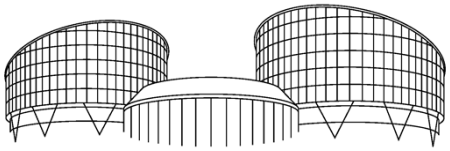

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF VEGOTEX INTERNATIONAL S.A. v. BELGIUM

(Application no. 49812/09)

JUDGMENT

Art 6 § 1 (criminal) • Fair trial • Tax debt time-barred by retrospective effect of case-law but subsequently reinstated by retrospective but foreseeable legislation, while dispute still pending and with aim of ensuring legal certainty • Compelling grounds of general interest
Art 6 § 1 • Adversarial proceedings • Dismissal of appeal on new grounds, substituted of court's own motion • Sufficient opportunity to challenge the substitution of grounds
Art 6 § 1 • Reasonable time • Excessive length of tax proceedings

STRASBOURG

10 November 2020

Referral to the Grand Chamber

08/03/2021

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

In the case of Vegotex International S.A. v. Belgium,

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

Georgios A. Serghides, *President,*
Paul Lemmens,
Helen Keller,
Georges Ravarani,
María Elósegui,
Darian Pavli,
Peeter Roosma, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 49812/09) against the Kingdom of Belgium lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Belgian public limited company, Vegotex International S.A. ("the applicant company"), on 10 September 2009;

the parties' observations;

Noting that on 14 May 2018 the Government were given notice of the complaints under Article 6 § 1 of the Convention and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court;

Having deliberated in private on 13 October 2020,

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

INTRODUCTION

1. The application concerns proceedings for the recovery of taxes and of a surcharge which the applicant company had been ordered to pay. Relying on Article 6 § 1 of the Convention, the applicant company complained of the decisive intervention by the legislature during the proceedings, in breach of the principle of legal certainty. It alleged a breach of its right of access to a court and a breach of the adversarial principle on account of the fact that the Court of Cassation had substituted its own grounds for those of the contested judgment. It also complained of a failure to comply with the reasonable-time requirement.

THE FACTS

2. The applicant is a Belgian public limited company with its registered office in Antwerp. It was represented by Mr P. Wouters and Mr D. Van Belle, lawyers practising in Leuven and Antwerp respectively.

3. The Belgian Government ("the Government") were represented by their Agent, Ms I. Niedlispacher, of the Federal Justice Department.

I. THE ADMINISTRATIVE PHASE

4. On 5 October 1995 the tax authorities informed the applicant company that they intended to rectify its tax return for the 1993 fiscal year, on the grounds that the deduction of certain expenses relating to a stock-exchange transaction by the applicant company had not been allowed because the expenditure in question did not satisfy the criteria laid down in the Income Tax Code. The deduction of investment costs could not be allowed either. The applicant company was informed that it would be required to pay a surcharge of 50% as it had attempted to evade payment of the tax.

5. On 2 November 1995 the applicant company expressed its disagreement.

6. On 11 December 1995 the tax office assessed the corporation tax payable by the applicant company at 12,054,089 Belgian francs (BEF) (approximately 298,813 euros (EUR)), to which a 50% surcharge of BEF 6,027,045 (approximately EUR 149,405) was added. A notice of assessment was issued to the applicant company on 15 December 1995.

7. On 22 February 1996 the applicant company lodged an objection with the Antwerp regional director of direct taxation against the tax assessment and the surcharge, giving reasons.

8. On 19 September 2000 the objection was rejected by the regional director.

9. On 24 October 2000 the tax authorities served the applicant company with a payment order interrupting the limitation period (*commandement de payer interruptif de prescription/verjaringsstuitend bevel tot betaling*; see paragraph 30 below). The document stated specifically that it was not aimed at enforcing payment of the tax debt, as the latter had been disputed by the applicant company.

II. THE JUDICIAL PHASE

10. On 14 December 2000 the applicant company brought proceedings in the Antwerp Court of First Instance seeking, in particular, the setting-aside of the tax surcharge imposed on it for the 1993 fiscal year.

11. On 8 March 2004 the Court of First Instance declared the application admissible and, to a very limited extent, well-founded. The surcharge was reduced to 10% in so far as it related to the deduction of investment costs. The remainder of the application was dismissed.

12. On 15 April 2004 the applicant company appealed. It sought, in particular, a finding that the State's entitlement to recover the tax for the 1993 fiscal year was time-barred. In that connection it argued that the debt

had become time-barred five years after the date on which it became due. In the applicant company's view, the five-year period had started to run on 15 February 1996, two months after the notice of assessment of 15 December 1995 had been sent. As the period had not been interrupted the debt had become time-barred on 15 February 2001. The applicant company referred to the case-law of the Court of Cassation, according to which service of a payment order in respect of a disputed tax debt did not interrupt the limitation period (see paragraph 31 below).

13. The Miscellaneous Provisions Act (*loi-programme*) of 9 July 2004 entered into force on 25 July 2004 (see paragraph 36 below).

14. On 6 February 2007 the Antwerp Court of Appeal upheld the first-instance judgment. It held that the payment order interrupting the limitation period issued on 24 October 2000 had not stopped the running of that period, as it did not constitute an "order" (*commandement*/*bevel tot betaling*) within the meaning of Article 2244 of the Civil Code. Its service had not been based on any authority to execute, since the notice of assessment issued on 11 December 1995 had been contested by the applicant. As the payment order was not an "order" (*commandement*/*dwangbevel*) within the meaning of section 49 of the Miscellaneous Provisions Act of 9 July 2004, that provision was not relevant in the present case. Nevertheless, the Court of Appeal considered that the limitation period had been suspended under Article 2251 of the Civil Code pending a final decision on the disputed tax debt, and that recovery of the debt was therefore not time-barred. Ruling on the merits, it dismissed all the complaints in respect of the impugned judgment.

15. On 22 August 2007 the applicant company lodged an appeal on points of law. It relied on a single ground of appeal, relating to the Court of Appeal's finding that the limitation period had been suspended under Article 2251 of the Civil Code.

16. On 19 November 2007 the State likewise appealed on points of law, relying on a single ground of appeal concerning the Court of Appeal's finding that the limitation period had not been interrupted under section 49 of the Miscellaneous Provisions Act of 9 July 2004.

17. On 17 October 2008 the advocate-general at the Court of Cassation made written submissions. He concluded that the ground of appeal relied on by the applicant company was inadmissible for lack of interest, since the impugned decision would at all events continue to be justified in law if the Court of Cassation substituted for the grounds of the impugned judgment a new ground to the effect that the limitation period, in accordance with section 49 of the Miscellaneous Provisions Act of 9 July 2004, had been interrupted by the service of the payment order of 24 October 2000. The advocate-general referred to the case-law of the Court of Cassation (judgments of 17 January 2008) and the Constitutional Court (judgments of 7 December 2005 and 1 February 2006) (see paragraphs 38 and 39 below).

18. The applicant company stated that it had received the advocate-general's submissions on 5 March 2009; that assertion was not disputed by the Government.

19. On 9 March 2009 the applicant company submitted a memorandum under Article 1107 of the Judicial Code (see paragraph 41 below). It argued that if the Court of Cassation substituted its own grounds for those of the contested judgment, as proposed by the advocate-general, it would be in breach of Article 6 of the Convention unless the applicant company had an opportunity to challenge the proposed new grounds. It also alleged that the criteria for the substitution of grounds were not met. It concluded by stating that a number of objections remained which had not been addressed by the lower courts, in particular the fact that the application of section 49 of the Miscellaneous Provisions Act of 9 July 2004 would amount to a violation of Article 6 of the Convention. That matter should have been debated before the lower courts.

