

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

THIRD SECTION

DECISION

Application no. 784/14
Maurice Marcellin Marie VAN WEERELT
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,
Valeriu Griţco,
Branko Lubarda,
Iulia Antoanella Motoc, *judges,*
and Marialena Tsirli, *Deputy Section Registrar,*

Having regard to the above application lodged on 31 December 2013,

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court;

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Maurice Marcellin Marie van Weerelt, is a Netherlands national, who was born in 1928 and lives in Steensel. He is represented before the Court by Mr P. van Hagen, a lawyer practising in Breda.

A. The circumstances of the case

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

1. Background to the case

3. The German tax authorities received information concerning assets held in a Liechtenstein bank by non-Liechtenstein residents, a number of Netherlands residents among them. In May 2008 the German tax authorities transferred to the Netherlands Tax and Customs Administration (*Belastingdienst*) a file containing particulars concerning the Netherlands residents under the procedure for spontaneous exchange of tax information (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, see below). The Netherlands tax authorities requested the German tax authorities' permission to use these particulars in criminal proceedings to be held in public; this was granted.

4. As relevant to the present case, it emerged that a Liechtenstein foundation (*Stiftung*) by the name of C. had been created in 1986 to administer a bank account held in Switzerland. The foundation was controlled through a trustee (*Treuhand*) in Liechtenstein. The "by-laws" of C. foundation, which were in English, listed as "first beneficiary of all assets and revenues, as well as of any possible liquidation proceeds ... during his lifetime and without any restriction" the applicant; upon his death, the applicant's wife as second beneficiary; upon her death, the applicant's brother; upon his death, the latter's descendants. These "by-laws" were revocable at any time by the applicant during his lifetime. C. foundation was liquidated on 3 November 2000.

2. The correspondence phase

5. On 9 June 2009 the Tax Inspector wrote to the applicant stating that he had information from which it appeared that the applicant was, or had been, involved with a financial interest (*als gerechtigde betrokken*) in a foundation under the law of the Principality of Liechtenstein and asked him to submit certain information with a view to a tax adjustment.

6. The applicant, through his counsel, replied on 26 June 2009. Although he did not deny his involvement with a Liechtenstein foundation, he stated that he had only the sketchiest recollection of it and possessed no pertinent documents. He invited the Tax Inspector to share the information in his possession in order to clarify matters.

7. The Tax Inspector responded on 7 July 2009. He did not consider it credible that the applicant no longer had the information requested, in view of the possible financial interest involved; nor did he believe that the applicant did not remember anything about his involvement with a Liechtenstein foundation.

8. The applicant, through his counsel, wrote to the Tax Inspector on 14 July 2009 restating his earlier position.

9. The Tax Inspector replied on 20 July 2009, pointing to increases in the applicant's asset position that could not be explained absent corresponding increases of his income or debt.

10. On 14 August 2009 the applicant submitted a written explanation to the effect that the increases noted had resulted from rising stock markets.

11. On 19 August 2009 the Tax Inspector wrote again, dismissing the applicant's explanation of the increases in his asset position as insufficient and demanding more detailed information. He also asked for more information on the applicant's involvement in the Liechtenstein foundation.

12. On 14 September 2009 the applicant submitted more detailed information in response to the request for an explanation of the increase in his asset position. In relation to the Liechtenstein foundation, he stated that he could remember nothing more than that he had once had dealings with such a body. He asked the Tax Inspector for copies of the documents concerning the Liechtenstein foundation which were apparently in his possession.

13. On 22 September 2009 the Tax Inspector wrote dismissing as insufficient the information which the applicant had given. With regard to the Liechtenstein foundation, he suggested that the applicant obtain the information needed from its trustee. On the information available, he reached the conclusion that the applicant was, or had been, involved with the Liechtenstein foundation and had failed to report its assets and income. He announced the intention to issue a tax adjustment based on an asset value of five million euros (EUR) and an annual interest yield of EUR 200,000, these figures to be reviewed if the applicant disproved them.

