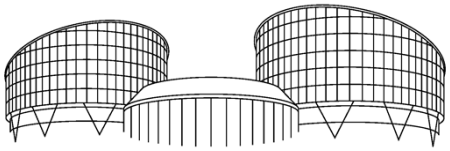

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

# CASE OF DE LEGÉ v. THE NETHERLANDS

*(Application no. 58342/15)*

JUDGMENT

Art 6 § 1 (criminal) • Fair hearing • Use of bank documents, for the re-setting of a tax fine, obtained from the applicant by a judicial order for disclosure, on pain of penalty payments, not within the scope of privilege against self-incrimination • Scope and application of the privilege concerning coercion in supplying documents in financial law context • Both prerequisites for the applicability of the privilege met in the circumstances • Authorities aware of pre-existing documents establishing holding of foreign bank account when seeking judicial order for disclosure • Judicial order specifically indicating documents to be supplied • Imposition of penalty payments in event of non-compliance with the judicial order not amounting to treatment in breach of Art 3

STRASBOURG

4 October 2022

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case of De Legé v. the Netherlands,**

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Gabriele Kucsko-Stadlmayer, *President,*
Tim Eicke,
Yonko Grozev,
Armen Harutyunyan,
Pere Pastor Vilanova,
Jolien Schukking,
Ana Maria Guerra Martins, *Judges,*
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application (no. 58342/15) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Dutch national, Mr Levinus Adrianus de Legé ("the applicant"), on 19 November 2015;

the decision to give notice to the Dutch Government ("the Government") of the complaint concerning the right to a fair trial;

the parties' observations;

Having deliberated in private on 5 July and 6 September 2022,

Delivers the following judgment, which was adopted on that last-mentioned date:

# INTRODUCTION

1. The case concerns the use of documents for the re-setting of a tax fine. Those documents relate to a foreign bank account and had been obtained from the applicant under threat of substantial penalty payments. The applicant alleged disrespect of the privilege against self-incrimination and invoked Article 6 § 1 of the Convention.

# THE FACTS

2. The applicant was born in 1934 and resides in El Campello, Spain. He and his spouse were residents of the Netherlands until 2000 when they moved to Spain. He was represented by Mr M. Hendriks, a lawyer practising in Nijmegen.

3. The Government were represented by their Agent, Ms B. Koopman, of the Ministry of Foreign Affairs.

4. The facts of the case may be summarised as follows.

## I. BACKGROUND TO THE CASE

5. In accordance with 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 and Article 27 of the Tax Treaty between Belgium and the Netherlands of 19 October 1970, the Dutch Tax and Customs Administration (*Belastingdienst*) in 2005 obtained from their Belgian counterparts information concerning bank accounts held by residents of the Netherlands with X Bank in Luxembourg that included balances of those accounts on 21 December 1994, 5 September 1996 and 28 November 1996. The account information had been stolen from the bank. It had been found in Belgium in the course of a criminal investigation.

6. On the basis of that information, the Dutch Tax and Customs Administration identified the applicant as one of the account holders.

7. Luxembourg had bank secrecy laws at the relevant time. These prevented the passage by lawful means of information relating to accounts held with banks based in that country to foreign tax authorities except with the cooperation of the account holders themselves.

## II. THE CORRESPONDENCE PHASE

8. On 7 March 2007 the Tax Inspector wrote to the applicant that an investigation into Dutch residents holding foreign bank accounts had been launched and that it had appeared that the applicant was holding or had held one or more bank accounts abroad which he had not accounted for in his income tax (*inkomstenbelasting*) and capital tax (*vermogensbelasting*) returns. The applicant was requested to declare any past and/or present foreign bank accounts held by him after 31 December 1994 on a form, entitled "Declaration (*verklaring*); Bank account(s) held abroad", and to complete a second form, entitled "Statement (*opgaaf*); Bank account(s) held abroad", both of which were attached to the Tax Inspector's letter. The second form indicated, *inter alia*, which documents the applicant was to provide, in addition to which the Tax Inspector in his letter also requested the applicant to submit copies of all bank statements of the account(s) concerned covering the period between 1 January 1995 and 31 December 2000. He was informed that, pursuant to section 47(1) of the General State Taxes Act (*Algemene wet inzake rijksbelastingen*; hereinafter "the Act"), he was obliged to provide the information and materials requested (*inlichtingenplicht*; see paragraph 33 below).

9. On 28 March 2007 the applicant, through his counsel, replied in writing. As relevant to the case before the Court, he observed that it was "sufficiently known" that letters such as that of 7 March 2007 would be followed by tax adjustments (*navorderingsaanslagen*) as well as tax fines. Since, consequently, Article 6 of the Convention under its criminal head was

applicable to the latter, he invoked the privilege against self-incrimination relying on *Saunders v. the United Kingdom* (17 December 1996, *Reports of Judgments and Decisions* 1996-VI) and *J.B. v. Switzerland* (no. 31827/96, ECHR 2001-III), pointing out that the information in issue was such that the Tax and Customs Administration could not obtain it without his cooperation, and noting that it was not at all established that that information even existed. He informed the Tax Inspector, accordingly, that "in the given circumstances" the request for information would not be complied with.

10. On 27 June 2007 the Tax Inspector sent to the applicant's spouse a letter in the same terms, and with the same attached forms, as the one that had been sent to the applicant on 7 March 2007. On 13 July 2007 the applicant's spouse, through her counsel, replied in the same terms as the applicant had in his letter of 28 March 2007.

11. On 25 July 2007 the Tax Inspector informed the applicant and his spouse that, as they had failed to submit the information and materials requested and had thus failed to comply with their obligations under section 47 et seq. of the Act, tax adjustments for income tax and/or capital tax would be issued in the course of the year on the basis of estimated figures.

12. On 22 November 2007 the Tax Inspector wrote to the applicant informing him that he possessed data from which it appeared that one or more bank accounts in the names of the applicant and his spouse were being or had been held with X Bank in Luxembourg; on the basis of these data it had been established that the applicant and/or his spouse were or had been (joint) holders of the account(s). The data in the Tax Inspector's possession also included balances of the account(s) on different dates in the period 1994 up to 1996. He notified the applicant of his intention to increase the applicant's taxable income for 1995 on the basis of estimated returns on investments and on interest rate figures obtained from the national statistical office, Statistics Netherlands (*Centraal Bureau voor de Statistiek*), and to increase his capital on 1 January 1996 on the basis of an estimate having regard to the average increase of the balances on accounts held by a large number of account holders at X Bank in Luxembourg between 1994 and 1996. The Tax Inspector would then issue corresponding tax adjustments for income tax and for contributions to national social security schemes (*premieheffing volksverzekeringen*) in respect of 1995 and for capital tax in respect of 1996 and impose statutory defined tax fines of 100% of these tax adjustments without remission (*kwijtschelding*) for having wilfully acted in breach of section 47 of the Act. The Tax Inspector referred to section 18(1) of the Act as the legal basis for the imposition of these fines and to paragraph 21(3) of the 1993 Regulation on tax fines (*Voorschift administratieve boeten 1993*) as regards the determination of the amount of the fines (see paragraphs 35-36 below). The applicant was further informed of the consequences if he were yet to comply with the obligation pursuant to section 47 of the Act to provide the information requested; if he did so before the tax adjustments were issued,

the fines would, in principle be set at 50% of the amount of the tax adjustment. Should he file an objection (*bezwaar*) against the tax adjustments issued but fully cooperate pending the objection phase of the proceedings, the fines could be mitigated to 75%.

The applicant was invited to submit a reaction before 1 December 2007.

13. On 28 December 2007, having noted that the applicant had not responded to the letter of 22 November 2007, the Tax Inspector issued the announced income tax/social security contributions adjustment in respect of 1995 of 10,142 Netherlands guilders (NLG) plus NLG 4,035 for interest on tax arrears (no. 0303.37.033.H.57) and a capital tax adjustment in respect of 1996 of NLG 1,928 plus NLG 726 for interest on tax arrears (no. 0303.37.033.K.67), each increased with a tax fine of 100% of the adjustments without remission (that is, NLG 10,142 (about 4,600 euros (EUR)) in respect of 1995 and NLG 1,928 (about EUR 875) in respect of 1996).

## III. THE OBJECTION PROCEEDINGS

14. On 21 January 2008 the applicant lodged an objection against the tax adjustment issued in respect of 1996, based on the lack of convincing evidence that he had in fact held a bank account in Luxembourg. He also challenged the tax fine imposed, arguing that since the tax adjustment should be declared void, the fine should be as well. He further objected to the Tax Inspector's conclusion that he had wilfully acted in breach of section 47 of the Act.