20. In a judgment of 13 March 2009 (F.07.0085.N-F.07.105.N) which echoed the advocate-general's submissions, the Court of Cassation held that, according to section 49 of the Miscellaneous Provisions Act of 9 July 2004, a payment order interrupted the limitation period in a valid manner even where there was no amount that was "indisputably due". It went on to find as follows:

> "Section 49 of the Miscellaneous Provisions Act is ... not an interpretative legal provision. Nevertheless, this new provision must be applied retrospectively by the courts, in accordance with the legislature's wishes. It is clear from the parliamentary drafting history of this provision that the legislature's aim in enacting a retrospective measure was to protect the rights of the Treasury in the context of pending proceedings in which tax debts disputed on the basis of the position taken in the case-law were about to become, or had already become, time-barred."

The Court of Cassation concluded that the payment order served on 24 October 2000 had interrupted the limitation period and that the debt was therefore not time-barred. The decision contested by the applicant company was justified in law on the basis of the new grounds set out by the Court of Cassation. Accordingly, the court declared the ground of appeal inadmissible for lack of interest and dismissed the applicant company's appeal.

The Court of Cassation declared the appeal lodged by the State inadmissible for lack of interest, as it related to a decision in the State's favour.

RELEVANT DOMESTIC LAW AND PRACTICE

21. The domestic legislation and case-law concerning the assessment of tax, the legal remedies and limitation periods in respect of taxation are described in detail in *Optim and Industerre v. Belgium* ((dec.),

no. 23819/06, §§ 11-16, 11 September 2012). In the interests of clarity, that information is reiterated and elaborated on below.

I. ASSESSMENT OF TAX AND LEGAL REMEDIES

22. Corporation tax is assessed on the basis of an entry in the tax roll. In order to collect the tax, the authorities must have a claim against the taxpayer, which they establish unilaterally by means of an entry in the tax roll, an officially recorded document. The assessment is entered in the roll in the name of the taxpayer, who is then informed by means of a notice of assessment, once the roll has become enforceable.

23. The taxpayer concerned may "lodge an objection in writing with the director of taxation against the tax assessment, including any additional amounts, increases and penalties" (Article 366 of the Income Tax Code).

24. The taxpayer subsequently has the possibility of challenging the decision on the administrative objection in the court of first instance (Article 375 of the same Code). Since the enactment of a Law which entered into force on 6 April 1999, court proceedings may also be brought if the director of taxation fails to take a decision within six months of the administrative objection being lodged (Article 1385 *undecies* of the Judicial Code).

25. Neither the objection nor the application to the courts affects the enforceability of the entry in the tax roll. The full amount of the disputed tax assessment may therefore be subject to an attachment order, enforcement procedures or any other measures aimed at ensuring recovery of the sums due (Article 409 of the Income Tax Code).

26. However, Article 410 of the Income Tax Code stipulates that in the event of an objection or an application to the courts, the amount due (the principal, together with any additions and increases and the corresponding interest) is deemed to constitute a debt that is "certain and of a fixed amount" and that can "be recovered by means of enforcement procedures" only "in so far as it corresponds to the amount of income declared" or, when it has been assessed of the authorities' own motion (in the absence of a tax return), "in so far as it does not exceed the most recent finally assessed amount payable by the taxpayer concerned in respect of a previous fiscal year".

27. Only amounts that are "indisputably due", according to the usual terminology, may be the subject of enforcement procedures pending a decision on the objection. This means, among other things, that where an objection has been lodged against an assessment and the amount indisputably due is zero, enforcement of the debt is not possible until such time as the dispute has been determined.

II. LIMITATION PERIODS IN TAXATION MATTERS

28. In accordance with Article 145 of the Royal Decree of 27 August 1993 implementing the Income Tax Code, tax debts become time-barred five years after the date on which the taxes became due. The running of the limitation period may be interrupted in the manner provided for in Articles 2244 et seq. of the Civil Code or by a waiver of the part of the period that has already elapsed. Where the limitation period is interrupted, a fresh period starts to run which can be interrupted in the same way and which expires five years after the last action stopping the running of the preceding period, if no legal proceedings are brought.

29. According to Article 2244 of the Civil Code, the limitation period is interrupted when the person concerned is served with a court summons, a payment order or a seizure order.

30. Prior to the entry into force of the Miscellaneous Provisions Act of 22 December 2003 (see paragraph 33 below), the lodging of an objection did not interrupt the limitation period for recovery of the tax debt. In order to interrupt the limitation period, the administrative authorities had adopted a practice of issuing the taxpayers concerned with a payment order (as was done in the present case, see paragraph 9 above).

31. In judgment C.01.0157.F of 10 October 2002 (confirmed by judgments C.01.0287.N of 21 February 2003, C.02.0024.F of 27 February 2004 and C.02.0596.F of 12 March 2004), the Court of Cassation ruled against this practice. It found that a payment order was "a step in the judicial proceedings which require[d] an authority to execute and [was] the prelude to attachment", with the result that, when served by the State in the absence of an amount of tax that was "indisputably due", it could not "have the effect of stopping time running". This ruling meant that a payment order could not interrupt the limitation period where the tax assessment was disputed.

32. This line of case-law prompted a response from the legislature. It took the view that action was essential "in order to prevent a situation in which, owing to the administrative authorities' inability to validly interrupt the limitation period for the recovery of disputed taxes that [were] not certain and of a fixed amount, and immediately payable, many of them would be declared time-barred". The legislature considered that the need for action was "particularly compelling in the light of the data concerning income tax arrears, which show[ed] that disputed tax assessments account[ed] for more than forty per cent of those arrears" (explanatory memorandum concerning the draft version of the Miscellaneous Provisions Act of 22 December 2003, Parliamentary papers (*Documents parlementaires*), Chamber, 2003-2004, DOC 51-0473/001 and 51-0474/001, p. 148).

33. The legislature therefore decided that the State should be equipped with a mechanism for interrupting the limitation period. Accordingly, when enacting the Miscellaneous Provisions Act of 22 December 2003, it inserted new provisions in the Income Tax Code to the effect that any administrative or judicial appeal against the assessment or collection of taxes and withholding tax suspended the running of the limitation period (new Articles 443 *bis* and 443 *ter* of the Income Tax Code).

34. The Minister of Finance stated on that occasion that these provisions "[were] not applicable with retrospective effect because this [was] a major issue with regard to limitation periods with public-policy implications, a fact which could have very significant repercussions for taxpayers" (Parliamentary papers, Chamber, 2003-2004, DOC 51-0473/027, p. 20).

35. In its opinion on draft Article 443 *ter* of the Income Tax Code, the *Conseil d'État* expressed doubts as to the applicability of this provision to tax debts which had already become time-barred before the entry into force of the legislation, in accordance with the above-mentioned case-law of the Court of Cassation. The *Conseil d'État* emphasised in that connection that "if the authors of the preliminary draft [wished] to prevent the risk of taxpayers invoking the statute of limitations in such cases, an explicit transitional provision [would be] required" (opinions of 7 and 12 November 2003, Parliamentary papers, Chamber, 2003-2004, DOC 51-0473/001 and 51-0474/001, p. 464).

36. On the basis of this observation among other considerations, the legislature subsequently inserted in the Miscellaneous Provisions Act of 9 July 2004 an "interpretative legal provision applicable to the cases referred to in the Court of Cassation judgments of 10 October 2002 and 21 February 2003 (reasons for government amendment no. 7, Parliamentary papers, Chamber, 2003-2004, DOC 51-1138/015, p. 2). The provision in question was section 49 of the Act, according to which "the payment order must also be interpreted as an act interrupting the limitation period within the meaning of Article 2244 of the Civil Code even where the disputed tax debt is not certain and of a fixed amount".

