

THE ROLE OF ADMINISTRATIVE ADJUDICATION IN THE REALIZATION OF THE CONSTITUTIONAL PRINCIPLE OF TAX EQUITY – A CROATIAN PERSPECTIVE*

Izvorni znanstveni rad

UDK: 342.92:336.225.69(497.5)
35.077.2:336.225.69(497.5)
3.077.2:336.225.69(497.5)
351.95:336.225.69(497.5)
342.565.4:336.225.69(497.5)
347.998.85:336.225.69(497.5)

Primljeno: 24. lipnja 2024.

Valentino Kuzelj**

The right to a fair trial in the Republic of Croatia is guaranteed by constitutional, international and supranational norms. Article 29 of the Constitution guarantees the broadest protection as it is not limited ratione materiae, in contrast to Article 6(1) of the European Convention. As opposed to Article 47 of the EU Charter, it is equally applicable to procedures in which EU law is applied, as well as in those in which domestic authorities only apply national regulations. Through its uniform and extensive application in tax cases, Croatian administrative courts should simultaneously protect the standards of a fair trial developed in the case law of the ECtHR and the CJEU – in accordance with the jurisprudence of the Croatian Constitutional Court. They should connect the requirements of material equity in taxation with the procedural guarantees of a fair trial, striving to build extensive protection of taxpayers' rights and contributing to the construction of an integral concept of equity in taxation.

Keywords: right to a fair trial, tax equity, principles of taxation, administrative dispute, Republic of Croatia

1. INTRODUCTION

The ideal of equity in taxation, as regulated by Article 51 of the Constitution of the Republic of Croatia¹ (hereafter: Constitution), is envisaged as the foundational principle

* This article is based on the paper 'Uloga upravnog sudovanja u ostvarenju ustavnog načela porezne pravednosti – utvrđivanje činjenica relevantnih za oporezivanje u upravnom sporu', written under the supervision of Professor Jasna Omejec, PhD, and awarded with the Rector's Award of the University of Zagreb for the academic year 2022/2023.

** Valentino Kuzelj, univ. mag. iur., Special hospital for medical rehabilitation Krapinske Toplice, Gajeva 2, 49217 Krapinske Toplice, Croatia, email: valentino.kuzelj01@gmail.com, ORCID: <https://orcid.org/0000-0003-3028-8562>

¹ The Constitution of the Republic of Croatia, *Official Gazette*, Nos. 56/90, 135/97, 113/00, 28/01, 55/01 [correction], 76/10, 5/14 [Decision of the Constitutional Court No. SuP-O-1/2014 of 14 January 2014].

of the Croatian tax system. The primary addressees of the said principle are the creators of fiscal policies (essentially the legislator). In this regard, it is not surprising that most of the Croatian scholarly papers in this field are aimed at (1) uncovering the meaning of equity in taxation in its historical context;² (2) providing a theoretical and/or comparative analysis of constitutional, supranational and/or international norms regarding taxation;³ and (3) examining the fairness of certain tax instruments, e.g. income tax⁴ and indirect taxes⁵ such as value added tax.⁶ All those papers are preoccupied with defining the meaning of material equity in taxation (in various contexts). There is a smaller field of research concerning the protection of taxpayers' rights in (administrative) tax procedures and, consequently, administrative disputes.⁷ Its primary interest concerns the nature of

² See e.g. Predrag Bejaković, 'Povijesni razvoj teorije o pravednosti oporezivanja' (2012) 21(1) *Porezni vjesnik* 93–100.

³ See e.g. Nataša Žunić Kovačević, 'Načelo jednakosti u poreznom pravu i sudskoj praksi nekih zemalja EU' (2001) 22(2) *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 763–789; Hrvoje Arbutina, 'Ustavna i nadnacionalna ograničenja ovlaštenja na oporezivanje' (2012) 62(5–6) *Zbornik Pravnog fakulteta u Zagrebu* 1283–1322; Stjepan Gadžo, 'Prilog istraživanju sadržaja načela pravednosti kao kriterija evaluacije normi međunarodnog poreznog prava' (2015) 31(2) *Pravni vjesnik* 131–155; Valentino Kuzelj, 'Komplementarnost ustavnopravnih i društvenih odrednica porezne pravednosti u Republici Hrvatskoj' in Vuk Bevanda (ed), *EMAN 2020 Conference Proceedings* (UdEkoM Balkans 2020) 469–475; Matija Miloš and Valentino Kuzelj, 'Ostvarenje i zaštita ustavnog ideala porezne pravednosti u svjetlu zahtjeva socijalne države' (2021) 58(4) *Zbornik radova Pravnog fakulteta u Splitu* 1101–1120.

⁴ See e.g. Renata Perić and Csaba Szilovics, 'Pravednost i jednakost u sustavima poreza na dohodak' in Mirela Župan and Mario Vinković (eds), *Suvremeni pravni izazovi: EU – Mađarska – Hrvatska* (University of Pécs, Faculty of Law and J.J. Strossmayer University of Osijek, Faculty of Law 2012) 243–254; Zsombor Ercsey and Emina Jerković, 'Porez na dohodak: odredbe o pravičnosti' in Mirela Župan and Mario Vinković (eds), *Suvremeni pravni izazovi: EU – Mađarska – Hrvatska* (University of Pécs, Faculty of Law and J.J. Strossmayer University of Osijek, Faculty of Law 2012) 255–274; Renata Perić and Emina Jerković, 'Personal Income Tax System: Provisions Regarding Fairness and Equality' in Vinko Kandžija and Andrej Kumar (eds), *Economic Integrations, Competition and Cooperation* (University of Rijeka, Faculty of Economics 2013) 143–153; Renata Perić and Emina Jerković, 'Principle of Fairness in Regard to Personal Income Tax' in Urban Bacher et al. (eds), *Interdisciplinary Management Research X* (J.J. Strossmayer University of Osijek, Faculty of Economics and Hochschule Pforzheim University 2014) 821–828; Renata Perić and Emina Konjić, 'Primjena načela pravednosti u sustavima oporezivanja dohotka' in Hrvoje Arbutina and Tereza Rogić Lugarić (eds), *Spomenica Prof. dr. sc. Juri Šimoviću* (Pravni fakultet Sveučilišta u Zagrebu 2017) 35–43; Emina Jerković, 'Važnost ciljeva i socijalno-političkih načela oporezivanja u funkciji ostvarenja pravednosti prilikom oporezivanja dohotka od nesamostalnog rada i samostalne djelatnosti' in *ERAZ 2017 Conference Proceedings* (UdEkoM Balkans 2017) 217–229; Valentino Kuzelj, Emina Jerković and Renata Perić, 'Predanost zakonodavca temeljnim (socijalnim) poreznim načelima Ustava pri uređenju sustava oporezivanja dohotka u Republici Hrvatskoj' (2022) 43(1) *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 247–266.

⁵ See e.g. Olivera Lončarić-Horvat, 'Socijalna država i posredni porezi' (1995) 2(2) *Revija za socijalnu politiku* 115–121.

⁶ See e.g. Jure Šimović, 'Socijalni učinci poreza na dodanu vrijednost' (1998) 5(2–3) *Revija za socijalnu politiku* 99–109; Emina Jerković, 'The Challenges and Effectiveness of Value Added Tax Rates as a Distributional Tool' in Dunja Duić and Tunjica Petrašević (eds), *EU and Comparative Law Issues and Challenges Series – ECLIC Vol. 2* (J.J. Strossmayer University of Osijek, Faculty of Law 2018) 672–686.

⁷ Tereza Rogić Lugarić, 'O odnosu između poreznih tijela i poreznih obveznika – hrvatska i usporedna iskustva' in Vlado Belaj (ed), *Zbornik radova II. međunarodne konferencije Razvoj javne uprave* (Veleučilište Lavoslav Ružička 2012) 505–521; Nataša Žunić Kovačević, 'Upravnosudska kontrola u poreznim stvarima' (2016) 53(1) *Zbornik radova Pravnog fakulteta u Splitu* 279–295; Tereza Rogić Lugarić, 'Porezna tijela i porezni obveznici: od "policajaca i lopova" do suradnika' in Ivan Koprić, Anamarija Musa and Teo Giljević (eds), *Građani, javna uprava i lokalna samouprava: povjerenje, suradnja, potpora*, (Institut za javnu upravu 2017) 341–362; Lana Ofak, 'Zaštita ustavnih jamstava poreznih obveznika u poreznim postupcima' (2018) 55(1) *Zbornik radova Pravnog fakulteta u Splitu* 153–168; Nataša Žunić Kovačević and Vlaho Bassegli Gozze,

the relationship between the taxpayer and tax authorities. The focus is on determining whether (and to what extent) taxpayers' right to participate in tax proceedings and administrative disputes is respected.

What these groups of papers have in common is the narrowed field of their research interest. While the first group deals with the normative (un)acceptability of substantive matters of tax laws (e.g. the progressiveness of the tax rates of direct taxes, or the regressive impact of value added tax), the second group limits itself to the protection of the procedural rights of taxpayers before tax authorities and administrative courts. The contribution of both these fields of research is substantial and welcome in the context of strengthening taxpayers' protection against the government's extensive (real and normative) influence in the field of taxation (which is still considered as the prime symbol of state authority and sovereign powers). Despite this, their separate approaches cannot offer a full picture of taxpayers' rights in their substantive and procedural scope and are not able to shed light on all the implications of the constitutional principle of equity in taxation as the foundation of the Croatian tax system.

Only a few papers come close to that goal. Lončarić-Horvat points out two possible trajectories for the constitutional protection of taxpayers' rights guaranteed by the Constitutional Act on the Constitutional Court of the Republic of Croatia (hereafter: Constitutional Act).⁸ The first trajectory is to challenge (*in abstracto*) the constitutionality of the laws or the constitutionality and legality of other regulations. Namely, the Constitutional Act gives every (natural or legal) person the right to propose to the Constitutional Court of the Republic of Croatia (hereafter: CCRC) the institution of such proceedings.⁹ The second possibility concerns the instrument of constitutional complaint¹⁰ which enables everyone to seek (*in concreto*) protection of their rights and freedoms violated in tax proceedings and administrative disputes.¹¹ One more recent paper strives to give a parallel analysis of the notions of substantive and procedural fairness in taxation.¹² However, all these attempts suffer from the lack of interdisciplinarity and fail to give a full picture of the procedural and substantive guarantees emanating from the constitutional principle of equity in taxation as envisaged by the framers of the Croatian constitution.

