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The Principle of Personality of Tax Penalties: A General Principle with a Narrow Scope?

1. Introduction

It is a great honour to have an opportunity to express my admiration for Professor Nykiel's work in the Jubilee Book dedicated to him by his colleagues and friends. In order to tackle a tax topic which fits within the general focus of this book on contemporary tax challenges and, at the same time, takes account of Professor Nykiel's expertise in the relationship between taxation and human rights, I have chosen to offer a French approach to the tax dimension of a fundamental principle of criminal law: the principle according to which no one should be punished for offences committed by others.

This principle is well established in the case law of the European Court of Human Rights (ECtHR). At point 53 of the *EL*, *RL* and *JO-L* v. *Switzerland* case,[2] it held that "it is a fundamental rule of criminal law that criminal liability does not survive the person who has committed the criminal act". In the Court's opinion, such a rule is required by the presumption of innocence enshrined in Art. 6(2) of the European Convention of Human Rights (ECHR).[3] "Inheritance of the guilt of the dead", says the Court, "is not compatible with the standards of criminal justice in a society governed by the rule of law". It concludes that when this happens, there is a violation of Art. 6(2).

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[2] ECtHR, judgment, 29 August 1997, *E.L.*, *R.L.* and *J.O.-L.* v. *Switzerland*, No. 75/1996/694/886; ECtHR, judgment, 29 August 1997, *A.P.*, *M.P.* and *T.P.* v. *Switzerland*, No. 71/1996/690/882.

[3] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, amended.

2. The principle in French law

In French Constitutional law, the principle derives from Art. 8 of the 1789 Declaration of Human Rights[4] which implies, according to the Constitutional Court (CC), that "no one can be punished except for his own actions". The Constitutional Court adds that "this principle applies not only to penalties imposed by the criminal courts but also to any sanction having the character of a punishment".[5]

The Conseil d'Etat (CE; the French administrative court dealing with most tax matters) and the Cour de Cassation (which deals, among other things, with criminal law cases) have already had several opportunities to draw some consequences from this principle (even anticipating, in the case of the Conseil d'Etat, the judgments of the ECtHR).[6] The Conseil d'Etat thus considers that "both the principle of personal responsibility and the principle of the personality of penalties preclude tax penalties, which have the character of a punishment intended to prevent the repetition of the acts they target, from being pronounced against taxpayers, natural persons, when they have not participated in the acts that these penalties punish".[7] Even more precisely, the Court held that "tax penalties, which have the character of a punishment intended to prevent the repetition of the conduct they target and do not have as their object the mere pecuniary reparation of a loss, constitute, even if the legislator has left the task of establishing and imposing them to the administrative authority, 'criminal charges' within the meaning of the provisions of paragraph 1 above. The principle of the personality of penalties derives from the principle of the presumption of innocence laid down by the provisions of paragraph 2 [of Art. 6 ECHR]".[8]

Once it is acknowledged that nobody should be punished because of offences committed by someone else, legal practice shows that this principle is not always easy to reconcile with the institutional framework of taxation. This may occur in family situations. This may also happen in the field of business taxation.

[4] FR, The Declaration of the Rights of Man and of the Citizen [*Déclaration des droits de l'homme et du citoyen*], 26 August 1789.

[5] See for instance: FR, CC, decision, 4 May 2012, No. 2012-239 QPC.

[6] FR, CE, decision, 2 March 1979, No. 6646. See also: FR, CE, decision, 10 July 1987, No. 55762–57763; FR, CE, decision, 6 April 1987, No. 55862.

[7] FR, CE, decision, 5 November 2014, No. 356148.

[8] FR, CE, decision, 5 October 2016, No. 380432.

2.1. Family situations

2.1.1. Heirs

As seen above, the ECtHR considers, on the basis of Art. 6(2) of the ECHR, that the principle of the individual nature of penalties precludes the imposition of tax penalties on heirs for acts committed by the deceased. It, however, does not preclude the recovery of tax penalties finally imposed on the tax offender from the heirs. European case law and French constitutional case law converge around this analysis, which explains why the Constitutional Court, in the aforementioned decision, reached the conclusion that Art. 1754 of the French Tax Code,[9] according to which "in the event of the death of the offender […], the fines, surcharges and interest owed by the deceased […] constitute an inheritance […] charge", is in conformity with the Constitution.[10] A reading of the comments on this decision published on the website of the Constitutional Court by its legal service shows the Court's concern to provide a solution consistent with the case law of the ECtHR. These principles have been implemented by lower courts, too.[11]

2.1.2. Joint taxation of couples and tax penalties

It should be noted, however, that the Conseil d'Etat takes a rather restrictive approach to the consequences of the principle in other circumstances. In the decision of 5 October 2016 quoted above, it had to establish how the principle could be accommodated in a system such as the French one which is based on joint taxation of couples. Let us recall in this respect that under the terms of Art. 6 of the French Tax Code, "married persons are subject to joint taxation for the income received by each of them and those of their children and dependents". According to Art. 156 of the same Code: "Income tax is established according to the total amount of annual net income available to each tax household".

