

# TAXPAYERS' RIGHT TO LEGAL ASSISTANCE UNDER THE CASE-LAW OF THE ECtHR AND THE CJEU

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***Abstract:** The article pertains to the European taxpayers' right to legal assistance as it stands in the case-law of the European Court of Human Rights and the Court of Justice of the European Union. The right to legal assistance is part of the broader right to a fair trial which is embedded in Article 6 of the European Convention on Human Rights and Fundamental Freedoms, as well as in Article 47 of the Charter of Fundamental Rights of the European Union. Such parallel existence within two separate legal systems at European level, which still remain formally independent from each other, requires a comparative look at how both European courts treat said right in their respective case-law. To that end, the article aims at providing a brief analysis on the landmark case-law handed down in tax matters dealing with the right to legal assistance.*

***Key Words:** Taxpayers, Right to Legal Assistance, case-law, European Court of Human Rights, ECtHR, European Convention on Human Rights, ECHR, CJEU, Court of Justice of the European Union, Charter of Fundamental Rights;*

The fair trial as a fundamental procedural safeguard does not translate only into objective obligations and requirements imposed on the states, namely upon their judicial authorities and tax disputes brought before them, but it also engenders subjective rights in favour of the European taxpayers. More specifically, those rights transpire into the right of access to a tribunal and the right to legal assistance, the latter being the subject of the present article.

The right to legal assistance, albeit being a bit faraway from the right of access to a court in the strict sense, but definitely among the constituent elements of the right to a fair trial, represents another procedural safeguard in the taxpayers' arsenal of defensive rights. At first sight a criminal nature of that safeguard could be implied with ease insofar as it is expressly subject of Article 6-3,

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c) of the European Convention on Human Rights and Fundamental Freedoms (hereinafter ECHR/the Convention) which addresses everyone “charged with a criminal offence”. Such a suggestion would be wrong though. The right to legal assistance could also be derived from Article 6-1 of the Convention and thus to be applied in civil proceedings to the extent that the very access to a court would be ineffective without such an assistance, given that the litigant entitled to it has been incapable to “effectively present his or her own case”.<sup>1</sup> What is more, said right is correlated with the “obligation to secure an effective right of access to the courts”<sup>2</sup> which weighs upon all Contracting States of the Convention and could in that sense call for positive measures in some circumstances on the part of competent authorities in that regard.<sup>3</sup> In any event, the right to legal assistance within the meaning of the Convention is not absolute<sup>4</sup> and therefore the duty for the states to secure it “does not hold good for all cases concerning "civil [and criminal] rights and obligations" or for everyone involved therein”,<sup>5</sup> which leads to the conclusion that “much [...] depend[s] on the particular circumstances”.<sup>6</sup> The ECtHR does not deem that it is incumbent on it “to indicate, let alone dictate, which measures should be taken”<sup>7</sup> in order that the states satisfy their obligation to ensure access to an effective remedy,<sup>8</sup> but “all that [it] requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6 para. 1”.<sup>9</sup> Given that “Article 6 para. 3 (c) [is] dealing only with criminal proceedings”,<sup>10</sup> the Court in Strasbourg finds that “despite the absence of a similar [to Article 6-3 c)] clause for civil litigation, Article 6 para. 1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case”.<sup>11</sup> As regards criminal matters, the ECtHR stresses that “the right of everyone charged with a criminal offence to be effectively defended by a lawyer assigned officially if need be, is one of the

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<sup>1</sup> ECtHR, *Airey v. Ireland*, App. n° 6289/73, para. 24.

<sup>2</sup> *Ibid.*, para. 25.

<sup>3</sup> *Ibid.*

<sup>4</sup> ECtHR, *Barsom and Varli v. Sweden*, App. n° 40766/06 and 40831/06.

<sup>5</sup> ECtHR, *Airey v. Ireland*, *supra*, para. 26.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.* The Court refers *mutatis mutandis* to the judgments *Syndicat national de la police belge*, 27 Oct. 1975, App. n° 4464/70, para. 39; and *Marckx v. Belgium* of 13 June 1979, App. n° 6833/74, para. 31.

<sup>10</sup> ECtHR, *Airey v. Ireland*, *supra*, para. 26.