14. On 19 October 2009 the applicant wrote submitting further documents regarding his asset position. As to the Liechtenstein foundation, he protested that a tax adjustment based on assets worth EUR 5 million and interest in an amount of EUR 200,000 was incomprehensible, given that the Tax Inspector had not revealed anything other than that he had "information from which it appeared that the applicant was, or had been, involved with a financial interest" in such a body. He asked the Tax Inspector to specify the information on which his assessment was based.

15. On 27 October 2009 the Tax Inspector wrote announcing his intention to issue tax adjustments if the information asked for was not forthcoming within four weeks.

16. The applicant submitted further documents on various dates until May 2010. None of these concerned the Liechtenstein foundation.

17. On 1 June 2010 the Tax Inspector sent the applicant's representative a summary of the information available concerning the Liechtenstein foundation "to jog [the applicant's] memory". The information in issue had been received by the Netherlands Tax and Customs Administration from the German tax authorities. It had emerged that the applicant had been involved in a Liechtenstein foundation called C., based in Vaduz, Liechtenstein. The

applicant had been the first beneficiary without restriction of all its assets and revenue and any possible liquidation proceeds. He had had the power to revoke its by-laws and dismiss its trustee. The Netherlands tax authorities had knowledge of dozens of similar cases, the pattern in all cases being the same: although ostensibly ownership of assets was vested in the Liechtenstein foundation, the existence and content of the relevant bye-laws, letter of authority and appointment of the economic beneficiary demonstrated that in real terms ownership of the assets lay with whoever had set up the foundation. The Tax Inspector was of the view that a similar arrangement must exist for the foundation C. as well and sent a final demand for the surrender of C.'s corresponding documents and accounts. A time-limit was set for this purpose, which in subsequent correspondence was extended until 6 September 2010.

18. On 3 September 2010 the applicant informed the Tax Inspector that the trustee of the C. foundation had referred him to an administrator in Switzerland.

19. On 10 September 2010 the applicant forwarded to the Tax Inspector a letter from the administrator in Switzerland refusing to supply any information "due to confidentiality matters".

20. The Tax Inspector thereupon ordered the applicant to provide information orally. A meeting for this purpose took place on 4 November 2010.

21. On 18 November 2010 the Tax Inspector wrote to the applicant noting that he had admitted to the possession of documents concerning the C. foundation and agreed to submit them to the Tax Inspector. The letter stated the demand that the applicant submit these documents.

22. On 23 November 2010 the applicant replied denying having made the admission suggested and stating that he had no such documents in his possession.

23. Faced with the imminent expiry, on 1 January 2011, of the statutory twelve-year time-limit for issuing tax adjustments, the Tax Inspector sent the applicant a letter on 6 December 2010 announcing that a tax adjustment would be sent shortly. The latter gave warning of the Tax Inspector's intention to impose a tax fine (section 67g of the General State Taxes Act – *Algemene wet inzake rijksbelastingen* – see below). The fine was to be based on the consideration that although the applicant knew, or ought to have known, that he was the sole beneficiary of the assets held in the C. foundation, he had deliberately failed to mention the property and income derived from it on his tax returns. The Tax Inspector counted as aggravating circumstances that the applicant had resorted to subterfuge (*listigheid*) and conspiracy (*samenspanning*) with foreign entities to conceal C. foundation's assets, and thus part of his property, from the Netherlands tax authorities and had made insufficient effort to supply to the Tax Inspector the information necessary to arrive at a correct assessment.

24. On 10 December 2010 the Tax Inspector sent the applicant a tax adjustment for income tax (*inkomstenbelasting*) and property tax (*vermogensbelasting*) due for 1998/1999. Absent detailed information, the estimate was that the assets in issue had a value of EUR 5 million and had yielded 4% per annum. The applicant was ordered to pay the taxes due, plus punitive fines (*vergrijpboetes*) in an amount equal to the taxes and tax interest (*heffingsrente*). The total sums came to EUR 285,656 in respect of income tax and EUR 85,890 in respect of property tax for this fiscal year alone.

