

Art 17 ECFR on the right to property and VAT

Edoardo Traversa/Stefania Lotito Fedele

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1. Introduction: Human rights and taxation in the European Union and ECHR legal order

Although the EU harmonization process in the area of Value-added tax started several decades ago, issues relating to its compatibility with fundamental rights have only arisen relatively recently.¹ As the case law of the European Court of Human Rights shows, human rights may have an impact on the application of VAT domestic rules in many areas, such as administrative penalties and sanctions, criminal proceedings, procurement of evidence, procedural guarantees, VAT fraud and abuse, VAT exemptions, VAT deductions or VAT increases. Despite the fact that the terms “tax”, “taxation” or any other concept related to it do not appear in any provision of the European Convention on Human Rights, except in Art. 1 of Protocol No.1², many ECHR judgments have been rendered on various issues relating to the application of tax laws: the principle of legality of taxation and legitimate purpose³, the principle of clarity of standards⁴, the principle of unreasonable non-retroactivity of substantive tax rules⁵, the principle of proportionality of the tax⁶, the principle of non-discrimination⁷, the right to silence and non-self-incrimination⁸; and the *ne bis in idem* principle under Art. 4 of Protocol No. 7.⁹ Other cases concern the procedural guarantees relating to due process of law and fair trial (reasonable duration, impartiality of the judging body, guarantee regarding the evaluation of the evidence, etc.).

In this context, this chapter will address the question whether VAT taxable persons can rely on the right to property (Art. 17 of the EU Charter in conjunction with Art. 52 of the Charter) in order to safeguard their right to input VAT deduction, particularly in situations where tax authorities suspect a fraud or an abuse. The analysis will concentrate on two cases: the *Bulves case* (ECHR) and the *Italmoda* case (CJEU). Finally, we will comment on the legal nature of the right to deduct from a fundamental rights perspective.

1 Lejeune/Vermeire, *The CJEU as Guardian of the Charter of Fundamental Rights of the European Union*, in: M. Lang et al. (eds.), *CJEU – Recent Developments in Value Added Tax 2015*, p. 335.

2 Only Art. 1 of the First Additional Protocol, after its first paragraph which states that “every natural or legal person has the right to respect for his goods”, recognizes through the second paragraph the “right of the States to put into force the laws which they deem necessary to regulate the use of the goods in a manner which is in the general interest or to ensure the payment of taxes or other contributions or fines”.

See the cases: echr, 12 September 2007, *Burden and Burden v. United Kingdom*, Application No. 13378/05; echr, 6 July 2003, *Buffalo s.r.l. v. Italy*, Application No. 38746/97; echr, 16 April 2002, *Dangeville v. France*, Application no. 36677/97, etc.

3 ECHR, 23 February 1995, *Gasus Dosier und Fordertechnik GmbH vs. Netherlands*, Application No. 15375/89.

4 ECHR, 14 October 2010, *ShchoKin v. Ukraine*, Applications nos. 23759/03 and 37943/06.

5 ECHR, 16 March 2010, *Belmonte v. Italy*, Application No. 72638/01.

6 ECHR, 4 November 2013, *Imbert de Tremiolles v. France*, No.K.M. v Hungary, Application no. 49570/11.

7 ECHR, 1st July 2014, *S.A.S. v. France*, Application No. 43835/11.

8 ECHR, 5 April 2012, *Chambaz v. Switzerland*, Application No. 11663/04.

9 ECHR, 4 March 2014, *Grande Stevens and Others v. Italy*.

2. The right to property as a fundamental taxpayer's right

By its coercive nature, a tax has a potentially restrictive impact on the enjoyment of property rights. In order to prevent any *a priori* conflict between taxation and human rights, Art. 1(1) of the Protocol to the European Convention on Human Rights contains a specific clause in the second paragraph stating that the right to property does not prevent Member States from applying laws aimed at “ensuring the payment of taxes or other contributions or fines”. However, the broad wording of this safeguard clause does not provide for absolute protection of public authorities in the exercise of their taxing powers but has to be read in light of the principle of proportionality (functional protection).

The European Court of Human Rights has clarified, in its ruling on a *Hungarian case* concerning the application of a 98% tax on severance payments in the public sector above a certain threshold,¹⁰ that the exercise of the power to tax in accordance with human rights goes beyond the mere respect for the principle of legality but has also a substantive nature.