<sup>11</sup> *Ibid.*

fundamental features of a fair trial”,<sup>12</sup> but nevertheless “the right to free legal assistance under Article 6 § 3(c) of the Convention is subject to two conditions”:<sup>13</sup> 1) the applicant must lack sufficient means to pay for legal assistance; and 2) the “interests of justice” must require that legal aid be granted.<sup>14</sup> As to the second condition, in order to determine whether “the interests of justice required the applicants to be granted legal aid before the domestic courts”,<sup>15</sup> the ECtHR takes into consideration “the facts of the case as a whole having regard, inter alia, to the seriousness of the offence, the severity of the possible sentence, the complexity of the case and the personal situation of the accused”.<sup>16</sup> Thus, in tax matters examined under the criminal head of Article 6 of the Convention the ECtHR rules in the Barsom and Varli v. Sweden<sup>17</sup> case that, without regard for the amounts of the tax surcharges imposed, “they were able to pay these sums to the Tax Authority”<sup>18</sup> and that in any event, “according to Swedish law, any failure by the applicants to pay the tax surcharges could not have been converted into a prison sentence”,<sup>19</sup> that consequently “they never faced a risk of being deprived of their liberty”.<sup>20</sup> Next, examining the complexity of the case, “[t]he Court cannot find that any complex legal questions were to be argued in the cases”<sup>21</sup> insofar as “the assessment relating to the tax surcharges was relatively straightforward in that the issue to be determined was firstly whether or not the applicants had submitted incorrect or incomplete information in their tax returns to the Tax Authority and, if so, whether there were any grounds for remission”.<sup>22</sup> Afterwards, in the assessment of the taxpayers’ particular situation the justices find “it highly unlikely that they would not be able to present their case and arguments adequately, without legal assistance, before the national court”.<sup>23</sup> The ECtHR gives also considerations to that the national judicial authority at issue was obligated “to ensure that the circumstances of each case are clarified to the extent that its character demands and, where necessary, to give directions to the

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<sup>12</sup> ECtHR, Barsom and Varli v. Sweden, supra. Reference made to the judgment of Poitrimol v. France, 23 Nov. 1993, App. n° 14032/88, para. 34.

<sup>13</sup> ECtHR, Barsom and Varli v. Sweden, supra.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid. The Court refers to its judgment Quaranta v. Switzerland, 24 May 1991, App. n° 12744/87, paras. 32-36.

<sup>17</sup> ECtHR, Barsom and Varli v. Sweden, supra. See as well V. Berger, La jurisprudence de la Cour européenne des droits de l’Homme et le droit fiscal [The case-law of the European Court of Human Rights and tax law], Droit fiscal n° 24, 17 June 2010, p. 11.

<sup>18</sup> ECtHR, Barsom and Varli v. Sweden, supra.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

parties to supplement the case-file with the requisite information”.<sup>24</sup> Thus, it is established that the national judicial body “specifically assessed the [... applicants’ particular situation] with reference both to domestic law and to Article 6 § 3(c) [of] the Convention”.<sup>25</sup> On the grounds of the considerations above, the justices infer therefore that the refusal to the taxpayers in the case by the national judicial authority to grant them legal assistance does not breach Article 6-3 c) of the Convention. In another tax case, *Benham v. the United Kingdom*,<sup>26</sup> where it is undoubtedly established that the applicant has no financial means to use the services of a defence counsel, the ECtHR engages itself to ascertain “whether the interests of justice required that Mr Benham be provided with free legal representation at the hearing before the magistrates”.<sup>27</sup> That question reduces in fact to investigating “the severity of the penalty at stake and the complexity of the case”.<sup>28</sup> In any event, it should be clear that “where deprivation of liberty is at stake, the interests of justice in principle call for legal representation”.<sup>29</sup> In the instant case two forms of legal assistance, pursuant to the domestic law, are offered to the taxpayer “charged with a criminal offence” but none of them provides judicial representation. Thus, the Court finds a violation of the applicant’s right derived from Article 6-3 c) insofar as, “[i]n view of the severity of the penalty risked by [him] and the complexity of the applicable law, [...] the interests of justice demanded that, in order to receive a fair hearing, [the applicant] ought to have benefited from free legal representation during the proceedings before the magistrates”.<sup>30</sup>

The tool of legal assistance being placed in the context of Union law, it should be taken as a starting-point the wording of Article 47-3 of the Charter of Fundamental Rights of the European Union (hereinafter the Charter)<sup>31</sup> which, to recall, draws inspiration from Article 6-3 of the Convention.<sup>32</sup> The Court of Justice aptly takes account<sup>32</sup> of Article 47-3 which “guarantees the right

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> ECtHR, *Benham v. the United Kingdom*, 10 June 1996, App. n° 19380/92.