The said approach is not an exclusive characteristic of Croatian legal and financial science, as Croatian constitutional jurisprudence in tax matters suffers from the same burden. The

⁸ 'Dokazivanje u poreznim stvarima – porezni postupak i upravni spor' (2022) 43(3) *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 873–896.

⁹ The Constitutional Act on the Constitutional Court of the Republic of Croatia, *Official Gazette*, Nos. 99/99, 29/02, 49/02 [consolidated text].

¹⁰ Article 38(1) of the Constitutional Act.

¹¹ Articles 60–82 of the Constitutional Act.

¹² Olivera Lončarić-Horvat, 'Ustavno-pravna zaštita u poreznom postupku' (2008) (4) *Pravo i porezi* 15–21.

¹³ Tajana Petrović and Sonja Cindori, 'Prava poreznih obveznika kao ljudska prava: razmatranje procesne i materijalne pravednosti u oporezivanju' in Matija Miloš *et al.* (eds), *Ljudska prava i pitanje identiteta* (ZA-Pravo and Pravni fakultet Sveučilišta u Rijeci 2022) 221–243.

CCRC tries to operationalize the constitutional principles of taxation in cases concerning the abstract review of constitutionality of tax legislation,¹³ although it has been only partially successful.¹⁴ Nevertheless, the CCRC properly places tax legislation as an object of constitutional scrutiny in the broader context of constitutional review. Its interpretation is based on the holistic approach to the Constitution “as it considers the two traditional groups of human rights protected by the Constitution (personal, civil and political rights, and social, economic and cultural rights) as an integrated whole, that is, as coordinated and equally protected legal goods”.¹⁵ This is “the legal framework within which the Constitutional Court reviews tax laws to the limit determined by the democratic constitutional order as the order of free political process”.¹⁶

However, in cases brought by taxpayers’ constitutional complaints, the CCRC limits itself to determining whether their right to a fair trial was respected.¹⁷ Beyond the requests for the procedural fairness of a tax procedure and an administrative dispute *per se*, it usually does not connect the requirements of due process with the notion of substantive equity in taxation as a foundational principle of the tax system. This approach is partly understandable having in mind that serious procedural failures of administrative courts and the High Administrative Court of the Republic of Croatia (hereafter: HACRC) constitute a breach of the taxpayers’ right to a fair trial under Article 29(1) of the Constitution, which is enough for the CCRC to annul their judgements without tapping into the politically sensitive field of constitutional principles of taxation. Nevertheless, the joint reading of procedural and material fairness in taxation could strengthen the CCRC’s judicial argumentation and accentuate the obligation of the administrative courts and the HACRC to establish extensive and consistent jurisprudence regarding the protection of taxpayers’ rights in administrative disputes. With this in mind, it is necessary to position the subject of this paper in the nexus of administrative, financial, and constitutional law, which requires an interdisciplinary approach.

1.1. Goals and hypotheses

The primary goal of this paper is to link the substantive (material) principles of taxation contained in Article 51 of the Constitution (understood as the reflection of horizontal and vertical equity in taxation) with the procedural guarantees of due process and the right to a lawful determination of tax liability. In this regard, the paper examines the requirements

¹³ See e.g. Decision No. U-I-1559/2001 CCRC (21 February 2007) paras. 7–8; Ruling No. U-I-2012/2007 CCRC (17 June 2009) paras. 5–6; Decision and Ruling No. U-IP-3820/2009 and others CCRC (17 November 2009) paras. 15–16.

¹⁴ For an extensive critique of the CCRC’s interpretation and application of Article 51 of the Constitution in the proceedings concerning the constitutional review of tax legislation, see Sonja Cindori and Valentino Kuzelj, ‘Socijalni aspekt kriznoga poreza: fiskalni instrument ili devijacija poreznog sustava?’ (2018) 27(2) *Ekonomska misao i praksa* 479–502; Miloš and Kuzelj (n 3) 1101–1120.

¹⁵ Decision and Ruling No. U-IP-3820/2009 and others CCRC (17 November 2009) para. 11.

¹⁶ *Ibid* para. 13.5.

¹⁷ See e.g. Decision No. U-III-181/2019 CCRC (20 March 2019) paras. 7–8; Decision No. U-III-278/2019 CCRC (12 July 2022) paras. 9–15.

emanating from the right to a fair trial in (administrative) disputes concerning taxation. Since the Republic of Croatia is a member state of the Council of Europe and the European Union (hereafter: EU) its national legal standards are heavily influenced by legal opinions of the European Court of Human Rights (hereafter: ECtHR) and the Court of Justice of the European Union (hereafter: CJEU). Therefore, the ECtHR's stance on the (in)applicability of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms¹⁸ (hereafter: Convention) to tax cases must be examined. Likewise, the standards of a fair trial guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union¹⁹ (hereafter: Charter) must be considered in (tax) matters which fall within its sphere of application.

Contrary to the limitations contained in Article 6 of the Convention, the right to a fair trial postulated by Article 29 of the Constitution is not limited *ratione materiae*. In contrast to the ECtHR's approach according to which Article 6 of the Convention applies to tax cases only in a limited scope, Croatian administrative courts must adhere to the constitutional guarantee of a fair trial in all cases (including those dealing with issues of taxation). At the same time, they must accept and protect standards of a fair trial developed in the ECtHR's jurisprudence. This obligation arises from the (quasi)constitutional status the CCRC has given to the Convention in the Croatian legal order. Hence, the limited possibility of the ECtHR to decide cases in matters of taxation does not prevent Croatian administrative courts from protecting taxpayers' rights in accordance with the Convention.

Furthermore, they are obliged to adopt standards of a fair trial contained in the Charter, as interpreted by the CJEU. The scope of protections arising from Article 47 of the Charter is in many ways analogous to those guaranteed by Article 6 of the Convention (in some respects, it is even broader), although there are a few notable differences. Namely, Article 47 of the Charter is not limited *ratione materiae* (in contrast to Article 6 of the Convention). However, its application is restricted to matters where national authorities and courts apply EU law. In contrast, Article 29 of the Constitution is applicable to all cases, notwithstanding the type of procedure (e.g. tax procedure, administrative disputes) or the matter decided (e.g. taxation). Hence, Croatian administrative courts should adopt standards of a fair trial developed in the jurisprudences of both European courts (the ECtHR and the CJEU), and interpret them as an integral part of the constitutional right to a fair trial, therefore building an integral concept of procedural protections of taxpayers' rights. This would in turn strengthen the protection of citizens' (taxpayers') rights and contribute to the uniform application of law (including the applicable international and supranational legal norms and standards). Applying these standards to the review of rulings issued by the tax administration is of utmost importance for the realization of the

¹⁸ The Convention for the Protection of Human Rights and Fundamental Freedoms, *Official Gazette – International Treaties*, Nos. 6/99 [consolidated text], 8/99 [correction], 14/02, 1/06, 13/17.

¹⁹ The Charter of Fundamental Rights of the European Union, *Official Journal of the European Union*, C 202 of 7 June 2016, pp. 389–405 [HR].

constitutional guarantee of judicial review of individual decisions made by public authorities.²⁰

Moreover, the failure by the administrative courts to apply these standards in a specific tax procedure and their omission to determine all the facts relevant to establish tax liability not only affects taxpayers' procedural rights, but also constitutes a violation of the substantive principles of equity and equality in taxation. These principles (postulated in Article 51 of the Constitution) embody the notion of both vertical and horizontal equity in taxation. The latter requires that persons of equal (or rather similar) economic strength pay an equal amount of taxes. According to the former, persons of greater economic strength should bear a higher (relative and not just in the absolute amount) tax burden. They are not directed exclusively at the legislator and are not limited to the abstract regulation of the tax system through legislation. They contain an implicit guarantee of a fair determination of tax liability. Therefore, Article 51 of the Constitution tacitly obliges administrative courts to correctly and lawfully determine all the facts relevant for the establishment of tax liability and the calculation of the amount of due taxes.

Thus, through the complementary application of standards developed in the jurisprudences of the ECtHR and the CJEU, and their operationalization as part of the constitutional guarantee of a fair trial, the Croatian administrative courts can build an integral concept of equity in taxation. This concept should recognize that "the protection of human rights in the field of tax law should be conceived not only as protection against unfair taxation, but also as protection within taxation and within the enforcement of tax law", which in turn "means that the implementation of tax provisions must be respectful of fundamental rights (from the right to property to the right to a fair trial), and that states must also ensure the effective taxation of each and every taxpayer in light of the principle of equality".²¹

1.2. Methodology and research objectives

The purpose of this paper lies not in the neutral portrayal of the existing legal rules (as a characteristic of legal science in the pure sense²²), nor in the recapitulation of judicial opinions dealing with the researched topic. The aim is to make a doctrinal contribution to the field of (both procedural and substantive) equity in taxation. Such a type of contribution is never entirely (or even mainly) comprised of simple descriptions of the positive law.²³ Thus, linking the substantive principles of taxation to the standards of a fair trial developed in the national constitutional jurisprudence and the case law of the two European courts (the ECtHR and CJEU) aims to advance the judicial approach of

²⁰ Article 19(1) of the Constitution.

²¹ Marco Gregg, 'Human Rights, Fundamental Rights and International Tax Law' (2014) (2) *European Tax Studies* 3.

²² Riccardo Guastini, *Sintaksa prava* (Naklada Breza 2019) 395.

²³ *Ibid* 400.

Croatian administrative courts to tax cases, and improve the argumentative strength of their judgments.

It is undisputable that the descriptive objective constitutes an important first step in legal research as it leads to other research perspectives.²⁴ Description is used to build a contextual legal framework for the development of the main research goal. It is necessary to describe the existing body of law and jurisprudence regarding the right to a fair trial and its applicability to tax cases. A comparative analysis is also indispensable, since the applicable rules belong to the three (not entirely aligned) normative levels (constitutional, international, and supranational), and their legal content depends on the case law of the three different courts (the highest in their own jurisdictions – the CCRC, ECtHR, and CJEU). Due to the legal status given to the norms of international (the Convention) and supranational (EU) law in the Croatian legal order, it is justified to consider defining the comparative research objective as both an external comparison (between the three partly separate and independent legal systems) and an internal comparison (because of the binding character given to the Convention and EU law).²⁵

Finally, the objective of this research is partly evaluative, but mainly recommendatory,²⁶ as it aims at improving the existing judicial practice of administrative courts in matters of taxation. Therefore, the analysis of legal texts, case law and secondary (scholarly) sources is conducted using descriptive, comparative, evaluative, and recommendatory (normative) approaches.

