Retroactive tax legislation in view of article 1 first protocol ECHR

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Article

Retroactive Tax Legislation in view of Article 1 First Protocol ECHR

Melvin R.T. Pauwels

One of the principles derived from the rule of law is that laws should not be retroactive. Taking into account that the rule of law is inherent to the ECHR, the question arises as to how the ECtHR judges retroactive tax legislation. This question is particularly emerging since retroactive tax legislation is not uncommon in the Member States. This contribution examines in which way the ECtHR tests retroactive tax legislation for compatibility with Article 1 First Protocol ECHR, and which basic guidelines with respect to the testing of retroactive tax legislation can be deduced from the case law of the ECtHR.

1 Introduction

In his famous work ‘The morality of law’ the legal philosopher Lon L. Fuller formulated eight principles of legality. These principles are derived from ‘the internal morality of law’. The principles do not regard the contents of the law – whether the law is fair – but the art of law making per se. The first observation to be made is that law is a precondition of good law. One of the principles is that law should not be retroactive. ‘A retroactive law is truly a monstrosity. Law has to do with the governance of human conduct by rules.’ In the same line another famous legal philosopher, Joseph Raz, notes that a condition for law to be obeyed is that it should be able to guide the behaviour of its subjects. Raz formulates among others the principle of the rule of law that laws should prospective and not retrospective. Interestingly, the European Court of Human Rights (ECtHR) has stated that ‘the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention’. The ECtHR has also observed: ‘the principle of legal certainty, which is necessarily inherent in the law of the Convention’. These considerations of the ECtHR combined with the aforementioned statements of Fuller and Raz with respect to retroactivity raise the question how the ECtHR judges retroactive laws. This question is particularly emerging with respect to retroactive tax legislation, since it is far from uncommon that tax legislation is granted retroactive effect, even where it is to a taxpayers’ disadvantage. This contribution deals with the subject which standards the ECtHR – as well as the earlier European Commission of Human Rights (EComHR) – applies when testing retroactive tax legislation for compatibility with Article 1 of the First Protocol of the European Convention on Human Rights (ECHR) (hereinafter: Article 1 First Protocol).

2 Some Methodological Remarks

2.1 Aim of the Contribution

In his comprehensive study on taxation and the ECHR, Baker among others dealt with case law of the ECtHR and the earlier EComHR with respect to retroactive tax legislation. Furthermore, Baker separately discussed

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2 Fuller 1969, p. 155.

3 Fuller 1969, p. 53.


5 ECtHR (Grand Chamber) 23 November 2000, no. 25701/94, The former King of Greece and Others v. Greece, para. 79. See also ECtHR (Grand Chamber) 22 June 2004, no. 31443/06, Broniowski v. Poland, para. 147.

6 ECtHR 13 June 1979, no. 6833/74, Marckx v. Belgium, para. 58. According to the ECtHR the principle of legal certainty is connected to the principle of the rule of law; e.g., ECtHR 27 September 2011, no. 7359/06, Agurdino S.R.L. v. Moldova, para. 25.


8 So, I do not take into consideration the case law of the courts in the various Member States. In this respect I note that, except for France and the Netherlands, the national courts do not often test retroactive tax legislation against Art. 1 First Protocol, but test it against the national Constitution, see Gribnau/Pauwels 2013, General report, p. 62.

that subject in a contribution in British Tax Review some years later.\textsuperscript{10} The question therefore arises: why now a contribution on the issue of retroactive tax legislation and the ECHR again? The first reason is that there have been new relevant cases of the ECtHR since the last contribution of Baker in 2005.\textsuperscript{11} Second, my contribution takes another approach. Baker discussed the issue of retroactive tax legislation and the ECHR mainly by discussing case-by-case the judgments of the ECtHR. Obviously, this approach is appropriate because the ECtHR decides case-by-case and because one should be very reluctant to generalize a judgment of the ECtHR in a particular case. Nonetheless, this contribution seeks to deduce some basic guidelines from the jurisprudence of the ECtHR on retroactive tax legislation. Therefore, in this contribution, the focus is not on the details of the various cases, but both on the method used by the ECtHR to examine retroactive tax legislation and on the considerations of the ECtHR that might have a more general scope. I think this approach could have added value besides (not instead of) the case-by-case analysis. After all, not only the ECtHR but also – actually: in the first place – national courts have to apply the ECtHR when a taxpayer claims that retroactive taxation infringes rights protected by the ECtHR. So, a more general framework of which limits the ECHR sets with respect to retroactive taxation could help the national courts. Moreover, a general framework could also be helpful for the national tax legislators (so that a legislator knows which ECtHR limits it should take into account where it considers to introduce tax legislation with retroactive effect) and for the taxpayers and their lawyers (so that they can better estimate their success chances when considering to start legal proceedings to contest retroactive tax legislation).

2.2 Research Questions

This contribution seeks to find answers to the following two research questions:

(1) in which way does the ECtHR’s assessment of retroactive tax legislation in a specific case fit within the general framework that the ECtHR uses to assess measures for compatibility with Article 1 First Protocol?

(2) which basic guidelines with respect to retroactive tax legislation can be deducted from the case law of the ECtHR?

It should be noted that this contribution does not discuss the issue of retroactivity of case law (judicial law making) in the field of taxation.\textsuperscript{12} Furthermore, the contribution only focuses on retroactive tax legislation that is to the taxpayers’ disadvantage.

2.3 Cases Analysed

A challenging issue when studying a subject concerning the application of the ECHR is that there is an overwhelming number of judgments and decisions of the ECtHR and of the earlier EComHR. As a consequence, it could well be that a judgment that is relevant for the subject analysed, has not been taken into account in the analysis, because that judgment is – for whatever reason – overlooked. Therefore, I think it is appropriate to account which judgments and decisions of the ECtHR and of the former EComHR with respect to retroactive tax legislation have been analysed to answer the aforementioned two research questions. These cases are A, B, C, and D; Building Societies; M.A.; the two Di Belmonte cases; and Joubert.\textsuperscript{13} Furthermore, also the three recent cases – NKM, Gall and RSz – with respect to the Hungarian 98% tax on severance payments have been taken into account, although not all three cases concern genuine retroactive taxation.\textsuperscript{14} Non-tax cases with respect to retroactivity are only discussed if relevant.

Some tax cases are not discussed in this contribution. In his contribution on retroactive tax legislation, Baker also mentions the Voggenberger case a retroactive tax case.\textsuperscript{15} However, here, I do not deal with that case because in my opinion the EComHR did not judge on an issue of retroactivity in that case.\textsuperscript{16} Also, the

\textsuperscript{10} See on that issue e.g., ECtHR 7 July 2011, no. 39766/05, Serkow v. Ukraine, and ECtHR 20 September 2011, no. 14902/04, OAO Neftyanaya Kompaniya Yukos v. Russia, paras 567–575.

\textsuperscript{11} EComHR 10 March 1981, no. 8531/79, A., B., C. and D. v. The United Kingdom; ECtRM 23 October 1997, no. 21310/93, 21449/93 and 21675/93, National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v. the United Kingdom; ECtRM (decision) 10 June 2003, no. 27793/95, M.A. and 34 Others v. Finland; ECtRM (decision) 3 June 2004, no. 72665/01, Di Belmonte (no. 2) v. Italy; ECtRM 16 maart 2010, nr. 72638/01, Di Belmonte v. Italy; ECtHR 23 July 2009, no. 30345/05, Joubert v. France.