<sup>27</sup> Ibid., para. 60. See as well V. Berger, *La jurisprudence de la Cour européenne des droits...*, op. cit., p. 11.

<sup>28</sup> ECtHR, *Benham v. the United Kingdom*, supra. The Court refers to its judgment *Quaranta v. Switzerland* of 24 May 1991, supra, paras. 32-38.

<sup>29</sup> ECtHR, *Benham v. the United Kingdom*, supra, para. 61. Reference made to the judgment *Quaranta v. Switzerland*, supra, para. 33.

<sup>30</sup> ECtHR, *Benham v. the United Kingdom*, supra, para. 64.

<sup>31</sup> Article 47-3 of the Charter: Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

<sup>32</sup> B. C. Mihaescu Evans, *Tableau comparatif des droits fondamentaux tels qu’ils sont reconnus dans la CEDH et dans l’ordre juridique de l’Union européenne respectivement* [Comparative table on the fundamental rights as recognised by the ECtHR and respectively in the legal order of the European Union]. RRDE (Revista română de drept european [Romanian review of European law]) n° 6/2012.

to an effective remedy through the grant of legal aid to individuals who lack sufficient resources”.<sup>33</sup> But what is more important is that the CJEU pays close attention to relevant in that regard case-law of the ECtHR.<sup>34</sup> Thus, it could be read first of all in the Community jurisprudence that the Explanations relating to the Charter<sup>35</sup> in connection with Article 47-3 touch namely upon “the judgment in *Airey v. Ireland* of 9 October 1979,[<sup>36</sup>] according to which provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy”.<sup>37</sup> In that way the value of said explanations finds legitimation through case-law and therefore the parallel with the Convention in terms of legal interpretation becomes binding. In addition, any uncertainty in that regard is overridden by the clarification that said “provision must be interpreted in its context, in the light of other provisions of EU law, the law of the Member States and the case-law of the European Court of Human Rights”.<sup>38</sup> The Court of Justice relies widely on case-law of the ECtHR, including as regards the position that “[t]he right of access to a court is not [...] absolute”.<sup>39</sup> In the same vein the CJEU points out that “the European Court of Human Rights has held that the question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant’s capacity to represent himself effectively”.<sup>40</sup> It is also noted that in its assessment to determine whether a right of legal aid should be granted the ECtHR can take into “[a]ccount [...] the financial situation of the litigant or his prospects of success in the proceedings”.<sup>41</sup> It must be stressed in any event that the legal assistance provided by a lawyer secured under Article 6-3 c) of the Convention is only a form of the broader

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<sup>33</sup> CJEU, judgment of 28 July 2016, *Ordre des barreaux francophones et al.*, C-543/14, para. 27; See also the judgment of 12 June 2014, *Peftiev et al.*, C-314/13, para. 25; judgment of 27 Feb. 2014, *Pohotovost*, C-470/12, para. 53.

<sup>34</sup> See the commentary on the judgment of the CJEU of 22 Dec. 2010, *DEB Deutsche Energiehandels*, C-279/09, of D. Simon, *Protection juridictionnelle effective [Effective judicial protection]*, Europe n° 2, Feb. 2011, comm. 38.

<sup>35</sup> Explanations relating to the Charter of Fundamental Rights of the European Union, [online]. OJ, 14 Dec. 2007, n° C 303, ISSN 1725-2431.

<sup>36</sup> ECtHR, *Airey v. Ireland*, supra.

<sup>37</sup> CJEU, 22 Dec. 2010, *DEB*, supra, para. 36.

<sup>38</sup> *Ibid.*, para. 37.

<sup>39</sup> *Ibid.*, para. 45. The CJEU relies on the judgments of the ECtHR *McVicar v. the United Kingdom* of 7 May 2002, App. n° 46311/99, para. 46; and the judgment *Steel and Morris v. the United Kingdom* of 15 Feb. 2005, App. n° 68416/01, para. 59.

<sup>40</sup> CJEU, judgment of 22 Dec. 2010, *DEB*, supra, para. 46. The CJEU refers to the judgments of the ECtHR *Airey v. Ireland*, supra, para. 26; *McVicar v. the United Kingdom*, supra, paras. 48 and 49; *P., C. and S. v. the United Kingdom* of 16 July 2002, App. n° 56547/00, para. 91; as well as *Steel and Morris v. the United Kingdom*, supra, para. 61.

<sup>41</sup> CJEU, judgment of 22 Dec. 2010, *DEB*, supra, para. 46. Reference made to the ECtHR, judgment *Steel and Morris v. the United Kingdom*, supra, para. 62.

