Access to File: Right(s) of the Defence or Defence of the Right(s)?

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Abstract

In November 2017, the Court of Justice of the European Union ruled in the Romanian *Ispas* case and decided that taxpayers are entitled to have access to file in VAT inspections. The unprecedented recognition of the fundamental right(s) of the defence leads to a number of questions as to the extent of the breach the Court made in the regular defence of national tax administrations. The paper aims to look into the lights and shadows of the European VAT inspections and to scientifically build a specific model for the appropriate exercise of taxpayers' access to file, in particular with regard to VAT fraud cases. In this respect, the author shall consider comparative approaches and a thorough analysis of the Court's case law concerning VAT and procedural rights. Equally important, the paper shall consider the possible effect of the Ispas judgement on the general development of the European rights of defence in all tax cases.

Keywords

administrative file; VAT; tax inspection; tax fraud; evidence

1 Introduction

In recent years, I came across a number of tax cases involving the exercise of the rights of defence and particularly of the right of access to the administrative file of the tax case. As a lawyer, I had the chance to take the matter before the Court of Justice of the European Union in the recent *Ispas* case. And from this point on, my interest grew,

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as I realised that we need to ask ourselves serious questions concerning the right(s) of the defence and the defence of the right(s) of taxpayers.[2]

The purpose of this research is to review the current state of affairs by means of a comparative approach and to comment on the possible impact the recent judgement in the *Ispas* case might have on the future development of access to file in tax procedures. References are made to the relevant case law of the Court of Justice of the European Union and national courts and the European tax doctrine, while also analysing the efforts of legislators and professional bodies in Europe and across the world.

2 Emergence of the Right of Defence in Tax Procedures

As the emergence of a *Magna Charta* of the taxpayers' rights always seemed to be an impossible mission within the European Community or the later European Union, the right of access to file, particularly in tax procedures, is a rather new topic of discussion. In fact, during the past 40 or 50 years, the Court of Justice of the European Union acknowledged the existence of a general right of defence, as a fundamental principle of the Community (European) law,[3] which was later on enshrined in a rather fragmented manner in the Charter of Fundamental Rights of the European Union.[4]

2.1 General remarks concerning the recognition of the right of defence and right of access to file in the European Union

In fact, most of the earlier cases submitted for analysis to the Court of First Instance or the Court of Justice of the European Union concerned investigations carried by the Commission in complex competition cases. Therefore, the right of defence was naturally put forward in immediate connection with the right of access to file, as the parties under investigation considered that they could not have exercised they right of defence properly without access to the (administrative) files in possession of the Commission or other authorities. The *Limburgse Vinyl Maatschappij and others* case is a good example in this respect, as the Court pointed out that: "The right of access to the Commission's file is therefore designed to ensure effective exercise of the rights of

2 For a similar analysis, see Mastellone, 2018.

3 For a general recognition of the right of defence as a fundamental right, see Court of Justice of the European Union, judgement of 17 October 1987, case 85/87, *Dow Benelux NV* v *Commission of the European Communities,* ECLI:EU:C:1989:379, par. 3.

4 See, for example, the provisions in Arts. 41, 47 and 48 of the Charter of Fundamental Rights of the European Union, O.J. C 326, 26 October 2012: 391–407.

the defence. Those rights are not only fundamental principles of Community law but are also enshrined in Article 6 of the ECHR." [5]

Developing from this point, it ruled that: "Infringement of the right of access to the Commission's file during the procedure prior to adoption of the decision can, in principle, cause the decision to be annulled if the rights of defence of the undertaking concerned have been infringed. [...] In such a case, the infringement committed is not remedied by the mere fact that access was made possible during the judicial proceedings relating to an action in which annulment of the contested decision is sought. Where access has been granted at that stage, the undertaking concerned does not have to show that, if it had had access to the non-disclosed documents, the Commission decision would have been different in content, but only that it would have been able to use those documents for its defence."[6]

Therefore, in such cases, the Court always carried an analysis of all circumstances of the affair before concluding on the annulment (or not) of an administrative decision.

2.2 The right of defence and right of access to file in tax procedures

In the last decade, the Court of Justice developed its earlier case law[7] concerning the right of defence and the right of access to file in competition and customs duties cases. A look into a few relevant cases of this type is therefore relevant.

