AS TO THE ADMISSIBILITY OF

Application No. 17951/91
by H. B.
against Switzerland

The European Commission of Human Rights (Second Chamber) sitting in private on 5 April 1995, the following members being present:

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

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 16 January 1991 by H. B. against Switzerland and registered on 19 March 1991 under file No. 17951/91;

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 16 April 1993 and the observations in reply submitted by the applicant on 9 July 1993;

Having deliberated;

Decides as follows:

THE FACTS

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

A. Particular circumstances of the case

The applicant, a German citizen born in 1940, is a businessman residing in Engelberg in Switzerland. Before the Commission he is represented by Mr. H.P. Derksen, a lawyer practising in Zurich.

I.

Upon establishing his residence in the Canton of Obwalden in 1979 the applicant entered into an agreement with the Obwalden Cantonal Tax Administration according to which he would pay cantonal taxes in the amount of at least 35,000 SFr per year.

In 1981/1982 the applicant's income was assessed as amounting to 180,000 SFr for the years 1980 and 1981/82.

In 1982 the Federal Tax Administration audited the accounts of the C. company. It transpired that upon instruction of the Foreign Ministry of Poland, the C. company had commissioned Polish workers for building sites in Libya and that in 1980, it had paid the applicant 735,845 SFr for commission services.

In 1983 the applicant submitted a new tax declaration wherein he referred, in addition to the previous 180,000 SFr, to remunerations obtained from the C. company.

II.

Upon repeated insistence of the Federal Tax Administration the Obwalden Cantonal Tax Commission introduced evasion proceedings (Hinterziehungsverfahren) against the applicant.

On 19 August 1986 the Cantonal Tax Commission imposed on the applicant a supplementary tax (Nachsteuer) of 172,328.15 SFr for the years 1980-1982, as well as a fine (Busse) of 413,587.40 SFr on account of tax evasion (Steuerhinterziehung). This fine was imposed on the basis of Section 129 para. 1 (b) of the Federal Decree on the Imposition of a Direct Federal Tax of 9 December 1940 (Bundesratsbeschluss über die Erhebung der direkten Bundessteuer; see below, Relevant domestic law and practice).

The Cantonal Tax Commission based its decision on the facts as they resulted from the Federal Tax Administration's documents on the C. company and from the applicant's subsequent new tax declaration submitted in 1983.

In its decision the Cantonal Tax Commission stated inter alia that "by failing to declare the large-scale payments and allowances of the C. company in 1980 in his tax declaration for the fiscal years 1981/1982, (the applicant) committed tax evasion" ("Indem <der Beschwerdeführer> in seiner Steuererklärung für die Steuerjahre 1981/82 die umfangreichen Leistungen und Entschädigungen der C. AG im Jahre 1980 nicht deklariert hat, beging er eine Steuerhinterziehung").

III.

On 19 September 1986 the applicant complained against this order to the Obwalden Cantonal Tax Appeals Commission (Steuerrekurskommission) which then fixed an oral hearing for 19 February 1987. At short notice the hearing was postponed to 23 February 1987. At this hearing the applicant was prevented from attending, though his lawyer was present.

On 23 February 1987 the Tax Appeals Commission dismissed the applicant's complaint. The Tax Appeals Commission found inter alia that the fine previously imposed by the Tax Commission on the whole was within the framework (Rahmen) laid down in a Circular (Kreisschreiben) of the Federal Tax Administration of 28 March 1958; in fact the applicant's fine lay slightly below the normal amount (see below, Relevant domestic law and practice). The Tax Appeals Commission further relied on Section 129 para. 1 (b) of the Federal Tax Decree and found no mitigating circumstances.

IV.

On 23 April 1987 the applicant filed an administrative law appeal (Verwaltungsgerichtsbeschwerde) with the Federal Court (Bundesgericht). Therein he complained inter alia under Article 6 para. 3 (a) of the Convention that he had not promptly been informed in detail about the charges raised against him. He also complained that he had not been able personally to participate in the proceedings, in particular at the oral hearing of 23 February 1987. The applicant further complained that the use of the Circular breached his right to an independent

tribunal under Article 6 para. 1 of the Convention. There was also a violation of Article 7 of the Convention.

On 8 July 1988 the Federal Court (Bundesgericht) gave its judgment. According to the operative part, the administrative law appeal was upheld for the reasons given in the considerations (im Sinne der Erwägungen) and the case referred back to the Tax Appeals Commission with the directive that it should question the applicant personally and determine the supplementary tax and the fine for the years 1980 until 1982.

