983. Bis heute kein Entscheid über Steuerpflicht. Dennoch Bestrafung im Jahre 1989 (Urteile des Obergerichtes vom 27. April 1989, des Bundesgerich-tes vom 12. September 1990). Die Frage ist erlaubt, wie weit das mit Artikel 6 Ziff. 1 EMRK vereinbar ist: 'Jederman hat Anspruch darauf, dass seine Sache innerhalb einer angemessenen Frist ge-hört wird", und dass innerhalb dieser Frist auch geurteilt wird. Es ist schlechterdings widersinnig, die Steuerpflicht bis 1991 nicht festgelegt zu haben, aber trotzdem wegen hinterzogener Steuern munter zu bestrafen."

2. The applicant further complains under Articles 6 para. 2 and 7 of the Convention that he was convicted, not on the basis of a statute, but under a Decree of the Federal Council which had not been enacted by Parliament and had not been subject to a referendum.

3. Also under Article 6 para. 2 of the Convention the applicant complains in his application form of 4 March 1991 as follows:

<Translation>

"The impossibility of a punishment follows a simple logic: The applicant should be punished for the evasion of a tax in respect of which it is not even clear whether it is due. The attempts nevertheless to punish are a clear breach of human rights."

<Original>

"Die Unmöglichkeit der Bestrafung folgt der einfachen Logik: Der Beschwerdeführer soll wegen Hinterziehung einer Steuer bestraft werden, von der noch nicht einmal feststeht, ob sie überhaupt geschuldet ist. Die Bemühungen, dennoch zur Bestrafung zu kommen, sind menschenrechtswidrig."

In the applicant's submissions the Federal Court itself acknowledged that Article 73 of the Administrative Criminal Code contained a lacuna (Lücke) in this respect.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 15 January 1991 and registered on 11 March 1991.

On 13 October 1993 the Commission (Second Chamber) decided to communicate the application to the respondent Government and invite them to submit written observations on the complaints under Article 6 para. 1 of the Convention.

The Government's observations were submitted on 5 January 1994, the applicant's observations in reply on 14 February 1994.

THE LAW

1. The applicant complains under Article 6 para. 1 of the Convention of the length of the proceedings. This provision states, insofar as relevant:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ..."

The Government submit that the applicant complained only of the length of the tax proceedings and not of the criminal proceedings. However, Article 6 para. 1 of the Convention is not applicable to tax proceedings. In certain cases it might be necessary to consider the length of tax proceedings which precede criminal proceedings in order to establish the reasonabless of the length of proceedings. In the present case this was unnecessary as the criminal proceedings were completely detached from the tax proceedings.

The applicant submits that the tax and criminal proceedings have to be considered together, and that they were excessively long. The determination of the tax evaded, which would be essential for punishment, has not occurred to this day.

The Commission observes that on 18 September 1984 a penal order was served on the applicant which sentenced him to a fine for a contravention under the Turnover Tax Decree. Upon the applicant's objection, he was informed that the calculation of taxes was provisional; if he requested a declaratory order, proceedings concerning the objection would be suspended until a decision on the calculation of taxes had been taken. As the applicant did not request a declaratory order, a further penal order was issued on 28 October 1985 which confirmed the conviction on the basis of the provisional calculation of taxes.

Before the Commission the applicant complains of the length of proceedings. In his application form of 4 March 1991, the applicant stated that "until today no decision on the tax obligation" had been given and that he had nevertheless been punished. He went on to inquire "how far this (was) compatible" with the requirement under Article 6 para. 1 of the Convention as to a "hearing within a reasonable time".

In the Commission's opinion, the applicant is in fact complaining

that there was never a definite calculation of taxes. He is thus complaining of the length of tax assessment proceedings, rather than of delays in the criminal proceedings in which he was involved.

However, according to the Commission's case-law, Article 6 of the Convention is not applicable to tax assessment proceedings (see No. 13013/87, Dec. 14.12.1988, Wasa Liv Ömsesidigt and approximately 15,000 individuals v. Sweden, D.R. 58 p. 189).

Furthermore, it cannot be said that the tax assessment proceedings at issue were interlinked with the criminal proceedings to such an extent that the two sets of proceedings had to be examined together.

It follows that this part of the application is incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 of the Convention.

2. The applicant further complains under Article 6 para. 2 of the Convention that there was no legal basis for his conviction. The Commission has examined this complaint under Article 7 para. 1 of the Convention which states:

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The Commission recalls that Article 7 para. 1 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define an offence. It follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision what acts and omissions will make him liable (see Eur. Court H.R., Kokkinakis judgment of 25 May 1993, Series A no. 260-A, p. 22, para. 52).

In the present case the applicant was convicted on the basis of Article 52 of the Turnover Tax Decree which states that whoever evades tax inter alia by means of not declaring goods or keeping them confidential shall be punished by a fine of up to five times the amount of the evaded tax.

In the Commission's opinion this provision defined with sufficient clarity the offence at issue as well as the ensuing punishment, enabling the applicant to infer therefrom which acts and omissions would make him liable.

Moreover, the Turnover Tax Decree was enacted by the Federal Council under Article 41ter of the Federal Constitution, and Article 8 para. 1 of the transitional provisions of that Constitution. The Decree thus satisfied the requirement of the statutory nature of the provision at issue.

It follows that this complaint is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

3. The applicant finally complains under Article 6 para. 2 of the Convention that he was convicted although a decision concerning the calculation of his taxes had not been taken.

The Commission has examined this complaint under Article 6 para. 1 of the Convention which provides that "in the determination of
... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

The Government submit that the applicant did not raise this complaint in his application. Moreover, as he never raised this complaint before a domestic court, he has not complied with the requirement as to the exhaustion of domestic remedies within the meaning of Article 26 of the Convention.

The Commission notes that in his application form the applicant complained inter alia that he "should be punished for the evasion of a tax in respect of which it is not even clear whether it is due". The applicant has therefore sufficiently raised the complaint at issue before the Commission.

The Commission further notes that in his plea of nullity, leading to the Federal Court's decision of 12 September 1990, the applicant complained that he should not have been convicted as no definite decision had been taken as to the amount of taxes due. The Commission need nevertheless not resolve this issue as this part of the application is in any event inadmissible for the following reason.

The Commission notes that on 30 May 1985 the applicant was informed by the Federal Tax Administration that the amount of taxes due had been estimated, and that, if he wished to have an exact calculation, he could request a declaratory order.

However, the Commission notes that, upon receiving this information, the applicant failed to request such a declaratory order. Thus, he waived his right to claim an exact calculation of the amount due.

His complaint that he was convicted on the basis of an estimation of the tax due is therefore manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission unanimously

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the
Second Chamber

(K. ROGGE)

President of the
Second Chamber

(H. DANELIUS)