In the *Sopropé* case, the Court had to decide whether the taxpayer had a 'proper hearing' before the customs authorities, which allowed 8 days for the taxpayer subject to a customs investigation to provide its observations on the investigative report. As the Portuguese company did not complain about access to file, the Court mentioned: "In accordance with that principle [of the right of defence], the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision. They must be given a sufficient period of time in which to do so."[8] Although the procedural matter seemed to be in competence of national authorities, the Court of Justice approached the matter from the perspective of the European principle of equivalence and effectiveness, in par. 38: "The authorities

[5] Court of Justice of the European Union, judgement of 15 October 2002, joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij and other* v *Commission of the European Communities,* ECLI:EU:C:2002:582, par. 316.

[6] Court of Justice of the European Union, judgement of 15 October 2002, joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij and other* v *Commission of the European Communities,* ECLI:EU:C:2002:582, par. 317–318; see also Court of Justice of the European Union, judgement of 8 July 1999, case C-51/92 P, *Hercules Chemicals NV* v *Commission of the European Communities,* ECLI:EU:C:1999:357.

[7] For a detailed presentation of the most important judgements, see Costaș, 2016: 30–33.

[8] Court of Justice of the European Union, judgement of 18 December 2008, case C-349/07, *Sopropé – Organizações de Calçado Lda* v *Fazenda Pública,* intervening party *Ministério Público,* ECLI:EU:C:2008:746, par. 37.

of the Member States are subject to that obligation when they take decisions which come within the scope of Community law, even though the Community legislation applicable does not expressly provide for such a procedural requirement. As regards the implementation of that principle and, in particular, the periods within which the rights of the defence must be exercised, it must be stated that, where those periods are not, as in the main proceedings, fixed by Community law, they are governed by national law on condition, first, that they are the same as those to which individuals or undertakings in comparable situations under national law are entitled and, secondly, that they do not make it impossible in practice or excessively difficult to exercise the rights of defence conferred by the Community legal order." It therefore rested with national courts to ascertain, on a case-by-case approach, if national (tax) authorities granted sufficient time to taxpayers to prepare their defence, taking into account criteria such as the significance for the parties concerned of the decisions to be taken, the complexities of the procedures and of the legislation to be applied, the number of persons who may be affected and any other public or private interests which must be taken into consideration (par. 40 of the Court's judgement) and taking into account that taxpayers must be able to furnish proof, for the purposes of inspection, of the lawfulness of all the transactions that they have effected (par. 41).

A significant development in this field is the *Solvay* case.[9] As in many other competition cases, the Belgian company complained that it did not have access to the administrative file the European Commission based its decision on. The case was decided by the Grand Chamber of the Court of Justice, in an appeal procedure and considering the recent (at that time) Charter of Fundamental Rights:

"Observance of the rights of the defence in a proceeding before the Commission, the aim of which is to impose a fine on an undertaking for infringement of the competition rules requires that the undertaking under investigation must have been afforded the opportunity to make known its views on the truth and relevance of the facts alleged and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty (*Aalborg Portland and Others* v *Commission,* par. 66). Those rights are referred to in Art. 41(2)(a) and (b) of the Charter of Fundamental Rights of the European Union."

The Grand Chamber, following the Advocate General Kokott approach, underlined that the right of access to the file means that the Commission (or any other public authority, in our view) must provide the undertaking concerned with the opportunity to examine all the documents in the investigation that might be relevant for its defence. Those documents comprise both inculpatory and exculpatory evidence, with the exception of business secrets of other undertakings, internal documents of the Commission and other confidential information (par. 54). Moreover, the European court stressed the fact that access to file should be granted to taxpayers in the early administrative procedure and that failure to do so justifies the annulment of

[9] Court of Justice of the European Union, judgement of 25 October 2011, case C-109/10 P, *Solvay SA* v *European Commission,* ECLI:EU:C:2011:686.

the administrative decision taken in disrespect of the rights of the defence. A particularly strong paragraph is the following:

"In such a case, the infringement is not remedied by the mere fact that access was made possible during the judicial proceedings (*Limburgse Vinyl Maatschappij and Others* v *Commission,* par. 318). As the examination undertaken by the General Court is limited to review of the pleas in law put forward, it has neither the object nor the effect of replacing a full investigation of the case in the context of an administrative procedure. Moreover, belated disclosure of documents in the file does not return the undertaking which has brought the action against the Commission decision to the situation in which it would have been if it had been able to rely on those documents in presenting its written and oral observations to the Commission."[10]

Furthermore, the Grand Chamber argued that where access to the file, and particularly to exculpatory documents, is granted at the stage of the judicial proceedings, the undertaking concerned has to show, not that if it had had access to the non-disclosed documents, the Commission decision would have been different in content, but only that those documents could have been useful for its defence (par. 57). After carrying its own analysis, the Court acknowledged that Solvay was not granted access to certain sub-files, which led to the annulment of the Commission's decision.