“[l]egal aid” enshrined in Article 47-3 of the Charter.<sup>42</sup> However, the fact remains that the other forms of judicial assistance, including the legal assistance in civil proceedings, are guaranteed by Article 6-1 of the Convention. The CJEU supports that vision when stating namely that, “[a]s regards legal aid in the form of dispensation from payment of the costs of proceedings or from provision of security for costs before an action is brought, the European Court of Human Rights has similarly examined all the circumstances in order to determine whether the limitations applied to the right of access to the courts had undermined the very core of that right, whether those limitations pursued a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved”.<sup>43</sup> Consequently, “[i]t is apparent from those decisions that legal aid may cover both assistance by a lawyer and dispensation from payment of the costs of proceedings”.<sup>44</sup> The Court in Luxembourg refers also to its Strasbourg counterpart in order to specify that any national procedure for selection of cases where legal aid should be granted “must operate in a non-arbitrary manner”.<sup>45</sup> Community judges face furthermore the inquiry “as to whether such aid must be granted to a legal person”.<sup>46</sup> The linguistic interpretation of the wording of Article 47 of the Charter indicates “that legal persons are not excluded from the scope of that article”.<sup>47</sup> The CJEU makes reference yet again to case-law of the ECtHR with a purpose to observe that the latter “held that the difference in treatment between profit-making companies, on the one hand, and natural persons and non-profit-making legal persons, on the other, is based on an objective and reasonable justification which relates to the tax arrangements governing legal aid, since those arrangements provide for the possibility of deducting all costs of proceedings from taxable profits and of carrying over losses to a subsequent tax year”.<sup>48</sup> The CJEU infers in fine that “[i]t is apparent from the examination of the case-law of the European Court of Human Rights that the grant of legal aid to legal persons is not in principle impossible,

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<sup>42</sup> CJEU, judgment of 22 Dec. 2010, DEB, supra, para. 46.

<sup>43</sup> Ibid., para. 47. The CJEU refers in that sense to the judgments of the ECtHR, *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, App. n° 18139/91, paras. 59 to 67, and *Kreuz v. Poland* of 19 July 2001, App. n° 28249/95, para. 54 and 55.

<sup>44</sup> CJEU, judgment of 22 Dec. 2010, DEB, supra, para. 48.

<sup>45</sup> Ibid., para. 49. Reference made in that sense to the ECtHR, judgment *Del Sol v. France* of 26 Feb. 2002, App. n° 46800/99, para. 26; ECtHR, *Puscasu v. Germany* of 29 Sept. 2009, App. n° 45793/07, p. 6, last paragraph; ECtHR, *Pedro Ramos v. Switzerland* of 14 Oct. 2010, App. n° 10111/06, para. 49.

<sup>46</sup> CJEU, judgment of 22 Dec. 2010, DEB, supra, para. 36.

<sup>47</sup> Ibid., paras. 38 and 39.

<sup>48</sup> Ibid., para. 50. The CJEU draws from the case-law of the ECtHR, *VP Diffusion Sarl v. France* of 26 Aug. 2008, App. n° 14565/04, p. 4, 5 and 7. See further para. 51 of the CJEU’s judgment of 22 Dec. 2010, DEB, supra, which refers to the ECtHR, *CMVMC O’Limo v. Spain* of 24 Nov. 2009, App. n° 33732/05, para. 26.

but must be assessed in the light of the applicable rules and the situation of the company concerned”,<sup>49</sup> and to that end “[t]he subject-matter of the litigation may be taken into consideration, in particular its economic importance”.<sup>50</sup> The Court of Justice clarifies further that in the assessment “of the financial capacity of an applicant, where that applicant is a legal person, consideration may be given inter alia to the form of the company (whether it is a capital company or a partnership, whether it is a limited liability company or otherwise); the financial capacity of its shareholders; the objects of the company; the manner in which it has been set up; and, more specifically, the relationship between the resources allocated to it and the intended activity”.<sup>51</sup>

In view of the above, regard being had to the efforts invested by the CJEU to maintain a close dialogue with the ECtHR at jurisprudential level, it is unlikely to arise radical discrepancies between the two judicial systems as to the legal assistance albeit its intense casuistic nature. Hence, it remains only to observe the manner in which the right to legal assistance will be applied in tax matters in the context of European Union law.

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<sup>49</sup> CJEU, judgment of 22 Dec. 2010, DEB, *supra*, para. 52.

<sup>50</sup> *Ibid.*, para. 53.

<sup>51</sup> *Ibid.*, para. 54.

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