15. On 20 March 2008 the applicant's counsel was allowed to see redacted documents purporting to prove the existence of the bank account or accounts in issue.

16. On 26 March 2008 the applicant also lodged an objection against the tax adjustment issued in respect of 1995 – which had reached him after the adjustment in respect of 1996 – and against the tax fine imposed, referring to the grounds of his objection lodged on 21 January 2008. In addition, he challenged the lack of evidentiary value of the documents relied on by the Tax Inspector given that the provenance of these documents was unclear and the documents themselves had been so heavily redacted as to be meaningless.

## IV. INTERVENING CIVIL PROCEEDINGS

17. On an unspecified date the State (the Tax and Customs Administration Directorate-General of the Ministry of Finance) summoned the applicant to appear before the provisional measures judge (*voorzieningenrechter*) of the Civil Law Section of the Regional Court (*rechtbank*) of The Hague in summary injunction proceedings (*kort geding*). The purpose was to obtain an order for the applicant to disclose information concerning bank account(s)

held abroad after 31 December 1995 and submit documents relating to such bank account(s) in respect of the years running from 1 January 1996 up to and including 1 January 2000. The State based its claim on the taxpayers' duty to provide information to the Tax Inspector under section 47 of the Act (see paragraph 33 below).

18. Having heard the parties on 19 November 2008, the provisional measures judge gave judgment on 27 November 2008. He ordered the applicant to state on the form "Declaration; Bank account(s) held abroad" (see paragraph 8 above) if he (had) held bank accounts abroad after 31 December 1995 and, if so, to provide information about those accounts by answering the questions on the form "Statement (*opgaaf*); Bank account(s) held abroad" (ibid.) and to provide the documents indicated on that form, including copies of all bank statements of the account(s) concerned covering the period between 1 January 1996 and 31 December 2000. The applicant was to comply with the order within fourteen days from the day on which the judgment was served on him and on pain of a penalty payment (*dwangsom*) of 5,000 euros (EUR) for each day or part of a day thereafter that he failed to comply, to a maximum of EUR 50,000. The judgment was provisionally executable (*uitvoerbaar bij voorraad*).

19. The applicant did not appeal. On 9 December 2008 his counsel sent to the counsel of the State documents received from the applicant and his wife, which consisted of the forms that had previously been sent to them by the Tax Inspector (see paragraphs 8 and 10 above) and in which they declared that they had held a bank account together at X Bank in Luxembourg after 31 December 1994. Bank statements and portfolio summaries relating to that account were also submitted.

## V. RESUMPTION OF THE TAX PROCEEDINGS

### A. Resumption of the objection proceedings

20. In the objection proceedings, which had been adjourned pending the summary injunction proceedings described in paragraphs 17-19 above, the Tax Inspector announced in a letter of 6 April 2009 that the applicant's objection of 26 March 2008 (see paragraph 16 above) would be declared inadmissible on procedural grounds not relevant to the case before the Court. A formal decision to that effect was taken on 1 June 2009. The Tax Inspector nonetheless considered the objection as a request to review *ex officio* (*ambtshalve*) the income tax adjustment in respect of the year 1995. Since it appeared from the information submitted by the applicant (see paragraph 19 above) that the figures on which the original estimation had been based (see paragraphs 12-13 above) were too high, they were reduced to the actual figures and the tax due, the interest on arrears and the tax fine payable by the

applicant were adjusted accordingly, resulting in the fine being fixed at NLG 3,067 (about EUR 1,400).

21. As regards the fine, it was set out in the decision that it was for the Tax Inspector to prove intent or gross negligence (*opzet of grove schuld*) on the part of the applicant for his failure to comply with his obligations under section 47(1) of the Act (see paragraph 33 below). In the fiscal context such proof could be provided by means of (rebuttable) presumptions that were based on established facts. In the case at hand the Tax Inspector presumed intent, referring to the following established facts: firstly, that there was an information note (*renseignement*) relating to a foreign bank account; secondly, that experience had shown that the identification of the holders of such accounts had in almost all cases been correct; thirdly, that the applicant had been identified as the account holder; fourthly, that the account was held in Luxembourg, out of sight of the Dutch Tax and Customs Administration; fifthly, that it was a fact of general knowledge that bank balances and revenues obtained therefrom should be declared for income and capital taxation purposes; and, sixthly, that questions in the applicant's tax returns relating to the bank balances held abroad and the revenues obtained therefrom had each time either not been answered or answered in the negative.

As for the severity of the penalty, the Tax Inspector considered the applicant's behaviour sufficiently serious to warrant the fine being fixed at 100% of the amount of the tax adjustment.

22. In a further letter of 6 April 2009, the Tax Inspector announced that the applicant's objection of 21 January 2008 (see paragraph 14 above) would be dismissed, and a formal decision to that effect was taken on 1 June 2009. The Tax Inspector similarly reduced the estimated figures in respect of the year 1996 to the correct levels and adjusted the capital tax due, the interest on arrears and the tax fine payable by the applicant, accordingly. As a result, that fine was set at NLG 1,816 (about EUR 825). As regards the imposition and severity of the fine, the text of the Tax Inspector's letter was the same as that of the letter concerning the objection of 26 March 2008 (see paragraph 21 above).

### B. Appeal proceedings

23. On 4 May 2009, the applicant lodged an appeal (*beroep*) against both decisions with the Tax Chamber (*belastingkamer*) of the Breda Regional Court. As relevant to the case before the Court, he protested against the use of the information which he had submitted following the order of the provisional measures judge (see paragraph 19 above) for the purpose of re-setting the tax fines. He relied on the Court's judgments in the cases of *Saunders* and *J.B. v. Switzerland* (both cited above).

24. In two judgments of 26 July 2010 that for present purposes were based on identical reasoning, the Regional Court found that the fiscal authorities

had used the data provided by the applicant on 9 December 2008 in a lawful manner. It based this conclusion on a judgment of the Supreme Court (*Hoge Raad*) of 21 March 2008 (ECLI:NL:HR:2008:BA8179) in which that tribunal had relied on the Court's case-law to the effect that the right not to incriminate oneself 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 (*Saunders*, cited above, § 69). It further held as regards the severity of the fines that this was justified, appropriate and necessary. Nevertheless, as the "reasonable time" requirement contained in Article 6 § 1 of the Convention had been breached, the Regional Court mitigated the tax fines by 5% (to NLG 2,913 (about EUR 1,325) and NLG 1,725 (about EUR 780), respectively). It dismissed the appeals for the remainder.

### C. Further appeal proceedings

25. The applicant lodged further appeals (*hoger beroep*) against the Regional Court's judgments with the Tax Chamber of the 's-Hertogenbosch Court of Appeal (*gerechtshof*).

26. On 19 December 2013 the Court of Appeal decided both appeals in one joint judgment. In so far as relevant the Court of Appeal held as follows:

> "*As regards the question [whether the Tax Inspector breached the principle of* nemo tenetur[1]*]*
>
> 4.8. [The applicant] claims that the Tax Inspector should not have used the data, which he had provided with his letter of 9 December 2008 [see paragraph 19 above], as evidence. In that context [the applicant] argues that he had experienced the Tax Inspector's letter of 7 March 2007 [see paragraph 8 above] as a criminal charge and that, as a result of having been coerced into submitting the bank documents on 9 December 2008, he had provided evidence against himself in breach of the principle of *nemo tenetur*.
>
> 4.9. In its judgment of 12 July 2013 (ECLI:NL:HR:2013:BZ3640[2]) the Supreme Court [Civil Chamber] considered the following:
>
> > '3.5 In the examination of the ground [for the appeal on points of law] it is to be considered at the outset that, pursuant to section 47 [of the Act], a taxpayer is obliged to provide the Tax Inspector with all data and information that may be relevant for taxation in the taxpayer's case. Since the present claim [the State's application for an order to disclose information] is based on that legal obligation, the starting point is that the requested provisional measure must be given. Article 6 of the European Convention on Human Rights (ECHR) does not preclude this (see [*Allen v. the United Kingdom* (dec.), no. 76574/01, 10 September 2002] and [*Marttinen v. Finland*, no. 19235/03, § 68, 21 April 2009]). The ground raises the question of whether, and if so to what extent, this starting point should be

[1] "*Nemo tenetur se ipsum accusare*"; i.e. the privilege against self-incrimination.

[2] See *Van Weerelt v. the Netherlands* (dec.), no. 784/14, § 37, 16 June 2015

abandoned in connection with the possibility that, if the application [for a provisional measure] were granted, [the applicant] might be coerced to cooperate, in a manner contrary to Article 6 ECHR, in the gathering of evidence for the purpose of the imposition of a tax fine or institution of a criminal prosecution, and that, if he refused to comply with the order issued in these summary injunction proceedings, he would forfeit (substantial) penalty payments.