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[9] FR, French Tax Code [*Code général des impôts*], Decree No. 50-481 of 6 April 1950, amended.

[10] FR, Constitution of 4 October 1958, amended.

[11] FR, Adm. Court of Rennes, judgment, 13 June 2002, No. 98-3228, 98-3239 and 98-3242; FR, Adm. Court of appeal of Lyon, judgment, 28 June 2011, No. 09LY00328, 2nd ch. The CE refused to admit the appeal against this decision on 27 July 2012 (decision No. 352200). See also: FR, Adm. Court of appeal of Paris, judgment, 24 September 2009, No. 07-3771.

Based on these texts, the Court held that "when it adds an additional penalty to an income tax reassessment to punish the behaviour of a taxpayer, the administration is bound to respect the principle of the personality of penalties […], which prevents a tax penalty from being directly applied to a person who has not taken part in the actions that this penalty punishes. This principle must, however, be reconciled with the system of joint taxation […] Thus, when only one of the spouses has taken part in wrongful acts, the resulting tax penalties must be considered as having been pronounced solely against him or her, even if they increase, for the income concerned by these acts, the tax due by the tax household formed by the two spouses, on all their income. It follows from the foregoing that the principle of the individuality of penalties enshrined in the stipulations of Art. 6 of the European Convention on Human Rights had to be applied taking into account the principle of joint taxation of married couples and did not prevent the penalties incurred because of the actions of only one of the spouses from being charged jointly to the members of this couple".

At first sight, this outcome may seem quite surprising. Its explanation is, however, to be found in the Advocate General's opinion[12] which puts forward that the principle of joint taxation "amounts to creating a legal fiction that is neither a natural nor a legal person, which is not even a legal person, which is at most a fiscal entity imagined for the sole purpose of establishing income tax, and behind which one immediately finds the natural persons who constitute the couple subject to joint taxation. The imposition of a tax penalty on the tax household constituted by a married couple based on the behaviour of only one of its members does not therefore amount to sanctioning a person other than the one to whom this behaviour is attributable". The Advocate General also stressed that civil law provisions enable the spouse, upon later dissolution of the community of assets between the spouses, to claim indemnity for the tax penalties triggered by the other spouse's behaviour during the marriage. The same mechanism also applies between spouses who have chosen a separatist matrimonial regime. This somewhat complex intellectual construction shows that the Conseil d'Etat wishes to preserve the institution of joint taxation of couples through the combination of an abstract conception of the tax household and the finding that civil law provides a remedy to avoid unfair penalization of an innocent taxpayer.

This pragmatic approach to the consequences of the principle of personality of penalties may also be found in the field of business taxation.

[12] FR, Advocate General (*rapporteur public*) V. Daumas, opinion under CE, decision, 15 October 2016, No. 380432.

2.2. Business situations

2.2.1. Mergers

A "classical" issue in French law is whether criminal or administrative penalties relating to offences committed by a legal person may be transferred to its legal successor in case of merger (or demerger). Here, the Conseil d'Etat has adopted a rather constructive approach to the principle of the personality of penalties, which it considered necessary to adapt to the specific situation of legal persons. In particular, it considered that "having regard to the objectives of preventing and repressing tax fraud and evasion to which tax penalties respond, the principle of the personality of penalties does not prevent these pecuniary penalties from being applied in the event of a merger or demerger, taking into account the universal transfer of assets and liabilities, from being borne by the acquiring company, a new company created to carry out the merger or companies resulting from the demerger, in respect of breaches committed, prior to this operation, by the acquired or merged company or by the demerged company".[13]

This approach was until recently, contrary to the position adopted by the Cour de Cassation (CdC), which is the Supreme Court in criminal law matters, which used to hold that no criminal liability could be established against the absorbing company by virtue of offences committed prior to the merger by the absorbed company.[14] However, the Cour de Cassation reversed its case law in a landmark judgment[15] where it held that in the case of a merger of a company with another company falling within the scope of Council Directive 78/855/EEC of 9 October 1978 on the merger of public limited liability companies,[16] as last codified by Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017,[17] the acquiring company may be subject to a fine or confiscation for an offence committed by the acquired company prior to the transaction. By relying on a recent judgment of the ECtHR,[18] the Cour de Cassation gave up its

[13] FR, CE, decision, 4 December 2009, *Sté Rueil Sports*, No. 329173.

[14] FR, CdC, judgement, 20 June 2000, No. 99-86.742; FR, CdC, judgement, 14 October 2003, No. 02-86.376; FR, CdC, judgement, 18 February 2014, No. 12-85.807.

[15] FR, CdC, judgement, 25 November 2020, No. 18-86.955.

[16] EU, Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies, OJ L 295, 20 October 1978, p. 36.

[17] EU, Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, OJ L 169, 30 June 2017, p. 46.

[18] ECtHR, judgement, 24 October 2019, *Carrefour France* v. *France*, No. 37858/14.

earlier approach, which equated the dissolution of a legal person with the death of a natural person, in favour of the specificity of legal persons, whose economic activity continues within the company that absorbed them. This renewed interpretation of the domestic texts is intended to prevent the merger from being an obstacle to the criminal liability of companies.