37. A number of taxpayers, including the applicants in the case of *Optim and Industerre* (cited above), lodged applications with the Administrative Jurisdiction and Procedure Court (*Cour d'Arbitrage*) (now the Constitutional Court) seeking the repeal of section 49 of the Miscellaneous Provisions Act of 9 July 2004.

38. In a judgment of 7 December 2005 (no. 177/2005; see also judgment no. 20/2006 of 1 February 2006), the Constitutional Court rejected the applications, finding as follows:

> "B.19.1. ... the justification given for the provision in issue was the fact that the limitation period in respect of disputed taxes had always been interrupted by the serving of a payment order, and the validity of such orders had always been

recognised, until the Court of Cassation judgments of 10 October 2002 and 21 February 2003 ...

While there was some disagreement as to the nature of the payment order within the meaning of Article 2244 of the Civil Code, there were no grounds, prior to [these] judgments, for rejecting the argument advanced by the administrative authorities regarding the dual effect of such orders, according to which a payment order, although invalid as an enforcement measure, could nevertheless retain its effects as an act interrupting the limitation period.

When the Civil Code was enacted in 1804 a payment order was not regarded as an enforcement measure, but rather as a preparatory step expressing the creditor's wish to obtain payment of the sums due.

Following the entry into force of the Judicial Code, and more specifically Articles 1494 et seq. thereof, disagreement arose as to the nature of payment orders, with some taking the view that a payment order was no longer a preparatory step but an enforcement measure. While the payment order referred to in Articles 148 and 149 of [the Royal Decree of 27 August 1993 implementing the Income Tax Code] constitutes an enforcement measure the validity of which depends on the debt being certain and of a fixed amount, the effects of the payment order within the meaning of Article 2244 of the Civil Code are not subject to any statutory validity criteria.

However, neither the above-mentioned provisions of the Judicial Code nor any judgment of the Court of Cassation ruled out the validity of a payment order as an act interrupting the limitation period where the debt was not certain and of a fixed amount.

On the contrary, some decisions of the lower courts have found payment orders to interrupt the limitation period irrespective of their validity as enforcement measures.

B.19.2. This approach guided administrative practice regarding income tax and prompted numerous taxpayers to sign a document waiving the part of the limitation period that had elapsed.

B.19.3. Furthermore, in a judgment of 28 October 1993 the Court of Cassation quashed a judgment of the Liège Court of Appeal on the ground that the latter had not replied to the arguments of the Belgian State to the effect that payment orders were 'aimed in particular at interrupting the limitation period, in accordance with Article 194 of the Royal Decree on the Income Tax Code ...'. The Brussels Court of Appeal, to which the case was remitted, held in a judgment of 24 June 1997 that 'such orders are to be considered as acts interrupting the limitation period for the purposes of Article 2244 of the Civil Code and are not affected by the invalidity of the subsequent attachment, as the payment order stops time running irrespective of the effects of the enforcement measure as such' (Brussels, 24 June 1997, J.T., 1998, pp. 458-459).

B.19.4. Having served a payment order, the State could therefore legitimately expect that it had interrupted the limitation period in a valid manner, even where the tax debt was disputed.

B.19.5. Moreover, the Minister of Finance observed as follows with regard to the impugned provision: '[It] prevents arbitrary discrimination between those taxpayers who have signed a document waiving the part of the limitation period that has elapsed and those who refused to sign such a waiver and awaited the service of a payment order. If the taxpayer does not sign a document waiving the part of the limitation period that has elapsed, serving a payment order is the sole means for the tax collector to stop the limitation period running. The recent case-law of the Court of Cassation

would mean that this possibility too would be lost, with the result that the debts would inevitably become time-barred. Given that the taxpayers themselves disputed the taxes, they could not have a legal expectation that the tax debt would become time-barred on that account. It would not appear reasonable for a taxpayer to expect to be released from his or her debts by lodging an appeal, while the State is unable to recover the tax due' (Parliamentary papers, Chamber, 2003-2004, DOC 51-1138/015, pp. 2-3).

B.19.6. Although from a legal viewpoint the *res judicata* effects of the Court of Cassation judgments of 10 October 2002 and 21 February 2003 are only relative, the fact that these judgments determined the legal issue relating to the nature and effects of payment orders confers on them a *de facto* authority to which all the courts are subject, since any ruling departing from the approach taken by the Court of Cassation would be liable to be quashed as being in breach of the law as interpreted by the Court of Cassation. Moreover, it is clear from the case-law relied on by the applicants that the lower courts agreed with the approach taken in the two Court of Cassation judgments cited above.

B.19.7. Hence, the judgments of 10 October 2002 and 21 February 2003 deprived of effect, retrospectively, the means of interrupting the limitation period that had been commonly used in relation to income tax ... As a result, one category of taxpayers was released from debts which they had disputed but which could not be assumed not to be payable. The legislature's aim in enacting a retrospective provision in its turn was to counteract the retrospective effect of the case-law established by the above-mentioned judgments.

B.19.8. The use of a retrospective provision is also explained in the present case by the absence of any provision allowing an application to be made to the Court of Cassation to set a time-limit on the effects of the positions of principle adopted in its judgments, whereas the Court of Justice of the European Communities (Article 231, second paragraph, of the EC Treaty), the Administrative Jurisdiction and Procedure Court (section 8(2) of the Special Law of 6 January 1989 on the Administrative Jurisdiction and Procedure Court) and the *Conseil d'État* (section 14 *ter* of the consolidated Laws on the *Conseil d'État* of 12 January 1973) can maintain the effects of decisions they have declared void.

B.19.9. The initial response of the legislature to the above-mentioned Court of Cassation judgments, in the Miscellaneous Provisions Act of 22 December 2003, entailed the insertion in the Income Tax Code of Articles 443 *bis* and 443 *ter* in a new Chapter IX *bis* entitled 'Time-barring of Treasury rights'.

The legislature elaborated on its response in the impugned provision of the Miscellaneous Provisions Act of 9 July 2004.

Given that these provisions were enacted within a short time of each other they should be deemed to constitute together the legislature's response to the above-mentioned judgments.

B.19.10. It was also noted during the preparatory work that 'disputed tax assessments account[ed] for more than forty per cent' of income tax arrears and that some cases that stood to benefit from the position taken by the Court of Cassation 'concerned large-scale tax fraud' ... The measure was deemed to meet the requirements of the general interest in so far as it protected the Treasury's rights with regard to the disputed assessments without adversely affecting taxpayers' rights.

B.19.11. Lastly, the retrospective effect of the impugned provision does not restrict to a disproportionate extent the rights of those taxpayers who considered, prior to the

> Court of Cassation judgments, that the payment order served on them had stopped the running of the limitation period in a valid manner. The fact that they hoped to benefit, contrary to expectations, from the above-mentioned case-law of the Court of Cassation does not render the legislature's intervention unjustified.
>
> B.20. The measure is therefore justified by specific, exceptional circumstances and is based on compelling grounds of general interest."

39. In two judgments of 17 January 2008 (F.06.0082.N and F.07.0057.N), the Court of Cassation confirmed that it was clear from section 49 of the Miscellaneous Provisions Act of 9 July 2004 that a payment order served in respect of a disputed tax debt constituted a valid act interrupting the limitation period even where no part of the debt was indisputably due. In the second of these judgments it also held that section 49 did not constitute an interpretative provision but that it should nevertheless be applied retrospectively, in accordance with the legislature's intentions.

40. In a judgment handed down on 21 November 2013 (F.11.0175.N), that is, after the judgment in the applicant company's case, the Court of Cassation held that section 49, "which [was] designed to prevent some taxpayers from securing an advantage not intended by the legislature, and which [was] in accordance with the general interest and necessary in order to ensure the payment of taxes – the rules on the assessment of which [had] not been amended by the legislature – [was] compatible with Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms."