3.6. In [*Saunders*, cited above] the European Court of Human Rights (ECtHR) held that the prohibition of forced self-incrimination is connected with the right to remain silent, which means that this prohibition does not extend to the use in criminal proceedings of evidence that, although obtained by means of coercion, has an existence independent of the will of the accused (hereafter: will-independent material). It does not appear from the ECtHR's later case-law that this point of view has been abandoned. This means that obtaining will-independent material by means of an order given in summary injunction proceedings does not constitute a violation of Article 6 ECHR, even if that order is accompanied by penalty payments.

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*, cited above]), 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.'

4.10. The Tax Inspector's letter of 7 March 2007 is based on section 47 of [the Act]. Having regard to the judgment [of the Supreme Court] cited in 4.9, Article 6 ECHR does not preclude the obligation to provide the Tax Inspector with all data and information that may be relevant *to the taxation* of the taxpayer concerned.

4.11. As regards the fines ... it is, according to the aforementioned judgment, relevant whether will-dependent or will-independent material is concerned. In its judgment of 21 March 2008 (ECLI:NL:HR:2008:BA8179), the Supreme Court considered the following on that point:

'3.3.2. The imposition of ... a fine must meet the requirements set out in Article 6 § 1 ECHR under its criminal head. This includes respect for the accused's right to remain silent and the right not to incriminate himself or herself (see *Saunders* [cited above]). In the *Saunders* judgment, the ECtHR made a distinction between (evidentiary) material that does and [(evidentiary) material that] does not owe its existence to the will of the accused. The documents containing data provided to the Tax Inspector by the person concerned constitute material in the latter sense. Moreover, the documents at issue concern an account in respect of which the person concerned had already, without his involvement, been identified as account holder and, therefore, are documents the existence of which the Inspector was entitled to assume; the documents, which are not directly relevant for the question whether the person concerned has committed the punishable offence, were submitted by the person concerned after the Inspector had specified the documents he required. Having regard to the *Saunders* judgment, Article 6 § 1 ECHR does not preclude that also in the framework of assessing whether a fine should be imposed documents such as the ones requested by the Tax Inspector for determining tax liability are taken into account, if these have been provided by the

taxable person. This is not altered by the fact that some active participation of the taxpayer – consisting in the case at hand in the submission of the documents by post – is required (see also *Jalloh v. Germany* [GC], no. 54810/00, [§ 114,] ECHR 2006-IX).'

4.12. In view of the judgment [of the Supreme Court] cited in 4.11, the information provided by [the applicant] in or with his letter of 9 December 2008 can be qualified as will-independent material. After all, it concerns bank account statements and portfolio summaries. Having regard to the judgment of the Supreme Court cited in 4.9, Article 6 ECHR does not preclude that the information provided by [the applicant] is taken into account in the framework of the tax fines."

27. The Court of Appeal subsequently found, in paragraphs 4.34 and 4.37 of its judgment, that neither the tax adjustments nor the fines had been set at too high an amount as the Tax Inspector had lowered the adjustments in view of the data provided by the applicant with his letter of 9 December 2008 and it had not appeared that the Tax Inspector's calculations were incorrect. It further held the severity of the fines to be appropriate and necessary. Nevertheless, because of the length of the proceedings the appellate court reduced the tax fines further to NLG 2,606 (about EUR 1,180) as regards the failure to provide the required information for the assessment of income tax and social security contributions, and to NLG 1,543 (about EUR 700) for the same failure but in relation to the assessment of capital tax; it dismissed the appeals for the remainder.

## D. Proceedings before the Supreme Court

28. The applicant lodged an appeal on points of law (*cassatie*), which is limited to procedural conformity and points of law, with the Tax Chamber of the Supreme Court. As relevant to the case before the Court, he again invoked the privilege against self-incrimination, relying on Article 6 of the Convention. He cited *Funke v. France* (25 February 1993, Series A no. 256-A); *J.B. v. Switzerland* (cited above); *Marttinen v. Finland* (cited above); and *Chambaz v. Switzerland* (no. 11663/04, 5 April 2012).

### *1. The advisory opinion of the Advocate General*

29. In his advisory opinion (*conclusie*) of 19 December 2014 the Advocate General (*Advocaat-Generaal*) at the Supreme Court stated, *inter alia*, that:

"4.4 [The applicant] complains in his first ground for the appeal on points of law about a violation of Article 6 ECHR, now that he has been compelled to give information without a guarantee having been given – prior to the request for information – that the information provided will not be used for a possible sanction.

4.5 It must be said at the outset that a taxpayer is obliged under section 47 of the Act to provide the Tax Inspector with data and information that may be relevant for taxation in the taxpayer's case. It can be deduced from the *Allen* and *Marttinen* cases [both cited above] that Article 6 ECHR does not preclude states from attaching penalties to a

taxpayer's refusal to declare his financial situation in the context of taxation. Thus, in the case of *Allen* the ECtHR held:

> In the present case, therefore, the Court finds that the requirement on the applicant to make a declaration of his assets to the Inland Revenue does not disclose any issue under Article 6 § 1, even though a penalty was attached to a failure to do so. The obligation to make disclosure of income and capital for the purposes of the calculation and assessment of tax is indeed a common feature of the taxation systems of Contracting States and it would be difficult to envisage them functioning effectively without it.

4.6 In the phase of making a tax declaration, the opening of the books does not lead to the risk of being sanctioned since the taxpayer thus precisely meets his legal obligations. Failure to make a tax declaration (in full) or to do so too late is punishable, but those fines are not a consequence of having provided information requested.

4.7 It will become a different matter if the Tax Inspector, under threat of punishment or a fine, compels the taxpayer to provide information which can lead to the discovery of a (fiscal) offence committed by the person being questioned. The question then arises whether the coercion used by the Tax Inspector implies a violation of the *nemo tenetur* principle.

4.8 In dealing with this first ground, I will first consider the case-law of the ECtHR in respect of the consequences of the use of coercion (punishment or fine) on a (potential) suspect/taxpayer to provide material or give statements and then I will consider some judgments of the Supreme Court on this topic. I will then analyse the case-law of the ECtHR and the Supreme Court and discuss the effect of the use of material obtained under coercion. Lastly, I will apply the prior analyses to the present case."

30. After having taken note of the Court's considerations in the cases of *Funke* (cited above, § 44); *Saunders* (cited above, §§ 68-69), *Choudhary v. the United Kingdom* ((dec.), no. 40084/98, 4 May 1999), *J.B. v. Switzerland* (cited above, §§ 65-66, 68 and 71), *O'Halloran and Francis v. the United Kingdom* ([GC], nos.15809/02 and 25624/02, §§ 35, 53 and 58, ECHR 2007-III), *Jalloh* (cited above, §§ 110-11, 113, 117 and 123), *Marttinen* (cited above, §§ 68-69, 71-73 and 75-76), *Chambaz* (cited above, §§ 52-58) and several domestic rulings, the Advocate-General made the following considerations:

> "4.37 The *Saunders* judgment makes a distinction between, on the one hand, will-dependent material, in particular statements, that may not be obtained by using methods of cooperation or oppression in defiance of the will of the accused in cases where Article 6 ECHR applies, and on the other hand, will-independent material, such as bank statements and other existing documents, [the disclosure of] which can in principle always be demanded even with coercion. In view of (at least) the judgments given by the ECtHR up to HR BNB 2008/159 [ruling of 21 March 2008], I endorse the Supreme Court rulings. Among others, the judgments in *Funke* and *J.B.* have not been able to convince me that the ECtHR has deviated from *Saunders* or [that it] intended to say something else with the *Saunders* judgment. It is true that in *Funke* and *J.B.* the ECtHR found a violation of Article 6 ECHR due to the obligation to provide documents, but both cases appear to concern a disguised request to declare which documents the taxpayer actually held. However, since *Chambaz*, it is in my opinion clear what the ECtHR means or has possibly meant for already some time.

4.38 Summarised briefly, the *nemo tenetur* principle ... does not only concern giving oral or written statements (thus the coming about of the material) but also the use of methods of coercion or oppression in defiance of the will of the accused when forcibly obtaining already existing (will-independent) material, such as documents.

