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The Role of Tax Administration Lawyers in Criminal Trials

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Criminal trials for tax evasion and VAT frauds

Criminal trials for tax evasion clearly differ from standard trials. The Public prosecutor is not free to prosecute unless the ministry of Finance takes legal action. The complaint lodged by the ministry of Finances is filtered by the Commission on Fiscal Offences (*Commission des infractions fiscales* CIF), which decides which cases require criminal prosecution. Only a minority of the tax evasion cases handled by the tax administration are prosecuted. Indeed, according to the DGFIP (*Direction générale des finances publiques*) activities report for 2011, of the 51,441 spot checks, "15,402 external tax verifications (*contrôles fiscaux externes* or CFE) in response to blatant lapses exceeding any mere error or omission and involving significant sums led to a legal response". Of these 15,402 dossiers, "1,046 complaints for tax evasion were submitted to the Commission on Fiscal Offences and 966 complaints were lodged following acceptation by the CIF".

When the CIF gives its consent, the judicial institution then takes over and the tax administration acts as civil party. It then takes counsel from a lawyer from one of the two Paris law firms that have been defending it since the mid 1950s. Tax administration lawyers therefore begin to work upstream of the construction of the file that will be used to write up their conclusions and construct their pleas. In this sense, the tax administration is not viewed as an ordinary client, but rather as a "partner". The chain of events, administrative at first and subsequently judicial, starting with a tax inspection and ending in a criminal trial for tax evasion, follows a specific path and deviates on this point from standard procedures. However, and herein resides the full ambiguity of the criminal trial for tax evasion, the administration attempts to give the impression that its special status has no influence on the decision handed down by the court. If the tax administration is an ordinary civil party, how is it that it practically never loses a trial? How does the administration handle its special status as a "victim/partner"? What is the real role of its lawyers in criminal trials for tax evasion?

To answer these questions, we will attempt to show that the peculiar nature of the criminal treatment of tax evasion cases automatically places the fiscal administration in an ambiguous situation that forces lawyers to play the role of guarantors of respect for the law and for criminal court procedures.

This issue of *Penal Issues* is extracted from a research in progress, in preparation for a doctoral thesis. The conclusions discussed here were drawn from the observation of 22 *correctionnel* court[1] hearings for tax evasion and for defrauding the VAT. Our observations were conducted in February and March 2012 in courts located for the most part in the Île-de-France region. Twenty were done in Paris, Versailles, Bobigny, Meaux, Créteil, Évry, Nanterre and Cergy-Pontoise, one in Le Mans and one in Caen.

The observations were supported by semi-directive interviews with tax administration lawyers, designated as AV1, AV2, AV3 and AV4 to protect their identity.

The specificity of tax cases

Well circumscribed dossiers

The lawyers we interviewed felt they had very little latitude, and viewed the dossiers as "well circumscribed" (AV2 and AV4). Information on the tax inspection process and on the taxpayer is contained in three all-important documents: the complaint, the complementary information sheet and the opinion of the Commission on Fiscal Offences. The tax administration lawyer receives a turnkey dossier, and his role is above all to draw up a summary. He may however introduce a personal vision of the case by demonstrating the defendant's intention to defraud or bad faith, in support of the material facts as recapitulated. This limited leeway produces very homogeneous legal briefs, along three lines:

- The material facts, including the tax evasion or fraud process and the amounts of the duties evaded.

[1] The *tribunal correctionnel* is a mid-level court where *délits* are tried.

- The intentional element, based on a demonstration of the defendant's bad faith and responsibility.
- The demand for a guilty verdict as well as for joint liability when a firm is involved.

What is at stake in the plea is not the provision of material evidence, which is always considered as already constituted. In the 22 hearings and 37 cases we observed the court only questioned the material evidence twice, and that was owing to the absence of the documents on which the complaint was allegedly based. Not only do the presiding judges seem to fully trust the work and conclusions of the tax administration, but moreover, the facts are very rarely denied by the defendant, whose line of defence is usually constructed around a denial of intentionality and/or of responsibility. It is then up to the defendant or his legal representative to convince the court that when the offence was committed he was ignorant of his fiscal obligations or did not personally fill in the documents.

