Constitutional judgment 3-4-1-15-07

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-15-07
Date of judgment	8 October 2007
Composition of court	Märt Rask and members Hannes Kiris, Indrek Koolmeister, Julia Laffranque and Priit Pikamäe.
Court Case	Petition of the Tallinn Administrative Court of 1 June 2007 to review the constitutionality of § 9 of the Liquid Fuel Stocks Act in the wording in force until 30 November 2006 (incl.).
Contested judgment	Judgment of the Tallinn Administrative Court of 1 June 2007 in administrative matter no 3-07-209.
Hearing	Written proceeding
DECISION	To satisfy the petition of the Tallinn Administrative Court and to declare § 9 and § 8(2) off the Liquid Fuel Stocks Act insofar as these do not guarantee a sufficiently effective stockpiling fee payment procedure, unconstitutional and invalid.

FACTS AND COURSE OF PROCEEDING

1. AS Letofin is a wholesaler operating in the liquid fuel market, who has paid stockpiling fee to AS Vedelkütusevaru Agentuur [Estonian Liquid Fuel Stocks Agency Ltd.] (hereinafter the “agency”) pursuant to the Liquid Fuel Stocks Act (hereinafter the “LFSA”) on the liquid fuel imported to Estonia.

2. In its letter of 27 November 2006 the agency submitted a request to the complainant for payment of additional stockpiling fee. Invoices were issued to the complainant together with the letter. On 15 December 2007 the complainant paid the required amount of the additional stockpiling fee.

3. AS Letofin filed an action with the administrative court applying for the establishment of the existence a public law relationship and for the recovery from the agency of the amount transferred in public law relationship without a legal basis. The complainant argued that § 9 of the LFSA did not guarantee the protection of the complainant's fundamental rights and freedoms, that the procedural rules were insufficient and the regulation established in the provision was therefore in conflict with §§ 13 and 14 of the Constitution.

4. By its judgment of 1 June 2007 no 3-07-209 the Tallinn Administrative Court satisfied the action of AS Letofin. The court did not apply § 9 of the Liquid Fuel Stocks Act in the wording in force until 30 November 2006 (incl.), and declared it unconstitutional.

The administrative court delivered the judgment to the Supreme Court on 6 June 2007, thus initiating the constitutional review proceeding.

JUSTIFICATIONS OF THE COURT AND THE PARTICIPANTS IN THE PROCEEDING

5. The Tallinn Administrative Court held in its judgment that the liquid fuel stockpiling fee is a public law (state) monetary payment, the administration and collection of which should be subject to administrative procedure. The court is of the opinion that it proceeds from Council Directive 68/414/EEC (hereinafter "directive 68/414"), which served as the basis for drafting the Liquid Fuel Stocks Act, as well as from the Liquid Fuel Stocks Act itself, that the obligation to hold stocks is a public law function, the main purpose of which is to guarantee national security, that is primarily the full and normal functioning of the state machinery in a crisis. The stockpiling fee collected from the importers of fuel to cover the administration costs of fuel stocks constitutes a state tax or fee for the purposes of § 113 of the Constitution, and is protected by the referred provision. In exchange for the payment of stockpiling fee no clear counter-performance is received. The obligation to store, manage and administer stocks, i.e. to perform the functions of public authority, has in entirety been transferred to the agency who is presently performing these functions. There is a public law relationship between the agency and the complainant: there is no contractual relationship between the parties and they have no right to agree on essentials; pursuant to the wording of the LFSA in force since 1 December 2006 the failure to pay stockpiling fee may be sanctioned by a fine under misdemeanour procedure; the parties have a relationship of subordination; to guarantee payment the respondent has at his disposal a public law remedy – recourse to the Ministry of Economic Affairs and Communications (hereinafter the "MEAC") to have the importer deleted from register; the respondent has the right to request a security in order to secure payment of stockpiling fee; the respondent is entitled to receive information from the MEAC. The situation where a person is required to pay a state fee without a procedure which would guarantee the person's fundamental rights, i.e. without applying the inquisitorial principle or the right to be heard, the outcome of procedure is not formalised in the form of a reasoned administrative act, is in conflict with the Constitution. The gap resulting from insufficient regulation of § 9 of the Liquid Fuel Stocks Act, the actual result of which is the collection of stockpiling fees by a civil court proceeding, is ineffective, excessively expensive and causes inconvenience for the participants in the proceeding. The insufficiently regulated administrative procedure under § 9 of the Liquid Fuel Stocks Act violates the complainant's right to legal clarity (§ 13(2) of the Constitution), the right to procedure and organisation, and the right to good administration (§ 14 of the Constitution), and thus disproportionately infringes upon the complainant's proprietary rights (§ 32 of the Constitution).