In its considerations the Court first dealt with the tax period of 1980. In the Court's opinion, the Tax Appeals Commission had correctly assumed that the applicant had received commission services amounting to SFr 588,675. The tax assessment concerning a further amount of SFr 180,000 obtained by the applicant had become final. It was also established that the applicant had committed the offence of tax evasion in 1980 with intent. On the other hand, the Tax Appeals Commission had not sufficiently ascertained the applicant's personal circumstances which were relevant when determining the severity of the punishment (Strafzumessung). As to the applicant's absence at the hearing on 23 February 1987, the Federal Court found that he could not be blamed for this given that the hearing had been fixed at short notice.

In respect of the tax period 1981/1982, the Federal Court agreed with the Tax Appeals Commission's assessment of the commission which the applicant had received, and found that for this period the applicant's taxable income had amounted to SFr 470,600. On the other hand, when finding that the applicant had committed tax evasion with intent, the Tax Appeals Commission had incorrectly relied on its conclusion for the tax period of 1980. In this respect the determination of facts was faulty (mangelhaft), and the Federal Court instructed the Tax Appeals Commission to hear the applicant personally in order to determine his culpability.

The Federal Court did not object to the use of the guidelines laid down in the Circular of 28 March 1958. It found that the tax authorities could derogate from the Circular and that the latter did not release the authorities from the obligation to examine independently all the circumstances of the case (Pflicht, die gesamten Umstände des Einzelfalles in eigener Verantwortung zu prüfen).

V.

Proceedings were then resumed before the Cantonal Tax Appeals Commission. On 25 April 1989 the Tax Appeals Commission conducted a hearing at which the applicant was questioned as to his personal circumstances with a view to fixing the fine for the tax evasion in 1980, and as to the facts of the case concerning the alleged tax evasion in 1981/1982. The hearing was not public.

On 7 November 1989 the Tax Appeals Commission reduced the supplementary tax imposed on the applicant to SFr 103,648.15, and the fine to SFr 109,659.10. The applicant's request for a complete reconsideration of his case was rejected on the ground that the Tax Appeals Commission was bound by the facts to the extent to which they had been established with binding effect by the Federal Court under Section 105 para. 2 of the Federal Judiciary Act. Thus the cantonal authorities could only examine the issues left open by the Federal Court. In respect of the issues decided with binding effect by the Federal Court, the applicant had failed to challenge that Court's decision by requesting the reopening (Revision) of the Federal Court's proceedings.

VI.

On 9 January 1990 the applicant again filed an administrative law appeal with the Federal Court. Therein he reiterated his complaint that he had not been informed promptly and in detail of the acts with which he had been charged. Moreover, the investigations of the tax authorities were incomplete, and the applicant was refused the right to participate in the establishment of the facts. The applicant further complained that his punishment was not in accordance with the law, and that the use of the Circular was incompatible with judicial independence. Finally, the applicant complained that he had not had a public hearing in these proceedings.

On 12 June 1990 the Federal Court dismissed the administrative law appeal. The decision was served on the applicant on 20 July 1990. The Court found that it was prevented from dealing with the alleged deficiencies of the previous proceedings. It noted that in its decision of 8 July 1988 it had confirmed the offence of tax evasion with intent for the year 1980, and the objective elements relating to the period 1981/1982. The Court dismissed the applicant's complaint under Article 7 of the Convention, finding that the use of a Circular was admissible. According to general rules for the determination of punishment (allgemeine Strafzumessungsregeln) the authorities, when fixing the fine, had to consider the further personal circumstances of the accused insofar as they related to his culpability.

Relevant domestic law and practice

I.

According to Section 106 of the Swiss Penal Code (Strafgesetz-buch) the maximum amount for a fine is SFr 5,000, unless the law provides otherwise. According to Section 333 of the Penal Code, its general provisions also apply to offences regulated in other Federal laws, unless the latter provide otherwise.

Section 129 para. 1 (b) of the Federal Decree on the Imposition of a Direct Federal Tax (Bundesratsbeschluss über die Erhebung der direkten Bundessteuer) of 9 December 1940 provides that the offence of tax evasion "is subject to a fine of up to four times the fraudulently concealed tax amount" ("unterliegt einer Busse bis zum Vierfachen des entzogenen Steuerbetrages").

Section 71 of the Federal Decree states, insofar as relevant:

<Translation>:

"Professional secrecy

1. Members and civil servants of the authorities of the Federation, the Cantons and the communities and members of the Cantonal Tax Appeals Commission responsible for the Direct Federal Tax must observe secrecy in respect of facts of which they learn when assessing a taxpayer and in respect of the authorities' proceedings ...

