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Blinded by dollar signs: fundamental rights seem to be less fundamental when public treasury is at stake

In this time of financial crises, newspapers anxiously declare that the world is full of (alleged) tax fraud, tax evasion and tax paradises. In order to increase the public treasury, boundaries are being crossed and fundamental rights for the taxpayer seem to have become a sham. Despite the strains of the judiciary to pinpoint the value of fundamental rights, the phenomenon does not seem to get any resistance what so ever. Are fundamental rights being degraded to mere pretext?

The right to not incriminate oneself is a fundamental right, as equality of arms is a fundamental principle. The latter should guarantee that the taxpayer and the tax authorities have the same means in a legal procedure. A recent judgment of the European Court of Human Rights (ECtHR), *Chambaz v Switzerland*,[1] and procedures relating to an anonymous informant of the tax authorities have led to some very interesting jurisprudence in the Netherlands. This jurisprudence shows that the tax authorities – and thus the government – do whatever it takes to collect the taxes of alleged 'tax frauds'. However, the authorities are not hesitant to breach the right to not incriminate oneself and the principle of equality of arms and find themselves on a slippery slope. This article addresses recent developments in the Netherlands concerning these two fundamental fair trial principles.

The right to not incriminate oneself

In the aforementioned procedures, the Dutch tax authorities reached an agreement with an anonymous informant. The arrangement includes payment of a sum of money to the informant in exchange for a list of names of alleged Dutch bank account holders of the Luxembourg branch of the Rabobank. The extent of the reward depends on the total amount of collected tax money as a result of the informant's information. The informant thus profits from putting as many names as possible on 'the list'. In response, the tax authorities have imposed additional tax assessments and high penalties based on the list of this mystic informant. The penalties qualify as a 'criminal charge' under Article 6 of the European Convention on Human Rights (ECHR). For this reason the persons in question have the right to a fair trial. Hence, they have the right to not incriminate themselves.

Despite the additional tax assessments and penalties imposed, the government wants more. Based on the obligation to give all the information needed for tax assessment purposes, as laid down in national law, the authorities asked the alleged bank account holders to provide information on the bank accounts. If the person in question was not willing to give this information he violated his legal duty to reveal all relevant information for tax assessment purposes, which gave the tax authorities a reason to start legal proceedings. The tax authorities asked the court to impose an incremental penalty payment if the respondent did not hand over the requested information. Both the regional court and the court of appeal granted the actions of the tax authorities. The grievances put forward before the Supreme Court are based on the case law of the ECtHR with regard to the right not to incriminate oneself, in particular the ruling of *Chambaz v Switzerland*.

The case of Mr Chambaz concerned tax proceedings in the Swiss courts, in which he was fined several hundred thousand euros for refusing to produce all the documents requested in relation to his business dealings with a company and banks. The Swiss courts held that the proceedings had not been criminal in nature, since their purpose had been to determine Mr Chambaz's tax obligations. Therefore he could not rely on

his right to not incriminate himself. The ECtHR observed that by fining Mr Chambaz for refusing to produce all the information requested, the authorities had put him under unlawful pressure to furnish documents that would have provided information on his income and assets for tax assessment purposes. By upholding the fines, while an investigation was ongoing into alleged tax evasion concerning matters linked to those in respect of which the applicant had exercised his right to remain silent and there was no guarantee that the documents would also be used for punitive means, the Swiss courts had obliged him to incriminate himself. The court found that there was a breach of Article 6 of the ECHR.

In the Netherlands the situation is hardly any different from that in Switzerland. The only difference is that instead of being fined, applicants are put under pressure to provide the requested information with an incremental penalty payment. The pressure, however, is – or at least feels – the same and creates the possibility for the persons involved to incriminate themselves.

Jurisprudence shows that the Dutch courts have taken notice of the *Chambaz* judgment; however, they are not willing to give way. The Advocate General (who advises the Supreme Court of the Netherlands) gave advice in a case concerning the tension between the right to not incriminate oneself and the obligation to reveal all the information relevant for tax assessment. The advice comes down to the following: as long as the information that has been given under pressure will not be used for any future penalty or other punitive means, the applicant has to provide all information relevant to determine tax obligations.[2] For this reason the court can still impose incremental penalty payments when the applicants persist in their refusal to give information when they order that the information will not be used for punitive means. The Supreme Court judgment of 12 July 2013[3] is in line with the advice of the Advocate General. However the Supreme Court makes an important distinction between material that exists independent or depended of the will of the suspect. The Supreme Court creates a specific link to the right to remain silent. This would mean that for example bank statements which can only be acquired trough an action of a suspect could still be used for punitive means.