4.39 In its judgment of 12 July 2013, BNB 2014/101[3], the Supreme Court correctly draws the conclusion from the case-law of the ECtHR that coerced disclosure of material by imposing penalty payments is only allowed when the taxpayer has been given the guarantee that the material requested will not be used for prosecution purposes. Also in view of the reference to *Saunders* under 3.6, the Supreme Court seems, as regards the material, to hold on to its distinction previously made on the basis of this judgment between will-dependent and will-independent material. However, according to the ECtHR in *Chambaz*, a taxpayer must also be given a guarantee concerning the use of will-independent material, at least for documents and other records such as bank statements.

4.40 Not every [form of] coercion breaches Article 6 § 1 ECHR; a low fine or light pressure is allowed. In my opinion, this does not include penalty payments. The Supreme Court also found this in its judgment of 12 July 2013, BNB 2014/101 but wrongly only in respect of will-dependent material in the form of statements. In his annotation of BNB 2014/101 [Mr] Van Eijsden wrote: 'The nature and extent of coercion of penalty payments are such that it cannot be said that the documents concerned can be obtained independently of the will of the taxpayer'. I agree with him.

4.41 For the time being, I see no reason to ignore *Chambaz* for being a judgment with reasoning tailored to that case alone ['*gelegenheidsarrest'*]. In addition, *Marttinen* can be regarded as a (major) precursor to this judgment. *Chambaz* is the (provisional?) tailpiece of a development restricting the margin for requisitioning will-independent material. What still constituted an exception in *Funke* and *J.B.*, has now been stated by the Court as a fixed rule in *Chambaz*. Also will-independent material that has been obtained through coercion – unless this is very light – cannot be used against the person concerned in a prosecution for tax fraud. To this end, a guarantee must be provided in advance to the person concerned. ...

4.43 In its judgment of 12 July 2013, BNB 2014/101, the Supreme Court ruled (in paragraph 3.9) that will-dependent material provided by a taxpayer on pain of penalty payments may not be used for tax fines or prosecution. If this nevertheless happens, the tax or criminal court must determine what consequence must be attached to that use.

4.44 It has been noted in the literature that this consideration of the Civil Chamber of the Supreme Court does not guarantee that the tax or criminal court will exclude the evidence, which, according to various authors, is the only correct consequence. ...

4.50 The ECtHR also recently ruled (23 October 2014) in the *Furcht v. Germany* case [no. 54648/09, 23 October 2014] that evidence obtained by the police by means of incitement (violation of Article 6 ECHR) should be excluded. The ECtHR considered that a mitigation of sentence was not sufficient; according to the ECtHR, any measure short of excluding such evidence is insufficient to afford adequate redress for a breach of Article 6 § 1.

4.51 In view of the above, I consider that exclusion of evidence is the only correct consequence that the tax or criminal court can attach to the use of material provided on pain of penalty payments. In the first place, this applies to the taxpayer who, prior to

[3] See, for this judgment, *Van Weerelt v. the Netherlands* (dec.), no. 784/14, § 37, 16 June 2015.

providing the material, has been given a guarantee from the civil court that the material will not be used for tax fines or prosecution, since the legal protection envisaged by the Civil Chamber of the Supreme Court would otherwise – in the words of Van Eijsden – 'be of no value whatsoever'. In my opinion, evidence should also be excluded when the taxpayer was unjustly not given the legal protection to which he was entitled prior to providing the material used. ...

4.56 As follows from sections 4.37-4.42, I am of the opinion that obtaining material by means of coercion through the imposition of penalty payments is only permitted when the taxpayer is given the guarantee that the requested material will not be used for the imposition of tax fines or for criminal prosecution, in which context I do not distinguish between statements and already existing material such as (bank) documents and other papers. In breach of Article 6 ECHR, this guarantee was not provided to [the applicant]. The question is whether this should have consequences.

4.57 I am of the view that it should not in so far as the statements provided by [the applicant] are concerned. In my opinion the Court of Appeal has apparently meant to say in paragraph 4.12 of its judgment [see paragraph 26 above] that that court has not used the statements provided by [the applicant] for its examination of the fine; the tax authorities had indeed made use of only the bank statements and portfolio summaries.

4.58 As regards the other information provided by [the applicant] (bank statements and portfolio summaries), the Court of Appeal held that these could be taken into account in the context of the fines. The fact that the Court of Appeal did indeed have regard to these data follows, in my view, from paragraphs 4.34 and 4.37 of that court's judgment [see paragraph 27 above]...

4.59 As follows from sections 4.43–4.50, I am of the opinion that the consequence of exclusion of evidence must be attached to the use of the material. The case must be remitted to another court of appeal, which must re-examine the imposition of the tax fines without using all the material provided by [the applicant] on pain of penalty payments by letter of 9 December 2008 ..."

### *2. The judgment of the Supreme Court*

31. On 29 May 2015 the Supreme Court gave judgment, dismissing the applicant's appeal on points of law. As relevant to the case before the Court, its reasoning included the following (domestic case-law references omitted):

"2.3.1. As regards the *nemo tenetur* principle the Court of Appeal has ... ruled that the information provided by [the applicant] to the Tax Inspector pursuant to the judgment of the provisional measures judge – bank account statements and portfolio summaries – can be regarded as will-independent, and that Article 6 ECHR does not prevent such data from being taken into account in the context of tax fines.

2.3.2. The first ground for the appeal on points of law challenges that finding on the basis of a point of law (*rechtsklacht*) and on the basis of reasoning. The point of law complaint is that it follows from the ECtHR's case-law that the *nemo tenetur* principle also applies to documents the handing over of which implies recognition of their existence, so that the Court of Appeal has failed to appreciate that in this case the question to be answered is not whether the documents handed over by [the applicant] exist independently of his will, but whether those documents can be taken into account in the proceedings irrespective of [the applicant's] will. The complaint about the reasoning is that the Court of Appeal has not explained why two declarations completed by [the applicant] would be will-independent.

2.3.3. In [*Saunders*, cited above] the ECtHR held that the prohibition of forced self-incrimination is connected with the right to remain silent, which entails that this prohibition does not extend to the use in criminal proceedings of evidence that, although obtained by compulsion, has an existence independently of the will of the accused. It does not appear from the ECtHR's subsequent case-law that it has differed in its approach since. This rule has been expanded on in Netherlands domestic case-law ...

It would not be reconcilable with the rule set out in *Saunders* that – as argued by [the applicant] – the *nemo tenetur* principle extends to all documents the surrender of which implies recognition of their existence. Such recognition is, after all, implicit in every forced surrender of documents. To accept [the applicant's] position would accordingly render the distinction made in the *Saunders* judgment meaningless.

In the case of documents such as those here in issue, namely bank account statements and portfolio summaries drawn up by the bank which relate to accounts of which the taxpayer concerned has already been identified as the holder and the existence of which the Tax Inspector could thus assume (*van welke stukken de inspecteur derhalve het bestaan mag aannemen*), it is beyond doubt that they constitute material that exists independently of the will of the person concerned (...).

The complaint based on a point of law therefore fails. ...

2.3.5. The finding of the Court of Appeal as summarised above under 2.3.1. is based on the factual finding that the information made available by [the applicant] consists of bank account statements and portfolio summaries. ... [T]his finding is to be understood in the sense that for the decision on the tax fine and for the decision to fix the fine at a lower amount, only the bank account statements and portfolio summaries which the bank made available to [the applicant] were of interest. This incorporates the finding that the statements (contained in one or more documents) that [the applicant] has made, have not had an independent significance for the decision.

Understood in this manner, the Court of Appeal has – unlike what is assumed in the ground for the appeal on points of law – not held that the declarations completed by [the applicant] are will-independent. The complaint [about the reasoning] thus lacks a factual basis."

32. Consequently, the tax fines, as set by the Court of Appeal, remained unaffected.

# RELEVANT LEGAL FRAMEWORK AND PRACTICE

## I. RELEVANT DOMESTIC LAW AND PRACTICE

### A. General State Taxes Act

33. Section 47 of the General State Taxes Act ("the Act"), as in force as the relevant time, provided as follows:

"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. ..."

34. A tax adjustment can be imposed within five years after the fiscal year concerned (section 16(3) of the Act). Where foreign assets are concerned, this period is twelve years (section 16(4) of the Act).

35. Section 18 of the Act, which was in force from 1 January 1994 to 1 January 1998 and applied to tax adjustments concerning those years, provided for the imposition of punitive fines. Its first paragraph read:

"The tax imposed by means of a tax adjustment will be increased by one hundred percent, unless it is not due to intent or gross negligence on the part of the taxpayer that too little tax was levied."

### B. Regulation on tax fines (1993)

36. In accordance with paragraph 21(3) of the 1993 Regulation on tax fines, in force at the relevant time, the Tax Inspector would not grant a remission of the statutory fine of 100% in case of, *inter alia*, serious or substantial or relatively substantial fraud (*ernstige òf omvangrijke òf verhoudingsgewijs omvangrijke fraude*), with the word "serious" indicating factors such as cunning (*listigheid*), falsehood (*valsheid*) or collusion (*samenspanning*) and the like.