6. AS Letofin still argues that § 9 of the LFSA in the wording in force until 30 November 2006 (incl.) is in conflict with §§ 13, 14 and 32 of the Constitution. The stockpiling fee has the essential characteristics of a special tax; this is a financial obligation established by law, collected for the performance of public law functions, and there is no reciprocity for the payer. This constitutes a public law obligation for the purposes of § 113 of the Constitution, and therefore the law should provide for a clear procedure for the declaration, determination and collection of stockpiling fee. Neither the regulation of § 9 of the LFSA in the wording in force until 30 November 2006 (incl.) nor of any other provision of that Act provide for a precise procedure and consequently the regulation is in conflict with § 13(2) and § 14 of the Constitution. The existence of a public law relationship is further supported by the fact that the MEAC has the right, upon relevant

notification from the stockholder, to make a decision to delete the registration, established in the Liquid Fuel Stocks Act, of the importer who has failed to pay the stockpiling fee within two months. Since 1 December 2006 the payment of stockpiling fees is secured by a fine (§ 201 of the LFSA). The lack of procedure in relation to a public law obligation results in the uncontrolled and unfair determination of the amount of stockpiling fee. As the AS Eesti Vedelkütusevaru Agentuur lacks the competence to determine and claim additional payments, the lack of clear procedure within a public law obligation violates the clause of ownership right established in § 32 of the Constitution.

7. AS Eesti Vedelkütusevaru Agentuur is of the opinion that § 9 of the LFSA in the wording in force until 30 November 2006 (incl.) is constitutional. For the purposes of § 14(2) of the Constitutional Review Court Procedure Act (hereinafter the "CRCPA"), § 9 of the Liquid Fuel Stocks Act was irrelevant for the adjudication of the case. The relationship of parties is a private law relationship and the administrative court was not competent to adjudicate it. The relevance of § 9 of the LFSA can not be determined without ascertaining the existence of the public law relationship, which is the object of the dispute. It appears from Council Directive 98/93/EC (hereinafter "directive 98/93") that the purpose of the directive is to further regulate the liquid fuel stocks market, and not to assign duties under public law. When defining the legal relationship the administrative court has incorrectly proceeded only from the general purpose of legislation. The holding of liquid fuel stocks constitutes a part of relevant specific market, wherein the respondent has been given exclusive rights. Consequently, the stockpiling fees are paid within a private law relationship, where the agency provides the service of holding stocks, which constitutes a clear counter-performance in exchange for the payment of stockpiling fees. The provision of securities in order to secure that an importer fulfils the obligation to pay stockpiling fees is characteristic of civil law relationships. Thus, the stockpiling fee is not a public law state fee for the purposes of § 113 of the Constitution. The administrative court has failed to give reasons for the unconstitutionality of § 9 of the LFSA, instead it has shown the unconstitutionality of the lack of additional regulation in the Liquid Fuel Stocks Act.

8. The Constitutional Committee of the Riigikogu is of the opinion that § 9 of the Liquid Fuel Stocks Act in the wording in force until 30 November 2006 (incl.) is not unconstitutional. The centralised arrangement of administration of liquid fuel stocks and the imposition of stockpiling fees on importers are legitimate under the Constitution. Nevertheless, the exact relation between private and public interests upon the organisation of administration of liquid fuel stocks needs to be specified further. It is also important to guarantee the minimum procedural guarantees to the payers of stockpiling fees.

