AFFAIRE A.P., M.P. et T.P. c. SUISSE

CASE OF A.P., M.P. and T.P. v. SWITZERLAND

(71/1996/690/882)

ARRET/JUDGMENT

STRASBOURG

29 août/August 1997

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SUMMARY[1]

Judgment delivered by a Chamber

Switzerland – imposition of criminal sanction on heirs for tax evasion committed by deceased (Article 130 § 1 of the Ordinance on Direct Federal Tax)

I. ARTICLE 6 § 2 OF THE CONVENTION

A. Applicability of Article 6

Reiteration of Court's case-law on concept of "criminal charge".

Nature and severity of the penalty risked: fines were not inconsiderable and might have been four times as large.

Nature of the offence: tax legislation lays down certain requirements, to which it attaches penalties in the event of non-compliance – penalties not intended as pecuniary compensation for damage but essentially punitive and deterrent in nature.

Classification of the proceedings under national law: Court attaches weight to the finding of the Federal Court, in its judgment in the present case, that the fine in question is "penal" in character and depends on the "guilt" of the offending taxpayer.

Conclusion: Article 6 applicable (seven votes to two).

B. Compliance with Article 6 § 2

No issue could be, nor was, taken with the recovery from the applicants of unpaid taxes – indeed, it is normal that tax debts, like other debts incurred by the deceased, should be paid out of the estate – imposing criminal sanctions on the living in respect of acts apparently committed by a deceased person is, however, a different matter.

Not necessary to decide whether the guilt of the deceased was lawfully established – proceedings were brought against the applicants themselves and the fine was imposed on them – applicants were subjected to a penal sanction for tax evasion allegedly committed by deceased.

Fundamental rule of criminal law that criminal liability does not survive the person who has committed the criminal act – such a rule is also required by the presumption of innocence enshrined in Article 6 § 2.

Conclusion: violation (seven votes to two).

1. This summary by the registry does not bind the Court.

II. ARTICLE 6 §§ 1 AND 3 OF THE CONVENTION

In view of finding of violation of Article 6 § 2, not necessary to address issues raised under Article 6 §§ 1 and 3.

Conclusion: not necessary to consider allegations (unanimously).

III. ARTICLE 50 OF THE CONVENTION

Costs and expenses before the Convention institutions to be reimbursed.

Conclusion: respondent State to pay specified sum to applicants (unanimously).

COURT'S CASE-LAW REFERRED TO

21.2.1984, Öztürk v. Germany; 24.2.1994, Bendenoun v. France

In the case of A.P., M.P. and T.P. v. Switzerland[1],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B[2], as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President,*
Mr L.-E. PETTITI,
Mr C. RUSSO,
Mr J. DE MEYER,
Mr I. FOIGHEL,
Mr A.B. BAKA,
Mr L. WILDHABER,
Mr J. MAKARCZYK,
Mr D. GOTCHEV,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 26 April and 30 June 1997,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 28 May 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 19958/92) against the Swiss Confederation lodged with the Commission under Article 25 by three Swiss nationals, Mrs A.P., Mr M.P. and Mr T.P., on 13 March 1992.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 §§ 1 and 2 of the Convention.

Notes by the Registrar

1. The case is numbered 71/1996/690/882. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning States bound by Protocol No. 9.

2. In response to the enquiry made in accordance with Rule 35 § 3 (d) of Rules of Court B, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 31). The lawyer was given leave by the President to use the German language (Rule 28 § 3).

3. On 10 June 1996 the President of the Court, Mr R. Ryssdal, decided, under Rule 21 § 7 and in the interests of the proper administration of justice, that a single Chamber should be constituted to consider both the instant case and the case of E.L., R.L. and J.O.-L. v. Switzerland[1].

4. The Chamber to be constituted for that purpose included *ex officio* Mr L. Wildhaber, the elected judge of Swiss nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 10 June 1996, in the presence of the Registrar, Mr Ryssdal drew by lot the names of the other seven members, namely Mr L.-E. Pettiti, Mr C. Russo, Mr J. De Meyer, Mr I. Foighel, Mr A.B. Baka, Mr J. Makarczyk and Mr D. Gotchev (Article 43 *in fine* of the Convention and Rule 21 § 5).

5. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Swiss Government ("the Government"), the applicants' lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 § 1 and 40). Pursuant to the order made in consequence, the Registrar received the applicants' and the Government's memorials on 6 and 10 December 1996 respectively.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 17 March 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr F. SCHÜRMANN, Head of the Human Rights and Council of Europe Section, Federal Office of Justice, *Agent*,
Mr J. LINDENMANN, Technical Adviser, Human Rights and Council of Europe Section, Federal Office of Justice,
Mr P. SCHNEEBERGER, Assistant Technical Adviser, Legal Division, Federal Direct Taxation Office, *Advisers*;

(b) *for the Commission*
Mrs J. LIDDY, *Delegate*;

1. Case no. 75/1996/694/886.

(c) *for the applicants*

Mr H.P. DERKSEN, *Rechtsanwalt*, practising in Wallisellen
(in the case of A.P., M.P. and T.P.), *Counsel*,

Mr R. KÜCHLER, *Rechtsanwalt*, practising in Lucerne
(in the case of E.L., R.L. and J.O.-L.), *Counsel*,

Mr H. HEGETSCHWEILER, *Rechtsanwalt*, practising in
Wallisellen (in the case of A.P., M.P. and T.P.), *Adviser*.

The Court heard addresses by Mrs Liddy, Mr Derksen, Mr Küchler and Mr Schürmann.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

A. Background to the case

7. The applicants are all Swiss nationals who live in the Canton of Zurich. They are the widow and sons of the late Mr P., who died on 28 February 1984.

Mr P. had been the sole shareholder of a construction company, and the applicants were Mr P.'s only heirs. The company's business was carried on by Mr P.'s sons.

8. An inventory of Mr P.'s estate was drawn up by the municipal authorities on 8 May 1984. A copy of that document in the Commission's file is dated 17 May 1984.

9. The three-month period within which the applicants could have renounced the inheritance (Articles 566 § 1 and 567 § 1 of the Swiss Civil Code – see paragraph 24 below) apparently expired on 28 May 1984.

10. Between 1 and 3 October 1985 the tax authorities examined the books kept by the company. Their inspection showed that over a period of several years Mr P. had appropriated certain back payments due to the company and failed to declare them as income, thus evading both cantonal and federal taxes.

11. The cantonal and federal tax authorities each initiated proceedings against the applicants for recovery of the unpaid taxes and at the same time imposed fines for tax evasion.

12. It appears that the applicants cooperated with the tax authorities by providing them with the information needed to calculate the correct assessments. However, they resisted the imposition of the fines and appealed to the appropriate tribunals, maintaining that they were innocent of the tax offence committed by Mr P.

13. The cantonal proceedings ended on 2 November 1989 with a judgment of the Canton of Zurich Administrative Court. The Administrative Court considered that it was a principle of criminal law in a State based on the rule of law that the innocent should not be punished, and – departing from its earlier case-law – held that the imposition of fines on the heirs for tax evasion by the deceased was accordingly illegal.

B. The federal proceedings

14. On 16 January 1990 the Direct Federal Tax Department of the Zurich Cantonal Tax Office, deciding on an objection lodged by the applicants, issued an assessment of the direct federal tax unlawfully withheld by Mr P. over 1981/82 and 1983/84 and imposed fines on the applicants. The fines came to 3,875.85 Swiss francs (CHF) for 1981/82 and CHF 2,882.90 for 1983/84. Its reasoning included the following:

> "By incorrectly declaring his income, the taxpayer withheld taxes from the State and thus became guilty of tax evasion. Pursuant to Articles 130 § 1 and 129 § 1, respectively, of the Ordinance on Direct Federal Tax his heirs must therefore pay a fine of up to four times the amount in addition to the tax withheld. For the tax period 1981/82, when more than 5/10 was evaded, the fine amounts to 1.5 times the amount, and for the tax period 1983/84, when more than 3/10 was evaded, it amounts to 1.3 times the amount of the taxes withheld. However, as it can be observed that the heirs have done everything possible to clarify the incorrect declaration of taxes, the fine is reduced to 1/4."

The Cantonal Tax Office declined to follow the precedent set by the judgment of the Zurich Administrative Court on 2 November 1989 (see paragraph 13 above) on the ground that it could not deviate from clear provisions of federal law as long as the unconstitutional nature of those provisions had not been clearly established.

15. The applicants lodged an appeal against this decision with the Federal Tax Appeals Board of the Canton of Zurich, relying *inter alia* on Article 6 § 2 of the Convention.