### C. Settled case-law of the Supreme Court

37. The Supreme Court (Tax Chamber) established that fines based on section 18 of the Act (see paragraph 35 above) should be qualified as a "criminal charge" within the meaning of Article 6 of the Convention (judgment of 19 June 1985, ECLI:HR:1985:AC8934).

38. In a judgment of 12 July 2013 (ECLI:HR:2013:BZ3640; see also *Van Weerelt v. the Netherlands* (dec.), no. 784/14, § 37, 16 June 2015, as well as paragraph 26 at point 4.9 above), which concerned proceedings against an order issued to a taxpayer by a provisional measures judge to submit, on pain of penalty payments, certain information and materials, the Supreme Court (Civil Chamber; *civiele kamer*) held that in as far as evidentiary material was concerned the existence of which is dependent on the will of the taxpayer, that material should not be used for the purpose of imposing a tax fine or of a criminal prosecution. If such use was nevertheless made, it was for the tax court which examined the tax fine or the criminal court examining the charge to determine the consequences. The Supreme Court did not, however, exclude

the use, for the purpose of imposing a tax fine or of a criminal prosecution, of material which has an existence independent of the will of the taxpayer.

39. According to settled case-law of the Supreme Court (Tax Chamber) (see case-law references in paragraphs 24, 26 and 30 above), it is that tribunal's understanding of the Court's *Saunders* judgment (cited above) and subsequent case-law that bank statements have an existence independent of the will of the account holder. On this point it held in a judgment of 24 April 2015 (ECLI:NL:HR:2015:1117) as follows:

> "4.4.2. The second part [of the cassation complaint] is directed against the Court of Appeal's finding that the documents demanded by the State, in particular bank statements, are in the given circumstances to be regarded as will-dependent material. This [complaint] succeeds. The [Supreme Court] judgment of 12 July 2013 [ECLI:NL:HR:2013:BZ3640], at [point] 3.6, defines, with reference to the *Saunders* judgment, 'will-independent material' as 'material that has been obtained through compulsion, but that exists independently of the will of the accused'. It follows that the qualification of material as either 'will-independent' or 'will-dependent' – which distinction is related to the right of the person concerned to remain silent – is connected to the nature of the material (whether it physically 'exists' independently of the will of the person concerned).
>
> The Court of Appeal incorrectly links the will-(in)dependence to the answer to the question whether the demanded documents can be obtained without the cooperation of the person concerned. This link renders the distinction made in the judgment of 12 July 2013 and in the *Saunders* judgment meaningless, since the surrender of documents on the basis of an order in summary proceedings can never take place without the cooperation of the person concerned."

## II. EUROPEAN UNION LAW

40. In its judgment of 18 October 1989 in *Orkem v Commission* (C-374/87, EU:C:1989:387) concerning European competition law, the Court of Justice of the European Communities ("the CJEC", which on 1 December 2009 became known as the Court of Justice of the European Union (CJEU)) examined the powers of the Commission to obtain information from an undertaking[4] under investigation. In so far as relevant, it held as follows:

> "34 Accordingly, whilst the Commission is entitled, in order to preserve the useful effect of Article 11(2) and (5) of Regulation No 17, to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct, it may not, by means of a decision calling for information, undermine the rights of defence of the undertaking concerned.

[4] In the field of EU competition law, the concept of "undertaking" covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. Any activity consisting in offering goods or services on a given market is an economic activity.

> 35 Thus, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove."

41. The European Union courts confirmed this case-law on many occasions, whilst also acknowledging the relevant developments in the case-law of this Court which took place after the *Orkem* judgment. Thus, the CJEC referred for example to *Funke*, *Saunders* and *J.B. v. Switzerland* (all cited above) in its ruling of 15 October 2002 in *Limburgse Vinyl Maatschappij NV and others v Commission* (joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, § 274) and held that, for the privilege against self-incrimination to apply, "both the *Orkem* judgment and the recent case-law of the European Court of Human Rights require, first, the exercise of coercion against the suspect in order to obtain information from him and, second, establishment of the existence of an actual interference with the right which they define" (ibid., § 275). In this judgment the CJEC also clarified that the right of an undertaking, as acknowledged in *Orkem*, not to be compelled by the Commission to admit their participation in an infringement of European competition law, means that, in the event of a dispute as to the scope of a question, it falls to be determined whether an answer from the undertaking to which the question was addressed was in fact equivalent to the admission of an infringement, such as to undermine the rights of the defence (ibid., § 273).

On 28 April 2010 the General Court of the European Union held that an undertaking could not be recognised as having an absolute right of silence. It considered that the mere fact of an undertaking being obliged to comply with the Commission's request for the production of documents already in existence could not constitute a breach of the principle of respect for the rights of the defence or impair the right to fair legal process, which offered, in the specific field of competition law, protection equivalent to that guaranteed by Article 6 of the Convention. Moreover, where an undertaking was asked to describe the object, course, results and conclusions of meetings in which it had participated, when it was clear that the Commission suspected that the object of those meetings was to restrict competition, a request of that nature was of such a kind as to require the undertaking concerned to admit its participation in an infringement of the Community competition rules, so that the undertaking was not required to answer questions of that type. In such a situation, undertakings could not claim that their right not to incriminate themselves had been infringed when they had nevertheless, voluntarily, replied to such a request (see *Amann & Söhne and Cousin Filterie v Commission*, T 446/05, EU:T:2010:165, §§ 326 and 328-29).

The *Orkem* case-law was most recently confirmed and clarified by the CJEU in its judgment of 28 January 2021 in *Qualcomm* (C-466/19 P, EU:C:2021:76). It found that in so far as the case-law arising from *Amann &*

*Söhne and Cousin Filterie v Commission* (cited above) ruled out that the mere fact of being obliged to produce documents already in existence could infringe the rights of defence, that case-law could not be interpreted, *a contrario*, as meaning that any request for the production of a document which could not be regarded as "already in existence" necessarily infringed those rights, in particular the right to avoid self-incrimination (*Qualcomm*, cited above, § 146). An undertaking would only be allowed to evade the obligation to communicate all necessary information where it was compelled to provide answers which might involve the admission on its part of the existence of an infringement (ibid., § 147).

42. In addition, in a judgment of 2 February 2021 – which concerned answers to questions to be provided rather than documentary material and is therefore of less relevance in the context of the present case – the Grand Chamber of the CJEU addressed the privilege against self-incrimination for the first time in the context of a natural person (*Consob*, C-481/19, EU:C:2021:84). With reference to this Court's judgments in *Saunders* (cited above) and *Ibrahim and Others v. the United Kingdom* ([GC], nos. 50541/08 and 3 others, 13 September 2016), the CJEU held that the right to silence would be infringed where a suspect is obliged to testify under threat of sanctions and either testifies in consequence or is sanctioned for refusing to testify (ibid., § 39). It considered that the right to silence could not be confined to statements of admission of wrongdoing or to remarks which directly incriminate the person questioned, but that it also covered information on questions of fact which may subsequently be used in support of the prosecution and may thus have a bearing on the conviction or the penalty imposed on that person (ibid., § 40). The CJEU specified that its case-law concerning the obligation for undertakings, in the framework of proceedings which may lead to the imposition of sanctions for infringements of EU competition rules, to provide information which may be used to establish the existence of anti-competitive conduct (such as *Orkem*, see paragraph 40 above) could not be applied by analogy in the determination of the scope of the right to silence of natural persons who are the subject of proceedings for an offence of insider dealing (ibid., §§ 46 and 48).

# THE LAW

## ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

43. The applicant complained under Article 6 § 1 of the Convention that documents concerning a foreign bank account had been obtained from him under coercion for use in tax proceedings in which tax fines were imposed on him, in disrespect of the privilege against self-incrimination. Article 6 § 1 of the Convention reads as follows:

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

44. The Government contested that argument.

## A. Admissibility

### 1. *As regards the bank statements and portfolio summaries relating to 1995*

45. The Court notes at the outset that the documents made available by the applicant after the summary injunction proceedings consisted of, *inter alia*, bank statements and portfolio summaries relating to a bank account in Luxemburg held by the applicant and his wife (see paragraph 19 above). To the extent that those bank statements and portfolio summaries related to 1995, the Tax Inspector used them to assess the actual – rather than an estimated – amount due for income tax and for contributions to national social security schemes in respect of that year and to re-set the corresponding tax fine (see paragraphs 20, 26 at point 4.12, 30 at point 4.57, and 31 at point 2.3.5. above). However, since the order issued in the injunction proceedings was only for the disclosure of information on bank accounts held abroad after 31 December 1995 (see paragraphs 17-18 above), it cannot be said that the tax fine imposed in relation to the fiscal year 1995 was based on evidence that had been provided by the applicant under coercion.