2. Breaches of professional secrecy ... shall be punished ..."

<Original>

"Schweigepflicht

1. Die Mitglieder und Beamten der für die Direkte Bundessteuer zuständigen Behörden des Bundes, der Kantone und der Gemeinden und die Mitglieder der kantonalen Rekurskommissionen haben über Tatsachen, die ihnen bei der Veranlagung eines Steuerpflichtigen bekannt werden, und über die Verhandlungen in den Behörden Stillschweigen zu beobachten ...

2. Verletzungen der Schweigepflicht ... werden ... geahndet ..."

II.

According to the Circular (Kreisschreiben) of the Federal Tax Administration of 28 March 1958, subsequently replaced by a Circular of 9 December 1987, "the tax punishment must be determined within the statutory framework of punishment ... according to objective and subjective criteria" (innerhalb des gesetzlichen Strafrahmens ... ist die Steuerstrafe nach objektiven und subjektiven Gesichtspunkten zu bemessen). The objective severity of the offence is determined on the basis of the relation of the amount withheld to the tax amount due. The Circular further states that its principles apply to the normal case of offences committed with intent.

COMPLAINTS

The applicant complains that contrary to Article 6 para. 1 of the Convention he was not heard by an independent tribunal in the above proceedings. Thus, the Tax Appeals Commission, when fixing his fine, applied a Circular issued by the Federal Tax Administration.

The applicant furthermore complains under Article 6 para. 1 of the Convention that the oral hearing on 23 February 1987 was held in his absence.

Under Article 6 para. 1 of the Convention the applicant complains that the proceedings were not conducted in public.

The applicant complains that the incomplete establishment of the facts violated his right to the presumption of innocence under Article 6 para. 2 of the Convention.

Under Article 6 para. 3 (a) of the Convention the applicant complains that he was not informed promptly and in detail of the acts with which he was charged.

Finally, the applicant complains under Article 7 of the Convention that his punishment was not in accordance with the law. Thus, the fine was fixed on the basis of the Circular of 28 March 1958. Moreover, although the act qualifies under Swiss law as a misdemeanour (Übertretung) the fine exceeded the maximum envisaged by Sections 106 and 333 of the Swiss Penal Code.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 16 January 1991 and registered on 19 March 1991.

On 8 January 1993 the Commission (Second Chamber) decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure, and invite them to submit written observations on the admissibility and merits in respect of the complaints under Article 6 para. 1 and Article 7 of the Convention.

The Government's written observations were submitted on 16 April 1993, the applicant's observations in reply on 9 July 1993.

THE LAW

1. The applicant complains that contrary to Article 6 para. 1 (Art. 6-1) of the Convention he was not heard by an independent tribunal in the above proceedings. Thus, the Tax Appeals Commission, when fixing his fine, applied a Circular issued by the Federal Tax Administration.

Article 6 para. 1 (Art. 6-1) of the Convention states, insofar as relevant for the application:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ..."

The Government submit that the authorities, when determining a fine, will act duty-bound within a margin of appreciation. The Federal Tax Administration cannot issue orders to the tax authorities. Its Circular, when referring to the "normal" fine calculated on the basis of the amount withheld, aims at harmonising fines by introducing objective criteria. The Circular constitutes a first step towards determining the objective severity of the offence. It also does not concern the subjective side of the offence, the authorities being called upon to determine the culpability of the person concerned.

In the applicant's submission, it contradicts the principle of the independence of the judiciary that the latter should consider guidelines (Richtlinien) prepared by the tax administration. According to the Circular, the higher the amount of taxes withheld, the higher the multiplicator will be to determine the fine.

The Commission recalls that the independence of a "tribunal" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention requires in particular that the body concerned must be independent of the executive in its functions and as an institution (see Eur. Court H.R., Campbell and Fell judgment of 28 June 1984, Series A no. 80, p. 39 et seq., para. 78).

It is true that in the present case the domestic authorities, when determining the applicant's fine, referred to a Circular issued by the Federal Tax Administration.

The Commission nevertheless notes the Federal Court's decision of 8 July 1988 according to which the Circular was not binding, in that the tax authorities could derogate from it and were obliged independently to examine all circumstances of the case.

The Commission finds no indication that the Tax Appeals Commission regarded itself bound by the Circular. Thus, in its decision of 23 February 1987 it referred to the Circular as one of various elements. Indeed, after hearing the applicant on 25 April 1989 it reduced in its decision of 7 November 1989 the supplementary tax and the fine imposed on the applicant.