\textsuperscript{14} Baker 2005, p. 4; EComHR 12 October 1994, no. 21294/93, Voggenberger Transport GmbH v. Austria.

\textsuperscript{15} In my view, the issue at hand in the Voggenberger case was not retroactivity but whether the tax decisions had sufficient legal basis in the law then applicable. The applicant company had complained that the decisions of the Austrian authorities with respect to the years 1986–1988 were unlawful, arguing that these could not be based on the provision which was in force before an amendment of 1 August 1988. The Austrian Courts however upheld the position the tax authorities had taken that their interpretation of the provision concerned did not go beyond the wording which it had before the amendment, containing simply a clarification. The EComHR rejected the applicant’s complaints that the decisions of the Austrian authorities were contrary to domestic law.
Agurdino case is not discussed, notwithstanding that retroactive tax legislation is involved. The reason is that, in this case, not the retroactive tax legislation itself was scrutinised by the ECtHR. The case is, in the main, an example of the application of the principle of res judicata (the principle of finality of judgments). The case confirms that the introduction of retroactive (tax) legislation – irrespective whether the retroactive legislation itself is permissible – is not a legitimate reason to review, let alone to quash, a final court judgment. Furthermore, in this contribution, the Optim case is only briefly discussed, although retroactive tax legislation is involved. The reason for this is that in this case the ECtHR does not get round the issue of retroactivity, as it considers that Article 1 First Protocol is not applicable (see section 5.2).

3 On Terminology
3.1 Retroactive versus Retrospective

Before analysing the issue of retroactivity as regards content, the terminology used should be made clear. The reason is that, in the literature as well as in case law, different concepts are used with various meanings when dealing with the phenomenon of retroactivity in legislation. In the English language a potential misunderstanding may arise when using the concepts of retroactivity and retrospectivity. These concepts are sometimes (implicitly) considered synonyms or interchangeable, but other times a conceptual distinction is made. Moreover, even if a conceptual distinction is made, the meaning of retroactivity and retrospectivity may not be the same in the various countries and legal discourses in which English is spoken or used. It may be the case that where a legal provision is applicable to facts prior to its enactment, this is called ‘retroactive’ in one country, while it is called ‘retrospective’ in another.

3.2 Concept of Retroactivity

Even if it is agreed on to use the term ‘retroactive’ for the situation in which a legislative provision is applicable to events occurred prior to the enactment, it still may be unclear what exactly the concept of retroactivity involves. For example the aforementioned Fuller has a remarkable opinion with respect to retroactivity in tax law:

> Contrast with the ex post facto criminal statute a tax law first enacted, let us say, in 1963 imposing a tax on financial gains realized in 1960 at a time when such gains were not yet subject to tax. Such a statute may be grossly unjust, but it cannot be said that it is, strictly, speaking retroactive. To be sure, it bases the amount of the tax on something that happened in the past. But the only act it requires of its addressee is a very simple one, namely, that he pays the tax demanded. This requirement operates prospectively. We do not, in other words, enact tax laws today that order a man to have paid taxes yesterday, though we may pass today a law: So, the decisions were upheld on the basis of a certain interpretation of the provision applicable in the years concerned and not on the basis of the later amendment (in which case there would indeed have been retroactive application).

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23 E.g., Building Societies; M.A.; R.Sz.

24 E.g., A, B, C, and D, Building Societies; M.A.


So, Fuller’s view implies that there is only retroactivity in the field of tax law if a tax act is enacted that demands that taxes should have been paid in the past. I think that not many tax scholars nowadays agree with Fuller’s view. Most tax scholars (and undoubtedly also most taxpayers) would agree that a 2013 tax act imposing tax on financial gains realized in 2010 is an obvious example of retroactivity. Not the moment on which tax is paid or should have been paid is relevant. In my view, the key issue for the label ‘retroactive taxation’ is whether or not the key event (income earned, expenses incurred, transaction executed, etc.) to which the tax law attaches consequences (hereinafter: taxable event) occurred prior to the enactment. There is no indication that the ECtHR follows Fuller’s approach. An example to the contrary is the M.A. case, in which due to a law enacted in December 1994 a capital gain with the sale of stock options on 7 November 1994 was taxed at a higher rate than the tax rate that was applicable at the moment of the sale. The ECtHR considered this as retroactive taxation. Also from other cases of the ECtHR it can be deducted that the relevant moment is the moment on which the taxable event occurred (and not the moment of the tax payment).

However, even if it is agreed on that the taxable event should be the central issue, there are still some ambiguities with the concept of retrospective taxation. One of the issues is whether an income tax provision that is enacted on a certain moment in a pending tax period (e.g., on 15 November 2013) and is applicable to taxable events occurred after the start of that tax period (e.g., 1 January 2013) should be qualified as retrospective. In some countries such a provision would indeed be considered retrospective, based on the reasoning that the provision applies with respect to a period prior to the enactment and/or that the provision also applies to taxable events that occurred prior to the enactment. However, there are also many countries in which such a provision would not be considered retrospective. In that approach, the basic idea is in essence that the taxable event of period-related taxes (such as the income tax) only arises at the end of the period. To my knowledge, the ECtHR has not clearly decided which approach is in its opinion correct. However, from a case law it can be deducted that in any event the first-mentioned view is apparently not principally rejected. Moreover, taking into account the different views in the various Member States, I expect that the ECtHR will not take up an explicit position on this issue. Moreover, there is no urgent reason for the ECtHR to take a position – neither if it is asked to do that by an applicant or government –, since the question whether or not a tax law is genuinely retroactive, is not decisive for the issue whether or not contested taxation is compatible with Article 1 First Protocol. It is also important whether or not legitimate expectations of the taxpayer are infringed. To address this latter issue it is not necessary that the contested taxation is retroactive. After all, also in case of non-retroactivity but immediate application of the law without grandfathering (retrospectivity) legitimate expectations could be at stake. This could be taken into consideration under the fair balance test. So, concluding, in cases in which it is unclear whether the qualification retroactivity is appropriate, the ECtHR has the possibility to simply jump over the issue and to turn to the fair balance test.

It should be noted that the approach in which the moment the taxable event occurs is decisive for the labelling retroactive or not, may not always have satisfying results. First, a legislator may artificially construe a taxable event that strictly legally occurs after the enactment (thus the statute is de jure prospective), but that in essence involves an event that occurred in the past (thus the statute is de facto retroactive). In such (extreme) situations, I think a substance over form approach should be applied, thus judging the statute like it is retroactive. Secondly, it may happen that the event that is legally the key event does not correspond with the event that is socially or economically considered the key event, and therefore the moments on which these events occur may not coincide in time. Sometimes the ECtHR just simply jumps over the issue whether or not the label ‘retroactive’ is appropriate. An example is the Di Belmonte case. In this case, the applicant had received compensation for expropriation which was...
subject to a tax. According to the applicant, this taxation involved retroactive taxation because the tax statute concerned was introduced after the expropriation and after the amount of compensation was established by a final decision of the local court. However, the Italian government took the position that there was no retroactive taxation, because the tax statute was enacted before the compensation tranches were paid. The government argued that the legally decisive moment for taxation is the moment of receipt of the income. The ECtHR decided not to take a position on this issue by considering (paragraph 42) ‘En tout état de cause, une éventuelle application rétroactive ( . . . ) au cas du requérant n’aurait pas constitué per se une violation de l’article 1 du Protocole no 1 ( . . . ), and subsequently turned to the fair balance test. A comparable example is the recent Gáll case. In that case, an amendment introducing a 98% tax on severance payments was enacted after the applicant’s dismissal but before the severance was paid (which is the legally relevant event). The ECtHR only implicitly noted that there was no genuine retroactivity, and moreover it subsequently considered that (paragraph 51) ‘the taxation complained of can be argued to have certain retroactive features. In particular, the severance itself was generated on the applicant’s dismissal ( . . . ) – which preceded the entry into force of the final amendment ( . . . ).’