Further advance concerning the right of defence and particularly the right to be heard before an administrative decision is issued came with the *Kamino* case.[11] The Court of Justice underlined that observance of the rights of the defence is a fundamental principle of European Union law, in which the right to be heard in all proceedings is inherent and that the right to be heard in all proceedings is now affirmed not only in Arts. 47 and 48 of the Charter of Fundamental Rights of the European Union, which ensure respect for both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Art. 41 of the Charter, which guarantees the right to good administration. Art. 41(2) provides that the right to good administration includes, inter alia, the right of every person to be heard before any individual measure which would affect him adversely is taken (par. 28–29).

One should note that judicial efforts seem to be the most productive ones, particularly in the European Union. It is true that, in its 2012 *Action Plan against Tax Fraud and Tax Evasion,* the European Commission launched in 2016 a document entitled *Guidelines for a Model for a European Taxpayers' Code.* The Model never became more that a *soft law* instrument, that is a mere recommendation for the Member States of the European Union. Most scholars and practitioners regard it as a unilateral statement of rules and principles that tax administrations would allegedly like to implement when dealing with taxpayers with the specific aim of ensuring an adequate balance between the rights and the duties of those taxpayers.

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10 See *Aalborg Portland and Others* v *Commission,* par. 103 and the case law cited, par. 56.

11 Court of Justice of the European Union, judgement of 3 July 2014, joined cases C-129/13 and C-130/13, *Kamino International Logistics BV, Datema Hellmann Worldwide Logistics BV* v *Staatssecretaris van Financiën,* ECLI:EU:C:2014:2041.

From a comparative point of view, the results seem to be slightly different in the private professional environment. Our research shows there is a private alternative developed by three major professional bodies: Confédération Fiscale Européenne (CFE), Asia Oceania Tax Consultants' Association (AOTCA) and Society of Trust and Estate Practitioners (STEP), launched in 2013. Precisely, the *Model Taxpayer Charter* was drafted in 2013 based on an analysis regarding taxpayers' rights and duties carried in 37 countries representing 73% of the gross domestic product worldwide. The 2015 version extended the research to 41 countries and 80% of the world's gross domestic product. The declared aim of the *Model Taxpayer Charter* is to provide for a regulation template that could be adapted and used by states that wish to implement in their own legislation the basis of a balanced approach between taxpayers' rights and duties. The model is in fact the result of the experience of some 500,000 members (mainly tax advisors) of the three professional bodies that worked on the document. The *Model Taxpayer Charter* (2015 version) consists of 37 articles with explanations.

3 The *Ispas* Judgement and Its Consequences in Romania

On 9 November 2017, the Court of Justice of the European Union delivered its judgement in case C-298/16, *Ispas*.[12] It is worth mentioning that on 7 September 2017, the General Attorney delivered his opinion and discussed thoroughly matters concerning the development of procedural rights in VAT cases and particularly the extent to which such rights might be exercised at the European level. The key points of this case and the effects of the *Ispas* judgement at national level are explained below.

3.1 Facts and the Court's judgement of 9 November 2017

Mr and Mrs Ispas both live in Cluj-Napoca, Romania. Between 2007 and 2009 especially, they obtained 5 building permits in Florești (Cluj county) and constructed apartments that were later sold. A number of 73 sale contracts were actually concluded, without the spouses registering for VAT purposes, collecting and paying VAT to the state budget. In fact, the *Ispas* case does not differ, in that regard, from the *Salomie* and *Oltean* case[13] decided by the Court by its judgement of 9 July 2015. Mr and Mrs Ispas had to register for VAT purposes, they should have collected VAT when

[12] Court of Justice of the European Union, judgement of 9 November 2017, case C-298/16, *Teodor Ispas, Anduța Ispas* v *Direcția Generală a Finanțelor Publice Cluj,* ECLI:EU:C:2017:843.

[13] Court of Justice of the European Union, judgement of 9 July 2015, case C-183/14, *Radu Florin Salomie* and *Nicolae Vasile Oltean* v *Direcția Generală a Finanțelor Publice Cluj,* ECLI:EU:C:2015:454. In this particular case, the Court ruled that the tax authorities' failure to inform the real estate developers of

concluding most of the sale contracts and they were at the same time entitled to deduct VAT paid for their acquisitions.