3. The applicant's objection and subsequent tax proceedings

25. The applicant lodged an objection with the Tax Inspector on 18 January 2011. As relevant to the case before the Court, he argued, firstly, that the Tax Inspector had failed to specify the demands for information which the applicant had not met and submitted in addition that he had answered each of the Tax Inspector's questions; secondly, that the Tax Inspector had not had the right to ask questions during the meeting of 4 November 2010 and demand answers, since these questions also served for the imposition of punitive fines; and finally, that the Tax Inspector had not shown that the applicant had failed to submit a tax return required by law.

26. The Tax Inspector adjourned the proceedings. It would appear that no decision has yet been taken.

4. Civil proceedings

(a) Proceedings before the Regional Court

27. On 25 February 2011 the Tax and Customs Administration summoned the applicant to appear before the provisional measures judge (*voorzieningenrechter*) of the Regional Court (*rechtbank*) of 's-Hertogenbosch in summary injunction proceedings (*kort geding*). The purpose was to obtain an order for the applicant to disclose all information concerning any assets held abroad, including those held in C. foundation and the allocation of the latter after the foundation had been dissolved.

28. The applicant submitted a counterclaim for an injunction restraining the Tax and Customs Administration from making any further such demands for information.

29. Having held a hearing on 22 March 2011, the provisional measures judge gave judgment on 5 April 2011. The applicant was ordered to disclose the information specified within twenty-eight days from the day on which the judgment was served on him, on pain of a penalty payment (*dwangsom*) of EUR 2,500 for each day or part of a day thereafter that he failed to comply up to a maximum of EUR 500,000. The judgment was provisionally executable (*uitvoerbaar bij voorraad*).

30. The judgment was served on the applicant on 6 April 2011.

31. On 9 May 2011 the applicant submitted a statement in writing that "to the best of his knowledge" he had held no foreign bank accounts after 1998 save for one Belgian account which he had duly declared to the tax authorities and had closed down in 2000, and a second letter from the Swiss administrator again refusing to supply information "due to reasons of confidentiality".

(b) Proceedings before the Court of Appeal

32. On 29 April 2011 the applicant lodged an appeal with the Court of Appeal (*gerechtshof*) of 's-Hertogenbosch against the judgment of the provisional measures judge.

33. On 4 November 2011, while the appeal was pending, the lawyers representing the Tax and Customs Administration wrote to the applicant informing him that they considered him to have been liable for penalty payments in an amount of EUR 2,500 daily since 6 May 2011. The Tax and Custom Administration reserved the right to demand their payment.

34. The Court of Appeal gave judgment on 31 January 2012 confirming the judgment of the provisional measures judge of the Regional Court.

(c) Proceedings before the Supreme Court

35. The applicant lodged an appeal on points of law with the Supreme Court (*Hoge Raad*). He complained of being forced to incriminate himself in that he was being compelled to provide evidence that would be used against him in proceedings to determine a "criminal charge".

36. The Advocate General (*advocaat-generaal*) to the Supreme Court submitted an extensively reasoned advisory opinion in which he discussed, *inter alia*, the case-law of the Court and of the Supreme Court itself. He recommended that the Supreme Court should not quash the judgment of the Court of Appeal and remit the case, but dismiss the applicant's appeal on points of law and direct that information extracted from the applicant under coercion should not be used for punitive purposes.

37. The Supreme Court gave judgment on 12 July 2013 (ECLI:NL:HR:2013:BZ3640). Its reasoning included the following:

> "3.7. In so far as it concerns evidentiary material the existence of which is dependent on the will of the taxpayer (hereafter 'will-dependent material'), the following applies. The principle is that the surrender of such material may be coerced for purposes of levying tax. If it cannot be excluded that the material will also be used in connection with a 'criminal charge' (compare [*J.B. v. Switzerland*, no. 31827/96, ECHR 2001-III]), the domestic authorities will have to ensure that the taxpayer will be able to exercise effectively his right not to cooperate in self-incrimination. Since regulation directed to this end is lacking in the Netherlands, it is for the courts to provide the necessary guarantees.
>
> 3.8. For this reason the (provisional measures) judge will have to add a qualification to that end to the order to be given. The State has brought its claim relying on

section 47 of the General State Taxes Act with a view to levying tax, while not excluding possible use of the information demanded for purposes of imposing administrative fines or prosecution. In order to comply with the requirements flowing from Article 6 of the Convention, as referred to in paragraph 3.7 above, the measure to be ordered, in so far as it concerns will-dependent material, will have to be limited in the sense that such an order may only be given subject to the restriction that the material supplied be only used for the purpose of levying tax.

