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RE: The obligation to report offshore accounts and the right to a fair trial.

1- In France, several provisions of the General Tax Code *(« Code Général des Impôts », or « GTC »)* and the Tax Procedures Book *(« Livre des Procédures fiscales » or « TPB »)* regulate the owning of offshore accounts, by measures such as the information of the Administration and the authorization of automatical taxation *(« taxation d'office »)*.

First, the taxpayer who holds such a bank account is required to declare and identify it in his statement of income *(GTC, Art. 1649 A)*.

He must answer to an information and justification request of the Administration on the assets that are in his foreign account, within sixty days, then - after notice in case of inadequate response - within thirty days *(TPB art. L. 23 C)*.

In the second place, a taxpayer who does not answer to the Administration or whose reply is deemed insufficient shall be automatically taxed at the rate of 60% on the highest value of the assets of the ten years preceding the submission of the application of information and justifications *(TPB, art. L. 71 and GTC, art. 755)*.

Does this system instituted by the French legislature meet the requirements of Article 6 of the European Convention on Human Rights (hereinafter "the Convention"), which guarantees the right to a fair trial?

The European Court of Human Rights (ECHR), which is of course the supreme interpreter of the Convention, has not yet had an opportunity to comment on this point.

Several explanations are possible: a request raising the matter has not yet been submitted to the ECHR, or it is being examined before a Chamber pending its communication to the French Government, or it has been the subject of a decision of inadmissibility issued by a single judge, a decision which is therefore not included in the HUDOC database.

In the absence of "direct" case-law by the Court, it is only possible to make assumptions based on the procedural principles established by the ECHR over the years in the matter of fair trial.

The first of these concerns the applicability of Article 6 of the Convention to disputes which arise or may arise under the tax provisions in question.

1. The applicability of Article 6 of the Convention

2 - The civil aspect of Article 6 is not involved because the ECHR declared that *« the tax disputes fall outside the civil rights and obligations field, despite the pecuniary effects which they necessarily have about the situation of taxpayers »*[1].

This applies both to the establishment of taxation and to the tax surcharges.

It is quite different from the criminal side, as shown in the decision of the Grand Chamber *Jussila vs. Finland* of November 23th 2006[2].

The ECHR does not merely recapitulate and clarify its jurisprudence on tax sanctions.

It deems it necessary to declare the following (§ 36):

"(...) Furthermore, the Court is not persuaded that the nature of tax-surcharge proceedings is such that they fall, or should fall, outside the protection of Article 6. (...) While there is no doubt as to the importance of tax to the effective functioning of the State, the Court is not convinced that removing procedural safeguards in the imposition of punitive penalties in that sphere is necessary to maintain the efficacy of the fiscal system or indeed can be regarded as consonant with the spirit and purpose of the Convention ».

In the light of this statement, it is necessary to recall the criteria which emerge from the case-law of the ECHR and then to compare them with the legislation in question.

A. The criteria laid down by the ECHR

3 - According to the established case law of the ECHR, the applicability of Article 6 under its criminal aspect is assessed on the basis of three criteria, often called the "Engel criteria', named after the case of *Engel and a. vs. Netherlands*[3].

The first criterion is the one of the characterisation under internal law, of the text defining the offense charged.

The second criterion, which is the most important, is the one of the nature of the offense. Sanctions must be based on general standards, applicable to all citizens as taxpayers, and which do not tend to pay compensation for damage but serve a purpose both preventive and repressive.

The third criterion is the degree of severity of the penalty that may suffer the person concerned. It has virtually been abandoned, at least in tax matters. The ECHR now estimates that the lightness of a sanction - for example, a tax surcharge of 10% - has not the effect of exclude it from the application of Article 6.

Moreover, the second and third criteria are alternative and not necessarily cumulative, which does not prevent the adoption of a cumulative approach if the separate analysis of each criterion does not allow to reach a clear conclusion as to the existence of a criminal charge[4].

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[1] *ECHR, Grand Chamber, July 12th 2001, No. 44759/98, Ferrazzini vs. Italy.*
[2] *ECHR, Grand Chamber, November 23th 2006, No. 73053/01, Jussila vs. Finland.*
[3] *ECHR, Grand Chamber, June 8th 1976, n° 5100/71, Engel and a. vs. Netherlands.*
[4] *ECHR, October 9th 2003, Ezeh and Connors vs. United Kingdom, § 86.*

These criteria apply ordinarily to a single procedure.

However, several instances may be conducted in parallel and in a coordinated manner in order to constitute a single procedural set.