2. THE RIGHT TO A FAIR TRIAL AND THE PROTECTION OF TAXPAYERS' RIGHTS

In the last few decades increasing attention has been given to building a relationship of mutual trust and cooperation between tax authorities and taxpayers,²⁷ where the “taxpayer becomes a partner, and not a presumed tax evader”.²⁸ Notwithstanding this commitment, there is still a need for repressive methods in combating different forms of tax evasion. Therefore, the tax procedure and the conduct of the tax administration must be strictly regulated and subjected to various limitations aimed at safeguarding the taxpayers’ right to a fair determination of tax liability.

²⁴ Lina Kestemont, *Handbook on Legal Methodology: From Objective to Method* (Intersentia 2018) 9–10.

²⁵ Ibid 12–13.

²⁶ Ibid 17–18.

²⁷ Rogić Lugarić, ‘Porezna tijela i porezni obveznici...’ (n 7) 342–344.

²⁸ Rogić Lugarić, ‘O odnosu između poreznih tijela i poreznih obveznika...’ (n 7) 506.

The legal regulation of the tax procedure (as a special type of administrative procedure²⁹) by the Croatian General Tax Act³⁰ is not enough to ensure the proper and lawful conduct of the tax administration. Judicial control of the legality and correctness of its decisions is an imperative that emanates from the conception of the rule of law as one of the highest values of the Croatian constitutional order.³¹ Namely, judicial control of administrative acts (including the decisions of tax authorities) is aligned with tendencies to limit the supremacy of the contemporary administrative state. These attempts are directed towards narrowing the discretion of administrative bodies and expanding the scope of judicial review of the administration of laws.³²

The framers of the Croatian Constitution did not place indisputable trust in the correct and lawful application of the law by the administrative authorities. On the contrary, the constitutional obligation for their decisions to be grounded in law is ensured by the guarantee of judicial control.³³ The said guarantee must be read together with the right to a fair trial, i.e. the right of everyone to have his or her rights and obligations decided upon fairly, before a legally established, independent, and impartial court.³⁴ In general, the right to a fair trial has a high place in the Croatian constitutional architecture and in the CCRC's jurisprudence. Some authors argue that in cases brought by citizens' constitutional complaints, the CCRC "deals almost exclusively with the protection of the right to a fair trial in all its aspects".³⁵

Even before the adoption of the Amendment to the Constitution of the Republic of Croatia in 2000³⁶ (until then the constitutional right to a fair trial explicitly applied only to criminal trials) the CCRC has interpreted it extensively, expanding its field of application to all types of judicial and administrative procedures,³⁷ declaring that Article 29

²⁹ Staničić correctly notes that the field of taxation is one of the administrative domains in which it is justified to depart from the general regulation of the administrative procedure according to Article 3(1) of the Croatian General Administrative Procedure Act (*Official Gazette*, Nos. 47/09, 110/21) that states: "This Act applies when adjudicating all administrative matters. Only individual issues of the administrative procedure may be regulated differently by law if it is necessary for adjudicating in individual administrative fields and provided it is not contrary to the basic provisions and the purpose of this Act". See Frane Staničić, 'Nastavak napora za usustavljanje uređenja upravnog postupka u Republici Hrvatskoj' (2016) (6441) *Informator* 1–3.

³⁰ The General Tax Act, *Official Gazette*, Nos. 115/16, 106/18, 121/19, 32/20, 42/20, 114/22.

³¹ Article 3 of the Constitution.

³² Arsen Bačić and Petar Bačić, 'Konstitucionalizam i administrativna država (O zahtjevima konstitucionalizma u razdoblju nadmoći egzekutive)' (2016) 53(1) *Zbornik radova Pravnog fakulteta u Splitu* 128.

³³ Article 19 of the Constitution.

³⁴ Article 29(1) of the Constitution.

³⁵ Dragan Elijaš, Sandra Marković and Sanja Trgovac, 'Pravo na pristup sudu kao aspekt prava na pravično suđenje' (2016) 37(1) *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 386.

³⁶ The Amendment to the Constitution of the Republic of Croatia, *Official Gazette*, No. 113/00.

³⁷ Duška Šarin, 'Aspekti prava na pravično suđenje – pravo na pristup sudu kroz jurisprudenciju Ustavnog suda Republike Hrvatske' (2016) 53(3) *Zbornik radova Pravnog fakulteta u Splitu* 734.

guarantees “the constitutional right of a citizen to a fair procedure before administrative bodies and all courts”.³⁸

Based on this judicial interpretation and subsequent modification of Article 29 by the Constitutional Amendment of 2000,³⁹ the field of application of the constitutional right to a fair trial is not just aligned with, but even broadened in comparison to Article 6 of the Convention as it “applies to all ‘rights and obligations’”,⁴⁰ including the protection of taxpayers’ rights before tax authorities and administrative courts. The CCRC repeatedly emphasizes that it has already “affirmed that the guarantees of a fair trial, contained in Article 29 paragraph 1 of the Constitution, apply to judicial proceedings before an administrative court (administrative dispute) which is regulated by Article 19 paragraph 2 of the Constitution”.⁴¹

2.1. Protecting taxpayers’ rights by THE incorporation of standards emanating from Article 6(1) of the Convention in the Croatian administrative courts’ jurisprudence

The right to a fair trial guaranteed by Article 6(1) (inseparably linked to the right to an effective legal remedy under Article 13) of the Convention represents a “part of the common heritage of the contracting states (...) whose aim and purpose is based on the principle of the rule of law”,⁴² making it the most important procedural human right.⁴³ Namely, “it epitomizes almost all the so-called procedural human rights and logically precedes all other material (substantive) human rights, which would not even be possible without an appropriate mechanism for their protection”.⁴⁴ In addition, both rights (to a fair procedure and to an effective legal remedy) protected by the Convention include the affirmative (positive) obligation of the state to take proactive steps to enact effective mechanisms for their realization.⁴⁵

Article 6(1) of the Convention prescribes: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. It is necessary to address the distinction between civil and criminal aspects of the

³⁸ Decision No. U-III-39/1997 CCRC (5 May 1999).

³⁹ The scope of the right to a fair trial (Article 29 of the Constitution) was broadened by Article 10 of the said Amendment to cover all the procedures concerning one’s rights and obligations.

⁴⁰ Šarin (n 37) 735.

⁴¹ Decision No. U-III-6497/2021 CCRC (22 March 2023) para. 4.1.

⁴² Sanja Grbić, ‘Građanska prava i obveze kao autonomni pojmovi prema čl. 6 Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda’ (2012) 28(3–4) *Pravni vjesnik* 121.

⁴³ Alan Uzelac, ‘Pravo na pravično suđenje u građanskim predmetima: nova praksa Europskoga suda za ljudska prava i njen utjecaj na hrvatsko pravo i praksu’ (2010) 60(1) *Zbornik Pravnog fakulteta u Zagrebu* 102.

⁴⁴ Alan Uzelac, ‘Hrvatsko procesno pravo i jamstvo “pravičnog postupka” iz Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda’ (1998) 19(supp) *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 1010.

⁴⁵ Vesna Batistić Kos, *Pozitivne obveze prema Europskoj konvenciji za zaštitu ljudskih prava i temeljnih sloboda* (Narodne novine 2012) 7 and 293–295.

right to a fair trial, according to the text of the Convention and the practice of the ECtHR. The first refers to the protection of procedural rights of the parties in disputes regarding their “civil rights and obligations”, while the latter aims to protect the procedural rights of defendants in criminal proceedings. The textual expression of guarantees contained in the Convention (created in the 1950s) “is not sufficient for monitoring and developing the doctrine of the protection of human rights in modern conditions”.⁴⁶ Instead, undeniable importance is given to their autonomous, evolutionary, and extensive interpretation in the case law of the ECtHR.⁴⁷

Thus, the applicability of the civil limb of Article 6 of the Convention is not determined by the type of procedure⁴⁸ according to the national law of a contracting state.⁴⁹ This is of particular importance in cases where the state appears as a party against an individual (which will be the case in administrative disputes) – “it is not decisive whether the public authority of a certain state acts as a private person or as a sovereign authority. The focus here is entirely on the ‘type of right itself’”.⁵⁰ It is necessary to determine the existence of a dispute concerning a certain right or obligation of a civil nature.⁵¹ However, the assessment of the civil nature of a disputed right or obligation cannot be solely based on its definition in the internal law of the contracting state. It is mandatory to determine its compatibility with the autonomous meaning of the Convention.⁵² Accordingly, the civil character of a right or obligation is not definitively determined *in abstracto*. The ECtHR assesses its nature in each individual case, often extending the scope of the term “civil” to areas that were not so long ago considered part of public law.⁵³ Although it is important that these cases revolve around rights and obligations of private law, the distinction between private and public law has ceased to be decisive as the ECtHR has included more and more cases of a public nature under the scope of application of Article 6(1) of the Convention.⁵⁴

However, this does not mean that the civil aspect of the Convention guarantee of a fair trial has been expanded to include all rights and obligations belonging to the sphere of

⁴⁶ Jasna Omejec, ‘Primjena Konvencije za zaštitu ljudskih prava i temeljnih sloboda u radu domaćih sudova (II. dio)’ (2007) 7(9) *Hrvatska pravna revija* 7.

⁴⁷ Ibid 11; Uzelac, (n 44) 1011; Grbić (n 42) 123–127; Maša Marochini Zrinski, ‘Izazovi u primjeni i tumačenju Konvencije u Republici Hrvatskoj’ (2018) 55(2) *Zbornik radova Pravnog fakulteta u Splitu* 428–429.

⁴⁸ It also applies to administrative procedures, although they belong to the sphere of public law, Lana Ofak, ‘Ograničavanje pravnog položaja stranke u posebnim upravnim postupcima’ (2014) 14(4) *Hrvatska i komparativna javna uprava* 995.

⁴⁹ Uzelac (n 43) 105.

⁵⁰ Sanja Grbić, *Pošteno suđenje u građanskim postupcima u Hrvatskoj u svjetlu članka 6., stavka 1. Europske konvencije o ljudskim pravima* (Pravni fakultet Sveučilišta u Rijeci 2014) 19.

⁵¹ Paul Lemmens, ‘The Right to a Fair Trial and Its Multiple Manifestations: Article 6(1) ECHR’, in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2014) 295.