Should the material that has come into the hands of the Tax Inspector, and thus the State, nonetheless be used also for purposes of imposing tax fines or prosecution, then the decision on what consequence should be attached to the violation of the restriction posed by the provisional measures judge will be for the court that decides on the tax fine or the prosecution to take.

3.9 The above reasoning means that in cases in which the surrender of material is demanded from a taxpayer under section 47 of the General State Taxes Act with a view to the correct levying of tax, and the taxpayer relies on the *nemo tenetur* principle, the following distinction has to be made.

(a) In civil summary injunction proceedings a taxpayer may be ordered, on pain of having to make penalty payments, to supply all material that may be relevant to the correct levying of taxes, regardless of whether it concerns will-independent or will-dependent material, subject however to the restriction that material of the latter type may only be used for the purpose of levying tax.

(b) Should the taxpayer not obey this order, he will forfeit the corresponding penalty payments. If the parties differ as to whether the taxpayer has obeyed the order, then in any ensuing execution proceedings the State will have the obligation so to state (*stelplicht*) and the corresponding burden of proof (*bewijslast*). This means that if the claim is contested, the State will have to prove – that is, make out a plausible case – that the taxpayer was in fact in a position to supply the material demanded from him but not surrendered.

(c) Will-dependent material supplied by the taxpayer in response to the order of the provisional measures judge may not be used for the purpose of imposing tax fines on, or prosecuting, the taxpayer. In the event of that happening, it will be for the tax court or criminal court to decide what consequence to attach to such use."

The operative provisions were as follows:

"The Supreme Court:

Annuls the judgment given on 31 January 2012 by the Court of Appeal of 's-Hertogenbosch, as well as the judgment given by the provisional measures judge on 5 April 2011, but only in so far as the orders given in the latter judgment ... are given without restriction and in so far as [the applicant] is ordered to pay the costs of the proceedings in the first-instance proceedings and the appeal proceedings concerning the principal claim [*principaal appel*]; and, judging anew to that extent,

Determines that, in so far as those orders relate to material the existence of which is dependent on the will of [the applicant], this material shall be supplied subject to the restriction that it shall only be used for the levying of taxes;

Determines that the time-limit of '28 days from the date of notification of the judgment [of the provisional measures judge] shall be replaced by '28 days from the date of notification of the judgment pronounced by the Supreme Court on 12 July 2013';

> Orders the State to repay to [the applicant] all that he has paid to the State in compliance with the judgment of the provisional measures judge, plus statutory interest until the day of complete repayment;
>
> Orders each of the parties to bear its own costs incurred in the proceedings at first instance, the appeal proceedings concerning the principal claim and the appeal on points of law."

5. Subsequent developments

38. The judgment of the Supreme Court was served on the applicant on 29 July 2013, together with a letter from the lawyer acting for the State requiring him to submit to the Tax and Customs Administration the information specified in the judgment of the provisional measures judge.

39. On 26 August 2013 the applicant replied, through his representative, that he did not have further information than he had already given. At most, he could try approaching his Swiss administrator a third time, but in view of the replies he had already received (see paragraphs 19 and 31 above) there would be little point in doing so.

40. On 14 October 2013 the lawyer acting for the State wrote to the applicant taking note of his failure to submit the information demanded and informing him of the intention to enforce the penalty payments in an amount of EUR 2,500 per day from 28 August 2013.

41. On 23 October 2013 an enforcement notice was served on the applicant for EUR 140,000 in respect of penalty payments imposed per that date.