Also in this case, the ECtHR subsequently rather focuses on the contents, i.e., the fair balance test, than on the labelling issue whether or not there is a case of retroactivity. For clarity’s sake, I note that, starting from the definitions provided in section 3.1, in both the Di Belmonte case and the Gáll case there is no retroactivity but retrospectivity.

4 General Framework for Testing for Compatibility with Article 1 First Protocol

Article 1 First Protocol reads as follows:

Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

When an applicant argues for a competent court that a certain measure violates Article 1 First Protocol, the court should examine several issues. In a nutshell, the following five steps can be deducted from the jurisprudence of the ECtHR.37

First of all, it should be established that Article 1 First Protocol is *ratione materiae* applicable to the case at hand.38 In that respect it should first be analysed whether there are ‘possessions’ within the meaning of Article 1 First Protocol (step 1). If that is the case, next, it should be established that the contested measure interferes with the right to peaceful enjoyment of these possessions (step 2). If there are no possessions or there is no interference, the applicant cannot invoke the protection of Article 1 First Protocol.

If it is established that there is an interference with the peaceful enjoyment of possessions, it should subsequently be examined whether the interference is in compliance with Article 1 First Protocol. In that respect the interference should meet three requirements. These requirements are cumulative. So, if one of these requirements is not met, the interference is held to violate Article 1 First Protocol.

The first requirement is that the interference should be lawful (step 3). Above all, the lawfulness test requires the existence of a legal basis in domestic law for the interference (principle of legality). Furthermore, the legal basis must have a certain quality. This relates to the notion of the rule of law. Among others, the applicable provisions in the domestic law should be sufficiently accessible, precise and foreseeable in their application.

The second requirement is that the interference should pursue a legitimate aim in the public interest (step 4). In that connection, the national authorities enjoy a certain margin of appreciation. In the tax sphere, the margin of appreciation is even ‘wide’. Furthermore, the notion of ‘public interest’ is interpreted extensively.

The third requirement is that the interference must strike a ‘fair balance’ between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights (step 5). This is the proportionality test. There must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized by the impugned measure. In assessing whether the fair balance requirement has been met, it is recognized that a state enjoys a wide margin of appreciation in the area of taxation, the ECtHR respects the legislature’s assessment in such matters unless it is devoid of a reasonable foundation. The fair balance requirement is not satisfied if the interference constitutes an individual and excessive burden.

37 See e.g., the NKM case, and the non-tax case ECtHR (Grand Chamber) 22 June 2004, no. 31443/96, Broniowski v. Poland.

38 Obviously, it is also necessary that the case at hand falls under the jurisdiction *ratione personae, ratione loci and ratione temporis*.
5 Applying the Framework to Retroactive Tax Legislation

5.1 Introduction

In this section, it is examined how the ECtHR scrutinizes retroactive tax legislation for compatibility with Article 1 First Protocol. In this section, there are regularly references to the M.A. case. The central position of this case may seem odd, as this case only concerns a ‘decision’ (holding that the application is inadmissible) in which it was concluded that the complaint that the retroactive taxation infringes Article 1 First Protocol is ‘manifestly ill-founded’. Nevertheless, the M.A. case seems to be one of the leading cases with respect to retroactive tax legislation.39 First of all, in this case, the ECtHR provides some considerations which potentially have a more general scope. Secondly, the ECtHR frequently refers to the M.A. case in other cases.40 Another leading case is the Building Societies case. This case is also discussed in section 6 regarding the particular situation of legislative intervention.

As I regularly refer to the M.A. case, I will now first briefly describe the main details of the case. In this case, the Finnish tax legislator had amended a tax statute as a result of which profits based on appreciation of stock received by an employee from his employer were to be regarded as a benefit related to employment for tax purposes instead of as lower-taxed capital income (as it was regarded before). This amendment was adopted on 21 December 1994 and published on 31 December 1994. Because during parliamentary proceedings it had became known that certain companies were planning to bring forward the opportunity to exercise the stock options in order to avoid the application of the new law, the Finnish legislator provided retroactive effect to the amendment until 16 September 1994, which is the date of the introduction of the bill in parliament. However, the so-called pure cases (i.e., cases in which the company had not initiated arrangements with the aim of making possible an earlier exercise of the options) were left outside of the scope of the retroactivity. In the case of M.A. the applicants had exercised their stock options by selling them on 7 November 1994 after the stock option arrangements had been changed. Thus, not being a pure case, the retroactive amendment was applicable to the gain the applicants made. This retroactive taxation was upheld by the ECtHR.

5.2 Interference with the Peaceful Enjoyment of Possessions

In tax cases, the first two steps regarding the scope ratione materiae of Article 1 First Protocol – whether there is an interference with the peaceful enjoyment of possessions – usually are not a problem. It follows from the structure of Article 1 First Protocol that taxation falls under that scope. After all, in the third sentence a reservation is made with respect to taxes, which indicates that taxation is in principle considered an interference with the peaceful enjoyment of possessions.41 In the Burden case it was reasoned as follows: Taxation is in principle an interference with the right guaranteed by the first paragraph of Article 1 of Protocol No. 1, since it deprives the person concerned of a possession, namely the amount of money which must be paid.42 Also in case the tax is not due by the taxpayer himself, but is withheld by another on payments to the taxpayer, Article 1 First Protocol is applicable.43 So, one could conclude that in cases in which the application of a substantive tax provision is contested, Article 1 First Protocol is in principle always applicable, since taxes inherently – by their nature – interfere with the peaceful enjoyment of possessions. Taking into account the aforementioned, it is not a surprise that also in cases involving retroactive taxation the ECtHR readily accepts that Article 1 First Protocol is applicable, sometimes even without explicitly considering whether there is an interference with the peaceful enjoyment of possessions.44

However, sometimes, for example in the Building Societies case and the Joubert case, the ECtHR takes another approach and examines whether there is a legitimate expectation – constituting possessions – that the disputed tax would be repaid.45 In this contribution, I do not elaborate on the emerging issue why and in which kind of tax cases the ECtHR applies such another approach.