⁵² Judgment *Ferrazzini v. Italy* (Application no. 44759/98) ECtHR (12 July 2001) (hereafter: *Ferrazzini*), para. 24.

⁵³ Lemmens (n 51) 296; Grbić (n 42) 128.

⁵⁴ Uzelac (n 43) 105.

public law. Mostly political rights are excluded from its scope, as are those that (in accordance with the ruling in the *Ferrazzini* case) belong to the hard core of public-authority prerogatives.⁵⁵ Thus, the ECtHR denied the possibility of applying the civil limb of Article 6(1) of the Convention in tax cases, pointing out that despite the existence of pecuniary effects on the taxpayer, this does not *eo ipso* lead to its automatic application in matters of taxation.⁵⁶ The ECtHR concluded that the evolution in the understating of relations between the state and the individual within democratic societies has not led to a change in the nature of tax disputes compared to the time of the adoption of the Convention. Issues related to taxation continue to “form part of the hard core of public-authority prerogatives” of the member states of the Council of Europe, “with the public nature of the relationship between the taxpayer and the community remaining predominant”. Accordingly, tax procedures, despite the undoubted pecuniary effects on the property of the taxpayer, do not fall under the meaning of civil rights and obligations.⁵⁷

In contrast, the ECtHR’s jurisprudence does not completely exclude the possibility of applying the criminal aspect of the right to a fair trial in tax cases, declaring in the *Jussila* case that although “there is no doubt as to the importance of tax to the effective functioning of the State, the Court is not convinced that removing procedural safeguards in the imposition of punitive penalties in that sphere is necessary to maintain the efficacy of the fiscal system or indeed can be regarded as consonant with the spirit and purpose of the Convention”.⁵⁸ When examining whether the criminal limb of Article 6(1) of the Convention is applicable, the ECtHR starts from the three criteria established in the *Engel* case. It is necessary first to establish whether the incriminated act belongs to the sphere of criminal law in the internal order of the contracting state. It is then important to examine the very nature of the offence and, finally, to consider the gravity of the prescribed sanction.⁵⁹ In the years following the *Engel* decision, the ECtHR “has made it clear that the second and third criteria are alternative and not necessarily cumulative”.⁶⁰

Furthermore, the practice of the ECtHR tends to expand the reach of the criminal aspect of Article 6(1) of the Convention to issues that traditionally did not belong to the sphere of criminal law, such as “penalties imposed by a court with jurisdiction in financial matters” and “even tax penalties can come within the scope of application of Article 6(1), on the basis of the *Engel* criteria, notwithstanding ‘the importance of tax to the effective functioning of the state’”.⁶¹ Thus, in one more recent case, the ECtHR once again

⁵⁵ Lemmens (n 51) 297.

⁵⁶ *Ferrazzini* (n 52) para. 25.

⁵⁷ *Ibid* para. 29.

⁵⁸ Judgment *Jussila v. Finland* (Application no. 73053/01) ECtHR (23 November 2006) (hereafter: *Jussila*) para. 36.

⁵⁹ Judgment *Engel and others v. Netherlands* (Application nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) ECtHR (8 June 1976) para. 82.

⁶⁰ Lemmens (n 51) 299. The ECtHR confirms this *expressis verbis* in the *Jussila* case: “The second and third criteria are alternative and not necessarily cumulative. It is enough that the offence in question is by its nature to be regarded as criminal or that the offence renders the person liable to a penalty which by its nature and degree of severity belongs in the general criminal sphere”, *Jussila* (n 58) para. 31.

⁶¹ Lemmens (n 51) 299–300.

emphasized the inapplicability of the civil aspect of the right to a fair trial in tax matters. At the same time, it concluded that the criminal limb of Article 6(1) of the Convention is applicable in regard to the surcharge for late payment (although according to internal law it belongs to the fiscal and not criminal regime), as it is “not intended as pecuniary compensation for damage but as a punishment to deter reoffending” with a pronounced deterrent and a punitive effect.⁶²

Such reasoning can be criticized both on the theoretical and practical level. Principally, the ECtHR’s stance on the inapplicability of the civil aspect of Article 6(1) of the Convention to tax cases should be abandoned, given that the effects of such reasoning have little impact on preserving the “hard core” of the public-authority prerogatives. Regarding the fiscal authority of the representative bodies, including the adoption of tax legislation and defining the tax system, the observation from the *Ferrazzini* decision is undoubtedly correct. Thus, the CCRC emphasizes budgetary (which necessarily includes taxing) powers as the exclusive prerogative of the bodies of representative democracy (namely the legislator and the executive) and denies citizens (as the personification of the sovereign will) the possibility of deciding issues related to budgetary matters (including issues from the sphere of taxation) via referendum.⁶³

The tax powers of the legislature (as a component of its fiscal sovereignty) derive from its authority to decide on issues of the state budget⁶⁴ and are subject exclusively to restrained control by the CCRC from the aspect of the constitutional (social) principles of taxation,⁶⁵ interpreted in relation to the entirety of the constitutional text.⁶⁶ In this sense, the CCRC rightly concludes that its role “in implementing constitutional judicial supervision of tax regulations is, however, significantly (...) different from the tasks of state and public authorities (including regular courts) (...), and other subjects dealing with taxes, politics of taxation, and the tax system in the Republic of Croatia, whether they create or directly apply positive legal norms governing that area, whether they are the direct addressees of these norms or those who study them in their work or activity”.⁶⁷ A higher degree of tax equity (higher than the constitutional minimum) depends on the will of the legislator. Citizens can indirectly influence the tax system (through the electoral processes) by translating the “public opinion on these issues into votes for or against certain public (and tax) policies”.⁶⁸

This refers to material fairness in taxation, the determination of which is largely left to the will of the legislator and is most closely related to the concept of the “hard core” of the

⁶² Judgment *Melgarejo Martinez de Abellanos v. Spain* (Application no. 11200/19) ECtHR (14 December 2021) paras. 24–25.

⁶³ Decision No. U-VIIR-1159/2015 CCRC (8 April 2015) para. 33.3.

⁶⁴ Article 91(1–2) of the Constitution.

⁶⁵ Article 51 of the Constitution.

⁶⁶ In accordance with the theory of the holistic interpretation of the Constitution accepted in Croatian constitutional jurisprudence, see Ruling No. U-I-3789/2003 and others CCRC (8 December 2010) para. 8.2.

⁶⁷ Decision and Ruling No. U-IP-3820/2009 and others CCRC (17 November 2009) para. 10.

⁶⁸ Kuzelj (n 3) 474.

public-authority prerogatives discussed by the ECtHR in the *Ferrazzini* case. At the same time, it has nothing to do with the requirements stated in Article 6(1) of the Convention. It is necessary to demarcate the discretion of representative bodies (primarily the legislator) in defining fiscal policies and adopting tax legislation from the assessment of the legality and correctness of the tax authorities' decisions determining tax liability. In relation to the protection of taxpayers' rights against the actions of tax authorities in tax proceedings and the administrative courts in disputes regarding the legality of the tax administration's decisions, the ECtHR's conclusion from the *Ferrazzini* dictum represents a short-sighted and limited denouement.

The requirements of procedural fairness in taxation refer to the procedure of the legal and proper administration of tax legislation, as well as the judicial supervision of its implementation, and they in no way encroach on the prerogatives of the legislator in the sphere of tax policy. The guarantee of a fair procedure is aimed precisely at the realization of the procedural aspect of equity in taxation. In this respect, there should be no obstacles in applying the civil aspect of Article 6(1) of the Convention. As Judge Lorenzen points out in his dissenting opinion regarding the decision in the *Ferrazzini* case, there is no "doubt that the obligation to pay taxes directly and substantially affects the pecuniary interests of citizens and that, in a democratic society, taxation (...) is based on the application of legal rules and not on the authorities' discretion". As a result, "Article 6 should apply to such disputes unless there are special circumstances justifying the conclusion that the obligation to pay taxes should not be considered 'civil'" regarding the application of the right to a fair trial as guaranteed by the Convention.⁶⁹

He further concludes that subsuming tax cases under the application of the civil limb of Article 6(1) of the Convention "does not in any way restrict the States' power to place whatever fiscal obligations they wish on individuals and companies. Nor does such a finding restrict the States' freedom to enforce any such laws as they deem necessary in order to secure the payment of taxes (...). Article 6 of the Convention is a procedural guarantee that grants primarily the right of access to a court and the right to have court proceedings determined fairly within a reasonable time".⁷⁰ In this sense, it should be said that the reasoning of the majority of judges in the *Ferrazzini* case does not protect the exclusive sphere of public-authority powers, but threatens to relativize the procedural rights of citizens (taxpayers) and, by preventing the supervisory role of the ECtHR in tax cases, facilitates the possibility of arbitrary decisions by the tax administration. Accordingly, it is "difficult to see why it is still necessary to grant the States a special prerogative under the Convention in this field and thus deny litigants in tax proceedings the elementary procedural guarantees" of a fair trial.⁷¹

⁶⁹ Dissenting Opinion of Judge Lorenzen in *Ferrazzini v. Italy* (Application no. 44759/98) ECtHR (12 July 2001) para. 7.

⁷⁰ Ibid para. 8.

⁷¹ Ibid.

Practical criticism of the mentioned approach stems from the fact that the principled inapplicability of the civil aspect of the Convention guarantee of a fair trial has atrophied in the ECtHR's practice, given that it has admitted cases originating from tax proceedings (such as requests for compensation of damages, the refund of overpaid tax, or requests for annulling tax assessments) under the "umbrella" of civil rights and obligations and has extended the reach of Article 6(1) of the Convention to disputes regarding those issues.⁷² This approach has *de facto* created different areas of application of the right to a fair trial to matters of taxation. The civil aspect of Article 6(1) of the Convention does not apply to "purely" tax cases. However, it is potentially applicable in cases arising from the tax procedure, whereas in relation to fines and penalties for the non-payment or late payment of taxes it is possible to apply the criminal limb of the Convention right to a fair procedure.⁷³ The inappropriateness of the abovementioned distinction in the approach to tax cases is particularly evident regarding the latter possibility. This approach has enabled the emergence of a "bizarre situation that a taxpayer – in circumstances where he knows that the upholding of a tax liability will inevitably lead to an assessment of penalties – may actually request that penalties be assessed early so that an appeal against those penalties can be joined with the appeal against the tax assessment: in those circumstances, Art. 6 will presumably apply to the entire proceedings".⁷⁴

For the reasons stated above, one must agree with Attard's conclusion that the decision in the *Ferrazzini* case perhaps appears to "stand on solid ground but the firm ground on which it is supposed to rest on reminds (...) of a glacier in an age of global warming. The strength of the despised *Ferrazzini* dictum is melting down. The *Ferrazzini* dictum is being eroded".⁷⁵

Finally, it should not be overlooked that the entire system for protecting human rights and fundamental freedoms under the Convention is primarily aimed at the "maintenance of constant pressure on the contracting states to accept, effectively implement and protect European legal standards as the foundations of legal culture, but also to force the contracting states to resolve their disputes in legally prescribed procedures in accordance with established standards".⁷⁶ In this sense, the institutional mechanisms for the protection of Convention rights in the legal systems of contracting states and their

⁷² Philip Baker, 'Should Article 6 ECHR (Civil) Apply to Tax Proceedings?' (2001) 29(6-7) *Intertax* 209.