This judgment is remarkable. In the first place the Supreme Court makes an undesirable distinction between material existing dependent of independent of the will of the suspect. Fact of the matter is that the authorities cannot access the information needed without any action taken by the suspect. In the ruling of the European Court in the case of Chambaz this distinction has not been made, material that can only be accessed with cooperation of the suspect was appointed as material dependant on the will of the suspect. For this reason we believe that the judgment of the Supreme Court is not in line with European Law.

Furthermore, in the Netherlands there is no difference between a tax inspector who determines the tax obligation and an inspector who imposes a penalty for evading a tax obligation. This means that both the tax inspector and a judge possibly have information at their disposal which they cannot use to impose a penalty, even if the information shows that taxes have been evaded. This situation creates an almost inhuman obligation to judge in an impartial manner regarding the penalty.

It is questionable whether the judgment of a civil court judge is binding for the tax court judge and criminal court judge. In other words, do the criminal and tax court judges have to decide that information that has been handed over under pressure cannot be used, just because the civil judge said so? Under the assumption that the tax judge and the criminal judge are sovereign judges, there is no guarantee that the information will actually not be used for any punitive action. Or perhaps the information will be used as leading information in order to try to get the relevant information from another – lawful – source. This risk cannot be ruled out.

The national law of the Netherlands at this moment does not provide a guarantee that possible incriminating information acquired form a suspect under pressure of the authorities will not be used in any way for punitive measures. Therefore the authors believe that forcing these taxpayers under the pressure of an incremental penalty payment to produce information is a breach of Article 6 ECHR even with the so called 'guarantee' of the Supreme Court.

The principle of equality of arms

Article 6 of the ECHR also ensures the principle of equality of arms, which means that both the taxpayer and the tax authorities should have equal means to plead their case.

The aforementioned bank accountholders requested the tax authorities to reveal the identity of the anonymous informant and all the documents relating to the case. The tax authorities refused to do so in order to protect the identity of the informant. The tax authorities invoked their right to hold back evidence when the situation calls for it. The Dutch court judged that the reasons to withhold this information are not legitimate. The information therefore is pinpointed as part of all the relevant documents of the proceedings. The tax authorities, however, keep refusing to hand over all evidence and leave it up to the court to decide what consequences this should bring.

The alleged account holders did not leave this unchallenged and started further proceedings. They stated that the tax authorities have an obligation to reveal all documents relating to the case and, if they continue to refuse, requested the court to impose incremental penalty payments on the tax authorities – 'a taste of their own medicine' we would say.

In the *Chambaz* case, the ECtHR reiterates that the only permissible restrictions on access to all evidence in the prosecuting authorities' possession had to be justified by the protection of vital national interests or the preservation of the fundamental rights of others. The Court had previously held that, in tax proceedings of a criminal nature before the administrative courts, it did not rule out the possibility that the tax authorities might be required to supply a litigant with certain documents even if they had not been specifically relied on in the case against the person involved. Although it was not for the ECtHR but for the domestic courts to assess the relevance of proposed evidence, proper reasons nevertheless had to be given for rejecting evidence.

The Advocate General in his advice in this case states that the taxpayers do have the right to take knowledge of all the information relevant to their case.[4] However, he also states that national law does not create an opening to force the government into giving documents by imposing an incremental penalty payment. The persons involved are therefore left empty handed. The Advocate General has pointed out that the judge could decide that the consequence of not handing over the information would be that the penalty and even possibly the tax assessments should be annulled. Therefore it will be up to the judges in the principal action to draw conclusions from the fact that the state continues to refuse to hand over all evidence in the case.

This single case shows that in the constant hunger for the truth – or hunger for 'dollar signs' – boundaries are being crossed. The right to remain silent and the right not to incriminate oneself are generally recognised international standards that lie at the heart of the notion of a fair trial. In this time of crises these basic rights seem to have become less fundamental. The few taxpayers who have the means to fight this battle in order to earn the rights they deserve are fighting a battle that can be compared with David's battle versus Goliath.

The authors hope that the Supreme Court of the Netherlands provides the alleged bank account holders with a figurative stone and gives them equal arms to protect their fundamental rights, starting with the right not to incriminate oneself.

Notes

1 ECtHR 5 April 2012, nr 11663/04 (*Chambaz v Switzerland*), EHRC 2012/135.
2 Conclusion Advocate General, PJ Wattel, 1 March 2013, LJN: BZ3640.
3 Judgment of the Supreme Court of the Netherlands, 13 July 2013, ECLI:NL:HR:2013:BZ3640.
4 Conclusion Advocate General, PJ Wattel, 24 May 2013, LJN: CA1396.