This safeguard clause does not exist in the EU Charter of Fundamental Rights (or in the Inter-American Convention on Human Rights). However, it is applied in the legal system of the European Union by virtue of the correspondence between Art. 1, I ECHR Protocol and Art. 17 of the EU Charter. In fact, the first paragraph of both articles, in addition to affirming the protection of the right to property within the Charter of Human Rights, recognizes the limitations for reasons of public utility in the cases and in the manner provided by law.

In the absence of a ruling by the Court of Justice of the European Union on the interpretation of Art. 17 of the EU Treaty,¹¹ it remains to be seen whether it entails the principle of non-confiscation capable of establishing a minimum level of protection of property rights against excessive taxation within the legal system of the European Union.

Such an evolution would also be needed in order to effectively address the well-known issue of international double taxation between Member States. In *Kerckhaert-Morres* and other subsequent cases,¹² the Court of Justice found that double taxation of cross-border dividends was compatible with the fundamental freedoms, since it was a legitimate consequence of the parallel exercise of taxing powers by two Member States.¹³ Another example is the famous *Block case*, in which

10 ECHR, 14 May 2013, *N.K.M. v. Hungary* (Application No. 66529/11); see also ECHR, 4 November 2013, *Gáll v. Hungary* (Application No. 49570/11).

11 See however CJEU, 5 July 2012, C-558/10, *Bourges-Manoury and Heitz*, EU:C:2012:418, which concerns Art. 13, Protocol on the Privileges and Immunities of the European Communities.

12 CJEU, 14 November 2006, C-514/04, *Kerckhaert-Morre*, EU:C:2006:713.

13 In this context, it would seem useful to recall another known judgment on the subject: CJEU, 20 November 2001, Joined Cases C-414/99 to C-416/99, *Zino Davidoff and Levi Strauss*, EU:C:2001:617.

the simultaneous application of the personal link to the taxation of the heir (in Spain) and the *de cuius* (in Germany), in the absence of a Double Taxation Convention applicable to the subject of inheritance and gift tax, in fact deprived the heir of the right to receive the inherited property.

Consequently, while the European Court of Human Rights recognizes the need to protect the right to property against arbitrary and confiscatory forms of taxation, the European Court of Justice considers that the disparities between the European system and that of a Member State cannot legitimately cause the confiscatory effects of the tax levy. EU law in its current state clearly lacks, despite some references in its caselaw,¹⁴ a unified theory of taxpayer's protection according to ability to pay.¹⁵

3. The application of the right to property to consumption taxes like VAT

An increasing number of cases are coming before the Court of Justice of the European Union as regards the compatibility of VAT rules with the EU Charter.¹⁶ Just to mention few clear (and particularly significant) examples of the direct relevance of the Charter in specific VAT cases, there are the *Akerberg Fransson* case (C-617/10), which stated that the national rules on tax penalties and criminal proceedings fall within the scope of Art. 50 of the Charter and must comply with the principle “not to be unished twice for the same offence” and the case *WebMind-Licenses*, which established that the use of evidence obtained by the tax authorities without the taxable person's knowledge in the context of ongoing parallel criminal proceedings must not breach Art. 7 of the EU Charter regarding the right to private life.¹⁷ However, no CJEU case thus far has dealt with the application of the right to property in tax matters.

Looking at the ECHR case law, the first question which arises regarding the application of the right to property to indirect tax measures is whether and to what extent there are “possessions” which are to be protected. This question is harder to answer than one might anticipate, even though is often claimed that “every tax is

14 CJEU, 12 June 2018, C-650/16, *Bevola and Jens W. Trock v. Denmark*, ECLI:EU:C:2018:424.

15 On ability to pay and EU law, see F. Alfredo García-Prats, Subjective Ability to Pay: Schumacker and E. Traversa, Objective Ability to Pay: The Gerritse Case, in: W. Haslehner et al. (eds.), *Landmark Decisions of the ECJ in Direct Taxation*, Kluwer, 2015, p. 1 et seq. and p. 21 et seq. See also Vogel, *The justification for taxation: a forgotten question*, in *The American Journal of Jurisprudence*, 1988, p. 19 et seq.

16 The Charter of Fundamental Rights of the European Union became legally binding following its entry into force with the Lisbon Treaty on 1 December 2009, and it has the same legal value as the EU Treaties.

17 See K. Egholm Elgaard, *The impact of the Charter of Fundamental Rights of the European Union on VAT law*, *World Journal of VAT/GST Law*, 2016, p. 63 et seq.

an infringement of one's property rights", which implies that at some point property has been taken away from the taxpayers, amounting to at least a *prima facie* violation of property rights. It may appear relatively straightforward that the right to property could apply to property taxes as well as direct taxes like income taxes. Nevertheless, its application to consumption taxes may be more controversial, because in that case the economic burden of the tax may be shifted to a person other than the taxpayer and/or incorporated in the price of the goods or services.