46. It follows that, to the extent that the applicant's complaint of a breach of the privilege against self-incrimination concerns the fine of about EUR 1,180 (see paragraph 27 above) imposed in relation to the fiscal year 1995, it must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

### 2. *Applicability of Article 6*

47. The Court notes that it is not in dispute between the parties that in so far as the proceedings at issue concerned a tax fine, they fall within the scope of Article 6 under its criminal head. In the light of its findings in *Jussila v. Finland* [GC], no. 73053/01, §§ 29-38 and 45, ECHR 2006-XI, and having regard to the qualification of the tax fine imposed on the applicant under domestic law (see paragraph 37 above), the Court sees no reason to conclude otherwise. In this respect it is observed that the determination of the "criminal charge" against the applicant had become final through the judicial rulings on his appeals against the (re-setting of the) tax fine that was allegedly grounded on information coerced from him (see, by contrast, *Van Weerelt v. the Netherlands* (dec.), no. 784/14, §§ 62 and 66, 16 June 2015).

48. However, as set out in paragraphs 55-59 below, the parties are divided as to whether the case falls within the scope of the privilege against self-incrimination, which privilege lies at the heart of the notion of a fair trial

under Article 6 of the Convention (see paragraph 63 below). The Court observes that this issue is closely connected to the merits of the applicant's complaint. Consequently, the Court considers that it would be more appropriate to examine these arguments in the context of an examination of the merits of the case.

*3. Objection based on the lack of significant disadvantage*

49. Article 35 § 3 (b) of the Convention, as amended by Article 5 of Protocol No. 15 to the Convention[5], provides:

> "3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
>
> (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits."

50. The Government argued that the applicant had not suffered any significant disadvantage as required by Article 35 § 3 (b) of the Convention. In that respect they noted that the materials obtained from the applicant pursuant to the order of the provisional measures judge of 27 November 2008 (see paragraph 18 above) had actually resulted in a reduction of the tax adjustments issued and the tax fines imposed on the applicant, as the Tax Inspector had adjusted both amounts downwards. The Government further noted that the applicant's complaint of disrespect of the privilege against self-incrimination had been duly considered by both the Court of Appeal and the Supreme Court. The Government therefore considered that the application should be rejected on that ground in accordance with Article 35 § 3 (b) of the Convention.

51. The applicant argued in reply that, although the tax fines at issue were indeed reduced due to the information which he had been forced to provide about his bank account in Luxemburg and on account of the length of the proceedings, he was still to pay NLG 4,149 (about EUR 1,900) for the two tax fines put together, which, both relatively and absolutely, remained in his view a considerable sum. In his opinion, the compelled cooperation had not led to an advantage, but to a less severe disadvantage. He further submitted, referring to the different viewpoints expressed in domestic legal practice on interpretation of the case-law of the Court relating to materials whose existence is dependent, and materials whose existence is not dependent on the will of the person concerned, that his complaint concerned a fundamental dispute of great importance for the legal protection of Dutch citizens.

52. The Court refers to the principles established in its case-law regarding the notion of "significant disadvantage" (see *Sylka v. Poland* (dec.)

[5] See Article 8 § 4 of Protocol No. 15 and paragraph 24 of the Explanatory Report to Protocol No. 15.

no. 19219/07, § 27, 3 June 2014). It observes that, although the amount of the tax fine imposed in relation to the fiscal year 1996 was reduced after the applicant, on the basis of the judicial order of 27 November 2008 (see paragraph 18 above), had made available the materials requested by the fiscal authorities, he did remain liable to pay the fine imposed for his failure to comply in time with his duty under section 47 of the Act. In addition, account should be taken of the fact that the question whether or not the punitive fine was imposed in breach of the privilege against self-incrimination constituted an issue of principle for the applicant (see, *mutatis mutandis*, *Konstantin Stefanov v. Bulgaria*, no. 35399/05, § 46, 27 October 2015). The issue also falls to be considered from an objective point of view, given the importance which the Court's case-law attaches to the right to remain silent and the right not to incriminate oneself (see paragraph 63 below).

53. Having regard to the foregoing as well as the particular circumstances of the case, the Court is of the opinion that, whether or not the applicant suffered a significant disadvantage, respect for human rights within the meaning of Article 35 § 3 (b) of the Convention requires that the examination of the application be continued. In that context, it observes that the case brought to the Court by the applicant concerns a question of interpretation of the Court's case-law. A ruling of the Court on this issue will provide national jurisdictions with guidance as to the applicability and scope of the privilege against self-incrimination (see, *mutatis mutandis*, *Nicoleta Gheorghe v. Romania*, no. 23470/05, § 24, 3 April 2012). That being the case, the Court concludes that respect for human rights as defined in the Convention and the Protocols thereto requires an examination of this part of the application on the merits.

#### *4. Overall conclusion on admissibility*

54. The Court notes further that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

### B. Merits

#### *1. Submissions of the parties*

##### (a) The applicant

55. The applicant maintained that, in breach of the privilege against self-incrimination, use had been made, in tax proceedings in which fines were imposed on him, of documents which he had been ordered, by judgment, to provide under the threat of penalty payments and without having been given a guarantee that the ordered materials would only be used for the purpose of levying tax. In his opinion, relying on the Court's rulings in the cases of

*J.B. v. Switzerland* (no. 31827/96, ECHR 2001-III), *Chambaz v Switzerland* (no. 11663/04, 5 April 2012), *Marttinen v. Finland* (no. 19235/03, 21 April 2009), and *Van Weerelt v. the Netherlands* (cited above), the privilege against self-incrimination is not limited to refusing to testify during a hearing but also includes a guarantee against the use of methods of coercion or oppression to obtain evidence in defiance of the will of the accused, also where it concerns potentially incriminating documents or other so-called pre-existing evidence.

56. With reference to *Choudhary v. the United Kingdom* ((dec.), no. 40084/98, 4 May 1999), the applicant further argued that a pre-existing document is not evidence that exists independently of the will of the suspect if the prosecution authorities would not have been able to take cognisance of it without coercing the suspect, and it was, moreover, clear from the Court's considerations in the cases of *J.B. v. Switzerland* and *Chambaz* (cited above) that the materials requested from him were covered by the privilege against self-incrimination and that the exception for evidence whose existence was not dependent on the will of the applicant did not apply.

**(b) The Government**

57. According to the Government, when considering whether Article 6 had been violated, the Supreme Court had correctly and in line with the Court's case-law (see *Van Weerelt*, cited above, § 55 with further references) drawn a distinction between evidentiary material, obtained through methods of coercion, having an existence independent of the taxpayer's will and evidential material whose existence depends on the will of the taxpayer.

58. Part of the rationale behind the privilege against self-incrimination was that statements made under duress could be influenced thus rendering such evidence unreliable whereas miscarriages of justice must be prevented. This applied to a far lesser extent to cases where the reliability of the evidence was not at issue and where there was therefore no risk of a miscarriage of justice. For this reason, the accused may be compelled to a certain degree to cooperate in the production of objective evidential material, that is to say material whose existence is not dependent on the taxpayer's will. According to the Government, the documents at issue in the present case fell into this latter category. The requested bank statements and portfolio summaries constituted information that was objective in nature and the risk of the evidential material being unreliable was small. Referring to the Court's considerations in *Saunders v. the United Kingdom* (17 December 1996, *Reports* 1996-VI), which considerations had been built on by the Netherlands domestic courts and which, according to the Government, had not been abandoned by the Court in subsequent case-law, as well as the Court's findings in *Jalloh v. Germany* ([GC], no. 54810/00, §§ 100-02, ECHR 2006-IX), the Government were of the opinion that the coercion exercised in this case had not been in violation of Article 6 of the Convention.

59. The Government lastly pointed out that in the present case the actual existence of the evidence was already known to the Tax Inspector in that information about the existence of the bank account had, after all, been obtained from the Belgian authorities. This meant that, in contrast to the situation in the cases of *Funke v. France* (25 February 1993, Series A no. 256-A) and *J.B. v. Switzerland* (cited above), there was no question of a "fishing expedition" in the case at hand.

*2. The Court's assessment*

**(a) General principles**

*(i) The right to a fair trial under Article 6 § 1 of the Convention*

60. The right to a fair trial under Article 6 § 1 is an unqualified right. However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case (see *O'Halloran and Francis v. the United Kingdom* [GC], nos. 15809/02 and 25624/02, § 53, ECHR 2007-III). The Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (see, among many other authorities, *Beuze v. Belgium* [GC], no. 71409/10, § 120, 9 November 2018).

61. Compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be excluded that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings (see, *inter alia*, *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 251, 13 September 2016, and *Beuze*, cited above, §§ 121-22).

62. The Court has found that cases concerning tax surcharges – or tax fines – differ from the hard core of criminal law for the purposes of the Convention, and that, consequently, the guarantees of Article 6 under its criminal head will not necessarily apply with their full stringency (see *Jussila*, cited above, § 43; *Segame SA v. France*, no. 4837/06, § 59, ECHR 2012 (extracts); *Chap Ltd v. Armenia*, no. 15485/09, §§ 41 and 44, 4 May 2017; and, in the context of a complaint under Article 4 of Protocol No. 7, *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, § 133, 15 November 2016).

*(ii) General approach to the privilege against self-incrimination*

63. The Court has held that the right to remain silent 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 of the Convention. 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 Article 6 (see *Ibrahim and Others*, cited above, § 266).

64. The privilege against self-incrimination does not protect against the making of an incriminating statement *per se* but against the obtaining of evidence by coercion or oppression. In this latter context, the Court has held as follows in its judgment in *Ibrahim and Others* (cited above, § 267, with further references):

> "... The Court, through its case-law, has identified at least three kinds of situations which give rise to concerns as to improper compulsion in breach of Article 6. The first is where a suspect is obliged to testify under threat of sanctions and either testifies in consequence or is sanctioned for refusing to testify. The second is where physical or psychological pressure, often in the form of treatment which breaches Article 3 of the Convention, is applied to obtain real evidence or statements. The third is where the authorities use subterfuge to elicit information that they were unable to obtain during questioning."

65. For an issue to arise from the perspective of the protection against self-incrimination, therefore, an applicant must firstly have been subject to some form of coercion or compulsion by the authorities (see, for example, *Serves v. France*, 20 October 1997, § 47, *Reports* 1997-VI, and *Bykov v. Russia* [GC], no. 4378/02, § 102, 10 March 2009). Secondly, for a case to fall within the scope of protection of the right not to incriminate oneself, either that compulsion must have been applied for the purpose of obtaining information which might incriminate the person concerned in pending or anticipated criminal proceedings against him or her, or the case must concern the use of incriminating information compulsorily obtained outside the context of criminal proceedings in a subsequent criminal prosecution (see *Weh v. Austria*, no. 38544/97, §§ 42-43, 8 April 2004; see also *Wanner v. Germany* (dec.), no. 26892/12, § 24, 23 October 2018).

66. The underlying principle for this is the fact that the right not to incriminate oneself presupposes, in particular, that the prosecution in a criminal case seek to prove their case against the accused without resorting 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 *Saunders*, cited above, § 68).

67. 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 (see *Saunders*, cited above, § 69; *Kalnėnienė v. Belgium*, no. 40233/07, § 52,

31 January 2017; *Sršen v. Croatia* (dec.), no. 30305/13, § 44, 22 January 2019; and *El Khalloufi v. the Netherlands* (dec.), no. 37164/17, §§ 38-40, 26 November 2019). However, where such evidence has been obtained by a measure which breaches Article 3, the privilege against self-incrimination remains applicable (see also *Jalloh*, cited above, §§ 105, 108, 115-16).

68. In cases where the privilege against self-incrimination is applicable (see *Jalloh*, cited above, §§ 110-13), the Court has held – noting that the right not to incriminate oneself is not absolute (see *Heaney and McGuinness v. Ireland*, no. 34720/97, § 47, ECHR 2000-XII; *Weh*, cited above, § 46, and *O'Halloran and Francis*, cited above, § 53) – that the degree of compulsion applied will be incompatible with Article 6 where it destroys the very essence of the privilege (see *John Murray v. the United Kingdom*, 8 February 1996, § 49, *Reports* 1996-I). Not all direct compulsion will destroy the very essence of the privilege against self-incrimination and thus lead to a violation of Article 6. In examining whether, in a given procedure, compulsion has extinguished the very essence of this privilege, the Court will consider, in particular, the nature and degree of the compulsion, the existence of any relevant safeguards in the procedure and, crucially, the use to which any material so obtained is put (see, for instance, *Allan v. the United Kingdom*, no. 48539/99, § 44, ECHR 2002-IX; *Jalloh*, cited above, § 101; and *Ibrahim and Others*, cited above, § 269).

*(iii) The privilege against self-incrimination and coercion to supply documents in the context of financial law matters*

69. In principle, the privilege against self-incrimination can also apply in situations of coercion to supply documents**.** In developing its case-law in financial law matters falling under the criminal head of Article 6 § 1 of the Convention, the Court has however made distinctions, in particular as to the pre-existence of such materials and as to whether the authorities were aware of their existence. The following case-law of the Court is of relevance in this context.

70. The case of *Funke* (cited above) concerned compulsion in the shape of pecuniary penalties to produce foreign bank statements in the context of a suspicion of infringement of regulations governing foreign exchange controls. In its reasoning the Court placed emphasis on the fact that the customs authorities had sought documents which they believed must exist, although they were not certain of the fact, and that they had been "unable or unwilling" to procure them by means other than compelling the applicant himself to provide evidence. It held that the special features of customs law could not justify such an infringement of the right to remain silent and not to contribute to incriminating himself and concluded that Article 6 had been breached (ibid., § 44).

71. In *J.B. v. Switzerland* (cited above) the tax authorities – having noted that the applicant had made investments with one P. and his companies that

had not been declared – attempted to compel him by means of the imposition of fines to submit **"**all documents concerning the companies in which he had invested money" (ibid., § 65). In the applicant's opinion, it was clear that the authorities suspected the existence of further items of income and assets which they could not prove, for which reason they requested the information. While the Court did not wish to speculate as to what the nature of such information would have been, it noted that the applicant could not exclude that, if it transpired from these documents that he had received additional income which had not been taxed, he might be charged with the offence of tax evasion. In view of the persistence with which the tax authorities attempted to achieve their aim, the Court remained unconvinced by the Government's argument that it could not be said that the authorities had gone out on a "fishing expedition" (ibid., § 69). Against the above background, the Court found a violation of the right under Article 6 § 1 of the Convention not to incriminate oneself.

72. In *Allen v. the United Kingdom* (dec.), no. 76574/01, ECHR 2002-VIII, the Court held that the requirement on the applicant to make a declaration of his assets to the revenue service did not disclose any issue under Article 6 even though a separate penalty was attached to a failure to do so. The Court differentiated *Allen* from *J.B. v. Switzerland* on the grounds that the applicant in *Allen* had not been prosecuted for failing to provide information which might have incriminated him in pending or anticipated criminal proceedings but for the offence of making a false declaration of his assets, which was an offence itself. The Court held that the privilege does not act as a prohibition on the use of compulsory powers to require taxpayers to provide information about their financial affairs for the purpose of securing a correct tax assessment, noting that 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. The Court noted that "the privilege against self-incrimination cannot be interpreted as giving a general immunity to actions motivated by the desire to evade investigations by the revenue authorities". The Court followed the *Allen* approach in *King v. the United Kingdom* (dec.), no. 13881/02, 8 April 2003, which also raised the issue of sanctioning the applicant for making an inadequate tax return.

73. In *Chambaz* (cited above) two fines were imposed on the applicant for his refusal to comply with a request from the Swiss fiscal authorities to submit all documents concerning his business dealings with a company and with banks which held assets on that company's behalf. While appeal proceedings against the imposition of those fines were pending, the federal tax authorities opened an investigation against the applicant for tax evasion.

Relying on Article 6 § 1, the applicant complained of a violation of his right not to incriminate himself due to the fact that he had been fined for his refusal to produce the requested documents which could have been used

against him in the investigation for tax evasion. On this point, the Court noted that by fining the applicant, the authorities had put him under pressure to furnish documents which would have provided information on his income and assets. While the Court did not wish to speculate as to the nature of that information, it considered that the applicant could not exclude that any information relating to additional income from non-taxed sources exposed him to being accused of having committed the offence of tax evasion and was of such a nature as to compromise his position in the investigation for tax evasion (ibid., §§ 53-54). Even though, when reiterating the general principles (ibid., § 52), it made a reference to *Saunders* (cited above, §§ 68-69), the Court did not refer to the distinction made in that judgment between material the existence of which is dependent on the will of the person concerned, such as replies to questions put, and material, such as already existing documents, that exists independently of that person's will**.** It concluded that in the specific circumstances of the case there had been a violation of Article 6 § 1.