The only leeway for both the defence and the civil party resides in legal problems and the discussion of the defendant's intentions. Demonstration of intentionality is often based on a description of fraudulent tactics precluding the possibility that the defendant's behaviour resulted from a mere mistake. Indeed, the tax administration makes a distinction between errors committed in good faith and frauds, the latter necessarily implying the intention to defraud. These two demonstrations are both essential and extremely complex. There can be no criminal conviction unless the offender committed the fraud intentionally; the administration's lawyer must therefore interpret the taxpayer's behaviour in such a way as to prove his fraudulent intention by noting every apparent sign pointing to it. Such was the case of a tax administration lawyer during a hearing for the offence of deliberate organisation of insolvency at the Paris Court of appeal. He began his plea with an explanation of the complexity of the case he was pleading on behalf of the tax administration. According to him, "*it is very complicated to prove that insolvency has positively been organised*", insomuch as "*the constitution of the offence is delicate, since the taxpayer is bankrupt most of the time*". Insolvency is recurrent in taxpayers tried for tax evasion; the lawyer's job then is to show that this situation is not the outcome of poor management of income and capital or of a precarious financial situation, but rather a means of getting around paying taxes. In his plea, the tax administration lawyer explained that "*in order to prove that insolvency is deliberate one must prove that the insolvency does not really exist, and that the taxpayer does still have some income*". He went on to show that the defendant, a nutritionist in his fifties, still had some patients and therefore continued to receive fees. Next the tax administration lawyer attempted to "*show that fraudulent tactics were used*" and tried to demonstrate that given his style of living, the very fact that he had no property was definitely a deliberate choice. "*The defendant is presently non-seizable with respect to his property, since he has none. There is nothing in his accounts, since he makes sure they are always in the red, day after day, through transfers. He seems to be making sure no seizure can be made, whereas he does have money since he withdraws something like 5,000€ a month and spends a great deal*". To ground the intention to fraud in facts, he ended his plea by showing that the offense had been going on for quite a while, indicating that this is no mistake, but truly a fraud: "*This is a very unusual case, these tactics have been going on for over 12 years. ... This is therefore definitely a case of tax evasion*".

In the course of our observations, we often had the feeling that the cases brought up by the tax administration were "won in advance", as if the very status of the civil party induced the obligation for the court to trust it. Tax administration lawyers only tacitly corroborated this feeling. According to one of those interviewed (AV1), judges never question the assertions of the tax administration because the dossiers are extremely solid in the cases it chooses to prosecute. In his opinion the administration wishes to avoid any jurisprudence that might not follow its own line and would thus lead courts, and consequently society as a whole to be increasingly loath to heavily sanction a number of deviant conducts.

> "*Maybe the administration will tend not to want to take some risks in certain cases. So the cases are filtered ... Naturally, the administration does not want to see precedents set up that might turn out to be unfavourable to it, in fact*".

The cases handled in *correctionnel* hearings have been filtered by the CIF, which chooses those cases that meet the criteria required for a criminal hearing. Our observations along with our discussions with tax administration lawyers pointed to three criteria:

- The amount of taxes evaded, with a minimum of around 100,000€.
- Administrative or criminal recidivism.
- Obvious physical evidence.

In addition to these requirements, there is a recent Court of Auditors' (*Cour des Comptes*) injunction aimed at the tax administration demanding that, in a denunciatory perspective, it diversify its criminal fiscal dossiers, as a result of which complaints for more complex offenses have been lodged. This injunction modifies the role of lawyers, now obliged to give more explanations when detailing the defrauding process.