While theoretical discussions could also arise concerning the moment the property was taken away by a taxation measure, the ECtHR has taken a very pragmatic approach. The Commission on Human Rights accepted relatively early, that every tax measure forms an interference with the right to property: "*The Commission is of the opinion that any legislation which introduces some sort of fiscal obligation will as such deprive the involved of a possession, namely the amount of money which must be paid*". According to the ECtHR, the taxpayer is protected irrespective of the method by which the tax is levied.¹⁸ According to the Court, the fact that tax was withheld might even provide a further indication that property was in fact acquired by a taxpayer: the very fact that tax was imposed on this income demonstrates that it was regarded as existing revenue by the state, it being inconceivable to impose tax on a non-acquired property or revenue".¹⁹ Given this very broad interpretation, it is not surprising that in the (tax) case law of the ECtHR, the existence of a possession is often assumed or not contested by the respondent state.²⁰ In accordance with this stance, the Court has also confirmed that the right to tax repayments and even the expectation to be able to deduct input VAT are "possessions" which fall within scope of the right to property.

4. Right to property and denial of the right to deduct granted in the ECHR: the Bulves case

The decision of the European Court of Human Rights (ECtHR) of 22 January 2009 in the case of *Bulves AD vs. Bulgaria*²¹ offers an interesting example of the interplay between VAT law and human rights. This case concerned the disallowance under Bulgarian domestic legislation of input VAT where the trader in question was apparently compliant and had no control over its supplier. The case dates from 2000 and so pre-dates Bulgaria's accession to the European Union. Nevertheless, the ECtHR quoted in its judgments the decisions of the European Court

18 ECHR, 4 November 2013, *N.K.M. v. Hungary* (Application No. 66529/11).

19 ECHR, 14 May 2013, *N.K.M. v. Hungary* (Application No. 66529/11).

20 There are, however, some exceptions to this, where the respondent government has contested the existence of possessions. See, e.g., ECtHR, 7 December 2000, *Drosopoulos v. Greece* (Application No. 40442/98); ECtHR, 22 January 2009, *Bulves v. Bulgaria* (Application No. 3991/03).

21 Application number 3991/03.

of Justice in *Optigen Ltd* (and the related cases²²) and *Axel Kittel* (and the related cases²³).

Briefly, the applicant company appealed to the ECtHR alleging a violation of Art. 1 of the First Protocol in that it had been denied the peaceful enjoyment of its possessions. The applicant company's case was based on the following contentions: the fact that it had complied fully with the VAT legislation, its absence of control over its supplier and the absence of any reason for it to believe the supplier had not paid over the VAT, and the fact that it should not be denied the deduction of the input VAT on the grounds of failure of the supplier to account properly.

The ECtHR first confirmed that the applicant company had at least a legitimate expectation of being able to deduct its input VAT and this amounted to a "possession" within the meaning of Art. 1 of the First Protocol. The denial of the deduction constituted an interference with the possession and the consequent question was whether this interference could be justified by the government. This required a "fair balance" to be struck between the demands of the general interest of the community and the protection of the company's fundamental rights as well as a reasonable relationship of proportionality between the means employed and the aims pursued. The ECtHR considered that the general interest of the community was in preserving the financial stability of the VAT system and curbing any fraudulent abuse. The Court noted the applicant company paid the VAT twice, once on payment of the original invoice (which was eventually paid over to the state) and once again on the tax assessment. There was, therefore, no negative effect on the state budget. There was also no indication of any involvement by the applicant company in any fraudulent abuse. Accordingly, the ECtHR concluded as follows:

Considering the timely and full discharge by the applicant company of its VAT reporting obligations, its inability to secure compliance by its supplier with its VAT reporting obligations and the fact that there was no fraud in relation to the VAT system of which the applicant company had knowledge, the Court finds that latter should not have been required to bear the full consequences of its supplier's failure to discharge its VAT reporting obligations in timely fashion, by being refused the right to deduct the input VAT and, as a result, being ordered to pay the VAT a second time, plus interest. The Court considers that this amounted to an excessive individual burden on the applicant company which upset the fair balance that must be maintained between the demands of the general interest of the community and the requirements of the protection of the property rights.