16. The Federal Tax Appeals Board gave its decision on 19 September 1990.

The assessment for 1981–82 was quashed on the ground that it had not been lawfully communicated to the applicants within the five-year limitation period (Article 134 of the Ordinance on Direct Federal Tax).

The assessment for 1983–84 was upheld. In this context, the Federal Tax Appeals Board held that Article 6 § 2 could be relied on directly only in so far as it provided guarantees additional to those under the Federal Constitution – which it did not.

In an *obiter dictum* the Federal Tax Appeals Board made a distinction between the presumption of innocence and the principle that only the guilty should be punished. The heirs' liability to pay fines incurred by the taxpayer, which did not offend against the latter principle — as construed in domestic law and applied to the deceased — did not necessarily offend against the former presumption either.

17. The applicants lodged an administrative-law appeal with the Federal Court on 21 December 1990.

In addition to reiterating their complaints concerning the fines, they argued that they were entitled, under Article 6 §§ 1 and 3 of the Convention, to a public hearing and to the rights of the defence.

18. The Zurich Federal Tax Appeals Board and the federal tax authorities, which had been invited to submit written comments pursuant to section 110 of the Federal Judicature Act (see paragraph 28 below), expressed the opinion that the appeal should be dismissed. The Direct Federal Tax Department of the Zurich Cantonal Tax Office, which had also been invited to submit comments, declined to do so.

19. The Federal Court dismissed the appeal without a hearing (section 109 of the Federal Judicature Act (see paragraph 29 below) in a judgment delivered on 5 July 1991 and served on the applicants on 16 October. Its reasoning included the following:

> "Unlike back tax, the fine for tax evasion (save in so far as it may comprise interest intended to compensate for delay) pursuant to Article 129 of the Ordinance on Direct Federal Tax is penal in character ... Moreover, the definition of tax evasion requires that the taxpayer should be guilty, whether by commission or by omission, of a breach of duty resulting in his being underassessed for tax.
>
> However, according to the principle that heirs inherit tax liabilities ... the latter are liable, under Article 130 § 1 of the Ordinance on Direct Federal Tax, up to the amount of their share in the estate, and irrespective of any personal guilt, for the deceased person's evaded taxes and the fines. The provision in question of the Ordinance on Direct Federal Tax thus expressly contemplates that the heirs enter into the position of the deceased even in respect of the penal tax without being personally guilty. It follows that as regards the liability of heirs, the applicants cannot derive any argument

from the presumption of innocence enshrined in Article 6 of the Convention, which only applies to persons charged with a criminal offence ... Nor can the general principles of the criminal law prayed in aid by the applicants avail them in the circumstances."

The Federal Court did not rule on the applicants' claims under Article 6 §§ 1 and 3.

II. RELEVANT DOMESTIC LAW

A. The Ordinance on Direct Federal Tax

20. At the relevant time, tax evasion was punishable by a fine of up to four times the amount evaded, the fine being payable in addition to the amount due (Article 129 § 1 of the Ordinance on Direct Federal Tax).

21. Article 130 § 1 provided, *inter alia*:

"If the evasion is discovered only after the death of the taxpayer, proceedings shall be brought against his heirs. Irrespective of personal guilt, the heirs shall be jointly liable for the deceased person's evaded taxes and the fine incurred by him up to an amount not exceeding their share in the estate."

B. The Swiss Civil Code

22. According to Article 537 § 1 of the Swiss Civil Code, an inheritance passes upon the death of the deceased.

23. The relevant parts of Article 560 of the Swiss Civil Code provide:

"1. The heirs shall automatically acquire the entire estate as soon as it passes.

2. Subject to the statutory exceptions, all claims and actions, property rights and other rights *in rem* and possessions of the deceased shall automatically pass to them, and they shall become personally liable for the deceased's debts."

24. Under Article 566 § 1 of the Swiss Civil Code, the heirs have the right to renounce the inheritance which has devolved to them. The time-limit for so doing is three months (Article 567 § 1).

C. Procedure

25. It was open to the taxpayer to lodge an objection against an assessment of direct federal tax to the authority which had made it (Article 105 of the Ordinance on Direct Federal Tax).

26. An appeal against the decision given in the objection proceedings lay to the Cantonal Tax Appeals Board (Article 106). The Direct Federal Tax Department of the canton and the federal tax authorities could also bring such an appeal (Article 107).

