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

FIFTH SECTION

DECISION

Applications nos. 37977/23 and 8275/24
Josefa SOLANELLAS SOLANELLAS
against Spain

The European Court of Human Rights (Fifth Section), sitting on 12 September 2024 as a Committee composed of:

Kateřina Šimáčková*, President*,
María Elósegui,
Stéphane Pisani*, judges*,

and Martina Keller, *Deputy Section Registrar,*

Having regard to:

two applications (no. 37977/23 and no. 8275/24) against the Kingdom of Spain lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 11 October 2023 and 8 March 2024, respectively, by a Spanish national, Ms Josefa Solanellas Solanellas, who was born in 1941 and lives in Barcelona ("the applicant") and was represented by Mr M. Ayats Vergés, a lawyer practising in Barcelona;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The applicant was the founder and member of the board of a company that imported and exported office supplies.

2. In 2004, after the company had requested a value-added tax (VAT) refund for the tax year of 2003, the tax authorities (AEAT) initiated audit proceedings against it for an illegal practice known as carousel fraud. The incriminated conduct consisted in a scheme allowing the simulation of supply of goods to some Portuguese companies. This permitted the applicant's company to benefit from undue VAT exemptions and reimbursements.

3. The proceedings were stayed in 2007 because the company's activities were subject to an intervening criminal investigation. However, this procedure ended in 2011 since the person under investigation (the president

of the company) had died, and this circumstance allowed the resumption of the tax proceedings.

4. On 17 October 2011 the AEAT found the company, which had meanwhile been declared bankrupt, liable for EUR 4,201,149 for undeclared or unduly refunded VAT from the period January to December 2003. It also fined the company EUR 2,360,642. These decisions were not challenged.

5. Subsequently, the AEAT declared the applicant subsidiarily liable for both the debt and the penalty (*acuerdo de derivación de responsabilidad*) on 12 February 2016. Beforehand, the applicant had submitted observations on 3 November 2015 in this respect, arguing summarily that she had not had any active part in the running of the company.

6. The ruling was based, *inter alia,* on section 40(1) of the 1963 General Tax Act (*artículo 40.1 de la Ley 230/1963, de 28 de diciembre, General Tributaria).* According to this provision, administrators are subsidiarily liable for the total amount of a tax penalty imposed on the company when they failed to do the necessary acts to comply with the company's tax obligations, consented to a breach [of tax law] on the part of their subordinates, or adopt decisions that facilitated such infringement. The AEAT justified this *culpa in vigilando* as follows: (i) the company had committed a tax offence; (ii) it had been declared bankrupt; (iii) the applicant had been the secretary of the board at the material time (objective element); (iv) the applicant had failed to observe her legal duties to prevent the offence (subjective element). Regarding this latter aspect, the decision made reference to the Supreme Court's case-law establishing the irrelevance of presence or absence of proof of bad faith or severe negligence on the administrator's side. The reason for this was that the tax offence necessarily implied that the administrators did not comply with their essential legal duties, that is to say, the requisite due diligence was not observed. The AEAT moreover quoted the specific provisions regarding these legal duties, especially the one to ensure that the company declares and pays its taxes, and underlined that subsidiary liability was attributed to the applicant because she was in a guarantor position but did not demonstrate the minimum required diligence. It relied on domestic case-law stating that administrators are responsible for the results of their management unless they prove that they have used all legal instruments at their disposal to prevent any illegal practice. In the decision it was noted that this consideration did not amount to the inversion of burden of proof but allowed the applicant to refute the guarantor position.

7. The applicant challenged this decision before the central economic and administrative court (TEAC). On 31 January 2018 the TEAC confirmed the decision but limited its effects to the period between June and December 2003, giving right to one of the applicant's allegations about the expiration of the AEAT's right to claim the VAT from before June 2003.

8. The applicant sought judicial revision before the *Audiencia Nacional*. She argued, *inter alia,* that the AEAT and the TEAC had failed to determine

which specific conduct described in section 40(1) of the General Tax Act was attributable to her. The complaint was rejected on 9 March 2021. The *Audiencia Nacional* reasoned that the lack of control of the company was evident from the applicant's whole behaviour as an administrator; the court notably held that she "abandoned her functions" (*dejación de sus funciones*). For the *Audiencia Nacional*, her conduct corresponded to "any of the forms" (*en cualquiera de las formas* [*sic*]) that give rise to liability under section 40 (1) of the General Tax Act.