Flawless discourse and behaviour

The specific status of the tax administration leads lawyers to base their behaviour and discourse primarily on their own image of their client, which they seek to convey, but also on the specificity of the object: taxes. Tax administration lawyers feel they are invested with a special mission: they must be "*guarantors* [of their client's] *credibility*", "*guarantors, before the court, of* [the client's] *efficiency and respect for the rules*" (AV2). They therefore must act measuredly so as to both represent the official character of the administration and also show that in spite of its special status it is on equal footing with the other parties. This twofold intention leads lawyers to a sort of ambivalence, obliging them to "*not overdo it*", and at the same time to anticipate and ward off any possible criticism of the tax administration. Lawyers are therefore obliged to demonstrate the humility and "*credibility*" (AV1) of the administration, by making sure there never seems to be any collusion between the court and the tax administration. "*Our language is elevated*", says one woman lawyer (AV3), and the content moderate. The determination to remain solemn and humble is not due solely to the specific status of the administration, but also to the specificity of tax affairs, which are a far cry from "*traditional*" criminal cases. Tax evasion is perceived either as a less serious offence or as on a very different register from offences involving a direct victim on whom suffering may have been inflicted. This peculiar aspect of fiscal cases brought to criminal court leads lawyers to subdue their discourse and behaviour at hearings, thus excluding to "*wax lyrical*" (AV2) in their pleas. "*You have to stick to the facts, and avoid any pathos*", says one administration lawyer, without "*being vicious*" (AV3), says another, and consider the context of tax evasion. Here, according to these lawyers, is where the human factor retains its place in criminal trials for tax evasion: that factor is the defendant, who may have committed the offense because of some suffering that led him not to respect his fiscal obligations, or may suffer during the hearing, leading the lawyer to measure his statements.

Lawyers agree on the need to demonstrate the tax administration's human side and discernment, to "*show it in its best light*" (AV4), and this also serves as justification of their role, often severely criticized by their colleagues. Defence lawyers have been quoted as being extremely harsh with their opponents, the tax administration lawyers. Remarks range from the impression that "*the administration never loses*" to more personal attacks: "*the devil's advocate*", or refusals to call a tax administration lawyer "*colleague*" (AV4). Under such more or less hostile criticism, lawyers attempt to show the human side of the administration, to prove that it is neither shameful nor amoral to defend it. Consequently, they make it a point of honour to act most respectfully toward the rights of the defendant, "*to play it fair*" (AV1) and to stay in their place and not encroach on the public prosecutor's territory. Tax administration lawyers are respectful of the limits imposed on them by their role in the criminal trial.

The role of the tax administration lawyer in criminal trials

Relations with the public prosecutor

Respecting the rules governing criminal trials apparently mostly means respecting the roles of the various protagonists, each of whom is allotted a specific type of discourse. We have observed the importance of the rule of "stay in your place", especially in understanding the relations entertained by tax administration lawyers with Public prosecutors and Deputy prosecutors. This relationship is based on a division of labour corresponding to two different goals. The lawyers' role is to show evidence of the offence and how it is constituted, whereas the Public prosecutor must attempt to prove that the defendant's behaviour is prejudicial to society at large. One tax administration lawyer (AV2) defines the Prosecutor's role as follows:

"*I think the Public prosecutor's role – because that's a role we, as the administration* [lawyer]*, can't have – is to give a reminder of what taxes are for. To me that is essential ... And to remind us why we pay taxes. What their utility is ... I think they have a truly educational role too, there*".

Whereas in appearance each actor has a relatively well-defined role, the reality is somewhat different. Most of the time the Prosecutor simply repeats what the tax administration lawyer has stated in his conclusions or in his plea. One prosecutor actually formulated that difficulty at a hearing of the Paris district court:

"*It's difficult to speak after the administration* [lawyer] *when you agree with his conclusions*".

While one rarely hears the Public prosecutor express that feeling at a hearing, it is equally rare to hear tax administration lawyers regret that their role is limited by that of the Public prosecutor. The division of roles between the Public prosecutor and themselves seems to be quite well integrated and respected. However, lawyers seek approval by the Prosecutor, "*who must go along with the administration* [lawyer] *in the suit*" (AV1), through "*an awareness raising process*", conducted either by the lawyers themselves or by the chief tax inspectors in charge of monitoring court cases and of communication between the tax administration and the courts.

"*Theoretically, the chief inspector has to make an appointment with the Public prosecutor and explain the case to him if there are any problems or if complementary investigations are needed. And in relations with the Prosecutor in charge of criminal fiscal affairs, there really is a need to sensitize that person, to establish a trustful relationship with the Public prosecutor*" (AV1).