I do however note that in tax cases in which the ECtHR does examine thoroughly whether there are possessions in the meaning of Article 1 First Protocol, the case at hand does often not concern a substantive tax dispute but involves procedural aspects of taxation.46

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39 Compare also the concurring opinion in the NKM case.
40 E.g., Di Belmonte (no. 2); Di Belmonte; ECtHR 23 February 2006, no. 25632/02. Stere and others v. Romania. ECtHR 22 January 2009, no. 3991/03, Bulves AD v. Bulgaria; NKM, R.S.; and the non-tax case ECtHR 18 May 2010, no. 16021/02, Plalam S.P.A. v. Italy.
41 Compare ECtHR 23 October 1990, no. 11581/85, Darby v. Sweden, para. 30 ‘Art. 1 of Protocol No. 1, second paragraph, establishes that the duty to pay tax falls within its field of application’.
42 ECtHR (Grand Chamber) 29 April 2008, no. 13378/05, Bunden v. the United Kingdom, para. 58; see also ECtHR (decision) 4 January 2008, nos. 23634/03 and 27815/03, Imbert de Treuille v. France.
43 Di Belmonte, para. 38. See also, however only after extensive considerations, NKM, paras 32–45.
44 A.B.C. and D., Di Belmonte (no. 2); M.A.; Di Belmonte; R.S.
45 Building Societies, paras 62–70; Joubert, paras 50–53.
One of these cases is the Optim case. In this case, the Belgium legislator enacted a law establishing that a provisional assessment did suspend the operation of a limitation period, subsequent to deviating judgment of the Belgium Supreme Court. The applicants challenged this law, among others in particular the retroactive effect of it. However, according to the ECtHR, although the applicants had legitimate expectations that the limitation period would operate to bar recovery of tax, the change of the tax law did not imply a deprivation of a possession within the meaning of Article 1 First Protocol.

To conclude, if the retroactivity concerns a substantive tax rule, the first two steps – whether there is an interference with the peaceful enjoyment of possessions – can in principle be passed by easily. However, if the retroactivity regards a procedural tax rule, it should be carefully examined whether in the case at hand there is an interference with the peaceful enjoyment of possessions within the meaning of Article 1 First Protocol.

5.3 Lawfulness of the Interference

5.3.1 Legal Basis

The requirement that the interference has a legal basis in domestic law is in principle met in case of retroactive taxation. After all, the fact that the legislator granted retroactive effect to the legislation concerned, does not alter the fact that the taxation, including the retroactive element, has a legal basis in the legislation concerned. Obviously, if the legislation concerned was not granted retroactive effect but the authorities nonetheless applied the legislation retroactively, the lawfulness requirement is in principle not met. However, in that case there is no issue of retroactivity of tax legislation but an issue that the tax authorities applied the legislation beyond its temporal field of application, thus without legal basis in that legislation.

5.3.2 Quality of the Legal Basis (I): Accessible and Precise

The requirement of lawfulness also implies that the legal norms concerned are sufficiently accessible and precise. Retroactive taxation as such is not incompatible with these two requirements. Provided that the legislation with retroactive effect was published in an appropriate way, the legislation meets the requirement that the applicable legal norm is sufficiently accessible. Furthermore, provided that it is clear from the legislation that retroactive effect is granted, also the requirement that the legal norm is sufficiently precise is met (as far as it concerns the retroactivity).

5.3.3 Quality of the Legal Basis (II): Foreseeable

In my opinion, the most emerging element of the lawfulness test with respect to retroactive taxation is the requirement that the legal norm concerned should be foreseeable in its application. As mentioned above this element is closely linked to the notion of the rule of law.

One might expect there is at least a substantial tension between retroactive tax legislation and the requirement that law should be foreseeable in its application. Moreover, one would also expect this, taking into account case law regarding the lawfulness requirement. For example, in the (non-tax) Rekvényi case, the ECtHR considered with reference to the famous (non-tax) Sunday Times case:

According to the Court’s well-established case-law, one of the requirements flowing from the expression ‘prescribed by law’ is foreseeability. Thus, a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

Similarly, in the (non-tax) Laskey case, it was stated that ‘individuals should be able to regulate their conduct with reference to the norms prevailing in the society in which they live. ( . . . ) an individual must be able to foresee the consequences of this actions ( . . . )’. Both quotations show that the Strasbourg court links up a close connection between the foreseeability requirement and the notion that an individual should be able to foresee the legal consequences of an action. In my view, the latter implies that legislation should be prospective. As a consequence, one might expect that retroactive legislation would not satisfy the foreseeability requirement, and thus would not be regarded lawful.

However, surprisingly, up until now, the ECtHR has not clearly tested retroactive tax legislation against the foreseeability requirement under the lawfulness test. A fine example is the above described M.A. case. One of the arguments of the applicants was ‘that the retrospective legislation does not fulfill the requirements of lawfulness in respect of foreseeability’. However, in spite of this argument, the ECtHR did not explicitly consider the foreseeability requirement under the lawfulness test, but it almost directly went to the fair balance test. And under that test the ECtHR considered that:

48 See e.g., the non-tax case ECtHR 8 November 2005, no. 63134/00, Kechko v. Ukraine.
49 ECtHR 20 May 1990, no. 25390/94, Rekvényi v. Hungary, para. 34; ECtHR 26 April 1979, The Sunday Times v. The United Kingdom, no. 6538/74, para. 49.
50 ECtHR 14 December 1992, nos. 21627/93, 21628/93 and 21974/93, Laskey and others v. The United Kingdom.
the fact that the legislation applied retroactively in the applicants’ case [does not; MP] constitute per se a violation of Article 1 of Protocol No. 1, as retrospective tax legislation is not as such prohibited by that provision. The question to be answered is whether, in the applicants’ specific circumstances, the retrospective application of the law imposed an unreasonable burden on them and thereby failed to strike a fair balance between the various interests involved.

In the case of M.A. the ECtHR concluded that this fair balance test was met and that there was no violation of Article 1 First Protocol. Taking into account this conclusion, one can deduce that the ECtHR is apparently of the opinion that the retroactive tax legislation at hand was not incompatible with the lawfulness requirement. However, it remains unclear what the legal reasoning of the ECtHR is with respect to the foreseeability requirement under the lawfulness test. Also in other cases concerning retrospective tax legislation, the ECtHR does not explicitly examine whether the application of the retroactive legislation satisfies this requirement under the lawfulness test\(^\text{51}\) or just considers that the lawfulness test is met.\(^\text{52}\)

The question arises as to what the explanation for this approach of the ECtHR is. I think there are two possible explanations, which might converge.

First, the following could be argued. It should be noted that the above quotations of the ECtHR with respect to the foreseeability requirement (holding that an individual must be able to foresee the consequences of his actions) are done in the context of ‘normal’ legislation, i.e., legislation that is prospective. It might be that the foreseeability requirement and its objective should be understood differently in the context of retroactive legislation. In that respect it should be repeated that the requirement implies that ‘the legal norms should be sufficiently ( . . . ) foreseeable in their application’. One could argue that in the context of retroactive legislation this requirement only\(^\text{53}\) implies that it should be clear for the taxpayer on the basis of the legislation concerned that the legislation will be applied retroactively by the tax authorities. So, after the enactment, the taxpayer should be able to foresee on the basis of the legislation concerned that the tax authorities will apply the legislation retroactively. If the taxpayer cannot clearly deduct from the legislation that the legislation has retroactive effect, the foreseeability requirement is not satisfied. Obviously, if the aforementioned reasoning would be correct, this would imply a rather narrow interpretation of the foreseeability requirement under the lawfulness test. In this interpretation the key issue is not whether the taxpayer could foresee the legal consequences of considered actions. The key issue would only be whether the taxpayer could foresee the actions of the tax authorities. In case of prospective legislation the latter issue would in principle also cover the former issue, but in the special case of retroactive legislation these issues do not correspond.