That is why the ECHR laid down the following principle in the decision *Chambaz vs. Switzerland* April 5th 2002 (§ 43):

"The Court may (...) be brought in certain circumstances, to examine broadly, from the standpoint of Article 6 of the Convention, a set of procedures if they are sufficiently interconnected for reasons either concerning the facts on which they relate to, or for the manner in which they are carried out by the national authorities. Article 6 of the Convention is thus applicable when one of the procedures at issue concerns a criminal charge and the others are sufficiently related to it".

B. The application of these criteria to the tax legislation in question

4 - It is a question of whether the taxpayer taxed automatically to any tax for free transfer of assets *("droits de mutation à titre gratuit")* is the subject of a "criminal charge" within the meaning of Article 6 § I.

Under French law, the tax for free transfer of assets is considered as a tax and not has a penalty.

However, those provided for in Articles L. 71 of the TPB and 755 of the GTC have particular features to a sanction.

Indeed, the rate and the base of the rights in question are the highest.

The procedure of automatic taxation stems from a presumption of donation.

The rights are to apply only to the taxpayer that refused to provide information on the origin and manner of acquisition of funds to an offshore account, not on a French account.

There is therefore very similar to the tax surcharges under Article 1729 of the GTC, which were considered by the ECHR as falling within the scope of application of Article 6 § 1[5].

The absence or inadequate reply to the requests of the Tax Administration definitely entails the automatic taxation of the taxpayer, under provisions which do not fall within criminal law, but falls under tax law, as this tax is provided by Articles L. 71 of the TPB and 755 of the GTC. However, this circumstance is not decisive.

Then the relevant transfer duties are based on general legal provisions applicable to all taxpayers.

They do not tend mainly to pay compensation of a prejudice, but they tend essentially to punish taxpayers and to prevent the repetition of the offending behavior by deter them not to declare their account abroad, but also to punish those who refuse to cooperate with the Administration by providing sufficiently information on foreign assets.

Moreover, the above provisions do not apply to taxpayers who reported their account abroad at least once in the last ten years.

Lastly, transfer duties have a considerable scale: first, they are calculated on the highest value of assets appearing on the foreign account over the last ten years preceding the submission of the application of

[5] ECHR, February 24th 1994, n° 12547/86, *Bendenoun vs. France.*

information and justifications, while rights are basically sitting on the value at the day of the operative event.

They are also calculated at the highest rate mentioned in Table III of Article 777 of the General Tax Code, whereas the rate is in principle determined in relation to the degree of kinship.

This leads to the question whether the procedure for the automatic taxation of tax for free transfer of assets at the highest rate complies with the requirements of Article 6.

2. Compliance with Article 6 of the Convention

5. The device provided by Articles L. 23 C and L. 71 of the TPB 755 and the GTC and its implementation by the tax authorities raise the field of Article 6 of the Convention three major and interrelated issues: the burden of proof, the right not to contribute to its own incrimination, and the respect for a contradictory debate and equality of arms.

A. The burden of proof

6 - According to the established case law of the ECHR, "the burden of proof is on the prosecution and any doubt should benefit the accused. Moreover, it is incumbent on the prosecution to inform the accused the charges against him - in order to provide him an opportunity to prepare and present his defense accordingly - and to provide sufficient evidence".

7 - Articles L. 23 C and L. 71 of the TPB and 755 of the GTC are based on the idea that the Administration does not have sufficient evidence about the origin and the modalities of acquisition of the funds to punish taxpayers suspected of hold an offshore account and must therefore oblige the person concerned to remedy the deficiency by providing incriminating evidence.

In so doing, they introduce a reversal of the burden of proof and run up against the principle of the presumption of innocence guaranteed by Article 6 § 2 of the Convention.

B. The right not to contribute to incriminating himself

8 - The question of sanctions for refusal to produce the documents requested by the Administration was raised for the first time to the ECHR in the case *Funke vs. France*[6].

Customs had provoked the criminal conviction of a German resident in France to obtain bank accounts abroad which they supposed to exist without being certain.

As they were unable or unwilling to obtain them by any other means, they attempted to compel him to prove himself that he had committed offenses.

The ECHR found that the applicant did not have a fair trial and therefore concluded that there had been a violation of Article 6 § 1.

In so doing, it had inferred from that provision a right not to be obliged to provide evidence under duress.

This principle was confirmed by the ECHR in two judgments delivered by the Grand Chamber in 1996, which established its case-law on the matter. This is the *John Murray vs. UK*[7] and *Saunders vs UK*[8] decisions.

[6] ECHR, February 25th 1993, n° 10828/84, *Funke vs. France*.

"68. The Court recalls that, although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their 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 Article6 (see the above-mentioned JohnMurray judgment and the above-mentioned Funke judgment). The right not to incriminate oneself, in particular, 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.

69. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. 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."

Since then, this approach has consistently been followed by the ECHR, as evidenced by the Grand Chamber's decision *O'Halloran and Francis vs. UK* of June 29th 2007, which summarizes it[9].