*(iv) Summary of the above case-law*

74. In order for an issue to arise from the perspective of the privilege against self-incrimination, there must be some form of coercion or compulsion exerted on the person concerned. It is furthermore required that either that person is subject to existing or anticipated criminal proceedings – that is to say, a "criminal charge" within the autonomous meaning of Article 6 § 1 –, or incriminating information compulsorily obtained outside the context of criminal proceedings is used in a subsequent criminal prosecution (see paragraph 65 above). These may be considered the two prerequisites for the applicability of the privilege against self-incrimination (see, for instance, *Eklund v. Finland* ((dec.), no. 56936/13, § 51, 8 December 2015).

75. Where these prerequisites are met, it is necessary to determine whether the use of evidence obtained by means of coercion or compulsion should nevertheless be considered as falling outside the scope of protection of the privilege against self-incrimination. As it transpires from the Court's case-law, the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent. When methods of coercion are used with the aim of having an accused person answer questions or make testimonial statements, either orally or in writing, the will to remain silent is clearly not respected and the privilege against self-incrimination thus applies. The privilege does not, however, extend to the use in criminal proceedings of materials obtained from an accused through methods of coercion when these materials have an existence independent of his or her will (see paragraph 67 above).

76. Where the use of documentary evidence obtained under threat of penalties in the context of financial law matters is concerned, it may further be deduced from the Court's case-law (see paragraphs 69-73 above), that such

use does not fall within the scope of protection of the privilege against self-incrimination where the authorities are able to show that the compulsion is aimed at obtaining specific pre-existing documents – thus, documents that have *not* been created as a result of the very compulsion for the purpose of the criminal proceedings – which documents are relevant for the investigation in question and of whose existence those authorities are aware. That situation is to be distinguished from the situation where the authorities attempt to compel an individual to provide the evidence of offences he or she has allegedly committed by forcing him or her to supply documents which they believe must exist, although they are not certain of it (see *Funke*, cited above, § 44, and *J.B. v. Switzerland*, cited above, § 69). The latter situation the Court has described as "fishing expeditions". The Court considers that in that context a parallel may be drawn with testimonial evidence: when a person makes a statement which incriminates him or her, he or she is similarly providing the authorities with information of whose existence those authorities were not yet aware. Where the making of that statement came about as a result of coercion or compulsion, an issue arises under the privilege against self-incrimination, since, as set out above (see paragraph 66), it is incumbent on the prosecution in a criminal case to prove their case without resort to evidence obtained through such methods.

77. Lastly, it follows from the case-law that, regardless of whether or not the authorities are aware of the existence of documentary or other material evidence, if this has been obtained by methods in breach of Article 3, its use will always fall within the scope of the privilege against self-incrimination (see paragraph 67 above).

78. If the prerequisites for the applicability of the privilege against self-incrimination are met (see paragraph 74 above), and the use of evidence obtained through coercion or compulsion does fall within the scope of protection of that privilege (see paragraphs 75-76 above), it is necessary to examine whether the procedure did not extinguish the "very essence" of the privilege, that is to say, to determine the manner in which the overall fairness of the proceedings was affected. For this purpose, it will be necessary to have regard, in turn, to the factors set out in paragraph 68 above: the nature and degree of compulsion used to obtain the evidence; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put.

**(b) Application of the above principles to the present case**

79. Turning to the present case, the Court notes that the applicant complained that, in breach of the privilege against self-incrimination, he had been ordered, by judgment, to provide under the threat of penalty payments documents to the domestic fiscal authorities which were used in tax proceedings in which fines were imposed on him (see paragraph 55 above). Relying on the Court's case-law, he argued that there were no grounds for

concluding that this situation fell outside the scope of the privilege against self-incrimination (see paragraph 56 above).

80. The Court observes at the outset that the documents submitted by the applicant consisted of, firstly, two forms completed by the applicant in which he indicated that he had held a bank account at X Bank in Luxembourg and, secondly, bank statements and portfolio summaries relating to that account (see paragraph 19 above).

81. There is, however, no indication whatsoever in the file that use was made of the two forms in order to establish intent on the part of the applicant as required for the imposition or re-setting of a tax fine as at issue (see paragraphs 21, 24, 27 and 35 above). Indeed, the Supreme Court explicitly stated that no use had been made of the forms for the imposition of the tax fine (see paragraph 31 at point 2.3.5. above). The domestic proceedings solely concerned the use of bank statements and portfolio summaries that had been drawn up by X Bank and related to an account of which the applicant had already been identified as an account holder. That being the case, no issue can arise as to a breach of the right not to incriminate oneself in relation to the forms submitted by the applicant.

82. In examining whether the prerequisites for the applicability of the privilege against self-incrimination are met in so far as the use of the bank statements and portfolio summaries is concerned, the Court firstly observes that at the time the provisional measures judge ordered the applicant, on pain of penalty payments, to disclose documents relating to bank accounts held by him abroad after 31 December 1995 (see paragraph 18 above), a tax fine for his failure to comply with his obligations under section 47 of the Act in respect of capital tax for 1996 had already been imposed on him (see paragraph 13 above). Secondly, it observes that although, strictly speaking, it might be true that the order of the provisional measures judge did not relate to the capital tax adjustment and tax fine already imposed and in respect of which objection proceedings were pending, it is a matter of fact that those latter proceedings had been adjourned awaiting the outcome of the summary injunction proceedings (see paragraph 20 above). This adjournment enabled the Tax Inspector subsequently to make use, in the decision on the objection lodged by the applicant against the tax adjustment issued and the accompanying fine imposed for the year 1996 (see paragraph 13 above), of the bank statements and portfolio summaries that had been provided by the latter pursuant to the order of the provisional measures judge.

83. As the Court has found above (see paragraph 47), the proceedings in which the applicant's objection and appeals against the tax fine imposed on him were determined fell within the scope of Article 6 of the Convention under its criminal head. Further, the bank statements and portfolio summaries that were used for re-setting the fine were obtained from the applicant by means of compulsion, namely the order of the provisional measures judge for disclosure on pain of substantial penalty payments (see paragraph 18 above).

In this context the Court reiterates that Article 6 § 1 – and thus also the right not to incriminate oneself – applies throughout the entirety of proceedings for "the determination of ... any criminal charge", including proceedings whereby a sentence is fixed (see *Phillips v. the United Kingdom*, no. 41087/98, § 39, ECHR 2001-VII, and *Aleksandr Dementyev v. Russia*, no. 43095/05, § 23, 28 November 2013). As such, the two prerequisites for applicability of the privilege against self-incrimination have been met (see paragraph 74 above).

84. The Court will therefore next examine whether the use of the bank statements and portfolio summaries falls within the scope of the protection provided by that privilege (paragraphs 75–76 above).

85. The Court has no doubt that these were pre-existing documents. It further considers that the authorities were aware of their existence since it had already been established that the applicant had held a bank account in Luxembourg at the relevant time (see paragraphs 6 and 12 above). It can therefore not be said that the authorities were engaging in a "fishing expedition" when they instituted summary injunction proceedings in order for the provisional measures judge to order the applicant to submit certain documents in relation to that account (see paragraph 17 above). The order subsequently issued by the provisional measures judge, moreover, specifically indicated what documents the applicant was to supply (see paragraph 18 above). The present case can thus be distinguished from the cases of *J.B. v. Switzerland* (where the applicant was to provide all documents which he had concerning certain companies; see paragraph 71 above) and *Chambaz* (where the applicant was fined for his failure to submit all documents concerning his business dealings with a particular company and with banks which held assets on that company's behalf; see paragraph 73 above). Lastly, the imposition of penalty payments which the applicant would incur if he failed to comply with the order of the provisional measures judge (see paragraph 18 above) cannot be considered to amount to treatment in breach of Article 3 of the Convention (see paragraph 77 above).

86. For the above reasons the Court finds that in the circumstances of the present case the use of the bank statements and portfolio summaries concerning the applicant's account with X bank that were obtained from him by a judicial order for disclosure on pain of penalty payments does not fall within the scope of the protection of the privilege against self-incrimination. There is, therefore, no reason for the Court to proceed to the examination as set out in paragraph 78 above.

87. In the light of the foregoing considerations, the Court concludes that it cannot be said that, due to the use of the aforementioned documents, the applicant was deprived of a fair trial.

88. Accordingly, the Court finds that there has been no violation of Article 6 § 1 of the Convention.

## FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning the tax fine imposed in relation to the fiscal year 1996 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 4 October 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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| Ilse Freiwirth<br>Deputy Registrar | Gabriele Kucsko-Stadlmayer<br>President |