A second explanation might be the following. This explanation relates to the fact that it follows from the general framework of the ECtHR (see section 4 above) that if the lawfulness requirement is not met in a certain case, the conclusion should be that Article 1 First Protocol is violated. So, there is strictly speaking no room for a balancing test in that case, for example balancing with the public interest aimed by the measure. Against this background, it might be that the ECtHR found that the foreseeability requirement under the lawfulness test is too strict to examine whether retroactive tax legislation is compatible with Article 1 First Protocol. It might for example be that in a case of retroactive tax legislation strictly speaking the foreseeability requirement is not satisfied due to the retroactivity (as the individual could not foresee the consequences of this actions), but that there are weighty reasons for the retroactivity (e.g., targeting tax avoidance). However, under the lawfulness test, there would be no room to balance the infringement of the foreseeability requirement against these weighty reasons. This would thus have the result that, although there is a sufficient justification for the retroactivity, the decision should be that there is a violation of Article 1 First Protocol. Such a result would, at least in my opinion, not be desirable, as assessing retroactivity should be based on a balancing test.\(^\text{54}\) Therefore, it could be that the ECtHR found that it is more appropriate to examine retroactive legislation under the fair balance test. Under this test, also the interest that an individual should be able to foresee the consequences of his actions could be taken into consideration. This element of foreseeability is often related to the concept of legitimate expectations.

Obviously, the two above-mentioned possible explanations have a highly speculative nature. Preferably, the ECtHR should clearly explain the relation between

\(^{51}\) See A.B.C. and D. Building Societies, paras 78-83. Compare also the cases of Di Belmonte (no. 2) and Di Belmonte, although these cases do strictly speaking not concern genuine retroactivity. See also the following non-tax cases: ECtHR 9 December 1994, no. 13427/87, Stran Greek Refineds and Stratis Andreadis v. Greece; ECtHR 20 November 1995, no. 17849/91, Pressos Compania Naviera S.A. and Others v. Belgium; and ECtHR 11 April 2002, no. 46356/99, Smokovitis and others v. Greece.

\(^{52}\) E.g., Joubert, para. 56.

\(^{53}\) Obviously, the substantive rule concerned (to which retroactive effect is granted) should also meet the qualitative lawfulness requirements such as the foreseeability requirement.

retroactive (tax) legislation and the foreseeable requirement under the lawfulness test. To end, in the three recent cases with respect to the Hungarian 98% tax on severance payments, surprisingly, the ECtHR gave some considerations about retroactivity under the lawfulness test. Taking into account the earlier case law, this is noteworthy in itself. However, in the end, the ECtHR does not reach a final conclusion with the retroactivity concerned under the lawfulness test but shifts the issue to the proportionality test. Therefore, in my opinion, one should be reluctant to deduce from these cases that the ECtHR has adopted a new approach by testing retroactivity also against the lawfulness requirement.

5.4 Legitimate Aim in the Public Interest

The second requirement is that the interference should serve a legitimate aim in the public interest. Taking into account the wide margin of appreciation, in tax cases this requirement is usually met. After all, the main aim of taxation is in principle to provide the government funds to finance its activities. Moreover, the third sentence of Article 1 First Protocol indicates that taxation does in principle not violate Article 1 First Protocol, thus implying that prima facie happen taxation serves a legitimate aim in the public interest. From case law it can be deducted that the ECtHR passes this requirement rather easily in retroactive tax cases and focuses on the proportionality test. However, in the Joubert case, the ECtHR did examine this requirement and even ruled this requirement was not met. With all due respect, I am of the opinion that this latter is methodologically confusing. I will further discuss this issue in the Joubert case in section 6.

5.5 Proportionality Test; Fair Balance

The main test in most cases examined under Article 1 First Protocol is the proportionality test. This also applies for retroactive tax cases. With respect to the proportionality test, the M.A. case is an important case as the ECtHR provides some general considerations that could also be of relevance for other cases. Here, I mainly focus on these general considerations and especially on the details of the M.A. case itself. It should be noted that for the special case of 'legislative intervention' a special standard applies (see section 6). A first general consideration in the M.A. case is that the fact that the legislation applied retroactively in the applicants' case does not constitute per se a violation of Article 1 of Protocol No. 1, as retrospective tax legislation is not as such prohibited by that provision.

This consideration has been repeated in other cases. The keynote that retrospective tax legislation is not as such prohibited by that provision is noteworthy as it as a point of departure raises the view of the principle of legal certainty. The CJ applies a point of departure that is reverse to a certain extent: retroactivity is not allowed, unless ( . . . ). Secondly, after the ECtHR rules that M.A. did not have an expectation protected by Article 1 EP, it notes that so-called pure cases might have to be assessed differently. It then considers: 'In such a situation, (. . .) taxation at a considerably higher tax rate than that in force on the date of the exercise of the stock options could arguably be regarded as an unreasonable interference with expectations protected by Article 1 of Protocol No. 1.' This could be regarded as a warning to the Member States. In recent case law of the ECtHR this consideration is quoted in general terms: 'taxation at a considerably higher tax rate than that in force when the revenue in question was generated could arguably be regarded as an unreasonable interference with expectations protected by Article 1 of Protocol No. 1.'

Strikingly, in some cases in which the generalized consideration is quoted, there is no retroactivity but at most a kind of retrospectivity (in the words of the ECtHR: 'the taxation complained of can be argued to have certain retroactive features'). This fact raises the question what the scope of the consideration is and in particular how the phrase 'when the revenue in question was generated' should be interpreted (e.g., 'generated' according to the standards in the tax law, or 'generated' according to another – for example an economic or a social – standard). Future jurisprudence should shed more light on this issue.

A third general consideration is that whether [the retroactive application; MP] is compatible with Article 1 of Protocol No. 1 depends, first, on the reasons for the
retroactivity and, secondly, on the impact of the 
retroactive law on the position of the applicants’. This is 
an important consideration. First, here, not the taxation 
itself – which constitutes the interference – is tested on 
its proportionality, but the ECtHR specifically focuses on the 
retroactive element. This implies that the ECtHR 
considers the retroactivity as a special phenomenon that 
should be scrutinized separately. Secondly, the 
consideration provides national courts a framework, 
although still rather abstract, for testing retroactive tax 
legislation under Article 1 First Protocol.

It is not entirely clear from the reasoning in the M.A. 
case what the exact relation is between the above- 
mentioned second and third general consideration. 
Taking into account the order of the considerations, one 
could argue that for pure cases only the second general 
consideration applies and that the third general 
consideration is only applicable if the case at hand is not a 
‘pure case’. However, if this view is correct, this would 
only shift the key issue, for one should need a criterion 
to distinguish between pure cases and non-pure cases. 
Furthermore, this view might imply that retroactivity in 
a pure case is always prohibited, thus without taking into 
account the reasons for retroactivity. I think this 
would not be a desirable or a right approach, because in 
my view the testing of retroactivity requires an 
assessment of the legislator’s balancing of the interests 
involved. I note that one could in reply argue that a case 
only qualifies as a pure case where there is no 
justification for the retroactivity. However, this would be 
a rather purposeless addition, because then it would still 
be necessary – for the qualification as ‘pure case’ – to 
test whether in the case at hand the retroactivity is 
justified. Against this background, I think the above- 
mentioned third general consideration generally applies 
for testing retroactivity, thus also in pure cases. 
Nevertheless, obviously, in a pure case the conclusion 
that retroactivity violates Article 1 First Protocol would 
rather be reached than in a non-pure case.