What that sensitization means above all is that a trustful relationship must be established, but it also entails making sure the Prosecutor's submissions are acceptable to the tax administration. So internal revenue lawyers and chief tax inspectors then attempt to impose their own conception of fair submissions, and to convince him, then, of the seriousness of the criminal offences and the prejudice they cause, not only to fair trade, but to society at large. Tax administration lawyers develop expectations in terms of how severe the Prosecutor's submissions should be. If the latter demands an insufficiently harsh sentence they feel they have not been understood. We have occasionally heard lawyers express their discontent about the Prosecutor's demands when they judged them "*not harsh enough*". This was true, for instance, at one hearing at the Meaux district court. A manager of a company was being judged for non-payment of the VAT, reducing the VAT and inaccurate entries in daybook and accounting documents. The eluded taxes amounted to 106,000€ and the tax administration had clearly demonstrated the existence of fraudulent manipulations. The investigation conducted by the tax administration had in fact demonstrated that the sub-contractors were fictitious companies. For these offences, in which the defendant's guilt seemed indubitable, the Public prosecutor requested a guilty sentence and a 5,000€ fine. After the hearing, the tax administration lawyer (AV1) and the chief tax inspector discussed these submissions, which they thought unsatisfactory, above all because they were not deterrent for the defendant, who would be tempted to continue his shams, and also because they were a bad example in terms of case law, thus playing into the hands of the defendants and of tax dodgers. The lawyers we interviewed felt that good Prosecutor's submissions are those that are "*adjusted to the individual*", both to his past history and his situation at the time of the hearing. When the Prosecutor is not repressive enough the tax administration lawyers and inspectors occasionally take the liberty to ask him to make more severe submissions:

Tax administration lawyer (AV2):
"*There are even some Public prosecutors who demand a suspended sentence to a 2,000€ fine, so at that point maybe you have to make them realize that there's nothing terribly repressive about that. ... When that happens two or three times, maybe the inspector should make an appointment with the Prosecutor, in some cases maybe even, if it's really necessary, with the Prosecutor's immediate superior. So there really is a need to sensitize them too, to the fact that enforcement of tax law is part of the enforcement of criminal law*".

The tax administration seeks to gain the Public prosecutor's support for its suit through its chief inspectors and lawyers. As a rule, tax administration lawyers and Public prosecutors agree on the most appropriate punishment for the defendant's acts. Apparent non-support of the suit does not reside so much in the Public prosecutor's lack of sensitivity to the seriousness of the offence and the need to punish tax evasion, but rather in insufficient understanding of tax dossiers. The tax administration is aware of the importance of educating Public prosecutors so that they support its cause. It has produced an educational booklet aimed at public prosecutors and describing the tax evasion and VAT fraud processes, intended at guiding their decisions. If the administration and its lawyers are so intent on gaining the Public prosecutor's support, it is mostly because they are aware of the importance of the Prosecutor or Deputy prosecutor's submissions in the court's ultimate decision.

Convincing the court

The goal of the tax administration lawyers' work, including both their written conclusions and their pleas, is to convince the court of the reality of the intentional element. To do so, lawyers do not stop at the demonstration of intentionality that appears in a document of the dossier, they go out looking for other elements proving that the offence of tax evasion is established. The idea, as one lawyer told us, is to look for intentionality behind what is said in the dossier:

"*After all, our job is to try to go beyond what's already written in the dossier. ... It's precisely not to go in and plead what's already written in the dossier, and was then repeated by the presiding judge, it's to get out, somewhat, of all those papers that are already in the dossier, and that everyone has seen*".

What the tax administration lawyers do then is they show how the defendant's personality reveals his intentionality and responsibility. But while their role is to prove that intention to defraud to the court, they are also occasionally obliged to convince it that the tax administration's complaint is justified.

"*There are judges who are stepping out of their remit and they believe that the judge's role is to defend citizens against the administration, against the state, and so they actually think they are in their role when they defend businesspeople and freedom of enterprise, and they believe that what was done is not necessarily misdemeanour, so there is a need, basically, to establish the criminal character of the case*" (AV1).