⁷³ In this regard, the ECtHR notes that, although it has found the Convention right to a fair trial applicable "to tax-surcharge proceedings, that provision does not apply to a dispute over the tax itself (...). It is, however, not uncommon for procedures to combine the varying elements and it may not be possible to separate those parts of the proceedings which determine a 'criminal charge' from those parts which do not. The Court must accordingly consider the proceedings in issue to the extent to which they determined a 'criminal charge' against the applicant, although that consideration will necessarily involve the 'pure' tax assessment to a certain extent", *Jussila* (n 58) para. 45.

⁷⁴ Baker (n 72) 210.

⁷⁵ Robert Attard, 'The Classification of Tax Disputes, Human Rights Implications' in Georg Kofler, Miguel Poiarens Maduro and Pasquale Pistone (eds), *Human Rights and Taxation in Europe and the World* (IBFD 2011) 400.

⁷⁶ Jasna Omejec, 'Primjena Konvencije za zaštitu ljudskih prava i temeljnih sloboda u radu domaćih sudova (prvi dio)' (2007) 7(7-8) *Hrvatska pravna revija* 2.

effective and consistent application should prevent the need to decide on the violation of Convention rights before the ECtHR, leading to “the majority of cases (...) being sanctioned before national courts”.⁷⁷ There is no reason why national legal orders should not protect citizens’ procedural rights in procedures that (*ratione materiae*) do not fall within the scope of application of the Convention. In this view, the HACRC judge Sanja Otočan notes that the restrictive “approach of the ECtHR described above does not mean that the right to a fair trial is not guaranteed in court proceedings in the Republic of Croatia (those that do not fall under the scope of Article 6, paragraph 1 of the Convention)” considering the scope of the constitutional guarantee of the right to a fair trial under Article 29(1) (which includes all procedures where the rights and obligations of the individuals are decided).⁷⁸ That is, in contrast to the civil aspect of Article 6(1) of the Convention, the material field of application of Article 29(1) of the Croatian Constitution is not limited to the procedures related to the rights and obligations of a civil nature. It guarantees everyone the right to an independent and impartial court which will decide upon their rights and obligations fairly and within a reasonable amount of time. Therefore, it is correct that in the Republic of Croatia the standards of a fair trial developed under the Convention should also be applied to the tax procedures and administrative disputes related to taxation, regardless of the (in)ability of the ECtHR to ultimately decide on the violation of the taxpayer’s procedural rights. This conclusion additionally apostrophizes the position granted to the Convention within the Croatian constitutional order. Namely, the CCRC has pointed out that the inconsistency of a legal norm “with the stated provisions of international law represents a violation of the principle of the rule of law from Article 3 of the Constitution, as a fundamental value of the constitutional order of the Republic of Croatia”.⁷⁹ In the other case, it went a step further and expressly confirmed that the reviewed legal provisions were “contrary to the provisions from Article 6, paragraph 1 of the Convention (...) thereby also at the same time [contrary] to the provisions of Articles 3, 5 and 134 of the Constitution of the Republic of Croatia”.⁸⁰

The CCRC attaches *de facto* constitutional significance to the provisions of the Convention. Therefore, the inconsistency of legal provisions with those of the Convention also signifies their unconstitutionality. Former justice and president of the CCRC Jasna Omejec defines this as the quasi-constitutional position of the Convention in the Croatian legal order.⁸¹ The conclusion is that all Convention guarantees are tacitly incorporated into the text of the Constitution and pervade the entire Croatian constitutional order. The tax authorities and administrative courts are obliged to apply them as part of the internal legal order which *de facto* occupies the position of constitutional norms. Thus, in a case regarding

⁷⁷ Sanja Otočan, ‘Zaštita konvencijskih prava u upravnom sporu’ in Jakša Barbić (ed), *Upravno sudovanje u Hrvatskoj* (HAZU 2018) 113.

⁷⁸ Sanja Otočan, ‘Načelo jednakosti oružja u hrvatskom upravnom sporu’ in Ante Galić (ed), *Novosti u upravnom pravu i upravnosudskoj praksi* (Organizator 2018) 39.

⁷⁹ Decision No. U-I-241/1998 CCRC (31 March 1999).

⁸⁰ Decision No. U-I-745/1999 CCRC (8 November 2000) para. 8.

⁸¹ Jasna Omejec, *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava: Strasbourški acquis* (Novi Informator 2013) 64.

taxation, the HACRC concluded that “the court of first instance failed to conduct the evidentiary proceedings in a way that would have enabled a proper and complete determination of the factual situation, which ultimately violated the plaintiff’s right to a fair trial guaranteed by Article 29, paragraph 1 of the Constitution and Article 6, paragraph 1 of the Convention”.⁸²

Therefore, administrative courts, when deciding on issues of tax matters, must be inspired by the practice of the ECtHR regarding the requirements set before public authorities (administrative and judicial) by Article 6(1) of the Convention, and incorporate them into their decisions. Such consistent application of the guarantee of a fair trial is aimed at marginalizing the negative impact of the impossibility of invoking the violation of Article 6(1) of the Convention in tax procedures and administrative disputes regarding taxation, as well as confirming the primacy of the Croatian Constitution as the primary and comprehensive guarantor of human rights and fundamental freedoms in the Republic of Croatia.

2.2. Tax cases and the right to a fair trial guaranteed by Article 47 of the EU Charter

As pointed out by Perrou, it is evident from the jurisprudence of the CJEU “that taxpayers are increasingly relying on the provisions of the Charter, especially on the protection that the fair trial guarantees provide in relation to tax proceedings”.⁸³ The right to a fair trial, inextricably linked to the right to an effective legal remedy, is proclaimed at the EU level by Article 47 of the Charter, which, among other things, guarantees the right of everyone “to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law”.⁸⁴ The aforementioned rights were recognized as pillars of the legal order of the EU even before their official proclamation in the Charter⁸⁵ and are largely complementary to the right to a fair trial under Article 6(1), as well as the right to a legal remedy under Article 13 of the Convention. However, their scope is wider than both mentioned Convention rights.⁸⁶ This explicitly follows from the provisions regarding the scope of rights guaranteed by the Charter, according to which, to the extent that it “contains rights which correspond to rights guaranteed by the Convention (...), the meaning and scope of those rights shall be the same as those laid down by the said

⁸² Judgement No. Usž-1286/22-3 HACRC (12 October 2022) para. 20.

⁸³ K Perrou, ‘The Application of the EU Charter of Fundamental Rights to Tax Procedures: Trends in the Case Law of the Court of Justice’ (2021) 49(10) *Intertax* 853.

⁸⁴ Article 47(2) of the Charter.

⁸⁵ In the *Sabou* case, where the Charter was inapplicable *ratione temporis*, the CJEU confirmed that “the questions referred relating to the obligations of the requesting Member State with regard to the taxpayer concern the implementation of European Union law, and the Court has jurisdiction to examine the application, in this context, of fundamental rights, in particular the right to be heard”, while also reiterating “that the rights of the defence, which include the right to be heard, are among the fundamental rights that form an integral part of the European Union legal order”, Judgment *Jiří Sabou v. Finanční ředitelství pro hlavní město Prahu* (Case C-276/12) CJEU (22 October 2013) ECLI:EU:C:2013:678 (EU) paras. 27–28.

⁸⁶ Tobias Lock and Denis Martin, ‘Article 47 CFR: Right to an Effective Remedy and to a Fair Trial’ in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, (Oxford University Press 2019) 2215.

Convention. This provision shall not prevent Union law providing more extensive protection”.⁸⁷ In relation to Article 6(1) of the Convention, the guarantee of a fair trial from Article 47(2) of the Charter is not limited to disputes about rights or obligations of a “civil” nature or to those connected with a criminal charge.⁸⁸ The right to a fair trial and to an effective legal remedy belongs to “everyone whose rights and freedoms guaranteed by the law of the Union are violated”.⁸⁹ In this context, its field of application is narrower compared to the right to a fair trial from Article 29(1) of the Croatian Constitution, which is aimed at protecting rights guaranteed by both national and EU law.

In accordance with the above, it is correct to claim that the right to a fair trial guaranteed by the Charter should be applied regardless of the type of procedure or the matter to be decided in it. The only condition for its application is that the disputed right or obligation is guaranteed by EU law. This follows from the scope of application of the Charter, which extends to the institutions of the Union and the bodies of its member states, “including administrative and judicial bodies”,⁹⁰ but “only when they are implementing Union law”.⁹¹ Thus, the right to a fair trial guaranteed by the Charter can also be applied to matters related to taxation if they fall within the competences of the EU. This is particularly the case regarding cooperation of the member states’ tax administrations in the exchange of information relevant for the determination of tax liability with the aim of preventing tax evasion. Although the need for such cooperation is evident in the process of increasingly strong European integration “dictated by the goal of achieving a single market and the fundamental freedoms underlying its realization”, it should be borne in mind that “a completely free exchange of data, with the aim of collecting taxes, is not possible; namely, there are significant obstacles to such an exchange – the rights of the taxpayer, for example the right to protection of privacy, or the right to keep a business secret”.⁹²

Thus, in a recent judgment the CJEU confirmed the complementarity of the right to respect for private life,⁹³ and the right to the protection of personal data,⁹⁴ with the right to a fair trial,⁹⁵ considering that the latter is aimed precisely at the protection of substantive rights guaranteed by the EU legal order.⁹⁶ Additionally, the CJEU states that the right to an effective remedy from Article 47 of the Charter can be invoked alone, i.e. it does not need to be specified by the provisions of the secondary EU law or by the legislation of the

⁸⁷ Article 52(3) of the Charter.