9. The ensuing appeal on points of law was declared inadmissible for lack of cassational interest and for failure on the applicant's part to lodge a motion to clarify or supplement the judgment (*la aclaración o el complemento de sentencia*) in regard to her complaint that the *Audiencia Nacional* judgment contained an *extra petita* ruling.

10. The applicant brought two actions for annulment, one against the inadmissibility decision of the appeal on points of law, which was declared inadmissible. The *Audiencia Nacional* rejected the second action for annulment ruling that it was seeking a new assessment on the merits and that the claim of breach of fundamental rights was merely instrumental. The subsequent *amparo* appeals were declared inadmissible for lack of constitutional importance on 12 June and 10 November 2023, respectively.

11. The applicant relies on Article 6 §§ 1, 2, 3 (a) and (b) and Article 7 of the Convention and complains that the domestic courts reached erroneous conclusions in unfair proceedings by finding that she was subsidiarily liable for the company's illegal practice.

THE COURT'S ASSESSMENT

12. Having regard to the same subject matter of the applications, the Court finds it appropriate to examine them jointly in a single decision.

13. The applicant complained that her subsidiary liability was based on objective liability proscribed in Spanish law; that the burden of proof was inverted; that the motivation was deficient especially because the Audiencia Nacional had ruled *extra petita*; and that the tax authorities had not determined which specific conduct was attributable to her. She argued that these elements had impeded the proper preparation of her defence and frustrated the right not to be punished without a law. She also complained that the transfer of liability was in breach of the principle of presumption of innocence.

14. The Court reiterates that, even if Article 6 does not apply to ordinary tax proceedings (see *Ferrazzini v. Italy* [GC], no. 44759/98, § 20, ECHR 2001-VII), it has been held to apply to tax surcharges proceedings or may have implications for other related tax proceedings (see *Vegotex International S.A. v. Belgium* [GC], no. 49812/09, §§ 71-74, 3 November 2022). The Court notes that the subsidiary liability of the

applicant is established in the domestic law under the fiscal regime (see paragraph 6). It was the tax authorities that initiated the proceedings which led to the applicant's liability under administrative law. However, the tax offence in question also gave rise to criminal prosecution against the late president of the company (see paragraph 3 above) that could have led to a conviction. Moreover, the applicant was also liable to pay a fine of a large amount of money. Given these elements, the Court concludes that the criminal limb of Article 6 is applicable (see *Melgarejo Martinez de Abellanosa v. Spain*, no. 11200/19, § 25, 14 December 2021). The Court finds furthermore that this conclusion holds also true for the applicability of Article 7, following its case-law that the three alternative criteria established in *Engel and Others v. the Netherlands* (8 June 1976, Series A no. 22) are equally pertinent to the issue of the applicability of Article 7 (see *Žaja v. Croatia*, no. 37462/09, § 86, 4 October 2016).

15. Regarding the complaint under Article 6 § 1, the applicant alleges that the *Audiencia Nacional* judgment contained an *extra petita* ruling as to whether the tax proceedings had exceeded the legal time frame and thereby it altered the subject matter of the debate. The Court observes in this connection that the applicant's appeal on points of law was declared inadmissible by the Supreme Court because she had failed to lodge a motion to clarify or supplement the judgment on this specific issue (see paragraph 9 above). It follows that domestic remedies have not been properly exhausted; and this complaint must be rejected in application of Article 35 §§ 1 and 4 of the Convention.

16. The applicant further complains under Article 6 § 2 that she was ordered to bear the company's tax penalty and debt for the sole reason that she had been the secretary of board in 2003 when the company had committed the offence and that she had the burden to prove her innocence.

17. The Court notes that the AEAT explained that the legal requirements to attribute subsidiary liability (see paragraph 6 above) were met. Notably, it reasoned that the applicant had had a guarantor position; this meant by no means a form of objective liability, rather, the applicant as a guarantor had statutory liability for the company's financial wrongdoings unless she could demonstrate that she did everything in her power to prevent them.