Reluctance to handle tax cases during *correctionnel* court hearings may also stem from lack of interest in this highly complex subject. This was true for one presiding judge, who relegated the tax case to the end of the hearing, "*so people won't have to wait too long*":

"*We'll put the tax case last. So we won't make people wait too long, because tax cases are a bit…* (she hesitates as to what word to use) *arduous*".

The hesitation on the choice of words shows her lack of interest for tax cases, which she confirmed at the end of the hearing, telling the tax administration lawyer:

"*You pleaded well, Maître, but still, this leaves me stone cold*".

Tax cases brought to criminal court require rather considerable knowledge of the

subject in order to perceive the defrauding process. As tax administration lawyers repeatedly point out, the presiding judge is not the tax judge. His job is not to establish the amount of the taxes eluded or the basis on which the tax should be calculated, but to give a decision on the existence or absence of a fraud and of the fraudulent intention. The reluctance of some presiding judges to take interest in tax cases obliges lawyers to make greater efforts to convince them that the administration's complaint is justified. This is generally true in non-specialized courts, where the lawyers' role tends to be educational, giving them the impression of being more "*useful*". Furthermore, the need to convince a court that shows little interest in tax cases argues against any particular suspicion of collusion between judges and the tax administration, and it is most important to avoid any such suspicion, so as to make the guilty sentence more solid.

> "*As long as we are treated like any other party, I feel that makes for a healthier debate. It's more complicated, that's true, and it's less comfortable, but at least the decision can't be attacked. It seems fairer, at any rate, since the judge has all the elements needed to make a decision*".

According to these lawyers, judges are increasingly less apt to trust the tax administration blindly, in recent years. Although they are unable to link this change to any one occurrence or moment, lawyers who have been defending the tax administration for over ten years (as was the case of AV1 and AV2) were witness to this. In recent years, in fact, they claim that some presiding judges do not hesitate to ask the administration to provide proof of its claims, thus making it clear that its special status is increasingly questioned. Documents proving the tax sham are demanded at every hearing, and presiding judges are critical when they are lacking. This was true in one Paris hearing where the complaint was based on forged invoices which were not included in the dossier:

> **Presiding judge**: "*The invoices involved are not here. Where is the proof of payments, then? All the same, the invoices, which are essential elements in the case, are not present*".

The Public prosecutor looks at the presiding judge, he seems bothered.

> **Public prosecutor**: "*It's really unfortunate that there are no invoices, because we don't even know the amounts charged*".
>
> (…)
>
> **Presiding judge**: "*This is not the first time that happens*".

The absence of probative documents, of the opinion of the Commission on Fiscal Offenses or of the summons is not unusual, and this carelessness seems to be due to the administration's quasi-certainty of winning criminal trials, according to its lawyers. Whereas the courts are increasingly less inclined to trust the tax administration, it is nonetheless clear that the latter wins the vast majority of its cases. Observing that it can easily obtain the judges' trust, it makes less of an effort to furnish a complete, effectively probative dossier, even though it attempts to file suit only in clear-cut cases that run no risk of producing adverse precedents. The ambivalence of the tax administration is at work on several levels, then, showing the difficulty it experiences in escaping its own self-image and effectively respecting the rules of the judicial process.

Conclusion

The role of tax administration lawyers is not confined to merely presenting a summary of the elements contained in tax evasion cases. Their understanding and experience of criminal law are of great importance for the tax administration, which would be at considerable loss to defend itself. While they sometimes have the impression that they hardly effect the judges' decisions, our observations have shown that they are the cornerstone of criminal trials for tax evasion, inasmuch as they are the intermediaries between the tax administration and the court. They guarantee that the rules of criminal law are respected, and are therefore instrumental in quieting suspicions of collusion between judges and the administration, and constructing an image of the latter as not only solemn and official but human and understanding as well. They are the representatives of an administration whose goal is ambivalent from the outset, since it combines the need to punish frauds with the building of a trustful relationship with taxpayers. The lawyers' role is rooted in this twofold aim, and obliges them to seek a balance between a cold statement of the facts and consideration of the defendant's humanity. By pointing up this ambivalence in their pleas, they bridge the gap between the fiscal and criminal aspects, thus demonstrating the validity of the criminal treatment of tax evasion.

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