9. The Economic Affairs Committee of the Riigikogu can not see a conflict between the regulation provided in § 9 of the Liquid Fuel Stocks Act in the wording in force until 30 November 2006 (incl.) and the Constitution. The Liquid Fuel Stocks Act was drafted on the basis of directive 68/414 (as amended by directive 98/93). The Liquid Fuel Stocks Act has taken into account the requirements arising from the directive, and the wording of the Act is sufficiently clear and understandable.

10. The Chancellor of Justice is of the opinion that the Liquid Fuel Stocks Act in the wording in force until 30 November 2006 (incl.) was not in conformity with § 14 of the Constitution to the extent that it did not guarantee the right to be heard and the application of the inquisitorial principle, and consequently failed to guarantee the general fundamental right to organisation and procedure, i.e. good administration. The Chancellor of Justice argued that if the regulation in § 9 of the Liquid Fuel Stocks Act, in the wording in force until 30 November 2006 (inc.), is not applied and is declared unconstitutional, the importers will still have – irrespective of the deficient regulation – the obligation to pay the stockpiling fee (see § 8(2)–(4) and § 10 of the LFSA). In essence this is a matter of legislative omission. The whole Liquid Fuel Stocks Act, insofar as it does not meet the requirement of legal clarity and does not guarantee the fundamental rights to organisation, procedure and good administration, should not be applied. The stockpiling fee, established in the Liquid Fuel Stocks Act, has the characteristics of a public law obligation, established in § 113 of the Constitution, and is very similar to fuel excise duty. The stockpiling fee procedure, as established in the Liquid Fuel Stocks Act, does not guarantee the right to organisation; neither is the procedure as quick as possible and precluding excessive expenses and inconvenience; the enforcement procedure has not been regulated, either. The Liquid Fuel Stocks Act makes no reference to the application of the Administrative

Procedure Act (hereinafter the “APA”) or some other special procedural Act, it does not guarantee the importers’ right to be heard or that the body conducting proceedings employs the inquisitorial principle.

As the possible declaration of unconstitutionality of the regulation, which is not longer valid at the moment, would not solve the actual problem – failure to guarantee the right to be heard and failure to employ the inquisitorial principle – the Chancellor of Justice proposes that the Supreme Court consider the possibility of giving the legislator some guidelines on how to interpret the norms of the Liquid Fuel Stocks Act during the transitory time, that is until the adoption of a new Act (wording).

11. The Minister of Justice is of the opinion that the present dispute is not a case for constitutional review. The dispute is over whether there was or was not a public law relationship between the complainant and the respondent. Irrespective of the nature of the relationship there is no question of infringement of person’s fundamental right in either case, because there is no question of failure to pass legislation of general application for the purposes of § 9(1) of the CRCPA. The state supervision functions have not been and can not be transferred to a state company under § 9 of the Liquid Fuel Stocks Act. When the agency presupposes, on the basis of available information, that an importer of fuel has not yet paid the stockpiling fee established in the Liquid Fuel Stocks Act, the agency shall forward a notification to that effect to the MEAC, who has the right to commence the administrative procedure provided in the Liquid Fuel Stocks Act and exercise supervision over whether the importer has paid the stockpiling fee established by law, or not. The procedural requirements established in the Administrative Procedure Act are applied to the administrative procedure conducted by the MEAC.

12. The Ministry of Economic Affairs and Communications is of the opinion that the regulation of § 9 of the LFSA in the wording in force until 30 November 2006 (inc.) is not unconstitutional and that the stockpiling fee is paid in private law relationship. The aim of directive 98/93 is to guarantee the stocks of liquid fuel for the cases of supply problems, whereas the organisational arrangements for the maintenance of stocks must be fair and non-discriminatory. It is up to each Member State to decide on the model of holding liquid fuel stocks. Upon determining the legal relationship between the agency and the payer of the stockpiling fee it is not only the purpose of the directive that has to be taken into account, instead the content of the legal relationship has to be taken into consideration. It is a legal person in private law, who has exclusive rights in the liquid fuel market for the purposes of the Competition Act, who collects the stockpiling fee, establishes and holds the stocks. The stockpiling fee is not a monetary payment in public law, the administration and collection of which should be subject to administrative procedure. There is a civil law relationship between the agency and the payer of the stockpiling fee, within which the payer of the stockpiling fee pays the fee to the agency and the agency provides the services of mandatory collecting, holding and administrating the fuel stocks in exchange. Pursuant to § 7(7) of the LFSA the agency is required to make a sales offer.