III. PROCEDURE IN THE COURT OF CASSATION

41. Under Article 1107, second paragraph, of the Judicial Code, where State Counsel makes written submissions, the parties may, at the latest during the hearing and solely in reply to those submissions, submit a memorandum in which they may not raise any new grounds of appeal. According to the next paragraph of that Article, each party may request an adjournment at the hearing in order to reply orally or by means of a memorandum to State Counsel's written or oral submissions. The Court of Cassation then sets the time-limit for submission of the memorandum.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

42. The applicant company complained of the State's intervention during the proceedings before the domestic courts, which it considered to be in breach of the principles of the rule of law and legal certainty and the right

to a fair hearing. It also alleged that the fact that the Court of Cassation had substituted its own grounds for those of the contested judgment had deprived the applicant company of its right of access to a court. Lastly, it complained of a breach of the reasonable-time requirement. It relied on Article 6 § 1 of the Convention, which in its relevant parts provides:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal ..."

A. Admissibility

1. Applicability of Article 6 § 1

(a) The parties' submissions

43. The Government did not dispute the applicability of the criminal limb of Article 6 of the Convention, in view of the tax surcharge imposed on the applicant company. However, they argued that Article 6 was not applicable under its civil head. In their view, the time-barring of the State's entitlement to recover taxes was in itself neither a civil nor a criminal matter and was covered only indirectly by the guarantees of Article 6 § 1 in so far as the tax surcharge itself was covered. The Government submitted that there was no support in the Court's case-law for the distinction which the applicant company sought to make between the assessment of the tax and its collection. The judgment in *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom* (23 October 1997, *Reports of Judgments and Decisions* 1997-VII), on which the applicant company relied, was not applicable in the present case because in that case the applicants had sought the repayment of taxes that had been unduly paid, and more specifically the sums it had paid under tax legislation that had been struck down as *ultra vires*. It was indisputable in the present case that the debt which the Belgian State had sought to recover was a tax debt based on fiscal legislation that had been properly enacted.

44. The applicant company maintained that the case concerned not only a criminal charge but also a dispute over civil rights and obligations, since the subject matter of the proceedings had been the time-barring of a claim for recovery of a disputed tax amount, and not the State's right to impose tax on a citizen. Since the dispute in the present case concerned the recovery of a debt rather than the assessment of taxes, there were no grounds to exclude the case from the scope of Article 6 § 1 of the Convention under its civil head.

(b) The Court's assessment

45. The present case concerns proceedings in relation to the tax authorities' decision to issue a supplementary tax assessment in respect of the applicant company, together with a tax surcharge amounting to 10% of the taxes for which it was considered liable, on account of errors in the company's tax return for the 1993 fiscal year.

46. As regards the civil limb of Article 6, the Court has held on numerous occasions that it is not applicable to the assessment of tax and the imposition of surcharges (see, among other authorities, *Ferrazzini v. Italy* [GC], no. 44759/98, § 29, ECHR 2001-VII; *Jussila v. Finland* [GC], no. 73053/01, § 29, ECHR 2006-XIV; and, more recently, *Formela v. Poland* (dec.), no. 31651/08, § 127, 5 February 2019).

47. The Court reached the same conclusion in the case of *Optim and Industerre v. Belgium* ((dec.), no. 23819/06, §§ 24-26, 11 September 2012) which, like the present case, concerned proceedings instituted by the applicants in the ordinary courts to challenge a supplementary tax assessment. The Court sees no reason to depart from that conclusion in the present case, since the proceedings brought by the applicant company in the domestic courts were aimed at contesting the assessment of the tax. The fact that, in practice, the issue of the time-barring of the debt was central to the proceedings does not alter that conclusion.

48. The case of *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society* (cited above), to which the applicant company referred, concerned a situation different from that in the present case in so far as the domestic proceedings were aimed at obtaining repayment of tax that had been wrongly paid by the applicant companies under tax legislation that was subsequently struck down.

49. The applicability of the criminal limb of Article 6 § 1 of the Convention, however, is not disputed by the Government. Regard being had to the fact that the tax surcharge imposed on the applicant company pursued an aim that was both preventive and punitive (see *Jussila*, cited above, §§ 29-39), and to the severity of the penalty which the company was liable to incur, namely a surcharge amounting to 10% of the tax (see *A.P., M.P. and T.P. v. Switzerland*, 29 August 1997, § 40, *Reports* 1997-V, and *Janosevic v. Sweden*, no. 34619/97, § 69, ECHR 2002-VII), the Court concludes that the provision relied on is applicable under its criminal limb.

50. The Court emphasises that the proceedings in question concerned both the supplementary tax assessment, which in itself did not come within the scope of application of Article 6 § 1, and the tax surcharge, which was covered by that provision. The Court must examine the proceedings in so far as they related to a "criminal charge" against the applicant company. Even assuming that it were possible to separate those parts of the proceedings which determined a "criminal charge" from those parts which

did not, examining the proceedings in relation to the tax surcharge will inevitably involve taking into consideration the aspects of the proceedings concerning the supplementary tax assessment (see *Jussila*, cited above, § 45; see also *Georgiou v. the United Kingdom* (dec.), no. 40042/98, 16 May 2000; *Sträg Datatjänster AB v. Sweden* (dec.), no. 50664/99, 21 June 2005; and *Chambaz v. Switzerland*, no. 11663/04, § 42, 5 April 2012).

2. Conclusion as to admissibility

51. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

52. The Court must consider whether the supplementary tax assessment proceedings and the tax surcharge imposed on the applicant company complied with the requirements of Article 6, having due regard to the facts of the individual case, including any relevant features flowing from the taxation context (see *Jussila*, cited above, § 39).

53. To that end, it will examine in turn the three complaints raised by the applicant company, concerning (1) the legislature's intervention during the proceedings, (2) the substitution of grounds by the Court of Cassation, and (3) the alleged breach of the reasonable-time requirement.

1. The legislature's intervention through the Miscellaneous Provisions Act of 9 July 2004

(a) The parties' submissions

(i) The applicant company

54. The applicant company complained of the fact that, by applying section 49 of the 2004 Miscellaneous Provisions Act to its case, the Court of Cassation had given effect to the legislature's intention to interfere in proceedings pending before the courts. That interference had clearly been aimed at influencing the course of proceedings to which the Belgian State was a party. This was contrary to the rule of law, the principle of legal certainty and Article 6 § 1 of the Convention. This was particularly true in the present case since the legislature's intervention had been due to a backlog in the processing of administrative objections to tax assessments, a situation which should not penalise taxpayers.

55. The Miscellaneous Provisions Act of 22 December 2003 had provided that, in future cases where an administrative objection was lodged against the tax assessment document, the limitation period for recovery of the tax debt would be suspended. The parliamentary drafting history of that

Act stated clearly that this rule would apply only to future cases. The subsequent retrospective interference resulting from section 49 of the Miscellaneous Provisions Act of 9 July 2004 had not been based on any substantial grounds, and the legislature had attempted to justify the retrospective effect by asserting that it was an interpretative law. Nevertheless, the Court of Cassation, after finding that the Act was in fact not interpretative in nature, had accepted that it had retrospective effect. The Government were not justified in referring to the judgments of the Constitutional Court (see paragraph 38 above) in so far as that court did not have jurisdiction to examine the compatibility of the legislation with the Convention. According to the applicant company, none of the grounds relied on by the Government could be construed as compelling grounds of general interest capable of justifying the retrospective effect of the legislation.