9 - Articles L. 23 C and L 71 of the TPB and Article 755 of the GTC aim to make the taxpayer admit by requiring him to indicate the origin and manner of acquisition of the alleged assets.

However, the application of the 60% tax for free transfer of assets severely penalizes the refusal of the taxpayer to recognize that he is the holder of the assets in question.

Such a system based on duress is a clear example of "improper compulsion by the authorities," in the words of *Saunclers stop,* and therefore ignores one of the fundamental requirements of Article 6.

Moreover, this system opens the way to a "classic" criminal procedure for tax evasion, the author of which incurs penalties of € 2,000,000 in fines and seven years of imprisonment under Article 1741 of the GCT.

Taking account of Article 40 of the French Penal Procedure Code, the taxpayer is virtually certain that the justifications provided in a purely tax procedure will be used during the investigation for tax evasion and may therefore serve as a basis for his criminal conviction by the judicial courts.

In total, the taxpayer is subject to criminal penalties for refusing to cooperate with the Administration because he has not provided certain information, which, moreover will also be used in criminal proceedings for fraud and which may have already started against him for the same acts.

C. Respect for adversarial and equality of arms

10 - The ECHR noted in its Grand Chamber judgment *Rowe and Davis vs. United Kingdom* of February 16th 2000[10] its constant jurisprudence in matter of the respect of a contradictory debate and of equality of arms.

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[7] ECHR, Grand Chamber, February 8th, n° 18731/91, *John Murray vs. UK.*
[8] ECHR, Grand Chamber, December 17th 1996, n° 19187/91, *Saunders vs. UK.*

[9] ECHR, Grand Chamber, June 29th 2009, n° 15809/02, *O'Hallaoran and Francis vs. UK.*

« 60. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. In addition Article 6 § 1 requires, as indeed does English law, that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused.

61. However, as the applicants recognised, the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities. »

It - It is common practice that the taxpayer does not have access to all the documents that concerns him during the period of thirty days allotted to him by Article L. 23 C of the TPB to produce justifications.

The Administration does not recognize itself any obligation to communicate those documents when no rectification procedure is initiated.

The absence or inadequacy of the the taxpayer is therefore placed at a distinct disadvantage vis-à-vis the Administration.

In addition, the Administration often refuses to disclose to a taxpayer the entire file that it holds, even after the proposed rectification.

It can wait until the last moment before the collection, or the very end of the control procedure *(TPB, Art. L.* 76 *B).* Here again the taxpayer is disadvantaged.

It is difficult to see how such methods serve to safeguard the fundamental rights of others or to safeguard an important public interest. In the final analysis, they appear to be contrary to the requirements of Article 6, §1 in the matter of adversarial proceedings and equality of arms, that is to say, of fairness.

Conclusion

12 - Article 6 of the Convention may apply fully to any tax for free transfer of assets at the highest rate under Article 755 of the GTC, because the taxpayer taxed automatically under the Article L. 71 of the TPB is the subject of a "criminal charge" in the autonomous sense, i.e. European, of this term.

Articles L. 23 and L. 71 of the TPB and Article 755 of the GTC do not satisfy the requirements of Article 6 as regards the burden of proof and the right not to contribute to its own criminal offense.

In effect, they reverse the burden of proof, in defiance of the presumption of innocence, and allow the authorities to exert undue coercion on the taxpayer by forcing him to produce incriminating evidence.

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[10] ECHR, February 16th 2000, n° 28901/95, *Rowe and David vs. UK*.

Moreover, where the taxpayer does not have access to all the documents of his file before the automatic taxation and even after the proposed rectification, the practice of tax services in the application of Articles L. 23 C and L. 71 of the TPB and Article 755 of the GTC disregards the respect for the a contradictory debate and equality of arms as required by Article 6.

The combination of these articles does not appear to be compatible with Article 6 as it is sovereignly interpreted by the ECHR.

Consequently, the regularity of tax procedures and criminal proceedings based on the contested provisions could be challenged before the French authorities and courts under the Convention, which is directly applicable in the domestic legal order.

The irregularity of a tax procedure would not fail to have consequences for the criminal proceedings which would be the prolongation or the accompaniment.

This is particularly so with regard to the burden of proof and the right not to contribute to its own criminal offense.

In other words, the traditional autonomy of criminal proceedings in relation to the tax procedure would be faced with the constraints arising from Article 6.

Lastly, it cannot be ruled out that, in the future, the application of the legislation in question will give rise to individual applications to the ECHR in the future after the exhaustion of the remedies available under French law.

In the light of the ECHR case law, there are strong arguments for the ECHR to find a violation of Article 6.

If this were the case, France would be required to amend its legislation to bring it into line with its international commitments and avoid new convictions.

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