CONTESTED PROVISION

13. § 9 of the Liquid Fuel Stocks Act is contested in the following wording, which was in force from 23 December 2005 until 30 November 2006 (incl.):

“§ 9. Stockpiling fee and payment thereof

(1) Stockpiling fee is a fee paid by the importer to cover the costs for holding of stocks.

(2) The obligation to pay stockpiling fee is created upon release for consumption, in the name of the importer, of the fuel included in the list specified in § 2 of this Act.

(3) Payment of stockpiling fee shall be made to the bank account of the stockholder without a prior request for payment no later than by the fifteenth day of each month in an amount corresponding to the volume released for consumption in the name of the importer during the previous calendar month, and the current rate for stockpiling fee. The explanation contained in the payment order shall set out the amount of stockpiling fee for each stock category and the total volume of fuel of each category released for

consumption.

(4) Calculation of the rate of stockpiling fee based on volume shall be based on the volume of the fuel at 15 °C.

(5) If an importer fails to pay stockpiling fee by the due date provided in subsection (3) of this section, the importer is required to calculate and pay a fine for delay on the amount not paid. The rate of fine for delay is 0.06 per cent per day.

(6) If an importer fails to pay stockpiling fee within two months as of the date provided in subsection (3) of this section, the Ministry of Economic Affairs and Communications has the right, upon receipt of pertinent notification from the stockholder, to make a decision to delete the registration, provided for in the Liquid Fuel Act (RT I 2003, 21, 127; 88, 591; 2004, 18, 131; 53, 365) in regard to such importer.

(7) In order to secure payment of stockpiling fee, the stockholder has the right to request relevant security, as necessary. The existence of security shall be certified by a guarantee document issued by a credit or financial institution or an insurer or by depositing a sum of money in the bank account of the stockholder.“

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

14. In order to adjudicate the matter the Chamber shall first analyse whether the norm contested by the Tallinn Administrative Court is relevant (I). Thereafter the Chamber shall form its opinion on the nature of the relationship under discussion (II) and on the lawfulness of the contested norm, and shall adjudicate the issue of declaration of unconstitutionality and invalidity of § 9 of the LFSA (III).

I.

15. Pursuant to the first sentence of § 14(2) of the Constitutional Review Court Procedure Act the provision the constitutionality of which the Supreme Court reviews within concrete norm control, must be relevant. Norms can be regarded as relevant if they are of decisive importance for the adjudication of a case.

According to the judgment of the administrative court the agency had required by its letter of 27 November 2006 that AS Letofin – the complainant – pay additional stockpiling fee. The basis for the imposition of the stockpiling fee was § 9 of the LFSA in the wording in force until 30 November 2006 (incl.). As this is the norm which determined the basis of and procedure for payment of stockpiling fee, § 9 of the LFSA is a norm decisive for the resolution of the matter and is, thus, relevant.

16. In order to guarantee legal clarity also those provisions that are closely related to the contested norm and may create ambiguity as to the actual legal situation if they remain in force, have to be regarded as relevant (see judgment of the Constitutional Review Chamber of the Supreme Court of 13 February 2007, in matter no 3-4-1-16-06 – RT III 2007, 6, 43, point 18).

In the Liquid Fuel Stocks Act the following provisions concern the stockpiling fee: § 8(2) (the costs for holding the stocks shall be covered out of the stockpiling fee to be paid by the importer), § 8 (3) (definition of importer), § 8(4) (definition of the costs for holding the stocks), and § 10 (minimum and maximum rates of stockpiling fee and the authority of the Minister of Economic Affairs and Communications to establish and change the rates). The Chamber is of the opinion that for the adjudication of the case § 8(2) of the Liquid Fuel Stocks Act, which establishes the obligation to pay stockpiling fee and determines the payers of stockpiling fee, is also relevant.