56. Moreover, contrary to the Government's assertion, the Court of Cassation judgments of 10 October 2002 and 21 February 2003 (see paragraph 31 above) had not been unforeseeable, given that the same court, in a judgment of 28 October 1993, had ruled that a tax assessment document could not properly give rise to enforcement measures if it was not itself legally enforceable. The legislature could therefore have taken any action that may have been necessary at that juncture, instead of using administrative circulars to introduce the device of a payment order interrupting the limitation period.

(ii) The Government

57. The Government submitted that the retrospective application of section 49 of the Miscellaneous Provisions Act of 9 July 2004 was fully justified on compelling general-interest grounds, as acknowledged by the Constitutional Court (see paragraph 38 above). Prior to the Court of Cassation judgments of 10 October 2002 and 21 February 2003 (see paragraph 31 above), it had been a matter of settled case-law and administrative practice that a payment order served by the authorities stopped time running even in relation to disputed tax debts. It had been necessary to give retrospective effect to the Miscellaneous Provisions Act of 9 July 2004 in order to counteract the effect of the change in the case-law by the Court of Cassation, which itself was retrospective. Hence, the fact that the Act had retrospective effect had not disproportionately restricted the rights of those taxpayers who had considered, prior to the aforementioned Court of Cassation judgments, that the payment order served on them had stopped the running of the limitation period in a valid manner. It had been necessary to apply the provision retrospectively because the Court of Cassation was not legally empowered to set a time-limit on the effects of its judgments. Thus, the retrospective nature of the provision had prevented arbitrary discrimination between those taxpayers who had signed a

document waiving the part of the limitation period that had elapsed and those who had refused to do so. Furthermore, almost half of income tax arrears concerned disputed tax assessments, which would inevitably have become time-barred if the provision had not been applied retrospectively. Some of the cases that would have benefited from the position taken by the Court of Cassation concerned large-scale tax fraud. It could not therefore be concluded that there had been a violation of Article 6 § 1 of the Convention.

(b) The Court's assessment

(i) Applicable general principles

58. In the context of civil disputes the Court has repeatedly ruled that although, in theory, the legislature is not precluded from adopting new retrospective provisions to regulate rights arising under existing law, the principle of the rule of law and the notion of fair trial enshrined in Article 6 of the Convention preclude any interference by the legislature – other than on compelling grounds of general interest – with the administration of justice designed to influence the judicial determination of a dispute (see *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, § 49, Series A no. 301-B; *Zielinski and Pradal and Gonzalez and Others v. France* [GC], nos. 24846/94 and 9 others, § 57, ECHR 1999-VII; *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 126, ECHR 2006-V; and, more recently, *Dimopulos v. Turkey*, no. 37766/05, § 32, 2 April 2019).

59. Those principles, which are essential elements of the concepts of legal certainty and protection of litigants' legitimate trust, are also applicable to criminal proceedings (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 132, 17 September 2009; see also, to similar effect, *Biagioli v. San Marino* (dec.), no. 8162/13, §§ 92-94, 8 July 2014, and *Chim and Przywieczerski v. Poland*, nos. 36661/07 and 38433/07, §§ 199-207, 12 April 2018).

(ii) Application to the present case

60. The question arises in the present case whether the legislature's intervention through the Miscellaneous Provisions Act of 9 July 2004 undermined the fairness of the proceedings by influencing the outcome of the dispute between the applicant company and the State while the proceedings were ongoing.

61. In answering that question the Court will have regard to all the circumstances of the case and will subject to close scrutiny the reasons adduced by the respondent State to justify the intervention in the proceedings as a result of the retrospective effects of section 49 of the Miscellaneous Provisions Act of 9 July 2004 (see *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society*, cited above, § 107, and *OGIS-Institut Stanislas, OGEC Saint-Pie X*

and Blanche de Castille and Others v. France, nos. 42219/98 and 54563/00, § 63, 27 May 2004). The Court cannot ignore the effect of the impugned legislation in conjunction with the method and timing of its enactment (see *Papageorgiou v. Greece*, 22 October 1997, § 38, *Reports* 1997-VI).

62. The Court will also have regard to the fact that the present case concerns tax proceedings. Unlike criminal penalties in the strict sense, a sum due by way of a tax penalty represents in a sense an extension of the tax debt, since it is calculated on the basis of that debt. In the instant case, the tax surcharge was set at 10% of the unpaid tax (see paragraph 11 above). Hence, the surcharge is closely linked to the tax debt. It is true that, in so far as the tax proceedings concerned the surcharge, they are characterised as relating to a "criminal charge" within the autonomous meaning of that concept under the Court's *Engel* criteria (see paragraphs 49 and 50 above). However, as tax surcharges differ from the hard core of criminal law, the criminal-head guarantees of Article 6 do not necessarily apply with their full stringency (see *Jussila*, cited above, § 43, and *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, § 133, 15 November 2016).

63. The Court observes at the outset that when the applicant company appealed against the first-instance judgment on 15 April 2004, it could legitimately expect that its tax debt would be declared time-barred in accordance with the case-law of the Court of Cassation dating back to the judgment of 10 October 2002 (see paragraph 31 above; for another case in which the Court recognised that one of the parties could expect that the Supreme Court's case-law would be followed in the proceedings concerning her, see *Gil Sanjuan v. Spain*, no. 48297/15, § 38, 26 May 2020).

64. However, section 49 of the Miscellaneous Provisions Act of 9 July 2004, which entered into force while the case was pending before the Court of Appeal (see paragraph 13 above), settled, finally and with retrospective effect, the issue of interruption of the limitation period in ongoing tax proceedings.

65. This intervention by the legislature resulted in the resumption of the process of recovering the taxes due and the corresponding surcharges in cases, such as that in issue here, which had become time-barred in the light of the conclusions of the Court of Cassation judgment of 10 October 2002. The Court notes that the Government did not dispute that, if the 2004 Miscellaneous Provisions Act had not been applied retrospectively, the applicant company's tax debt would have been considered time-barred, despite the fact that this had not been established by a judicial decision. Thus, the fact that the company's tax debt was not declared time-barred was solely due to the retrospective application of the provision in question.

66. The Court of Cassation also stated in the present case that it was clear from the parliamentary drafting history that the legislature's aim had been "to protect the rights of the Treasury in the context of pending proceedings in which tax debts disputed on the basis of the position taken in

the case-law ... had already become ... time-barred" (see paragraph 20 above).

67. Given that the limitation period in respect of the applicant company's tax debt had already expired when section 49 of the Miscellaneous Provisions Act of 9 July 2004 entered into force, the legislature, by settling the issue of the interruption of the limitation period with retrospective effect, intervened decisively to influence in the State's favour the outcome of the proceedings to which the latter was a party.

68. It remains to be ascertained whether the retrospective application of section 49 was based on compelling grounds of general interest.

69. In that connection, respect for the rule of law and the notion of a fair trial require that any reasons adduced to justify such measures be treated with the greatest possible degree of circumspection (see *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society*, cited above, § 112, and *Maggio and Others v. Italy*, nos. 46286/09 and 4 others, § 45, 31 May 2011).

70. The Court has previously ruled that the State's financial interests alone do not, in principle, justify the retrospective application of a law designed to legalise existing practices (*loi de validation*) (see, among other authorities, *Zielinski and Pradal and Gonzalez and Others*, cited above, § 59; *Scordino*, cited above, § 132; and *Lilly France v. France (no. 2)*, no. 20429/07, § 51, 25 November 2010). The protection of the Treasury's rights, relied on by the Government, is therefore insufficient to justify the retrospective intervention in question.

71. The Government also argued, like the Constitutional Court in referring to the parliamentary drafting history (see paragraph 38 above), that some of the tax files comprising the backlog of cases in dispute concerned large-scale tax fraud.