The Commission thus does not find that the domestic courts, when determining the applicant's fine, were subject to instructions by the administration which could have called in question their independence contrary to Article 6 para. 1 (Art. 6-1) of the Convention.

This part of the application is therefore manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention that the oral hearing on 23 February 1987 before the Tax Appeals Commission was held in his absence. Thus, he could not participate in the establishment of the facts.

The Government submit that the applicant has not complied with Article 26 (Art. 26) of the Convention in that he did not file his application within six months after the Federal Court's decision of 8 July 1988. This decision referred the case back to the Tax Appeals Commission only to the extent that the fine had to be determined, but not in respect of the evaded tax. In any event, at the hearing of 23 February 1987 before the Tax Appeals Commission, at which the

applicant was represented by a lawyer, no witness and no new evidence were heard.

The applicant submits that he has complied with the six months' rule. In his administrative law appeal of 23 April 1987 he expressly requested to be heard personally. He also introduced the present application within six months after the Federal Court had given its final decision on 12 June 1990. That Court's decision of 8 July 1988 was not definitive in that it referred the case back to the Tax Appeals Commission for renewed examination.

The Commission recalls that, under Article 26 (Art. 26) of the Convention, it may only examine a case "within a period of six months from the date on which the final decision was taken".

In the present case, the applicant was absent at an oral hearing before the Tax Appeals Commission on 23 February 1987, though he could not be blamed therefor. He raised this complaint in his administrative law appeal of 23 April 1987 to the Federal Court. The latter partly upheld the applicant's administrative law appeal on 8 July 1988. The Tax Appeals Commission then conducted an oral hearing in the applicant's presence on 25 April 1989.

The Commission has examined the Federal Court's decision of 8 July 1988. On the one hand, the Court regarded it as established that in the tax period of 1980 the applicant had received a commission amounting to SFr 588,675 and that the assessment of a further amount of SFr 180,000 become final. In respect of the tax period of 1981/82 it was established that the applicant's taxable income had amounted to SFr 470,600.

On the other hand, the Court found that the Tax Appeals Commission had not sufficiently examined the applicant's personal circumstances which were relevant for determining the severity of the punishment for the tax period of 1980. In respect of the tax period of 1981/82 the Federal Court instructed the Tax Appeals Commission to hear the applicant in order to determine his culpability.

Thus, the second set of proceedings conducted before the Tax Appeals Commission were limited to the issues set out by the Federal Court in its decision of 8 July 1988. In respect of these issues the applicant had an oral hearing before the Tax Appeals Commission on 25 April 1989.

In respect of the other issues, the Federal Court's decision of 8 July 1988 was therefore final. Insofar as the applicant complains that he did not have an oral hearing during these proceedings, he failed to file this complaint before the Commission within six months as from 8 July 1988. He has therefore not complied with the requirements of Article 26 (Art. 26) of the Convention.

This part of the application must therefore be rejected according to Article 27 para. 3 (Art. 27-3) of the Convention.

3. Under Article 6 para. 1 (Art. 6-1) of the Convention the applicant complains that the proceedings were not conducted in public.

a) The Government submit that the applicant has not exhausted domestic remedies according to Article 26 (Art. 26) of the Convention. Thus, he failed to raise this complaint before the Tax Appeals Commission. Moreover, he also did not raise this complaint in his administrative law appeal of 23 April 1987 to the Federal Court and he also failed to ask for a public hearing before that Court. Only in his administrative law appeal of 9 January 1990 did he finally raise this complaint.

The applicant submits that he has exhausted domestic remedies.

In its decision of 8 July 1988 the Federal Court left everything open when it referred the case back to the Tax Appeals Commission which was instructed to hear the applicant. In his subsequent administrative law appeal of 9 January 1990 he expressly complained that he had not had a public hearing, though the Court did not deal with it.

The Commission recalls that, under Article 26 (Art. 26) of the Convention, it may only deal with a matter "after all domestic remedies have been exhausted, according to the generally recognised rules of international law".

The Commission has just found that the complaint about the hearing of 23 February 1987 in the first set of the proceedings before the Tax Appeals Commission is inadmissible as the applicant did not comply with the requirements of Article 26 (Art. 26) of the Convention. The second set of proceedings resumed before the Tax Appeals Commission concerned issues set out by the Federal Court in its decision of 8 July 1988, relating to the applicant's personal circumstances which were considered relevant for the determination of the fine. In respect of these issues the applicant had an oral, albeit not public, hearing before the Tax Appeals Commission on 25 April 1989.