In the M.A. case, the ECtHR has also provided some 
additional guidelines with respect to the application of 
the framework provided in the above-mentioned third 
general consideration. With respect to the first part – the 
reasons of the retroactivity – it is important that the 
ECtHR accepts in the M.A. case the reasons for the 
retroactivity after considering ‘that the assessment made 
by the legislature in this respect cannot be regarded as 
unreasonable’. Thus, the standard is that the legislature’s 
assessment will be accepted ‘unless it is devoid of 
reasonable foundation’.

As the number of cases in which the ECtHR judged 
retroactive taxation is rather small, it is hard to say what 
kind of reasons for retroactivity could be considered 
legitimate. Nonetheless, I agree with Baker that from 
case law it can be deducted that if the reason for 
retroactive taxation is to counteract tax avoidance, the 
ECtHR will not readily judge that the retroactive 
taxation violates Article 1 First Protocol. After all, the 
ECtHR upheld the retroactive tax legislation concerned 
in the A.B.C. and D. case (tax avoidance; artificial tax 
losses), the Building Societies case (taking advantage of a 
loophole; frustrating the intention of the Parliament) 
and the M.A. case (escaping the application of an 
announced change in tax law). So, targeting tax 
avoidance is accepted as a legitimate reason.

Interestingly, in the M.A. case the ECtHR also accepts 
the connection the Finnish government ties between the 
prevention of the tax avoidance and ensuring equal 
treatment of taxpayers (i.e., equal treatment in 
comparison with those who did not try to escape the 
application of the amendment). Another accepted reason 
is to remedy technical deficiencies of the law in order to 
prevent that taxpayers enjoy the benefit of a windfall. 
This latter reason is even ascended to a ‘general principle’. 
Although there is no clearly confirming jurisprudence of the 
ECtHR yet, I expect that other legitimate reasons could under circumstances be the 
prevention of so-called announcement effects (see also 
hereinafter with respect to ‘legislation by press release’), 
and to clarify an obscurity in the tax legislation, e.g., for 
the purpose of legal certainty, for example by means of a 
so-called interpretative statute.

With respect to the second part – the impact of the 
measure –, the ECtHR considers in the M.A. case ‘that 
the legislation was not such as to amount to confiscatory 
taxation or of such a nature as could deprive the 
legislation of its character as a tax law’. These elements 
refer among others to the financial impact. I think that 
in this respect also the particular (financial) situation of 
the individual could be of relevance; therefore, it might 
be that this test has different outcomes for various 
individuals. Furthermore, I think that one should not 
deduce from the quoted consideration that the two 
elements are the only elements that are relevant to assess

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61 Also in some other cases the court focuses on the retroactivity 
when testing the proportionality; see A.B.C. and D., Building 
Societies, paras 80–83. In the R.Sz. case, the element of 
retroactivity is one of the various distinguished elements on the 
basis of which the ECtHR concludes that the proportionality test is 
not met.

62 Baker 2005, p. 8: ‘legislation which is designed to counter a 
picular tax avoidance arrangement will be very hard to challenge 
on grounds that it is unjustified’ See also J. Tiley, ‘Human rights 
2006, p. 80.

63 Building Societies, paras. 81.

64 See NKM, paras 51 and 74, and R.Sz., paras 40 and 59.

65 Compare also the ruling of the Dutch Supreme Court 2 October 
2009, ECLI:NL:HR:2009:BI1909, para. 3.5.4

66 Retroactive interpretative statutes are not uncommon in tax 
legislation; see Gribnau/Pauwels 2013, General report, pp. 47–50 
and 57. See on this subject e.g., Bruno Peeters and Patricia 
Popelier, Retroactive interpretative statutes and validation statutes 
in tax law: an assessment in the light of legal certainty, separation 
of powers, and the right to a fair trial”, in: Gribnau/Pauwels 2013, 
pp. 117–128.
the impact. In my view, another relevant element is whether or not legitimate expectations are infringed by the retroactivity.\textsuperscript{67} Related, a relevant element could be whether or not, relying on the then applicable tax law, the taxpayer already spent income concerned, unaware that at a later moment the income would be subject to retroactive taxation.\textsuperscript{68}

I note with respect to these two latter elements that it is of relevance whether the government announced the change in legislation and the retroactive effect of it (sometimes called ‘legislation by press release’).\textsuperscript{69} In case such an announcement is sufficiently clear and the retroactivity does not go beyond the date of the announcement, I am of the opinion that in principle the retroactivity is foreseeable and therefore in principle no legitimate expectations are infringed by the retroactivity. So, in that case, there is in principle no violation of Article 1 First Protocol, provided that there are also legitimate reasons for the retroactivity (often: preventing announcement effects). To my knowledge, the ECtHR has not yet confirmed this view, but I expect it will do so if such a case is brought to court, taking into account the perspective of comparative law.\textsuperscript{70} First, various Member States this technique of ‘legislating by press release’ is regularly used in the tax area.\textsuperscript{71} Secondly, from the ruling of the CJ in the Stichting Goed Wonen II case it can be deduced that the CJ accepts that this technique could prevent that retroactivity leads to an infringement of legitimate expectations, provided that the announcement concerned is sufficiently clear for taxpayers.\textsuperscript{72} In that case, the CJ also accepted that the aim to prevent announcement effects (in that case: the effect that – if the retroactive effect was not announced – contrived financial arrangements would be put into operation between the time at which it was announced that the law would be amended and the time at which that amendment came into force) could be a legitimate reason to justify the retroactive effect, provided that the risk of announcement effects was significant enough.\textsuperscript{73}

To be sure, the aforementioned discussion with respect to ‘legislation by press release’ does not imply that if the retroactive tax legislation is not properly announced in advance, the retroactivity necessarily violates Article 1 First Protocol. To the contrary, there are various cases in which the ECtHR upheld the retroactivity of the tax legislation although the retroactive effect went beyond the date of the first announcement of the retroactive effect.\textsuperscript{74}

To end, provide a short overview of the judgments of the ECtHR and of the earlier EComHR in the various cases under the fair balance test. As mentioned before, the court upheld retroactive tax legislation in the A.B.C. and D. case, the Building Societies case and the M.A. case. Also in the Di Belmonte (no. 2) case, the ECtHR held that the impugned taxation met the fair balance test. Interestingly, in the other Di Belmonte case, the ECtHR ruled that the taxation did not met the fair balance test and thus that there was a violation of Article 1 First Protocol. However, it should be noted that the key ground for the judgment is not the quasi-retroactive effect of the tax legislation involved. The decisive issue was that there had been a delay in the payment of the compensation by the Italian authorities to the applicant for the expropriation.\textsuperscript{75} If the compensation would have been paid regularly and in a timely manner, the compensation would have fallen outside the temporal scope of the new tax legislation. In the Joubert case – with respect to a procedural issue (legislative validation of a tax assessment issued by incompetent authorities) – the ECtHR found that the fair balance test was not met. However, this case is special as it concerns legislative intervention pending legal proceedings (see section 6).