In judicial proceedings carried at national level, the spouses raised the question of access to administrative file, particularly to all the documents and information used by the tax authority to determine their supplementary tax obligations. They both claimed that they never had access to file and that they had never been in the position to challenge these documents and information (of which a significant part was collected illegally before the tax inspections begun). They also claimed that the judge could not decide the case without analysing the administrative file, an argument that later led to the national court ordering the tax administration to provide the files for both taxpayers (those files were submitted to the Cluj Court of Appeal and therefore became public in December 2015, more than 3 and a half years after the tax decisions had been issued).

Under these circumstances, the Cluj Court of Appeal decided to stay the proceedings and to refer the following question for a preliminary ruling: "Is an administrative practice consisting in the taking of a decision imposing obligations on an individual without allowing that individual to have access to all of the information and documents considered by the public authority when it adopted that decision, being information and documents contained in the administrative file (not a public file) drawn up by the public authority, compatible with the principle of respect for the rights of the defence?"

On 9 November 2017, the Court of Justice ruled that: "The general principle of EU law of respect for the rights of the defence must be interpreted as a requirement that, in national administrative procedures of inspection and establishment of the basis for the assessment of value added tax, an individual is to have the opportunity to have communicated to him, at his request, the information and documents in the administrative file and considered by the public authority when it adopted its decision, unless objectives of public interest warrant restricting access to that information and those documents."

It is worth mentioning that the Court recalled: "In a tax inspection procedure, the purpose of which is to verify whether the taxable persons have performed their obligations in that regard, it is indeed legitimate to expect that those persons would request access to those documents and information, with a view to, if need be, providing explanations or supporting their claims against the point of view of the tax authorities" (par. 33) and that: "If the rights of the defence are to be genuinely respected, there must nonetheless be a real possibility of access to those documents and that information, unless objectives of public interest warrant restricting that access" (par. 34).

One last note here. Even if the judgement itself is revolutionary, as it extends the application of the right of defence to VAT cases from previously heard competition

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their status for VAT purposes does not amount to exonerating those developers from registering for VAT purposes ["(48) *Such a practice, however regrettable it may be, is not in principle such as to provide the taxpayers concerned with precise assurances that VAT will not be levied on property transactions such as those at issue in the main proceedings*"].

and customs case, the more interesting lecture is that of Advocate General Bobek's opinion. That opinion is a fine piece of analysis of the European law and the right of defence (including its component of the right of access to file), under the so-called theory of lights and shadows, that actually justifies the application of procedural rules in the field of harmonised taxation, such as VAT.

3.2 Effects of the *Ispas* judgement at national level

Our analysis shows that in Romania tax courts valued the Court of Justice's case law concerning the right of defence and particularly the right to be heard before the *Ispas* judgement. In fact, in reference to Art. 9 of the old Tax Procedure Code,[14] in force until 31 December 2015, the High Court of Cassation and Justice and lower courts developed a case law in the sense of annulment of tax decisions issued without the prior hearing of the taxpayer.[15]

Just a few months ago, relying on Art. 9 of the new Tax Procedure Code[16] concerning the right to be heard in tax procedures, the High Court of Cassation and Justice set up a new standard and decided that Art. 41 of the Fundamental Charter and the associated case law of the Court of Justice does not allow tax authorities to consider the taxpayer had been heard if he/she/it replied questions during the tax inspection, was informed of the tax inspection's results and was provided with a copy of the tax report. The national court stressed that the taxpayer should be actually heard, in accordance with the principle of the right of defence.[17] It is precisely the solution of Art. 9 par. (4) of the new Tax Procedure Code, which allows the annulment of the tax decision if the taxpayer has not been heard.

Before the delivery of the Court's judgement in the *Ispas* case, on 9 November 2017, national courts and administrative bodies did not approach the matter of access to file and refused to assess its consequences. In fact, most courts relied their decisions on the fact that there was no national rule allowing access to file for the taxpayer and that taxpayers could exercise their rights before the court. It should be noted that tax courts

14 Government Ordinance no. 92/2003, republished in the *Official Journal,* no. 513 of 31 July 2007.

15 Înalta Curte de Casație și Justiție, Secția Contencios Administrativ și Fiscal [High Court of Cassation and Justice, Administrative and Tax Section], decision no. 2615 of 21 May 2009; Înalta Curte de Casație și Justiție, Secția Contencios Administrativ și Fiscal [High Court of Cassation and Justice, Administrative and Tax Section], decision no. 4489 of 21 October 2010; Înalta Curte de Casație și Justiție, Secția Contencios Administrativ și Fiscal [High Court of Cassation and Justice, Administrative and Tax Section], decision no. 4759 of 29 March 2013; Înalta Curte de Casație și Justiție, Secția Contencios Administrativ și Fiscal [High Court of Cassation and Justice, Administrative and Tax Section], decision no. 4008 of 28 October 2014. All available at: http://www.scj.ro. For an account of the case law of lower tax courts in Romania, see Costaș, 2016: 28.