The Commission notes that the applicant raised this complaint in his administrative law appeal of 9 January 1990, though the Federal Court did not deal with this complaint in its decision of 12 June 1990. Nevertheless, it does not transpire that the applicant failed to comply with the procedural requirements for filing the appeal.

The applicant's complaint cannot therefore be declared inadmissible for non-exhaustion of domestic remedies within the meaning of Article 26 (Art. 26) of the Convention.

Insofar as the Government submit that the applicant failed to raise this complaint in the proceedings before the Tax Appeals Commission, the Commission finds that this issue falls to be examined together with the merits of the complaint.

b) The Government submit with reference to Section 71 of the Federal Decree on the Imposition of a Direct Federal Tax that such proceedings are conducted in non-public proceedings in order to protect the private sphere of taxpayers. Article 6 para. 1 (Art. 6-1) of the Convention has not been breached as the applicant's lawyer, who was well versed in these matters, could have asked for a public hearing but failed to do so.

The applicant submits that Section 71 of the Federal Decree does not concern criminal proceedings. Tax evasion is a criminal matter requiring a public hearing. The applicant did not invoke this complaint before the Tax Appeals Commission in view of the Swiss Government's interpretative declaration made at the time in respect of Article 6 para. 1 (Art. 6-1) of the Convention.

The Commission finds that this complaint raises serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. This aspect of the case cannot, therefore, be regarded as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention, and no other ground for declaring it inadmissible has been established.

4. The applicant complains that the incomplete establishment of the facts violated his right to the presumption of innocence under Article 6 para. 2 (Art. 6-2) of the Convention.

According to this provision, "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

The Commission recalls that the presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law, a judicial decision concerning him reflects an opinion that he is guilty (Eur. Court H.R., Barberà, Messegué and Jabardo judgment of 6 December 1988, Series A no. 146, p. 31, para. 67 et seq.).

Even assuming that the applicant has complied with the requirements under Article 26 (Art. 26) of the Convention, he does not substantiate his complaint that the presumption of innocence was disregarded in the proceedings at issue. The mere criticism of the assessment of evidence made by the Courts is not sufficient. It does not appear from the case-file that during the proceedings the courts anticipated the finding that the applicant had committed the acts with which he was charged.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

5. Insofar as the applicant complains under Article 6 para. 3 (a) (Art. 6-3-a) of the Convention that he was not informed promptly and in detail of the acts with which he was charged, the Commission notes that the acts with which the applicant was charged were expressly stated in the decision of the Cantonal Tax Commission of 19 August 1986. This part of the application is, therefore, also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

6. The applicant complains under Article 7 para. 1 (Art. 7-1) of the Convention that his punishment was not in accordance with the law. Thus, the fine was fixed on the basis of the Circular of 28 March 1958. Moreover, although the act qualifies under Swiss law as a misdemeanour the fine exceeded the maximum envisaged by Sections 106 and 333 of the Swiss Penal Code.

Article 7 para. 1 (Art. 7-1) of the Convention 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 Government submit that the applicant has not exhausted domestic remedies within the meaning of Article 26 (Art. 26) of the Convention as he failed to raise this complaint in his appeal of 19 September 1986 to the Tax Appeals Commission. In any event the fine imposed did not exceed the limit stated in Section 129 of the Federal Decree on the Imposition of a Direct Federal Tax which provides for a fine of up to four times the fraudulently concealed tax amount. The applicant was thus aware of the fine which he risked if he committed the offence concerned.

The Commission need not examine whether the applicant has complied with the requirements under Article 26 (Art. 26) of the Convention, as this complaint is in any event inadmissible for the following reasons.

The Commission notes that the applicant's punishment was based expressly on Section 129 of the Federal Decree on the Imposition of a Direct Federal Tax. According to this provision, the offence of tax evasion is subject to a fine of up to four times the fraudulently concealed tax amount. The Swiss Penal Code in Section 333 expressly envisages that other Federal laws may provide exceptions in respect of its provisions on offences.

Thus, the act of which the applicant was convicted duly constituted an offence under Swiss law, and his punishment did not exceed the maximum penalty provided for in the relevant provisions, as required by Article 7 para. 1 (Art. 7-1) of the Convention.

The remainder of the application is therefore manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission,

by a majority,
DECLARES ADMISSIBLE, without prejudging the merits of the case, the complaint that the applicant did not have a public hearing;

and

unanimously,
DECLARES INADMISSIBLE the remainder of the application.

Secretary to the Second Chamber — President of the Second Chamber

(K. ROGGE) — (H. DANELIUS)