In the recent R.Sz. case, the ECtHR ruled that the retroactive 98% taxation on the severance payment violated Article 1 First Protocol. However, in this case the retroactivity is just one of the elements on the basis of which the ECtHR reaches its conclusion. More important is that it seems that the ECtHR does not like the substantive tax provision itself (so obviously, a fortiori, neither the retroactive effect of it). This view is supported by the fact that the ECtHR also held that there was violation of Article 1 First Protocol in the NKM case, concerning the same legislation but in which case there was no retroactive effect (in the case of NKM both the dismissal and the payment of the severance occurred after the introduction of the 98% tax on severance payments) but at most retrospектив effect (in the wording of the ECtHR: it had ‘certain retroactive features’).

Summarizing, there have been some cases involving (quasi-)retroactive taxation in which the ECtHR found that the fair balance test was not met. However, all these cases have in common that not the retroactivity as such was the key obstacle according to the ECtHR. In each of these cases there were (additional) special circumstances explaining the judgment that Article 1 First Protocol was

\textsuperscript{67} Compare the approach of the CJ when testing retroactive tax legislation for compatibility with the principle of legal certainty; e.g., CJ (Grand Chamber) 26 April 2005, C-376/02, Stichting ‘Goed Wonen’ II, para. 33. Compare also the ruling of the Dutch Supreme Court 2 October 2009, ECLI:NL:HR:2009:BIJ9009, para. 3.3.2–3.5.3.

\textsuperscript{68} Compare R.Sz., para. 59.

\textsuperscript{69} Gribnau/Pauwels 2013, General report, pp. 55–57.


\textsuperscript{71} CJ (Grand Chamber) 26 April 2005, C-376/02, Stichting ‘Goed Wonen’ II, paras 43–44.

\textsuperscript{72} CJ (Grand Chamber) 26 April 2005, C-376/02, Stichting ‘Goed Wonen’ II, paras 38–39.

\textsuperscript{73} A.B.C. and D. Buildings Societies, M.A.

\textsuperscript{74} Strictly speaking this case did not concern retroactivity but retrospective, see section 3.2.

\textsuperscript{75} See especially para. 45 of the Di Belmonte case. Compare also a contrario the result of the Di Belmonte (no. 2) case.
violated (Di Belmonte: delay in payment; Joubert: intervention pending legal proceedings; R.Z.: substantive provision itself is problematic). Against this background and taking into account the other aforementioned cases involving retrospective taxation, it can be concluded that up till now the ECtHR has not yet concluded in a tax case that there is a violation of Article 1 First Protocol due to the retroactive effect itself.

6 THE PARTICULAR SITUATION OF LEGISLATIVE INTERVENTION PENDING LEGAL PROCEEDINGS

The ECtHR applies a stricter standard towards retroactivity, including retroactivity in the tax area, in a particular type of situation. This concerns the situation where the retroactive law decisively influences pending legal proceedings before court (hereinafter also: legislative intervention). Initially, the ECtHR applied a standard without exceptions. It ruled that the principle of the rule of law and the notion of fair trial enshrined in Article 6 (…) preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute.76 It seems that due to the tax case Building Societies it became apparent to the court that this rule was too strict.77 In this case, the ECtHR accepted the justification provided by the government for the legislative intervention.78 After the judgment in the Building Societies the standard became that ‘the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute.’79 Due to the subordinate clause between dashes, the issue has become a matter of balancing instead of an issue governed by a hard and fast rule. Obviously, the subsequent question is which kind of grounds could be regarded as compelling. This question demands a separate analysis, since there is quite a lot of case law on this issue and it is hard to deduct general lines from it.80 Here, I only focus on case law with respect to tax cases.

81 ECtHR 12 July 2001, no. 44759/98, Ferrazzini v. Italy. This case law has been criticized in the literature by many; see e.g., Natalie Lee, ‘Time for Ferrazzini to be reviewed?’, British Tax Review (2010), pp. 589–609.
83 Joubert case.
84 RETROACTIVE TAX LEGISLATION IN VIEW OF ARTICLE 1 FIRST PROTOCOL ECHR

In that respect, it should first of all be noted that the afore-mentioned standard does not only apply in the sphere of Article 6 ECHR – which provision is not applicable to pure tax cases81 – but also in the sphere of Article 1 First Protocol.82 As a consequence, the standard is also of relevance for tax cases under the scrutiny for compatibility with Article 1 First Protocol.83 To my knowledge, the most important tax cases concerning a legislative intervention during pending legal proceedings are the Building Societies case and the Joubert case.

The Building Societies case is an important case, since the ECtHR accepted the legislative intervention by the UK legislator84. In this case the UK legislator had introduced retroactive legislation to prevent that taxpayers would make an advantage of a technical deficiency in the tax law arisen by a changeover to a new tax-payment regime and would enjoy the benefit of a windfall. The judgment of the ECtHR was based on various considerations, but an essential issue appears to be that the applicants had tried to make an advantage of the loophole, which the ECtHR apparently did not appreciate at all.85

The Joubert case concerned the situation that a certain division of the French tax authorities performed tax audits at the applicant and subsequently issued tax assessments, including penalties. For the national court the applicants took the position that this division was not the competent authority for these acts. However, pending the legal proceedings a law was enacted implying that such kind of acts were considered regular, as a result of which at the end the applicant lost his case for the national court. The ECtHR ruled that this legislative intervention violates Article 1 First Protocol. A remarkable part of the judgment concerns the test whether the interference serves a legitimate aim in the public interest.80 According to the ECtHR, the aim invoked by the French government was actually to preserve the budgetary interest, which interest however does not qualify as a legitimate aim. This latter decision was based amongst others on the consideration that in principle the mere budgetary interest cannot justify a...
retroactive intervention by a validation statute (‘qu’en principe ce seul intérêt financier ne permet pas de justifier l’intervention rétroactive d’une loi de validation’) and the consideration that the French government had not taken the position that the loss of the amount of revenue at stake (about 1.1 billion francs for all legal proceedings) would have such an impact on the government’s budget that the public interest would be affected. With all due respect, in my opinion this decision is methodologically confusing. Taking into account the wide margin of appreciation granted to the national authorities in the tax area under the legitimate aim test and the fact that the notion of ‘public interest’ is extensive (see section 4), it is, in my opinion, hard to see that, in a tax matter, a budgetary interest is considered not being a legitimate aim in the public interest. To be sure, this position does not imply that I do not agree with the opinion of the ECtHR that the mere budgetary interest does not justify the legislative intervention. However, in my opinion, it would be more appropriate to conceive this standard as a matter of balancing, i.e., that the mere budgetary interest does not outweigh the interests infringed by the legislative intervention. Being a matter of balancing, this principle better fits under the proportionality test rather than under the legitimate aim test.\(^87\) As a matter of fact, the ECtHR also applied this proportionality test as an alternative reasoning in the Joubert case to condemn the legislative intervention,\(^88\) which reasoning is thus in my view more convincing. An explanation for the methodological remarkable approach by the ECtHR is that the afore-mentioned standard that in principle the mere budgetary interest cannot justify a retroactive intervention by a validation statute, originates from the above-mentioned case law with respect to legislative intervention. It is true that in that connection this standard is settled case law,\(^89\) but it should be noted that this standard was originally provided when testing for compatibility with Article 6 ECHR and within the framework that only compelling grounds of the general interest could justify a legislative intervention. In this respect, it should be noted that the adjective ‘compelling’ refers to weighing. Therefore, in my view, when this consideration is transposed from the test under Article 6 ECHR to the test under Article 1 First Protocol, the standard better fits under the proportionality test.