42. The applicant has maintained his position that he can neither submit nor retrieve any further information in order to comply with the orders given him.

6. Parallel proceedings

(a) The information decision

43. The applicant states that on 23 August 2011 the Tax Inspector issued an information decision (*informatiebeschikking*) pursuant to section 52a of the General State Taxes Act, as in force by then (see below). The applicant lodged an objection; this was dismissed on 18 November 2011.

44. The applicant states that he lodged an appeal with the Regional Court, which was dismissed on 2 January 2013. An appeal on points of law is still pending before the Supreme Court.

(b) Proceedings with regard to other fiscal years

45. The applicant states that information orders have been issued for other fiscal years, and that the objection proceedings which he has brought against these have been adjourned.

B. Relevant domestic law

1. The Constitution for the Kingdom of the Netherlands

46. The provisions of the Constitution for the Kingdom of the Netherlands (*Grondwet voor het Koninkrijk der Nederlanden*) relevant to the case are the following:

Article 93

"Provisions of treaties and of resolutions of international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published."

Article 94

"Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with the provisions of treaties that are binding on all persons or of resolutions by international institutions."

2. The General State Taxes Act

47. Until 1 July 2009, section 67j of the General State Taxes Act provided as follows:

Section 67j

"If the Tax Inspector has committed an act in relation to the taxpayer ... to which the latter can reasonably attach the corollary that a fine will be imposed on him for particular conduct, then... the taxpayer ... shall no longer be obliged to make any statement in relation to that conduct in so far as it concerns the imposition of the fine."

48. Until 1 July 2011, other provisions of the General State Taxes Act relevant to the case were the following:

Section 25

"...

3. If the objection is directed against a tax demand [or] a tax adjustment with respect to which:

a. the required return has not been submitted; or

b. the requirements pursuant to [*inter alia*, sections 47 and 49] have not been fully complied with,

then the tax demand or tax adjustment shall be maintained in the objection proceedings, unless it is apparent that, and to what extent, the tax demand or tax adjustment is incorrect.

The preceding sentence does not apply in so far as the objection is directed against a punitive fine. ..."

Section 47

"1. Everyone is obliged to make available to the Tax Inspector, when so requested:

a. the data and information that can be of relevance for the levying of taxes in their regard;

b. the books, documents and other information-bearing media, or their content – as the Tax Inspector sees fit – the consultation of which may be of relevance for the determination of facts that may influence the levying of taxes in their regard.

2. If tax law designates matters pertaining to a third party as matters pertaining to the presumed taxpayer (*degene die vermoedelijk belastingplichtig is*), then in so far as it concerns these matters, the same obligations apply to the third party. ..."

Section 49

"1. The data and information shall be given clearly, definitely and without any reservation, orally, in writing or in some other way – as the Tax Inspector sees fit – and within a time-limit to be set by the Tax Inspector. ..."

Section 67g

"1. The inspector shall impose the fine in a decision against which an objection may be lodged.

2. ... [T]he Tax Inspector shall inform the taxpayer ... of the grounds of the imposition of the fine no later than in the decision referred to in the first paragraph. ..."

49. On 1 July 2011 amendments to the General State Taxes Act entered into force which, among other things, changed section 25(3) and added a new section 52a. As relevant to the case before the Court, the amended provisions read as follows:

Section 25

"...

3. If the objection is directed against a tax demand [or] a tax adjustment with respect to which the required return has not been submitted, or if it concerns an information decision (*informatiebeschikking*) within the meaning of section 52a(1), then the tax demand or information decision shall be maintained in the objection proceedings, unless it is apparent that, and to what extent, the tax demand or tax adjustment is incorrect. The preceding sentence does not apply in so far as the objection is directed against a punitive fine. ..."

Section 52a

"1. If, in relation to a tax demand, supplementary tax demand or tax adjustment to be issued or a decision to be taken, the obligations flowing from [*inter alia*, sections 47 and 49] are not or not entirely complied with, ... the Tax Inspector can so establish by means of a decision against which an objection can be lodged (*voor bezwaar vatbare beschikking*) ([a so-called] information decision). In the information decision, the Tax Inspector shall draw attention to section 25(3).