2.2.2. Group tax consolidation

Another interesting issue also arises in the context of tax consolidation which occurs between companies of the same tax group (called "*integration fiscale*"). Article 223A of the French Tax Code states that "each company of the group is jointly and severally liable for the payment of the corporate income tax and, where applicable, of the corresponding late payment interest, surcharges and tax fines, for which the parent company is liable up to the amount of the tax and penalties which would be due by the company if it were not a member of the group". Notwithstanding the wording of the law, the mechanism put in place by Art. 223A still leaves a number of uncertainties.

First of all, the law is silent on whether the penalties resulting from infringements committed by tax-consolidated subsidiaries should be calculated on the basis of the adjustments made at the level of each member company or on the basis of the consequences of these adjustments on the overall profit of the tax group. The administration's practice seems to be to impose penalties on the parent company only when an adjustment results in the appearance of an increase in the overall profit. However, there is room for a question that an advocate general before the Conseil d'Etat formulated in the light of Art. 6(2) of the ECHR.[19]

One might even go a step further than just choosing the most appropriate method of calculating penalties. Does Art. 6(2) not prevent the parent company of the group from being liable for the penalties relating to the breaches committed by its subsidiaries?

According to the Conseil d'Etat, there is no incompatibility between the rule of Art. 223A of the French Tax Code and the ECHR. In a recent decision[20] where the question was whether the parent company of a tax consolidated group should be held liable of a penalty for the abuse of law committed by a subsidiary, the Court recalled that according to Art. 223A of the French Tax Code, "the parent company bears the consequences of infringements committed by group companies". Among these penalties is the 80% increase

[19] FR, Advocate General [*rapporteur public*] Cl. Legras, opinion under CE, 13 December 2013, EURL Pub Finance, No. 338133.

[20] FR, CE, decision, 11 December 2020, *Société BNP Paribas*, No. 421084.

in duties payable by the taxpayer in the event of abuse of law within the meaning of Art. L 64 of the Tax Procedure Code,[21] provided for in Art. 1729 of the French Tax Code. The Court went on to say that "it follows from the provisions of Art. 223A of the French Tax Code that a company which opts for the tax consolidation regime provided for by this article and the following articles of the same Code chooses to be solely liable, not only for the corporation tax due on all the income of the group formed by itself and its subsidiaries which are members of it, but also for the tax penalties of a pecuniary nature applied, as the case may be, on account of infringements committed by the latter". It held that the applicant company is not entitled to argue that the abovementioned provisions of Art. 223A of the French Tax Code, "which are limited to designating, in the event of an option for the consolidated tax group regime, the person legally liable for the financial penalties imposed on the companies belonging to the group, would disregard the principle of the personality of penalties protected by Art. 6(2) of the ECHR".

The Advocate General's opinion[22] allows us to better understand the justification of the Court's decision. The applicant company indeed tried to transpose to the parent companies of tax consolidated groups the existing case law on partners of partnerships, who cannot be subject to penalties such as those provided for bad faith if they did not personally participate in the acts in question, in particular when they did not have the status of manager.[23] However, with regard to fiscally integrated groups, the Advocate General took the view that "the penalties are established at the level of each member company on the basis of their own behaviour, and the parent company is only liable for them financially".[24] In other words, the parent company's liability for penalties is a freely accepted financial consequence of tax consolidation within a group.

3. Conclusion

As the examples developed in this article have illustrated, there is an unavoidable tension between the specific institutions established by tax legislation and the traditional individualistic conception of human

[21] FR, Tax Procedure Code [*Livre des procédures fiscales*], decree No. 81-859 of 15 September 1981, amended.

[22] FR, Advocate General [*rapporteur public*] L. Cytermann, opinion under CE, decision, 11 December 2020, *Société BNP Paribas*, No. 421084.

[23] Cf. for example, FR, CE, decision, 27 June 2016, *Min. c/ M.F…*, No. 376513.

[24] Cf. in this sense FR, CC, decision, 27 September 2019, No. 2019-804 QPC, Para. 9.

rights. This tension is even increased by the need to take into account the specificity of legal persons, as compared to individuals. The study of French case law shows that the courts so far have tried to preserve the institutional framework of tax law and to prevent human rights from being instrumentalized by legal persons in order to avoid repression. To date, the tension therefore seems to be resolved at the detriment of a strict implementation of human rights. It is, however, probable that in the eternal swinging of the? pendulum between repression and protection, the balance between opposite forces will continue to evolve.

Abstract

The principle of personality of tax penalties is well established in the case law of the European Court of Human Rights. It is also very important in the case law of the French administrative Supreme Court. However, this principle may conflict with traditional institutions of tax law such as, for example, joint taxation of couples or group tax consolidation. This article studies the technical consequences of the principle of personality of tax penalties in a variety of tax matters and describes how the French case law has tried to find a balance between opposite constraints.

Keywords: tax penalties, personality, family taxation, mergers, group consolidation