Besides these methodological remarks, also the substantive decision as such in the Joubert case that the mere budgetary interest cannot justify the legislative intervention is noteworthy, just because this standard is confirmed in a tax case. Furthermore, it should however be noted that a budgetary interest is not in any case disallowed as a ground to justify a legislative intervention. First of all, the ECtHR considers that ‘in principle’ the mere budgetary interest cannot justify a legislative intervention. This ‘in principle’ leaves room for exceptions. I estimate that the mere budgetary interest could qualify as a compelling ground of the general interest if the impact on the government’s budget is so substantial that the public interest would be affected. Secondly, if there are also other reasons for the legislative intervention besides the budgetary interest, the budgetary interest could be taken into consideration together with the other reasons – to assess whether the legislative intervention is justified by compelling ground of the general interest.\(^90\)

Another issue is that the decision in the Joubert case raises the question whether the conclusion should be that in tax cases a legislative intervention influencing pending legal proceedings always violates Article 1 First Protocol. After all, it could be argued that in tax cases reasons for a legislative intervention would likely to have in essence a financial nature. The above-mentioned Building Societies case shows however that this conclusion is not right. Although one could argue that the various reasons provided by the UK government in the end can be reduced to the budgetary interest, the ECtHR accepted the reasons and upheld the legislative intervention in that case.

Nevertheless, I agree with Baker that the deviating judgments in the Building Societies case and in the Joubert case are noteworthy.\(^91\) In that connection, I also wonder whether the decision in the Joubert case would have been different if the French government had also brought forward other arguments to justify the legislative intervention, such as the argument that the legislative intervention was necessary to preserve that taxpayers would have obtained the benefit of a windfall due to the mere fact that a non-competent authority executed the acts involved, and/or to ensure an equal tax treatment in comparison with taxpayers by whom the competent authority issued the tax assessments. Other than Baker,\(^92\) I do not think that an explanation for the deviating judgments is that the Joubert case concerns a procedural tax matter, while the Building Societies case concerns a substantive tax matter. Perhaps a key difference is that in the Building Societies case the applicants actively sought to exploit the loophole and tried to frustrate the original intentions of Parliament,

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87 Compare e.g., ECtHR 20 November 1995, no. 17849/91, Pressos Compania Naviera S.A. and Others v. Belgium, paras 37 and 43.
88 Joubert, paras 65-68.
89 See e.g., ECtHR (Grand Chamber) 28 October 1999, nos. 24846/94 and 34165/96 to 34173/96, Zelinski and Pradal and Gonzalez and Others v. France, para. 59, ECtHR 14 February 2006, no. 67847/01, Lecarpentier and others v. France, para. 47, and ECtHR 9 January 2007, nos. 31301/03, etc., Aubert and others v. France, para. 84 Compare also ECtHR 20 November 1995, no. 17849/91, Pressos Compania Naviera S.A. and Others v. Belgium, para. 43.
90 For example, in the Building Societies case the ECtHR took into account also the budgetary interest where it upheld the legislative intervention.
whilst in the Joubert case it just happened to the applicant that incompetent authorities issued the assessment.

7 Conclusion

Two research questions have been formulated. The first question is in which way the ECtHR’s assessment of retrospective tax legislation in a specific case fits within the general framework that the ECtHR uses to assess measures for compatibility with Article 1 First Protocol. An important result of the analysis concerns the foreseeability requirement under the lawfulness test. One might expect that there is a strain relation between retrospective tax legislation and the requirement, that an individual must be able to foresee the consequences which a given action may entail. However, up until now, the ECtHR has not clearly tested retrospective tax legislation against the foreseeability requirement under the lawfulness test. From case law it can be deduced that the main test for the compatibility of retrospective taxation under Article 1 First Protocol is whether the proportionality requirement is met.

The second research question is which basic guidelines with respect to retrospective tax legislation can be deducted from the case law of the ECtHR. The analysis shows that one should distinguish between the particular situation in which the retroactive application has the effect that pending legal proceedings are decisively influenced, and other situations of the application of retrospective tax legislation.

With respect to the latter situations, it is important that the ECtHR ruled that retrospective tax legislation is not as such prohibited by Article 1 First Protocol. Nonetheless, the ECtHR apparently considers retrospective taxation as a special situation, since it particularly scrutinizes the retrospective element. Whether retrospective taxation is in compliance with Article 1 First Protocol depends, first, on the reasons for the retroactivity and, secondly, on the impact of the retrospective law on the position of the applicants. With respect to the reasons, the ECtHR accepts the legislature’s assessment unless it is devoid of reasonable foundation. From case law it can be deduced that if the reason for retrospective taxation is to counteract tax avoidance, the ECtHR will not readily judge that the retrospective taxation violates Article 1 First Protocol. Another accepted reason is to remedy technical deficiencies of the law in order to prevent that taxpayers enjoy the benefit of a windfall. I expect that other legitimate reasons could under circumstances be the prevention of so-called announcement effects and to clarify an obscurity in the tax legislation, e.g., for the purpose of legal certainty. With respect to the impact of the measure, the ECtHR tests whether the legislation is such as to amount to confiscatory taxation or of such a nature as could deprive the legislation of its character as a tax law. I think that in this respect also the particular (financial) situation of the individual could be of relevance. Furthermore, in my view, another relevant element is whether or not legitimate expectations are infringed by the retroactivity. Related, a relevant element could be whether or not the taxpayer already spent the income concerned, unaware that at a later moment the income would be subject to retrospective taxation. With respect to these two latter elements, I think it could also be of relevance whether the government announced the change in legislation and the retroactive effect of it in advance. To end, although the afore-mentioned indicates that the national tax legislators are left a substantial margin of appreciation with respect to retroactivity, it should be noted that the ECtHR has also provided a warning by considering in general terms that taxation at a considerably higher tax rate than that in force when the revenue in question was generated could arguably be regarded as an unreasonable interference with expectations protected by Article 1 First Protocol. Future jurisprudence should shed more light on the issue how this consideration should be interpreted and how it corresponds to the afore-mentioned other considerations.

With respect to the situation in which the retroactive application has the effect that pending legal proceedings are decisively influenced, the ECtHR applies a stricter standard. Such an interference is not allowed unless there are compelling grounds of the general interest. In this respect it is important that the ECtHR ruled, also in a tax case, that in principle the mere budgetary interest cannot justify such a legislative intervention. This however does not imply that in tax cases a legislative intervention is always incompatible with Article 1 First Protocol ECtHR. For example, in the Building Societies case, the ECtHR upheld the legislative intervention which was aimed to prevent that the taxpayers could benefit from a technical loophole and would enjoy a windfall profit.
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