72. The Court does not dispute the fact that combating large-scale tax fraud constitutes a general-interest ground. Nevertheless, it considers that this ground was not sufficiently compelling in the circumstances of the present case. There is no indication that the applicant company's case concerned efforts to combat large-scale tax fraud, nor indeed was this alleged by the Government. Furthermore, it is not clear either from the drafting history of the legislation or from the Government's observations how many cases may have been concerned or the amount of the debts that might have become time-barred in the absence of the impugned legislative measure (see, to similar effect and *mutatis mutandis*, *Arnolin and Others v. France*, nos. 20127/03 and 24 others, § 76, 9 January 2007, and *SCM Scanner de l'Ouest Lyonnais and Others v. France*, no. 12106/03, § 31, 21 June 2007).

73. At the same time, the Court is not impervious to the Government's argument that the legislature's intervention was necessary in order to restore legal certainty after the latter had been undermined by the Court of

Cassation judgment of 10 October 2002. By enacting the retrospective provision in question, the legislature sought to counteract the effect of that Court of Cassation ruling, which itself was retrospective, and to reaffirm the legality of an administrative practice that had been followed hitherto and the legitimacy of which had not seriously been called into question (see the Constitutional Court judgment of 7 December 2005, points B.19.1-B.19.4 of the reasoning, paragraph 38 above). Thus, the aim of the legislature's intervention was to reassert the administrative authorities' original intention. Accordingly, it was not unforeseeable (see, to similar effect and *mutatis mutandis*, *OGIS-Institut Stanislas, OGEC Saint-Pie X and Blanche de Castille and Others*, cited above, § 72).

74. The Court must also have regard to the fact that what was at stake was not simply the protection of the State's financial interests (see, conversely, *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, Series A no. 332, in which the State's liability was in issue, and *Maggio and Others*, cited above, in which the legislature sought to restore balance in the social-security system). The aim in the present case was also to ensure that taxes were paid by those who were liable for them (see paragraph 40 above).

75. The legislature's intervention was designed to ensure legal certainty (see paragraph 73 above) and, as observed by the Constitutional court, to prevent arbitrary discrimination between different taxpayers (see the Constitutional Court judgment of 7 December 2005, point B.19.5 of the reasoning, cited at paragraph 38 above). These aims on the part of the legislature are to be understood in the light of the timeline in the present case. On 24 October 2000 the payment order was served on the applicant company, stating specifically that it was aimed at interrupting the limitation period. The change in the case-law of the Court of Cassation occurred on 10 October 2002, while the applicant company's application was pending before the Court of First Instance. There is no indication in the case file that the applicant company pleaded before the Court of First Instance that its debt had become time-barred. This would suggest, as observed by the Constitutional Court (see point B.19.11 of the reasoning of the judgment cited above) that it considered, like other taxpayers, that the payment order had interrupted the limitation period. It was only subsequently, in its notice of appeal of 15 April 2004, that the applicant company referred for the first time to the new case-law of the Court of Cassation and inferred from it that the debt had become time-barred on 15 February 2001, that is to say, even before the delivery of the Court of Cassation judgment of 10 October 2002. Section 49 of the Miscellaneous Provisions Act of 9 July 2004 subsequently entered into force on 25 July 2004, before the Court of Appeal had given its ruling.

76. It therefore appears that, until the Court of Cassation judgment of 10 October 2002, the applicant company itself considered the limitation

period to have been interrupted by the payment order of 24 October 2000. Having hoped, rather than expected, to be able to benefit from the new case-law of the Court of Cassation (see the Constitutional Court judgment of 7 December 2005, point B.19.11 of the reasoning, cited at paragraph 38 above), it could not therefore have been surprised by the legislature's response (see, to similar effect, *OGIS-Institut Stanislas, OGEC Saint-Pie X and Blanche de Castille and Others*, cited above, § 71).

77. Accordingly, in the specific circumstances of the present case, the measure in question was based on compelling grounds of general interest, the aim being to restore the interruption of the limitation period by payment orders that had been served well before the Court of Cassation's 2002 judgment, and thus to allow the disputes pending before the courts to be resolved, without affecting taxpayers' substantive rights (see, to similar effect, *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society*, cited above, § 112, and *OGIS-Institut Stanislas, OGEC Saint-Pie X and Blanche de Castille and Others*, cited above, § 72).

78. Lastly, the Court observes that its conclusion matches the assessment made by the Constitutional Court and the Court of Cassation (see paragraphs 38 and 40 above), which likewise found nothing spurious about the legislature's intervention (see, conversely, *Maggio and Others*, cited above, § 48).

79. In view of the foregoing, the Court considers that the retrospective intervention by the legislature through section 49 of the Miscellaneous Provisions Act of 9 July 2004 was based on compelling grounds of general interest.

80. Accordingly, it finds that there has been no violation of Article 6 § 1 of the Convention on this account.

2. Substitution of grounds by the Court of Cassation

(a) The parties' submissions

(i) The applicant company

81. The applicant company alleged that the substitution of grounds by the Court of Cassation had resulted in a breach of its right of access to a court, the principle of equality of arms and the adversarial principle. In the applicant company's view, in determining the applicability of section 49 of the Miscellaneous Provisions Act of 9 July 2004, although the Court of Appeal had found that provision to be inapplicable and the applicant company had not criticised that decision in its appeal on points of law, the Court of Cassation had ruled on a Court of Appeal decision that had not been lawfully submitted to it for review. In dismissing the applicant company's appeal by applying an unforeseeable, artificial and unlawful barrier, the Court of Cassation had made it impossible for the company to

assert its complaints, not just before that court but also before the courts below, in the event that the case had been sent back to a different court of appeal. The applicant company maintained that it had been unable to raise the issue of the compatibility of section 49 of the 2004 Miscellaneous Provisions Act with Article 6 § 1 of the Convention, owing to the limited scope of the case before the Court of Cassation. The latter had ruled in contradiction with its settled case-law, according to which it could not apply the judicial construct of substitution of grounds to grounds that had not been criticised in the appeal on points of law. Moreover, the Court of Cassation could only substitute its own grounds where the relevant facts had been established by the judgment of the court below in the contested judgment, which was not the case here.

82. As to the procedure that had been followed, the applicant company observed that it had not received the advocate-general's written submissions in which the substitution of grounds had been proposed until 5 March 2009, just a few days before the hearing of 13 March 2009. It would have been pointless and impossible, in the space of a few days, to present serious arguments to the Court of Cassation concerning the interruption of the limitation period under section 49 of the Miscellaneous Provisions Act of 9 July 2004; moreover, that question did not come within the jurisdiction of the Court of Cassation. Accordingly, in its memorandum under Article 1107 of the Judicial Code, the applicant company had concentrated on those aspects over which the Court of Cassation had jurisdiction (which excluded issues of fact) and on the subject matter of the case before that court (which concerned only the suspension of the limitation period and did not extend to its interruption under section 49 of the Miscellaneous Provisions Act of 9 July 2004).

(ii) The Government

83. The Government submitted that, since tax surcharges differed from the hard core of criminal law, the guarantees under the criminal head of Article 6 of the Convention ought not necessarily to apply with their full stringency. The Court should therefore take a more benevolent view in assessing whether Article 6 § 1 had been complied with. In the instant case the substitution of grounds by the Court of Cassation had occurred after the applicant company had been given every opportunity to make known any evidence needed for its claims to succeed, and to have knowledge of, and comment, on all the evidence adduced or observations filed, with a view to influencing the court's decision. As to the applicant company's argument that the advocate-general's submissions had not been sent to it until 5 March 2009, the Government maintained that the company could have requested an adjournment in order to have more time to reply to those submissions, in accordance with Article 1107, third paragraph, of the Judicial Code. In the Government's view, by confining itself in its

memorandum of 9 March 2009 to criticising the substitution of grounds, without challenging the advocate-general's legal arguments, the applicant company had deliberately opted for a procedural strategy for which it alone was responsible.