2. The time-limit for issuing a tax demand, supplementary tax demand or tax adjustment to be issued or for taking a decision shall be extended by the period

between the notification of the information decision taken in relation to that [tax demand, supplementary tax demand or tax adjustment] or decision in which it is established that the taxpayer has not or not entirely complied with his obligations and the moment at which this information decision becomes final or is annulled.

3. If the Tax Inspector issues a tax demand, supplementary tax demand or tax adjustment or takes a decision before the information decision taken in relation to that [tax demand, supplementary tax demand or tax adjustment] or decision has become final, the information decision shall lapse.

4. This section is without prejudice to the possibility for the Tax Inspector to bring proceedings before the civil courts with the aim to obtain an order for compliance with the obligations flowing from this Act on pain of forfeiture of penalty payments."

C. Relevant European Union law

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

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 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."

Article 7
Provisions relating to secrecy

"1. All information made known to a Member State under this Directive shall be kept secret in that State in the same manner as information received under its domestic legislation.

In any case, such information:

- may be made available only to the persons directly involved in the assessment of the tax or in the administrative control of this assessment,

- may in addition be made known only in connection with judicial proceedings or administrative proceedings involving sanctions undertaken with a view to, or relating to, the making or reviewing the tax assessment and only to persons who are directly involved in such proceedings; such information may, however, be disclosed during public hearings or in judgements if the competent authority of the Member State supplying the information raises no objection,

- shall in no circumstances be used other than for taxation purposes or in connection with judicial proceedings or administrative proceedings involving sanctions undertaken with a view to, or in relation to, the making or reviewing the tax assessment.

2. Paragraph 1 shall not oblige a Member State whose legislation or administrative practice lays down, for domestic purposes, narrower limits than those contained in the provisions of that paragraph, to provide information if the State concerned does not undertake to respect those narrower limits.

3. Notwithstanding paragraph 1, the competent authorities of the Member State providing the information may permit it to be used for other purposes in the requesting State, if, under the legislation of the informing State, the information could, in similar circumstances, be used in the informing State for similar purposes.

4. Where a competent authority of a Member State considers that information which it has received from the competent authority of another Member State is likely to be useful to the competent authority of a third Member State, it may transmit it to the latter competent authority with the agreement of the competent authority which supplied the information."

COMPLAINTS

50. The applicant complained under Article 6 of the Convention that he had been forced in civil summary injunction proceedings to lend his active cooperation to the collection of evidence for use against him in tax proceedings in which substantial fines had already been imposed on him.

51. He complained in the alternative that Netherlands law has no statutory safeguards in place to prevent such use.

THE LAW

52. The applicant invoked Article 6 of the Convention, which in its relevant part provides as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. The applicant's main complaint

53. The applicant alleged that the order to surrender information to the tax authorities on pain of penalty payments although the tax authorities had already imposed substantial fines on him constituted a violation of the *nemo tenetur* principle enshrined in Article 6.

54. As the Court has frequently held, while the privilege against self-incrimination (*nemo tenetur se ipsum accusare*, also *nemo tenetur se ipsum*

prodere) is not specifically mentioned in Article 6 of the Convention, there can be no doubt that it is a generally recognised international standard which lies at the heart of the notion of a fair criminal procedure under that Article. Its rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 § 2 of the Convention (see, as a recent authority, *H. and J. v. the* Netherlands (dec.), nos. 978/09 and 992/09, § 68, 13 November 2014, with further references).

55. The right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent (see *Allan v. the United Kingdom*, no. 48539/99, § 50, ECHR 2002-IX). As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing (*Saunders v. the United Kingdom*, 17 December 1996, § 69, *Reports of Judgments and Decisions* 1996-VI). Thus it was that the Court found Article 6 § 1 to have been violated by the bringing of a prosecution with a view to obtaining incriminating documents from the accused himself (*Funke v. France*, 25 February 1993, § 44, Series A no. 256-A); the use of incriminating evidence secured from the accused himself by inspectors using powers of compulsion (*Saunders*, cited above, § 75); and the sentencing of a criminal suspect to a term of imprisonment for refusing to account for his movements at a particular time (*Quinn v. Ireland*, no. 36887/97, §§ 56 and 60, 21 December 2000).