16 Law no. 207/2015, *Official Journal,* no. 547 of 23 July 2015.

17 Înalta Curte de Casație și Justiție, Secția Contencios Administrativ și Fiscal [High Court of Cassation and Justice, Administrative and Tax Section], decision no. 2323 of 4 June 2018. Available at: http://www.scj.ro.

have the power, relying on Art. 13 of Law no. 554/2004, to order the tax authorities to produce all the evidence and information they collected and used before and during the tax audit (a prerogative that was actually used in the *Ispas* national case).

Following the Court's decision, the orientation of national courts is rather odd. Most of the tax courts, probably relying on the fact that legislators did not react after the judgement of 9 November 2017, refused to apply the decision in the *Ispas* case. It is particularly the case of Mr and Mrs Ispas, in the national case, who saw their argument as to the breach of the rights of defence (and particularly the right of access to file) rejected before the Cluj Court of Appeal.[18]

There is, however, a very interesting decision taken by the same Cluj Court of Appeal, in a VAT case. During the tax audit, the company was not allowed access to file. Relying on Art. 13 of Law no. 554/2004, the Cluj Court of Appeal ordered the tax authority to produce all relevant documents and overpassed serious objections from the tax authorities which actually refused to provide such documents and information relying on tax secrecy. During discovery, it was revealed that content from the tax report was provided to tax inspectors by the Prosecutor's office on a stick and that some evidence had been collected by a certain secret service. Moreover, the Prosecutor specifically asked for a certain result of the tax inspection, in order to use the tax report as evidence in the criminal file which was advancing in a parallel procedure. By its decision no. 385 of 6 December 2017, the Cluj Court of Appeal ruled that the right of access to file has been recognised by the Court of Justice in its judgement of 9 November 2017 in the *Ispas* case and that tax authorities are under the obligation to respect this right. Therefore, the court quashed the administrative decision and sent the tax case back to be heard before the tax administration, instructing tax authorities to provide full access to the administrative file and to respect the taxpayer's right to be heard after allowing him enough time to process the documents and information received.

The decision mentioned is, for sure, a fine piece of national application of the Court's judgements in the *Sopropé, Solvay* and *Ispas* cases. Its future, however, rests uncertain since the High Court of Cassation and Justice still has to hear the case on appeal (probably in two-years' time).

4 Conclusion

In a nutshell, I can clearly say that the purpose of this research has been reached. On the one hand, it proved important to assess the origins of the right of defence and to conclude that there is a full recognition of this right, with all its components, at the European level. More recent judgments refer to the Charter of Fundamental Rights of the European Union and point out that Arts. 41, 47 and 48 provide not only for

[18] See Curtea de Apel Cluj, Secția a III-a Contencios Administrativ și Fiscal [Cluj Court of Appeal, Third Section Administrative and Tax Litigation], decision no. 404 of 20 December 2017, not yet published. The case is to be heard on appeal before the High Court of Cassation and Justice.

the general right of defence, but also for the right of access to file. On the other hand, the judicial developments, both in the European *Ispas* case and at the national level prove that former tax rules that disregarded taxpayers' rights are under serious pressure.

In fact, as Advocate General Bobek nicely put it in par. 65 of his opinion in the *Ispas* case, "...one point remains clear: where there is light, there must also be shadow (that of the EU fundamental rights). If, as a matter of EU law, the Member States are obliged to provide for effective enforcement in the name of EU law, that enforcement must be controlled from the same source, that is, by EU fundamental rights. It would be inconceivable to oblige the Member States to carry out certain activities (such as to effectively collect VAT) while the control of and limits to that exercise would suddenly fall outside of the scope of EU law".

To conclude with, I must say that the Court's case law so far provides sufficient element for the determination of a matrix of the right of access to file. Therefore, if Member States do not regulate in this field, it is for the tax courts to make reference to this case law and ensure the respect of the European Union fundamental rights.

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