27. An administrative-law appeal lies to the Federal Court against the decision of the Federal Tax Appeals Board (section 98 (e) of the Federal Judicature Act). Such an appeal may be lodged by both the tax debtor and the federal tax authorities (Article 112 of the Ordinance on Direct Federal Tax).

28. If the Federal Court orders an exchange of written pleadings, it asks the authority which gave the decision to forward the case file (section 110 (2) of the Federal Judicature Act), at the same time inviting it to submit its comments in writing (section 110 (1)).

The cantonal authority which gave the last decision at cantonal level is also invited to comment (section 110 (3)), as is the federal authority which would itself have been entitled to lodge an appeal (section 110 (1)).

29. At the material time, section 109 (1) of the Federal Judicature Act made it possible for a three-judge Chamber of the Federal Court to dismiss an administrative-law appeal as manifestly ill-founded without a hearing, provided that its decision was unanimous.

D. The Swiss Criminal Code

30. Under Article 333 § 1 of the Swiss Criminal Code, the general provisions of the Code apply to offences created by other federal laws unless the latter provide otherwise.

31. Article 48 § 3 of the Criminal Code provides that a fine lapses if the convicted person dies.

However, pursuant to Article 333 § 1 of the Criminal Code, Article 130 § 1 of the Ordinance on Direct Federal Tax (see paragraph 21 above) derogates from this principle as a *lex specialis*.

E. Subsequent developments

32. Section 179 (1) of the Federal Direct Taxation Act of 14 December 1990, in force since 1 January 1995, provides for the liability of heirs, *inter alia*, for any fines determined with legal force. According to section 179 (2), the heirs shall not be so liable if the tax-evasion proceedings are concluded after the death of the taxpayer, provided that the heirs themselves are guiltless and do what they can to enable the tax authorities to make a correct assessment.

PROCEEDINGS BEFORE THE COMMISSION

33. Mrs A.P., Mr M.P. and Mr T.P. applied to the Commission on 13 March 1992. They relied on Article 6 §§ 1 and 2 of the Convention, complaining that, irrespective of any personal guilt, they had been convicted of an offence allegedly committed by Mr P. and that they had not had a fair and public hearing by an independent and impartial tribunal established by law.

34. The Commission declared the application (no. 19958/92) admissible on 16 October 1995. In its report of 18 April 1996 (Article 31), it expressed the opinion that there had been a violation of Article 6 § 1 of the Convention on account of the failure to hold a public hearing (twenty votes to eight) but not of Article 6 § 2 (seventeen votes to eleven). The full text of the Commission's opinion and of the eight separate opinions contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

35. The Agent of the Government, speaking at the Court's hearing, asked the Court to find that there had not been a breach of the requirements of Article 6.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

36. The applicants alleged that, irrespective of any personal guilt, they had been convicted of an offence allegedly committed by someone else, contrary to Article 6 § 2 of the Convention, which provides:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

Neither the Government nor the Commission shared this view.

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* - 1997), but a copy of the Commission's report is obtainable from the registry.

A. Applicability of Article 6

37. In the Government's view, which the Commission shared in substance, Article 6 was not applicable to the case, since no "criminal charge" had been brought against the applicants.

They pointed to the fact that in cases such as the present one there was no question of personal guilt on the part of the heirs. For that reason, no entry had been made in the criminal record of any of the heirs.

Rather, it was the guilt of the deceased which had to be demonstrated. The fact that proceedings had been brought against the heirs was explained by the fact that in Swiss law the estate as such had no legal personality, so that the deceased's assets and liabilities fell directly to the heirs.

Moreover, the heirs themselves were liable for the evaded taxes and fines only up to an amount not exceeding their share in the estate, and they could escape liability altogether by declining to accept their inheritance.

38. The applicants contended that the main feature of the case was that the tax evasion committed by the deceased was the basis of a fine imposed on them. If the deceased had been alive when the evasion was discovered, the fine would have been imposed on him as a penal measure.

The fact that no entry was made in the criminal records of the heirs was irrelevant, since in some cases (for example, for petty offences) no such entry was made even concerning those responsible.

The possibility of renouncing the inheritance could not be taken into consideration either, since the period during which this was possible had expired long before the tax evasion by the deceased was discovered. Escaping the fine in this way had accordingly never been an option open to the applicants.