18. The Court has regard to the financial interests of the State in tax matters, taxes being the State's main source of income (see *Janosevic v. Sweden*, no. 34619/97, § 103, ECHR 2002-VII) and refers to its relevant case-law presented in *Busuttil v. Malta*, no. 48431/18, §§ 46-48, 3 June 2021, concerning the general principles in respect of the burden of proof and legal presumptions of facts and law.

19. Bearing in mind that the right to presumption of innocence is not absolute (see *Busuttil*, cited above, § 46), the Court notes that the applicant had the possibility to refute her guarantor's liability, namely by proving that she used all the legal instruments at her disposal to recognise, correct and

prevent any illegal practice (see paragraph 6 above). For the Court, the applicant's exoneration from the guarantor position was therefore not unattainable – and the applicant submitted indeed no elements to show that it was.

20. In the light of the above, the Court finds that the attribution of liability was not solely based on an objective fact; and the burden of proof on the applicant was limited to the possibility to exonerate herself from the guarantor position. In these circumstances, it cannot be said that the principle of presumption of innocence was not respected in the applicant's case.

21. Relying on Article 6 § 3 (a) and raising in substance Article 6 § 3 (b), the applicant further claims that the domestic courts failed to indicate which particular conduct described in section 40(1) of the General Tax Law was attributed to her and that this failure prevented her from preparing her defence.

22. The Court observes at the outset that the nature of the accusation (liability for a tax offence in a situation where she had a guarantor position and *culpa in vigilando*) was communicated to the applicant before the decision of 12 February 2016, and she made observations in the matter on 3 November 2015. As quoted by the AEAT, her central point of defence was that she had not adopted any decision enabling the infringement and indeed, she had not had any active part in the running of the company. This point was apparently not developed (see paragraph 5 above).

23. The Court further notes that section 40(1) outlines three modalities of being liable for *culpa in vigilando*, "any" of which – in the *Audiencia Nacional*'s phrasing – was applicable to the applicant's case. Indeed, the wording of the law allows the understanding that those modalities are alternative, rather than cumulative, and ultimately refer to various facets of the concept of fiscal mismanagement. For the Court, were this a situation of applying a hypothesis of criminal law proper to a prosecuted defendant's case, a more thorough examination of foreseeability may be warranted. However, the present case concerns the transfer of tax liability to the applicant; and the legal basis upon which that liability was based (see paragraph 6) had been unequivocally notified to the applicant before the decision was made on 12 February 2016. Once aware that section-40(1)-liability was being considered to be applied to her, the applicant was in a position to develop a defence concerning all relevant aspects of her management of the company – and indeed, she attempted to do so (see paragraph 5 above).

24. The Court therefore finds no appearance that the applicant was not duly informed of the nature and cause of the accusation against her or that her ability adequately to prepare her defence was impaired.

25. It follows that the applicant's complaints under Article 6 §§ 2 and 3 are manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

26. Lastly, the applicant complained under Article 7 of the Convention that the AEAT and the domestic courts established a form of objective liability to her detriment.

27. The Court reiterates that, in some specific circumstances, objective liability may raise an issue under Article 7 of the Convention (*Varvara v. Italy*, no. 17475/09, § 70, 29 October 2013, and *G.I.E.M. S.r.l. and Others v. Italy* [GC], nos. 1828/06 and 2 others, §§ 242-43, 28 June 2018). However, in the present case, the AEAT decision of 12 February 2016 identified the applicable legal requirements to attribute subsidiary liability to the applicant (see paragraph 6 above) and these included a subjective requirement related to the applicant's conduct (see paragraph 17 above). The Court is therefore satisfied that no purely objective liability was imposed on the applicant, since, as the AEAT explained, she could have escaped *culpa in vigilando* by showing that the requisite subjective elements were not present (notably, as explained in paragraphs 6 and 17 above, by proving that she observed her guarantor's duties under the law). The Court thus finds that the imposition of subsidiary liability on the applicant does not indicate any appearance of a violation of her rights under Article 7 of the Convention.

28. It follows that this complaint is likewise 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,

Decides to join the applications;

Declares the applications inadmissible.

Done in English and notified in writing on 3 October 2024.

Martina Keller Deputy Registrar	Kateřina Šimáčková President