⁸⁸ Opinion of AG Wathelet in *Berlioz Investment Fund SA v. Directeur de l’administration des Contributions directes* (Case C-682/15) CJEU (10 January 2017) ECLI:EU:C:2017:2 (EU) paras. 35–37.

⁸⁹ Article 47 of the Charter.

⁹⁰ Lock and Martin (n 86) 2221.

⁹¹ Article 51(1) of the Charter.

⁹² Hrvoje Arbutina, ‘Usklađivanje hrvatskog prava s pravom Europske unije u području razmjene informacija o izravnim porezima i porezima na premije osiguranja između poreznih administracija zemalja članica’ (2013) 4(1) *Godišnjak Akademije pravnih znanosti Hrvatske* 112.

⁹³ Article 7 of the Charter.

⁹⁴ Article 8 of the Charter.

⁹⁵ Article 47 of the Charter.

⁹⁶ Judgment, *État luxembourgeois v B and État luxembourgeois v B, C, D and F.C.* (Joined cases C-245/19 C-246/19) CJEU (6 October 2020) ECLI:EU:C:2020:795 (EU) para. 52.

member states. At the same time, “the recognition of that right, in a given case, presupposes (...) that the person invoking that right is relying on rights or freedoms guaranteed by EU law”.⁹⁷ Such understanding stems from the textual interpretation of the first part of the provision of Article 47(1) of the Charter, according to which the right to judicial protection and an effective legal remedy is enjoyed by everyone “whose rights and freedoms guaranteed by the law of the Union are violated”. Such an interpretation is in part contrary to the opinion of Advocate General Wathelet in the *Berlioz* case, who advocates the automatic application of Article 47 of the Charter, considering that “the systematic identification of a specific right or freedom as a condition of the application of the right to an effective remedy does not follow from that case-law”.⁹⁸

The guarantee of the right to a fair trial is also applied in the case of the transposition of a European directive into national legislation. The CJEU in the *Berlioz* case points out that the fact that an EU directive does not explicitly provide “for penalties to be imposed does not mean that penalties cannot be regarded as involving the implementation of that directive and, consequently, falling within the scope of EU law”.⁹⁹ Namely, “it is irrelevant that the national provision serving as the basis for a penalty such as that imposed on *Berlioz* is included in a law that was not adopted in order to transpose Directive 2011/16, since the application of that national provision is intended to ensure that of the directive”.¹⁰⁰ Therefore, the CJEU concludes that the national legislation “which provides for a penalty for failure to respond to a request from the national tax authority that is intended to enable that authority to comply with the obligations laid down by Directive 2011/16 must, therefore, be regarded as implementing that directive”.¹⁰¹ Additionally, from the decision in the aforementioned case, it follows that the right to a fair trial as a general principle of EU law is applicable in situations where a measure aimed at implementing a directive has a negative impact on an individual, and the existence of such an impact is sufficient even when the provisions of national law (by which the directive is implemented) “do not recognize any subjective right of the taxpayer”.¹⁰²

At the same time, member states are guaranteed national procedural autonomy within the framework of the EU legal order, but it “must therefore not result in the denial of an effective remedy”.¹⁰³ Hence, according to the judicial reasoning in the *Berlioz* case, it follows from the right of everyone to have their case heard by an independent and impartial court that such a court must have full jurisdiction to determine all the relevant

⁹⁷ Ibid paras. 54–55.

⁹⁸ Opinion of AG Wathelet (n 88) para. 53.

⁹⁹ Judgment *Berlioz Investment Fund SA v. Directeur de l'administration des Contributions directes* (Case C-682/15) CJEU (16 May 2017) ECLI:EU:C:2017:373 (EU) (hereafter: *Berlioz*) para. 39.

¹⁰⁰ Ibid para. 40.

¹⁰¹ Ibid para. 41.

¹⁰² Katerina Pantazatou, ‘Luxembourg: Fundamental Rights in the Era of Information Exchange – The *Berlioz* Case (C-682/15)’ in Michael Lang *et al.* (eds), *CJEU – Recent Development in Direct Taxation 2017* (Linde Verlag Ges.m.b.H. 2018) 136.

¹⁰³ Lock and Martin (n 86) 2221.

facts.¹⁰⁴ Regarding this, the CJEU points out “that a decision of an administrative authority that does not itself satisfy the conditions of independence and impartiality must be subject to subsequent control by a judicial body that must, in particular, have jurisdiction to consider all the relevant issues”.¹⁰⁵ In another case, the CJEU states that “for the judicial review guaranteed by that article to be effective, the court reviewing the legality of a decision implementing EU law must be able to verify whether the evidence on which that decision is founded has been obtained and used in breach of the rights guaranteed by EU law and, especially, by the Charter”.¹⁰⁶ It goes even further and, in relation to the possibility of using evidence in tax proceedings that originated from a parallel (incomplete) criminal proceeding, it emphasizes the need to empower the court (hearing the dispute regarding the tax authorities’ decision) to examine whether the evidence “was obtained in that criminal procedure in accordance with the rights guaranteed by EU law or can at least satisfy itself, on the basis of a review already carried out by a criminal court in an *inter partes* procedure, that that evidence was obtained in accordance with EU law”.¹⁰⁷ If there is no possibility of such judicial control, “the right to a judicial remedy is not effective, or if another right guaranteed by EU law is infringed, the evidence obtained in the context of the criminal procedure and used in the administrative tax procedure must be disregarded and the contested decision which is founded on that evidence must be annulled if, as a result, the decision has no basis”.¹⁰⁸

In the context of a request by the tax administration of one member state (the requesting authority) for the delivery of information relevant to taxation, the CJEU points out that the requested authority is not limited to the examination of the procedural regularity of the request, but must be able to determine the foreseeable relevance of the requested data, i.e. “that the information sought is not devoid of any foreseeable relevance having regard to the identity of the taxpayer concerned and that of any third party asked to provide the information, and to the requirements of the tax investigation concerned”.¹⁰⁹ In the context of an action brought by the person who has the requested information, against the penalty imposed on her due to non-compliance with the order of the (requested) tax authority to disclose the data in question, “the national court not only has jurisdiction to vary the penalty imposed but also has jurisdiction to review the legality of that information order”.¹¹⁰ However, regarding the legality of the requested authority’s decision to issue the information order, in relation to its foreseeable relevance, judicial supervision is limited to verifying the obvious absence of such relevance.¹¹¹ Therefore, the reviewing

¹⁰⁴ Pantazatou (n 102) 138.

¹⁰⁵ *Berlioz* (n 99) para. 55.

¹⁰⁶ Judgment *WebMindLicenses Kft. v. Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság* (Case C-419/14) CJEU (17 December 2015) ECLI:EU:C:2015:832 (EU) para. 87.

¹⁰⁷ *Ibid* para. 88.

¹⁰⁸ *Ibid* para. 89.

¹⁰⁹ *Berlioz* (n 99) para. 89.

¹¹⁰ *Ibid*.

¹¹¹ *Ibid*.

court of the requested member state must be given access to the request for providing information issued by the requesting member state.¹¹²

It is clear from the above that a national judge, in cases that fall under the field of application of EU law, must act with increased awareness of the demands placed before him by various legal sources regarding the guarantee of a fair trial in tax matters. Namely, despite the inapplicability of Article 6(1) of the Convention to tax cases, according to Article 52(3) of the Charter, a national judge must interpret the rights contained in the Charter, which correspond to the rights guaranteed by the Convention, in accordance with the meaning and scope given to them by the Convention. This opens the possibility of providing a wider level of protection than that within the Convention framework, since the application of Article 47 of the Charter (contrary to the exclusion of tax matters from the scope of application of Article 6(1) of the Convention) is not limited *ratione materiae* (instead, the application of the Charter depends on the spectrum of legislative competences of the EU). Consequently, national (administrative) courts are obliged to interpret national procedural rules in accordance with the Convention and incorporate the requirements emanating from Article 6(1) into the national standards of a fair trial (even in cases where the practice of the ECtHR excludes the possibility of its application to certain cases, i.e. those concerning taxation). Therefore, the conclusion that “the administrative law of the Republic of Croatia must simultaneously include the law developed by the court in Strasbourg, qualified as Convention law, and the Community law developed by the court in Luxembourg”,¹¹³ is undoubtedly valid.

Regarding such a dual track of fair trial protection, Pistone warns that, until the EU’s potential accession to the Convention, there is a possibility of conflict between the two European systems for the protection of citizens’ procedural rights in a situation where the CJEU takes a position on questions that have not yet been raised or decided in the practice of the ECtHR, and the latter court then decides differently on the same issue.¹¹⁴ It should be noted that Article 29(1) of the Croatian Constitution guarantees the broadest level of protection, and through its consistent implementation, the standards of a fair trial under the Convention and the Charter are also protected. Given that the sphere of application of the constitutional right to a fair trial is not limited *ratione materiae*, as it also includes cases that do not fall under the Convention’s field of application, as well as those that go beyond the sphere of EU legislation, it should be concluded that in case of doubt, a national (administrative) court is obliged to provide a level of protection for parties in an administrative (tax) dispute in accordance with constitutional standards, incorporating and expanding the standards of protection guaranteed by both European documents and developed in the practice of the two European courts. Such behaviour is in accordance with the principle of the rule of law and the right to legal protection, which should be considered “as the legal principles of tax law that establish a global minimum standard

¹¹² Ibid para. 101.

¹¹³ Bosiljka Britvić Vetma, Frane Staničić and Božidar Horvat, ‘Transformacija upravnog sudovanja zbog primjene nadnacionalnog prava’ (2021) 12(1) *Godišnjak Akademije pravnih znanosti Hrvatske* 52.

¹¹⁴ Pasquale Pistone ‘General Report’ in Pasquale Pistone (ed), *Tax Procedures* (IBFD 2020) 19.

for tax procedures”.¹¹⁵ Namely, their (explicit or implicit) existence in national legal orders and international instruments permeates the legal interpretation of national courts, which show an increasing tendency to seek solutions “beyond the positive boundaries of legal principles and compare them with internationally accepted standards and interpretations”.¹¹⁶

It is necessary to point out another important component of the right to a fair procedure in tax matters, which has so far remained unnoticed both in academic literature and in administrative and constitutional court practice. Namely, the right to fair treatment in tax matters is not an end in itself. It is aimed at achieving the principle of (horizontal and vertical) equity in taxation as a requirement that persons of comparable economic strength bear the same tax burden, while persons of unequal economic capabilities should bear a different tax burden. In its practice, the CCRC has summarized the essence of the constitutional principle of equality and equity in taxation by determining that at its centre stands “the requirement for the proportionality of tax burdens in accordance with the economic capabilities of each individual (Article 51, paragraph 1 of the Constitution), as a special expression of the general principle of proportionality (Article 16 of the Constitution)”.¹¹⁷ Therefore, the fair determination of the existence and amount of tax liability is inseparable from the constitutional principle of horizontal and vertical equity in taxation, as two aspects of the tax principles under Article 51 of the Croatian Constitution.