There had accordingly been a violation of Art. 1 of Protocol No. 1. The case is not only relevant because of references to ECJ case law. It is one of a very small number of cases where the ECtHR has been willing to strike down a provision of do-

22 CJEU, 12 January 2006, joined cases C-354/03, C-355/03 and C-484/03, *Optigen Ltd, Fulcrum Electronics Ltd and Bond House Systems Ltd v. Commissioners of Customs & Excise*, EU:C:2005:89.

23 CJEU, 6 July 2006, joined cases C-349/04 and C-404/04, *Axel Kittel vs. Belgian State and Belgian State v. Recolta Recycling SPRL*, EU:C:2005:397.

mestic tax law as infringing Art. 1 of the First Protocol and where it has refused to accept that the national measure was within the wide margin of appreciation enjoyed by states in tax matters.

5. Denial of the right to deduct in EU VAT law: Italmoda case

The *Italmoda* case is related to the denial of the right to deduct in VAT fraud situations.²⁴ It is an interesting case as the CJEU seems to importantly limit the autonomy of the Member States in the application of the VAT rules, but not necessarily in favour of the taxpayer.

The facts were the following. Italmoda was a Dutch company trading shoes.²⁵ In 1999 and 2000, it was also carrying out supplies of computer equipment. This equipment, that it acquired in the Netherlands and in Germany under a Netherlands VAT identification number, was traded to customers established in Italy. The goods acquired in Germany were supplied directly from Germany to Italy. Italmoda had respected all its VAT requirements regarding the goods acquired in the Netherlands. However, for the goods bought in Germany, it had not declared any intra-Community acquisition (either in the Netherlands or in Germany). Moreover, no intra-Community acquisitions were reported by the Italian customers in Italy.

The Italian authorities decided to collect the VAT due by the Italian clients of Italmoda and denied their right to deduct input VAT. On the other hand, the Dutch tax authorities considered that Italmoda “had knowingly participated in fraudulent activity designed to evade VAT in Italy”.²⁶ Therefore, they refused

the right to exemption in respect of the intra-Community supplies effected in that Member State, the right to deduct input tax and the right to a refund of the tax paid in respect of the goods originating in Germany, and consequently issued three additional assessments to Italmoda.²⁷

The Dutch Court of Appeal however decided that “*there was no justification for departing from the normal system of VAT collection and for refusing to apply the*

24 CJEU, 18 December 2014, joined cases C-131/13, C-163/13 and C-164/13, *Italmoda*, EU:C:2014:2455. The facts regarding the other companies concerned by the other joined cases (C-163/13 – *Turibu*/C-164/13 – *TMP*) will not be analysed, as the requests for a preliminary ruling in these cases have been declared inadmissible.

25 See CJEU, 18 December 2014, joined cases C-131/13, C-163/13 and C-164/13, *Italmoda*, EU:C:2014:2455, paras. 9–14.

26 CJEU, 18 December 2014, joined cases C-131/13, C-163/13 and C-164/13, *Italmoda*, EU:C:2014:2455, para. 11.

27 CJEU, 18 December 2014, joined cases C-131/13, C-163/13 and C-164/13, *Italmoda*, EU:C:2014:2455, para. 11.

exemption or the right to deduct VAT”.²⁸ The case was then brought in front of the Supreme Court of the Netherlands (the Hoge Raad der Nederlanden), which noted that during the period in question (1999–2000), “the application of the exemption or the right of deduction was not subject, under Netherlands law, to the condition that the taxable person must not have deliberately participated in VAT evasion or in a tax avoidance arrangement”.²⁹ This was however the reason invoked by the national authorities to deny the VAT rights concerned. The Dutch Supreme Court therefore decided to refer the matter to the CJEU.³⁰

The two questions that are of interest in relation to the present discussion can be summarized as follows:

- On the basis of the EU law, should the national authorities and courts refuse to apply certain VAT rights (in the present case, exemption of intra-Community supply, right to deduct VAT or VAT refund) when VAT evasion has been established and the taxable person concerned knew of or should have known that he was participating therein, even if the national law does not provide any rule to refuse the application of those VAT rights?
- If the answer is positive, should these VAT rights also be refused (i) if the VAT fraud occurred in a Member State other than the Member State in which the goods were dispatched and (ii) if the taxable person concerned has met all the formal conditions imposed by the Member State of dispatch to benefit from the VAT rights and has always provided to that Member State all the required information in respect of the goods, the dispatch and the persons acquiring the goods in the Member State of arrival of the goods?