84. The Government did not dispute that the finding of inadmissibility in relation to the ground of appeal raised by the applicant company in its appeal on points of law amounted to a limitation of its right of access to a court. However, that limitation had been justified. It had pursued a legitimate aim, namely the proper administration of justice, by ensuring that the parties were not subjected to damaging and unnecessary delays in concluding the proceedings. It had also been proportionate. The substitution of grounds was strictly delineated by the case-law and could be applied only to purely legal grounds which had been challenged in the relevant ground of appeal, and subject to respect for the rights of the defence. Furthermore, the applicant company would not have benefited had the judgment been quashed on the basis of its appeal, since the court rehearing the case would in any event have ruled in the same way as the Court of Cassation or risk its decision being overturned by that court. Lastly, contrary to the applicant company's assertion, there was nothing to suggest that the Court of Cassation had breached the procedural rules regarding the circumstances in which the substitution of grounds was permitted, especially since, in the present case, that substitution had not entailed any change to the findings of the contested judgment. Hence, in the Government's view, it was clear that the essence of the right of access to a court had not been impaired.

(b) The Court's assessment

85. First of all, in the Court's view, no issue arises as regards the principle of equality of arms relied on by the applicant company. This principle requires each party to the proceedings to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see, among other authorities, *Nideröst-Huber v. Switzerland*, 18 February 1997, § 23, *Reports* 1997-I, and *Regner v. the Czech Republic* [GC], no. 35289/11, § 146, 19 September 2017). In the present case there is nothing in the case file or in the parties' submissions to indicate that they were placed in different situations with regard to the advocate-general's written submissions or the substitution of grounds by the Court of Cassation (see, *mutatis mutandis*, *Krčmář and Others v. the Czech Republic*, no. 35376/97, § 39, 3 March 2000).

86. However, the concept of a fair hearing also includes the right to adversarial proceedings, according to which the parties must have the opportunity to make known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court's

decision (see *Lobo Machado v. Portugal*, 20 February 1996, § 31, *Reports* 1996-I, and *Vermeulen v. Belgium*, 20 February 1996, § 33, *Reports* 1996-I).

87. The court itself must respect the adversarial principle, for example if it dismisses an appeal or decides a case on the basis of a ground which it has raised of its own motion (see *Skondrianos v. Greece*, nos. 63000/00 and 2 others, §§ 29-30, 18 December 2003; *Clinique des Acacias and Others v. France*, nos. 65399/01 and 3 others, § 38, 13 October 2005; *Amirov v. Azerbaijan* (dec.), no. 25512/06, 18 January 2011; *Čepek v. the Czech Republic*, no. 9815/10, § 45, 5 September 2013; and *Les Authentiks and Supras Auteuil 91 v. France*, nos. 4696/11 and 4703/11, § 50, 27 October 2016). The decisive factor is therefore whether one of the parties was "taken by surprise" by the fact that the court based its decision on a ground raised of its own motion (see *Villnow v. Belgium* (dec.), no. 16938/05, 29 January 2008, and *Clinique des Acacias and Others*, cited above, § 43).

88. Courts must exercise special diligence where the dispute takes an unexpected turn, especially where it concerns a matter that is left to the discretion of the court concerned. The principle of adversarial proceedings requires that courts should not base their decisions on elements of fact or law which have not been discussed during the proceedings and which give the dispute an outcome which neither party would have been able to anticipate (see *Čepek*, cited above, § 48).

89. In the present case the Court of Cassation made use of its power to determine the case on the basis of a ground raised of its own motion (see, to similar effect, *Clinique des Acacias and Others*, cited above, § 39). The Court does not propose to examine the technique of substitution of grounds as such, but solely to consider whether the use made of that technique by the Court of Cassation breached the applicant company's right to adversarial proceedings (see *Les Authentiks et Supras Auteuil 91*, cited above, § 51).

90. It is not the Court's task to examine whether the criteria defined by the Court of Cassation's case-law regarding the substitution of grounds were satisfied in the present case, since it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I, and *López Ribalda and Others v. Spain* [GC], nos. 1874/13 and 8567/13, § 149, 17 October 2019).

91. Accordingly, only the possible omission by the Court of Cassation to inform the parties of its intention to raise the ground in question of its own motion is capable of giving rise to an issue under the Convention (see, to similar effect, *Cimolino v. Italy*, no. 12532/05, § 45, 22 September 2009).

92. In the instant case the Court notes that the issue of the application of section 49 of the Miscellaneous Provisions Act of 9 July 2004 was not raised by the applicant company in its appeal on points of law, as the

Antwerp Court of Appeal had found that this provision was not applicable (see paragraph 14 above). Consequently, the applicant company had no interest in submitting arguments on this point in its appeal to the Court of Cassation.

93. Nevertheless, the applicant company cannot be deemed to have been "taken by surprise" in the present case (see, conversely, among other authorities, *Clinique des Acacias and Others*, cited above, § 43, and *Liga Portuguesa de Futebol Profissional v. Portugal*, no. 4687/11, §§ 61-62, 17 May 2016).

94. Firstly, the Court notes that the Court of Appeal's decision concerning section 49 of the Miscellaneous Provisions Act of 9 July 2004 formed the subject matter of the appeal on points of law lodged by the State (see paragraph 16 above). It cannot therefore be said that the applicability of that provision did not form part of the proceedings (see, to similar effect, *Les Authentiks and Supras Auteuil 91*, cited above, § 52, and *Ndayegamiye-Mporamazina v. Switzerland*, no. 16874/12, § 39, 5 February 2019; see also, conversely, *Prikyan and Angelova v. Bulgaria*, no. 44624/98, § 46, 16 February 2006), even though the two appeals were not formally joined at that stage.

95. Secondly, and most importantly, the parties had received a copy of the advocate-general's written submissions to the Court of Cassation in which he had called on that court to substitute its own grounds for those of the contested judgment (see paragraph 17 above). Even though the Government did not dispute the fact that the applicant company had not received those submissions until a few days before the Court of Cassation hearing (see paragraph 18 above), the fact remains that it was open to the applicant company, under Article 1107 of the Judicial Code, to submit a memorandum in reply to the advocate-general's submissions and to request that the hearing be adjourned so that it could reply orally or in a memorandum to those submissions (see paragraph 41 above).

96. In these circumstances, the Court considers that the substitution of grounds by the Court of Cassation was not in breach of the right to adversarial proceedings or the right of access to a court.

97. Accordingly, there has been no violation of Article 6 § 1 of the Convention on this account.

3. Compliance with the reasonable-time requirement

(a) The parties' submissions

(i) The applicant company

98. The applicant company submitted that the notice of rectification of 5 October 1995, in which the administrative authority notified it that it was imposing a tax surcharge, should be regarded as the starting-point for calculating the period to be taken into consideration, as it was at that point

that the company had been informed of the charge against it. At the very least, the threat of a surcharge should be considered to have been real when the latter had been entered in the roll, a measure notified to the applicant company in the notice of assessment of 11 December 1995. Its objection, lodged on 26 February 1996, had been rejected by the regional director on 19 September 2000, four years and seven months after being lodged. The length of the administrative phase in itself had been excessive. Throughout that time, there had been no opportunity for the applicant company to speed up the proceedings. Subsequently, the judicial phase, which had begun with the institution of proceedings by the applicant company on 14 December 2000 and had concluded with the Court of Cassation judgment of 13 March 2009, had lasted for almost nine years. Hence, the proceedings overall had lasted for fourteen years, in breach of Article 6 § 1 of the Convention.