2.3. The Right to a correct and legal assessment of tax liability as a component of the constitutional principle of equity in taxation

The presented constitutional, international, and supranational provisions on the guarantees of a fair trial require that the minimum standards of citizens’ procedural rights be effectively met before administrative bodies and courts. In that sense, the right to a fair trial is a universal principle and serves as a means for the realization of the substantive rights of taxpayers, reflected in the demand for a fair procedure of tax assessment and collection. This apostrophizes the request “that their rights are not sacrificed for the interests of the state treasury and the effective implementation of tax supervision”.¹¹⁸ In this sense, the procedural principles of tax law aim to “prevent arbitrariness and preserve the consistency of the exercise of taxing powers with the requirements of the rule of law”.¹¹⁹ They are necessarily connected to the realization of substantive (material) principles of a certain tax system. Pistone points out that the substantive principles of taxation differ in accordance with the fundamental goals defined by the positive law of an individual state, while procedural principles are almost universal in nature, and the

¹¹⁵ Ibid 14.

¹¹⁶ Ibid.

¹¹⁷ Decision and Ruling No. U-IP-3820/2009 and others, CCRC (17 November 2009) para. 13.5.

¹¹⁸ Ofak (n 7) 153.

¹¹⁹ Pistone (n 114) 12.

tendency towards their uniform interpretation stems from the fact that (at least in the context of the EU) they are regulated on the three legal levels described above: national (the Constitution), international (the Convention), and supranational (EU law).¹²⁰

Such a conclusion is only partially correct considering that, despite the frequent one-sided focus of legal science on the requirements for the material fairness of the tax system contained in the (constitutional) principles of tax law, certain substantive principles of taxation implicitly contain the requirement for a fair (legal and correct) determination of tax liability, and they should also be considered universal principles. Namely, the substantive (material) principles of the tax system, mostly contained in the norms of national constitutions, are indeed primarily addressed to the legislator as the creator of tax policies. Nevertheless, such an understanding is reductionist and leads to the wrong conclusion about the exclusively political character of tax principles. It is incorrect on a substantive level as well, considering the possibility of the restrained control of the constitutionality of tax legislation by constitutional courts. On the other hand, the uncritical translation of such a conclusion to the procedural aspect of the tax principles is entirely missed, considering that their inherent political nature refers only to the process of drafting tax legislation. Discretionary actions during its administration are impermissible. In this sense, it is necessary to apostrophize Beck's warning that "whoever abolishes the border between politics and non-politics undermines their own argument. If everything is political in some way, then also in some way nothing is political anymore".¹²¹

This does not mean that the procedural rights of taxpayers are not subject to limitations and the balancing of different (primarily fiscal) interests. It is generally accepted that fundamental rights are subject to limitations for the purpose of achieving other legitimate goals. The Croatian Constitution allows the legal limitations of human rights in accordance with the principle of proportionality,¹²² while the EU Charter also allows the limitation of rights and freedoms contained therein. However, such limitations must be necessary, provided for by law, proportionate, and must not violate the essence of limited rights and freedoms.¹²³ Therefore, restrictions aimed at increasing the efficiency of tax procedures must not deprive citizens (taxpayers) of the core of their procedural rights. The protection from excessive legal encroachment on the right to a fair procedure from the perspective of the national Constitution should be provided by the CCRC, and the CJEU's case law must offer an answer to the acceptability of restrictions from the perspective of the Charter. On the other hand, the guardian of taxpayers' rights against the overly extensive interpretation of the legal powers of tax authorities and the inappropriateness of their actions in specific cases is necessarily an administrative judge, who through supervision

¹²⁰ Ibid 12–13.

¹²¹ Ulrich Beck, *Pronalaženje političkoga: Prilog teoriji refleksivne modernizacije* (Naklada Jesenski i Turk 2001) 203.

¹²² Article 16 of the Constitution.

¹²³ Article 52(1) of the Charter.

of the respect for taxpayer's procedural rights in tax procedure simultaneously implements the material principles of the tax system.

The role of an administrative judge is even more important considering the nature of the administrative (and tax) procedures in the Republic of Croatia, which hardly meets the legal standards for the protection of the procedural rights of the parties (taxpayers). Namely, on the occasion of the reform of the general administrative procedure, "it was emphasized that a thoroughly reformed two-stage administrative dispute should and can take on the task of ensuring the rights of citizens, while administrative decision-making should be made more efficient and quicker, while abandoning the excessive formalization that makes the administrative procedure similar to a judicial one in which formalization and a detailed legal regulation are necessary. The administration should be relieved of the task of imitating the court through overcomplicated administrative procedures".¹²⁴ In this sense, Britvić Vetma points out that the fulfilment of the Convention requirement for the independence of administrative bodies (that decide on the rights or obligations of a civil nature) is questionable regarding the hierarchical structure of public administration and the binding character of the instructions of higher administrative bodies on lower ones. She concludes that, to ensure full compliance with the standards under Article 6(1) of the Convention, it is necessary to ensure a "subsequent review of the [administrative] decision by the body that complies with these requirements, specifically by a court of full jurisdiction".¹²⁵ Despite the somewhat different legal regulation,¹²⁶ it is difficult to expect a higher level of commitment to the protection of the rights of parties in the tax procedure compared to the general administrative procedure. Some authors point out that tax practitioners "attach almost no meaning to the issue of tax fairness", and "they consider any tax that achieves the desired and predicted economic effect to be fair".¹²⁷ The very requirement of the principle of efficiency in collecting tax revenues and conducting tax supervision "affects the procedural position of the parties, to their detriment".¹²⁸ Such a stance of tax authorities not only negatively affects the rights of taxpayers, but "[in]sufficient expertise, conscientiousness and objectivity of the tax administration as well as its attitude towards taxpayers (arrogance, bullying, intractability, etc.) have an effect on resistance to paying taxes",¹²⁹ which adversely affect the achievement of the tax

¹²⁴ Ivan Koprić, Polonca Kovač and Bosiljka Britvić Vetma, 'Zaštita prava građana u odnosu s javnom upravom: povijesni razvoj, sadašnje stanje i perspektive razvoja u Hrvatskoj i Sloveniji' in Ivan Koprić, Anamarija Musa and Teo Giljević (eds), *Građani, javna uprava i lokalna samouprava: povjerenje, suradnja, potpora* (Institut za javnu upravu 2017) 317.

¹²⁵ Bosiljka Britvić Vetma, 'Europska konvencija za zaštitu ljudskih prava (članak 6) i Zakon o upravnim sporovima iz 2010.' (2012) 49(2) *Zbornik radova Pravnog fakulteta u Splitu* 408.

¹²⁶ The general administrative procedure in the Republic of Croatia is regulated by the General Administrative Procedure Act, while the tax procedure (as a special form of administrative procedure) is regulated by the General Tax Act as *lex specialis*. Nonetheless, the General Administrative Procedure Act (as *lex generalis*) is still the subsidiary legal source applicable to all questions not regulated by the General Tax Act. See note 29 (*supra*).

¹²⁷ Emina Jerković, 'Odnos poreznih obveznika i Porezne uprave kroz primjenu poreznih načela prilikom oporezivanja dohotka' in Danijela Romić, Željka Vajda Halak and Ivan Belaj (eds), *V. međunarodna konferencija Razvoj javne uprave* (Veleučilište Lavoslav Ružička 2015) 178.

¹²⁸ Žunić Kovačević and Bassegli Gozze (n 7) 877.

¹²⁹ Jerković (n 127) 182.

system's fiscal goals. Therefore, the administrative dispute becomes the primary instrument for protecting taxpayers' rights against the actions of tax authorities, but also for building trust in the legal and tax system.

Although in most cases the violation of taxpayers' procedural rights will prove to be a sufficient basis for providing legal protection in an administrative dispute, connecting the procedural guarantees with the substantive (material) principles of taxation would strengthen legal argumentation and contribute to the construction of uniform practice centred on human rights and freedoms as the basis of contemporary liberal democratic orders. Human rights can be artificially divided into groups or generations at the theoretical level only.¹³⁰ In this (strictly theoretical) context, the procedural rights of taxpayers would belong to the theoretical construct of civil rights and freedoms, and the substantive (material) principles of taxation would be placed in the sphere of socioeconomic human rights. Their inseparable connection is highlighted precisely by deriving fair trial requirements from the substantive tax principles, whereby the procedural principles in relation to the material ones stand as a means to an end. As indicated above, it should be emphasized that the material principles of taxation, contained in Article 51 of the Croatian Constitution, implicitly contain the requirement for a fair determination of tax liability at the centre of which stands the principle of proportionality. Again, the constitutional provision stipulates that everyone "shall participate in the defrayment of public expenses, in accordance with their economic capability",¹³¹ which reflects the demand for vertical justice in taxation. Furthermore, the framers of the Constitution determined that the "tax system shall be based upon the principles of equality and equity".¹³² Arbutina points out that the principle of equality should be understood as a requirement for horizontal equity in taxation, according to which people with equal economic opportunities should bear the same tax burden. He interprets vertical and horizontal fairness in taxation as a "constitutional emphasis on the importance of the social dimension of taxation".¹³³ Within this framework, it is necessary to recall the position of the CCRC that "the constitutional nature of social rights (...) refers to two basic requirements of the welfare state: - the state and public authorities are obliged to follow a policy of fair and equal redistribution of national resources in order to equalize extreme inequalities; - the legislative and executive authorities are legally

¹³⁰ See e.g. Valentino Kuzelj and Antonija Petričušić, 'Neprihvatljivost artificijelnog izdvajanja socijalnih jamstava iz općeg koncepta ljudskih prava' (2022) 59(4) *Zbornik radova Pravnog fakulteta u Splitu* 747–769.

¹³¹ Article 51(1) of the Constitution.

¹³² Article 51(2) of the Constitution.