39. The Court reiterates that the concept of "criminal charge" within the meaning of Article 6 is an autonomous one. In earlier case-law the Court has established that there are three criteria to be taken into account when it is being decided whether a person was "charged with a criminal offence" for the purposes of Article 6. These are the classification of the offence under national law, the nature of the offence and the nature and degree of severity of the penalty that the person concerned risked incurring (see, among other authorities, the Öztürk v. Germany judgment of 21 February 1984, Series A no. 73, p. 18, § 50).

40. As regards the nature and severity of the penalty risked, the fines were, in the Court's opinion, not inconsiderable: they amounted to CHF 3,875.85 for the fiscal year 1981/82 and CHF 2,882.90 for 1983/84 (see paragraph 14 above). Moreover, in setting these figures, the authorities took the applicants' cooperative attitude into account; the fines might in fact have been four times as large (see paragraph 14 above).

41. As regards the nature of the offence, it is noted that tax legislation lays down certain requirements, to which it attaches penalties in the event of non-compliance. The penalties, which in the present case take the form of fines, are not intended as pecuniary compensation for damage but are essentially punitive and deterrent in nature (see, *mutatis mutandis*, the Bendenoun v. France judgment of 24 February 1994, Series A no. 284, p. 20, § 47).

42. As regards the classification of the proceedings under national law, the Court attaches weight to the finding of the highest court in the land, the Federal Court, in its judgment in the present case, that the fine in question was "penal" in character and depended on the "guilt" of the offending taxpayer (see paragraph 19 above).

43. Having regard to the above features, the Court considers that Article 6 is applicable under its criminal head.

Accordingly, the question arises whether Article 6 § 2 was complied with.

B. Compliance with Article 6 § 2

44. The applicants contended that they had been compelled by a legal presumption to assume criminal liability for tax evasion allegedly committed by the deceased Mr P.

If, as in the present case, the applicants did their utmost to enable the authorities to make a correct assessment of back tax, the fine would be reduced but would nevertheless be imposed. Thus, although they were themselves blameless, they could not avoid being fined for Mr P.'s offence.

Moreover, the imposition of the fine on them presupposed a tacit conviction of the deceased without any form of judicial review.

45. The Government, with whom the Commission concurred in substance, considered that the guilt of the deceased had been lawfully established by the judgment of the Zurich Federal Tax Appeals Board of 19 September 1990 (see paragraphs 15 and 16 above).

There was no question of punishing the applicants for criminal acts committed by the deceased. Rather, the liability of the person who had evaded taxes was imposed on his estate. This was clear from the fact that the applicants would not have been liable to pay the fine if they had renounced the inheritance, and that in any event they were not liable for more than their share in the estate.

46. The Court observes that no issue could be, nor was, taken with the recovery from the applicants of unpaid taxes. Indeed, the Court finds it normal that tax debts, like other debts incurred by the deceased, should be paid out of the estate.

Imposing criminal sanctions on the living in respect of acts apparently committed by a deceased person is, however, a different matter. Such a situation calls for careful scrutiny by the Court.

47. In this case the Court does not find it necessary to decide whether the guilt of the deceased was lawfully established.

Pursuant to Article 130 § 1 of the Ordinance on Direct Federal Tax the proceedings were brought against the applicants themselves and the fine was imposed on them (see paragraphs 11 and 21 above).

It must therefore be accepted that, whether or not the late Mr P. was actually guilty, the applicants were subjected to a penal sanction for tax evasion allegedly committed by him.

48. It is a fundamental rule of criminal law that criminal liability does not survive the person who has committed the criminal act. This is in fact recognised by the general criminal law of Switzerland, particularly by Article 48 § 3 of the Swiss Criminal Code, under which a fine lapses if the convicted person dies (see paragraph 31 above).

In the Court's opinion, such a rule is also required by the presumption of innocence enshrined in Article 6 § 2 of the Convention. Inheritance of the guilt of the dead is not compatible with the standards of criminal justice in a society governed by the rule of law. There has accordingly been a violation of Article 6 § 2.

II. ALLEGED VIOLATIONS OF ARTICLE 6 §§ 1 AND 3 OF THE CONVENTION

49. The applicants further alleged that they had not had an oral hearing before an independent and impartial tribunal, and that they had not had the opportunity to exercise the rights of the defence, contrary to Article 6 §§ 1 and 3, the relevant parts of which provide:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by [a] … tribunal ...
>
> …

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing ...

..."

50. In view of its conclusion that the imposition of a criminal sanction on the applicants amounted to a breach of Article 6 § 2, the Court does not consider it necessary to address these issues.