56. However, the right does not act as a prohibition on the use of compulsory powers to require taxpayers to provide information about their financial affairs. Indeed, the obligation to make disclosure of income and capital for the purposes of the calculation and assessment of tax is a common feature of the tax systems of member states and it would be difficult to envisage them functioning effectively without it (see *Allen v. the United Kingdom* (dec.), no. 76574/01, 10 September 2002, and *King v. the United Kingdom* (dec.), no. 13881/02, 8 April 2003).

57. The Court now turns to the facts of the case.

58. In December 2010 the Tax Inspector issued a tax adjustment with a view to interrupting the statutory time-limit for so doing, which was about

to expire (see paragraphs 23 and 24 above). The tax adjustment was based on the Tax Inspector's estimates of the applicant's assets and income. It included back taxes, interest and a fine that may indeed be considered substantial as the applicant argues. However, the applicant lodged an objection against it and no final decision has yet been taken in the matter (see paragraph 26 above), nor in respect of other fiscal years (see paragraph 45 above).

59. In parallel with the administrative proceedings brought by the applicant concerning the tax adjustment, the Tax and Customs Administration brought summary injunction proceedings before the civil courts with a view to obtaining from the applicant accurate information on which to base the tax adjustment. These led to an order for the applicant to disclose the information in issue failing which penalties would be imposed up to a maximum of EUR 500,000, which order survived the applicant's appeals to the Court of Appeal and the Supreme Court.

60. Although endorsing the order, the Supreme Court qualified it by adding the restriction that in so far as the information to be provided by the applicant concerned material the existence of which was dependent on his will, it should be supplied subject to the restriction that it should only be used for the levying of taxes, not for the purpose of imposing tax fines or bringing a criminal prosecution. In so doing the Supreme Court had regard to the Court's case-law, in particular *J.B. v. Switzerland*, no. 31827/96, ECHR 2001-III (see paragraph 37 above).

61. In view of the case-law set out above, in particular the *Allen* and *King* decisions, the Court accepts that the Tax and Customs Administration was entitled to compel the applicant to give information that could not be obtained from any other source than the applicant himself for the purpose of levying taxes and interest in accordance with the applicable tax legislation.

62. It further accepts that the Supreme Court acted pre-emptively to prevent the misuse of this information for the purpose of determining a "criminal charge" against the applicant. In any case, there has as yet been no final determination of any "criminal charge" against the applicant, whether by way of tax fines or criminal prosecution; moreover, the Court sees no reason to find already at this stage that the requirements of Article 6 will not be met in any future proceedings to which that provision may apply.

63. In the circumstances, therefore, the situation impugned in, among other cases, *J.B. v. Switzerland*, cited above; *Shannon v. the United Kingdom*, no. 6563/03, 4 October 2005; and *Chambaz v. Switzerland*, no. 11663/04, 5 April 2012, does not obtain.

64. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. The applicant's alternative complaint

65. The applicant complained in the alternative that there was no statutory protection against the use of information extracted from a taxpayer through the use of coercive powers in the determination of a "criminal charge".

66. The Court observes that the Supreme Court noted this lacuna and in direct application of Article 6 of the Convention gave a ruling designed to take the place of a statutory safeguard (paragraph 3.7 of its judgment; see paragraph 37 above). Absent any final decision reflecting the use of information coerced from the applicant to ground the determination of a "criminal charge" against the applicant, and given the place occupied by the Convention in domestic law (see Articles 93 and 94 of the Constitution of the Kingdom of the Netherlands, paragraph 46 above), the Court cannot find on the facts of the case before it that the applicant's Convention rights are not adequately protected.

67. It follows that this complaint too is 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