¹³³ Arbutina (n 3) 1287. Therefore, the notions of horizontal and vertical equity in taxation should not be understood as separate principles. They are complementary in the sense that "[h]orizontal equity is just a logical implication of any traditional answer to the question of vertical equity. If tax justice is fully captured by a criterion that directs government to tax each level of income at a certain rate, it simply follows that people with the same pretax incomes should be taxed at the same rate", Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford University Press 2002) 37.

obliged to achieve harmony between the limited resources of the state budget and the social goals set in the Constitution".¹³⁴

Although these principles are primarily aimed at the legislator when adopting tax legislation and defining the tax system, it is difficult to speak of horizontal and vertical equity in taxation if arbitrary actions of the tax administration and violation of taxpayers' rights in the tax procedure cause the wrong determination of tax liability. In this regard, it is worth recalling a decision of the German Federal Constitutional Court regarding taxation, where it "held that the equality principle precluded assessment and collection of the speculation profits' tax from trading in securities, because most taxpayers easily evaded that tax. Thus, the structural deficiency inherent in the execution of the tax law was unfair to honest taxpayers".¹³⁵ As summarized by Ordower, although "the statute imposed a reporting obligation on taxpayers, the Constitutional Court observed that the tax acted as a penalty for honest taxpayers who reported their activities but generally failed to reach taxpayers who did not report voluntarily. In substance but not in form, the statute imposed a greater tax burden on honest taxpayers than it did on dishonest taxpayers, and as such, violated the equality principle".¹³⁶

As confirmed by the German example, the mentioned aspects of tax equity require a proper determination of the tax obligation based on a legally and correctly established factual situation with respect for all procedural rights of the taxpayer. Otherwise, an illegal and/or improper determination of tax liability violates the fundamental principles of the tax system, namely that persons with equal economic strength bear the same tax burden, and persons with greater economic strength a relatively greater tax burden. In this sense, it is undoubtedly necessary to agree with Žunić Kovačević when she points out that "in a state governed by the rule of law (...) the primary place should be given to an ethical principle, so the tax law principle of equality should come before the economic effects of taxes".¹³⁷ This is correct from both the legislator's point of view when translating tax policies into legislation, as well as from the standpoint of the tax authorities, which must not sacrifice the rights of taxpayers for the sake of efficiency in tax collection.

Therefore, the Croatian administrative courts should not limit themselves to the "technical" examination of the legality and regularity of tax procedures, but approach tax cases with an awareness of the goal of those procedures, which is primarily contained in the material (substantive) principles of taxation. In doing so, they should be inspired by the decisions of higher courts, especially by the constitutional jurisprudence and the case law of the two European courts (the ECtHR and CJEU). At the same time, they should not disregard the possibility to challenge the judicial practices of higher courts with their decisions (as well as legislation aimed at limiting taxpayers' rights for the purpose of

¹³⁴ Decision and Ruling No. U-IP-3820/2009 and others CCRC (17 November 2009) para. 13.1.

¹³⁵ Henry Ordower, 'Horizontal and Vertical Equity in Taxation as Constitutional Principles: Germany and the United States Contrasted' (2006) 7(5) *Florida Tax Review* 323.

¹³⁶ Ibid 324–325.

¹³⁷ Žunić Kovačević (n 3) 763.

achieving other legitimate, primarily fiscal, interests) and thereby participate in a permanent judicial dialogue on the meaning of human rights and the taxpayers' position against the state monopoly of fiscal coercion. Challenging the arguments of higher courts should by no means be equated with a challenge to their authority. On the contrary, it should be understood as an incentive to build stronger judicial reasoning, centred on human rights and fundamental freedoms. We should remind ourselves that the courts in their actions embody a dual authority: one emanating from the function they perform in the legal order and the other embodied in the arguments they use in their decisions.¹³⁸ One of the reasons for the institutional crisis and the decline in the authority of the courts can be found precisely in the insufficient quality of legal argumentation, which is necessarily linked with the "production" of bad judicial rulings (not necessarily in terms of the outcome, but in terms of its reasoning and legal foundation).¹³⁹

Therefore, through the innovative reading of human rights and the meaningful understanding of their protective social role, administrative courts must overcome the institutional argument of authority they possess by their very position in the legal order and acquire the authority of legal argument, thereby partially separating the force of their reasoning from coercion which is inevitably associated with the concept of judging. With this said, one should only partially agree with Harašić, who points out that "by this second aspect of authority we actually mean referring to the decisions of other courts, since that other court is the authority".¹⁴⁰ Such a point is correct, but insufficient for understanding the authority of legal argumentation, given that (in the absence of the doctrine of precedent in the continental-European legal circle) the adoption of a decision contrary to the practice of the courts of higher instances (including the Strasbourg and Luxembourg courts) can initiate a dialogue on the very nature and the content of a specific human right and thus contribute to the continuous development in understanding the role human rights play in the liberal democratic order.

It is in this sense that we need to understand the statement "that quality, if we apply it to the judiciary, can only be measured as a 'process' that concerns the preparation of judicial decisions: a high-quality judiciary should be able to produce 'processes' that are themselves of high-quality".¹⁴¹ At the same time, such a process should by no means be equated (exclusively) with the technical requirements of conducting actions in the administrative dispute and the almost mechanical equipping of the verdict with the prescribed elements. On the contrary, such a process of permanent refinement of the quality of administrative judgments should be understood as the exercise of the administrative courts' powers in accordance with the goal set by the framers of the Constitution through the material (substantive) principles of taxation. This view is in accordance with tendencies in the development of judicial supervision over the actions of

¹³⁸ Žaklina Harašić, 'Autoritet i sud' (2015) 52(2) *Zbornik radova Pravnog fakulteta u Splitu* 409.

¹³⁹ Ibid 412.

¹⁴⁰ Ibid 409.

¹⁴¹ Bosiljka Britvić Vetma, 'Kvaliteta odluka upravnih sudova' (2014) 51(2) *Zbornik radova Pravnog fakulteta u Splitu* 395.

administrative bodies, and “since the initial idea and aspiration for the effective judicial control of the legality of administrative acts, in modern times there is more and more talk about the human right to administrative adjudication, and thus, in the context of taxation, on human rights in the field of taxation”.¹⁴²

3. CONCLUSION

The framers of the Croatian Constitution did not place unreserved trust in the legality and correctness of the actions of the public (tax) administration and the acts it passes. Therefore, Article 19(2) of the Croatian Constitution guarantees judicial review of such acts. The effective implementation of this guarantee is inextricably linked with the right to a fair trial, which is regulated by the highest national (Article 29 of the Constitution), international (Article 6 of the Convention) and supranational (Article 47 of the Charter) standards. These considerations provide the basis for several conclusions which follow from the research objectives set in the introduction.

Firstly, the guarantee of a fair trial under Article 29(1) of the Constitution provides the broadest level of protection considering that, unlike Article 6(1) of the Convention, it is not limited *ratione materiae* and is, unlike Article 47 of the Charter, applicable regardless of whether domestic courts apply EU law or exclusively national regulations. Therefore, it is justified to claim that the constitutional right to a fair trial represents a basic procedural right of taxpayers and is a prerequisite for the implementation of substantive principles of taxation in tax proceedings and administrative disputes. It incorporates the requirements of a fair trial from Article 6(1) of the Convention and Article 47 of the Charter. Therefore, administrative courts should interpret it with regard to the standards developed in the practice of the ECtHR and the CJEU – in accordance with the jurisprudence of the CCRC.

Secondly, the observations made are not only theoretical in nature (which is especially evident in tax cases), and the guarantee of a fair trial requires the active engagement of administrative courts in protecting the subjective right of the taxpayer to the legal and correct determination of tax liability. This duty is further accentuated by the requirements arising from the material (substantive) principles of taxation. Namely, the procedural rights of the taxpayers serve here as a means for realizing the principles of vertical and horizontal equity in taxation contained in Article 51 of the Constitution. The Croatian administrative courts should strengthen their own argumentation through the connection of procedural and substantive guarantees and strive to build consistent and extensive jurisprudence regarding the protection of taxpayers' rights.

Finally, through the complementary application of the standards set in the Convention and the Charter, as well as through the operationalization of the constitutional guarantee of a fair trial in administrative tax disputes, Croatian administrative courts should

¹⁴² Žunić Kovačević (n 7) 284.

continuously contribute to the construction of an integral concept of equity in taxation. In this way, they would accept an active role in the democratic order and set limits to the actions of public authorities in matters of taxation (which are still inextricably linked to the coercive nature of state authority).

By focusing on the protection of the subjective rights of taxpayers, administrative courts also protect objective legality, strengthen trust in the tax system and the entire legal order, and focus on human rights and freedoms as the *raison d'être* of a modern liberal and democratic constitutional state.

ULOGA UPRAVNOG SUDOVANJA U OSTVARENJU USTAVNOG NAČELA POREZNE PRAVEDNOSTI – HRVATSKA PERSPEKTIVA

Pravo na pravični postupak u Republici Hrvatskoj zajamčeno je normama ustavnog, međunarodnog i nadnacionalnog ranga. Pritom jamstvo pravičnog postupka iz ustavnog članka 29. pruža najširu razinu zaštite, s obzirom na to da ne poznaje ograničenja ratione materiae poput onih iz članka 6. stavka 1. Europske Konvencije te se, za razliku od članka 47. Povelje Europske unije o temeljnim pravima, jednako primjenjuje na postupke u kojima dolazi do primjene europskog prava, kao i u onima u kojima domaća tijela primjenjuju isključivo nacionalne propise. Njegovom ujednačenom i ekstenzivnom primjenom u poreznim predmetima hrvatski upravni sudovi trebaju istovremeno obuhvatiti i standarde pravičnog postupka razvijene u praksi Europskog suda za ljudska prava te praksi Suda Europske unije – vodeći se ustavnosudskom jurisprudencijom. Stoga bi, kroz povezivanje zahtjeva za materijalnom pravednošću u oporezivanju iz ustavnog članka 51. s procesnim pravima stranaka, trebali osnažiti vlastitu argumentaciju i stremiti sveobuhvatnoj zaštiti prava poreznih obveznika te kontinuirano pridonositi izgradnji integralnog koncepta porezne pravednosti.

Ključne riječi: pravo na pravični postupak, porezna pravednost, načela oporezivanja, upravni spor, Republika Hrvatska

Valentino Kuzelj, univ. mag. iur., Specijalna bolnica za medicinsku rehabilitaciju Krapinske Toplice, Gajeva 2, 49217 Krapinske Toplice, Hrvatska.