Regarding the first question, the CJEU first recalled that the prevention and the fight against fraud and abuse is “*an objective recognised and encouraged*” by the VAT Directive, and that a taxable person cannot rely on the application of EU law for fraudulent or abusive purposes.³¹ The Court thus considered that these fundamental principles have always to be taken into account when a Member State is evaluating, in application of its procedural autonomy,³² the possibility of denying

28 CJEU, 18 December 2014, joined cases C-131/13, C-163/13 and C-164/13, *Italmoda*, EU:C:2014:2455, para. 13. The Gerechtshof te Amsterdam took account, in particular, of the fact that the tax evasion had taken place not in the Netherlands, but in Italy, and that *Italmoda* had, in the Netherlands, satisfied all the formal statutory conditions for the exemption to be applied.

29 CJEU, 18 December 2014, joined cases C-131/13, C-163/13 and C-164/13, *Italmoda*, EU:C:2014:2455, para. 14.

30 CJEU, 18 December 2014, joined cases C-131/13, C-163/13 and C-164/13, *Italmoda*, EU:C:2014:2455, para. 15.

31 CJEU, 18 December 2014, joined cases C-131/13, C-163/13 and C-164/13, *Italmoda*, EU:C:2014:2455, paras. 42–43.

32 The CJEU has indeed clearly stated in the *Italmoda* case that the denial of VAT rights “*is the responsibility, in general, of the national authorities and courts, irrespective of the VAT right affected by the fraud*”. See CJEU, 18 December 2014, joined cases C-131/13, C-163/13 and C-164/13, *Italmoda*, EU:C:2014:2455, para. 46.

the application of VAT rights guaranteed by the VAT Directive. In application of these principles, the CJEU decided that the national authorities and courts must refuse the application of VAT rights

when they are claimed fraudulently or abusively, irrespective of whether those rights are rights to a deduction, to an exemption or to a VAT refund in respect of intra-Community supplies.³³

The Court therefore not only recognizes that Member States in the exercise of their procedural autonomy may deny those rights granted by EU law, but goes one step further and states that EU law itself requires the Member States to do so.³⁴ The CJEU also recalled that this denial is not only applicable

where tax evasion has been carried out by the taxable person itself but also where a taxable person knew, or should have known, that, by the transaction concerned, it was participating in a transaction involving evasion of VAT carried out by the supplier or by another trader acting upstream or downstream in the supply chain.³⁵

The effective participation therefore does not prevail: in the presence of fraudulent elements (active or “conscious” participation), the benefit of VAT rights can be denied. This position was already supported by the CJEU’s previous case law.³⁶

What is even more interesting is that the Court considered that even if the Dutch national law did not contain any provision that made it possible to deny the right to deduct, EU law – and in particular the EU principle of prohibition of abuse and fraud³⁷ – required Member States to refuse the benefit of VAT rights.³⁸ The CJEU also indicated that with respect to these general principles, the denial of rights

does not amount to imposing an obligation on the individual [...] but is merely the consequence of the finding that the objective conditions required [by the VAT Directive] for obtaining the advantage sought [...] have, in fact, not been satisfied.³⁹

33 CJEU, 18 December 2014, joined cases C-131/13, C-163/13 and C-164/13, *Italmoda*, EU:C:2014:2455, para. 49.

34 CJEU, 13 February 2014, C-18/13, *Maks Pen*, EU:C:2014:69; CJEU, 6 February 2014, C-33/13, *Marcin Jagiełło*, EU:C:2014:184; CJEU, 16 May 2013, C-444/12, *Hardimpex Kft*, EU:C:2013:318.

35 CJEU, 18 December 2014, joined cases C-131/13, C-163/13 and C-164/13, *Italmoda*, EU:C:2014:2455, para. 50.

36 See also CJEU, 6 July 2006, joined cases C-439/04 and C-440/04, *Kittel and Recolta Recycling*, EU:C:2006:446, para. 55; CJEU, 6 December 2012, C-285/11, *Bonik*, EU:C:2012:774, para. 37; CJEU, 13 February 2014, C-18/13, *Maks Pen*, EU:C:2014:69, para. 26; CJEU, 7 December 2010, C-285/09, *R.*, EU:C:2010:742, para. 55; CJEU, 6 September 2012, C-273/11, *Mecsek-Gabona*, EU:C:2012:547, para. 54.

37 The importance of the fight and the prevention of tax fraud and abuse and the impossibility to benefit from EU provisions for fraudulent or abusive ends.

38 CJEU, 18 December 2014, joined cases C-131/13, C-163/13 and C-164/13, *Italmoda*, EU:C:2014:2455, paras. 51–56.

39 CJEU, 18 December 2014, joined cases C-131/13, C-163/13 and C-164/13, *Italmoda*, EU:C:2014:2455, para. 57.