(ii) The Government

99. In the Government's submission, the period to be taken into consideration had begun on 14 December 2000 (the date on which the applicant had applied to the Antwerp Court of First Instance) and had ended on 13 March 2009 (the date of the Court of Cassation judgment). In view of the complexity of the case and what was at stake in the dispute, this length of time appeared reasonable. The taxes and the surcharge of which the applicant company complained had amounted to almost EUR 450,000, meaning that there were substantial interests at stake in the tax dispute. Furthermore, the applicant company had submitted a large number of documents at the appeal stage, including a third set of additional observations and a summary of its position, running to fifty-four pages; this demonstrated the complexity of the dispute and the fact that the company had been partly responsible for the length of time taken to prepare the case. The judgment of the Antwerp Court of Appeal also testified to the complexity of the case, as it contained a detailed analysis of the legal theory and case-law on the interruption or suspension of limitation periods. Therefore, it could not be said that there had been a breach of the reasonable-time requirement in the present case.

(b) The Court's assessment

100. The Court reiterates its case-law to the effect that the reasonableness of the length of criminal proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the applicant's conduct and the conduct of the competent authorities (see *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II, and *J.R. v. Belgium*, no. 56367/09, § 59, 24 January 2017). In addition, only delays attributable to the State may

justify a finding of failure to comply with the reasonable-time requirement (see *Idalov v. Russia* [GC], no. 5826/03, § 186, 22 May 2012).

101. The Court notes that lodging an objection with the administrative authorities is a required step before bringing tax proceedings in the court of first instance. Accordingly, the applicant company was not entitled to bring proceedings in the civil courts before having lodged such an objection. Furthermore, prior to the entry into force of Article 1385 *undecies* of the Judicial Code, introduced by an Act of 23 March 1999 which entered into force on 6 April 1999, no judicial proceedings could be brought until the administrative proceedings had been concluded (see paragraph 24 above). Consequently, since this administrative phase was a *sine qua non* for triggering the judicial phase proper, it should also be taken into account in assessing compliance with the reasonable-time requirement (see, for a case coming under the civil limb of Article 6 § 1, *König v. Germany*, 28 June 1978, § 98, Series A no. 27). However, regard must also be had to the fact that as of 6 April 1999 the applicant company had the possibility of applying directly to the courts without awaiting the outcome of the proceedings on its administrative objection.

102. Thus, in the Court's view, the period to be taken into consideration began on 5 October 1995, when the applicant company was informed of the tax authorities' intention to rectify its tax return and impose a tax surcharge (see, to similar effect, *Janosevic*, cited above, § 92). It ended with the Court of Cassation judgment of 13 March 2009. Accordingly, the proceedings concerning the applicant company lasted for thirteen years and six months, at one administrative level and three levels of court jurisdiction.

103. The processing of the applicant company's objection by the regional director took four years and seven months for a single set of proceedings, without any explanation being offered other than the authorities' backlog of tax appeals. However, it should be noted that as of 6 April 1999 the applicant company could have applied to the courts without awaiting the outcome of the administrative proceedings (see paragraph 101 above). Hence, the period from 6 April 1999 to 14 December 2000 (when the judicial proceedings were instituted) should be deducted from the period taken into consideration in assessing the reasonableness of the length of the proceedings.

104. Next, the judicial phase, which began with the institution of proceedings on 14 December 2000 and ended with the Court of Cassation judgment of 13 March 2009, lasted for eight years and three months. More than three years and three months elapsed between the application to the courts and the delivery of the first-instance judgment, and almost a further three years before the Court of Appeal judgment was handed down. The Court of Cassation judgment, for its part, was delivered almost one year and seven months after the applicant company had lodged its appeal on points of law.

105. It is true that the case, as emphasised by the Government, was of a certain complexity and that the financial interests at stake were considerable. It is likewise true that the case raised complex issues regarding limitation periods and that the applicant company submitted a third set of additional observations and a summary to the Court of Appeal. Nevertheless, the Court considers that these factors are insufficient to explain the duration of the proceedings which, taken overall, were unreasonably long.

106. Accordingly, there has been a violation of Article 6 § 1 of the Convention on account of the failure to comply with the reasonable-time requirement.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

107. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

108. The applicant company sought compensation in respect of pecuniary damage comprising the taxes paid, together with costs and interest for late payment, amounting to 606,712.94 euros (EUR), plus default interest from 1 March 1997 onwards. It also claimed EUR 1 for each violation found in respect of non-pecuniary damage, plus default interest as of 15 February 2001.

109. The Government left the matter to the Court's discretion, but observed that there was no causal link between the alleged pecuniary damage on the one hand and the supposed breach of the reasonable-time requirement and the substitution of grounds by the Court of Cassation on the other.

110. The Court has found no violation in respect of the complaints concerning the legislature's intervention and the substitution of grounds. Hence, no award for just satisfaction can be made on that account.

111. The only violation found in the present judgment is a violation of Article 6 § 1 of the Convention on account of the failure to comply with the reasonable-time requirement. Hence, no award of just satisfaction can be made under any other head. In that connection the Court cannot discern any causal link between the violation found and the pecuniary damage alleged. It therefore dismisses the claim under this head.

112. As to non-pecuniary damage, regard being had to the amount claimed by the applicant company and the Court's practice in respect of

such claims (see, for instance, *Kovárová v. Slovakia*, no. 46564/10, § 48, 23 June 2015, and the case-law cited therein), the Court considers that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant company.

B. Costs and expenses

113. The applicant company claimed EUR 42,223.07 in respect of the costs and expenses incurred in the domestic proceedings, and EUR 19,875 in respect of those incurred before the Court, plus default interest on the total amount as of the date of payment of these expenses.

114. The Government left the matter to the Court's discretion with regard to the reasonableness of the costs and expenses claimed for the proceedings before the Court. With regard to the proceedings before the domestic courts, they observed that there was no causal link between the expenses claimed and the complaints raised by the applicant company, and that the company would have had to pay those expenses in any event.

115. According to the Court's case-law, an applicant is entitled to reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. This includes only domestic legal costs actually and necessarily incurred to prevent or redress the breach of the Convention (see, to similar effect, *Associated Society of Locomotive Engineers and Firemen (ASLEF) v. the United Kingdom*, no. 11002/05, § 58, 27 February 2007). Regard being had to the violation found, this is not the case as regards the domestic proceedings for which the applicant company claimed reimbursement of its costs and expenses. The Court therefore dismisses the claim in respect of the costs and expenses incurred in the domestic proceedings.

116. As regards the proceedings before it, the Court reiterates that costs and expenses are only recoverable to the extent that they relate to the violation found (see *Murray v. the Netherlands* [GC], no. 10511/10, § 134, 26 April 2016, and *Denisov v. Ukraine* [GC], no. 76639/11, § 146, 25 September 2018, and the case-law cited therein). In that connection the Court notes that the applicant company's complaints succeeded to only a very limited extent and that a substantial portion of its pleadings concerned aspects of the application resulting in a finding of no violation. Hence, regard being had to the documents in its possession and the above criteria, the Court deems it reasonable to award EUR 5,000 to the applicant company in respect of the proceedings before it.

C. Default interest

117. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention on account of the legislature's intervention during the proceedings;

3. *Holds* that there has been no violation of Article 6 § 1 of the Convention on account of the substitution of grounds by the Court of Cassation;

4. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the failure to comply with the reasonable-time requirement;

5. *Holds*
   (a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros), plus any tax that may be chargeable to the applicant company, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the claim for just satisfaction.

Done in French, and notified in writing on 10 November 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Registrar

Georgios A. Serghides
President