III. APPLICATION OF ARTICLE 50 OF THE CONVENTION

51. Article 50 of the Convention provides:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The applicants made no claims in respect of damage or of costs and expenses incurred in the domestic proceedings.

A. Costs and expenses

52. In respect of costs and expenses incurred in the proceedings before the Strasbourg institutions, the applicants claimed 7,000 Swiss francs (CHF).

53. The Government considered CHF 3,000 in respect of the Strasbourg proceedings to be reasonable.

The Delegate of the Commission did not comment.

54. The Court is satisfied that the costs stated were necessarily incurred, and considers that the sum claimed is reasonable as to quantum. It therefore allows the claim in full.

B. Default interest

55. According to the information available to the Court, the statutory rate of interest applicable in Switzerland at the date of adoption of the present judgment is 5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by seven votes to two that Article 6 § 2 is applicable in the present case and has been violated;
2. *Holds* unanimously that it is not necessary to consider the applicants' allegations of violations of Article 6 §§ 1 and 3 of the Convention;
3. *Holds* unanimously
   (a) that the State is to pay the applicants, within three months, 7,000 (seven thousand) Swiss francs in respect of costs and expenses incurred in the proceedings before the Strasbourg institutions;
   (b) that simple interest at an annual rate of 5% shall be payable from the expiry of the above-mentioned three months until settlement.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 29 August 1997.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 55 § 2 of Rules of Court B, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr De Meyer;
(b) dissenting opinion of Mr Baka, joined by Mr Bernhardt.

Initialled: R. B.
Initialled: H. P.

CONCURRING OPINION OF JUDGE DE MEYER

(*Translation*)

A fine for tax evasion, just like any other penalty imposed for conduct considered to be reprehensible, is inherently punitive in nature. It was unnecessary for the questionable criteria[1] set out in the Engel and Others v. the Netherlands[2] judgment to be referred to for that conclusion to be reached.

1. See on this subject my dissenting opinion in the Putz v. Austria case (judgment of 22 February 1996, *Reports of Judgments and Decisions* 1996-I, p. 329).
2. Judgment of 8 June 1976, Series A no. 22.

DISSENTING OPINION OF JUDGE BAKA, JOINED BY JUDGE BERNHARDT

Unlike the majority of the Court, I have voted against finding that there has been a violation of Article 6 § 2 of the Convention.

I consider that the fine imposed by the authorities on the heirs in the instant case was fiscal in nature and not criminal. Such types of fines are designed to prevent tax evasion. In doing so their main purpose is to protect the financial interests of the State and in a broader sense those of the community. Their undeniably severe punitive character is not just to punish for the tax which was withheld, but also to deter the offender, through the imposition of a financial penalty, from committing further offences and to deter other taxpayers from possible tax evasion in the future.

In the present case, the applicants were under an obligation to pay the tax withheld and the fine not on account of their own conduct but by virtue of Article 560 § 2 of the Swiss Civil Code according to which the heirs "... shall become personally liable for the deceased's debts". The fact that the fine, which Mr P.'s heirs were supposed to pay for the fraudulent tax evasion of the deceased, was reduced to 1/4 demonstrates that the tax authorities sought to lessen the punitive component of the fine while at the same time maintaining part of its more general deterrent features.

That the fine is basically fiscal in nature is also supported by the fact that the applicants have never been accused of having committed a criminal offence in connection with the tax evasion of the deceased. It cannot be said that "[t]he fact that no entry was made in the criminal records of the heirs was irrelevant, since in some cases (for example, for petty offences) no such entry was made even concerning those responsible" (see paragraph 38 of the judgment). It is more justified, however, to point to the fact that while the incorrectly declared income was significant and the imposed fine "not inconsiderable" (see paragraph 40 of the judgment) no entry was made in the criminal records of Mr P.'s heirs, thus excluding the assumption that the fine was criminal in character.

As far as the classification of the proceedings under national law is concerned, I do not consider that the Swiss Federal Court when it said "that the fine in question was 'penal' in character and depends on the 'guilt' of the offending taxpayer" can be read as classifying the fine as criminal. It simply emphasised the punitive "penal" element of the fiscal fine for tax evasion.

It follows that I am of the opinion that Article 6 § 2 of the Convention is not applicable in the present case since the applicants were not charged with a criminal offence as required by this provision.