II.

17. The stocks of liquid fuel are established and administered in the public interests. Pursuant to § 1(2) of the Liquid Fuel Stocks Act the liquid fuel stocks means the quantities of petroleum products at the disposal or under the control of the state, which are established in order to ensure national security and the survival of

the population of the state, to perform obligations assumed under international agreements relating to the supply of energy and fuel, and to prevent an adverse effect on economic activities or to mitigate the effect of disturbances in the event of disturbances in the supply of petroleum products. The referred obligation of Member States is based on Council Directives 98/93/EC and 68/414/EEC.

The holding of required stocks is incomprehensible without administration of the stocks. Pursuant to the referred directives the Member States were entitled to impose the holding of the stocks on an appropriate body. In Estonia the holding of fuel stocks is vested with the AS Eesti Vedelkütusevaru Agentuur, the main functions of which arise from the Liquid Fuel Stocks Act (see § 4 of the LFSA). The referred agency is a state company within the meaning of the Participation in Legal Persons in Private Law by the State Act.

Pursuant to § 8(2) of the Liquid Fuel Stocks Act in the wording in force until 30 November 2006 (inc.) it was the importer who covered the costs for holding the stocks to the extent and pursuant to the procedure established by the Liquid Fuel Stocks Act or a regulation issued on the basis of the Act. There was no public law relationship or a contractual relationship in private law between the stockholding body and a payer of stockpiling fees. The payment of stockpiling fees was based solely on the provisions of legislation of general application. The Chamber argues also that the payment of stockpiling fees can not be related to actual counter-performance by the agency. Although, pursuant to § 7 of the LFSA, in the event of difficulties in supply, the stockholder shall make a sales offer to the persons in whose name fuel has been released for consumption, this formal point of fact can not be regarded as decisive upon determining the character of the relationship between the agency and the payers of stockpiling fee.

The Chamber is of the opinion that the obligation to pay stockpiling fee is a public law claim. Pursuant to valid regulation the relationship between the agency and an obligated subject of stockpiling fee is a power relationship, wherein the agency has the powers, authorised by the state, to collect stockpiling fees, to check the amount of payments, to require information, to impose coercive measures, etc. Consequently, the stockpiling fees are proceeded subject to public law procedure, more precisely within the frames of one of its subtypes – the administrative procedure.

III.

18. Next, the Chamber shall analyse § 9 of the LFSA and evaluate it in conjunction with other provisions regulating the payment of liquid fuel stockpiling fee.

When reviewing the constitutionality of § 9 of the Liquid Fuel Stocks Act, the Tallinn Administrative Court was right to refer to the general right to organisation and procedure, established in § 14 of the Constitution, as the fundamental right relevant in this case (see judgment of the General Assembly of the Supreme Court of 28 October 2002, in matter no 3-4-1-5-02 – RT III 2002, 28, 308, point 30). The Supreme Court has also derived the right to good administration from § 14 of the Constitution (see judgment of the Administrative Law Chamber of the Supreme Court of 5 March 2007, in matter no 3-3-1-102-06 – RT III 2007, 10, 82, point 21); judgment of the Constitutional Review Chamber of the Supreme Court of 17 February 2003, in matter no 3-4-1-1-03 – RT III 2003, 5, 48, points 14–16).

The Chamber points out that the of stockpiling fee procedure as an administrative procedure must meet the basic requirements of the latter. The payment of stockpiling fee is of encumbering character for the person who is obliged to pay it, that is why it is especially important to guarantee such fundamental procedural rights as the right to information, right to be heard, right to file challenges and appeals. The regulation of the exercise of the referred fundamental procedural rights may be included either in the Administrative Procedure Act or in some other special Act. The Administrative Procedure Act is the framework Act which is to be applied, pursuant to § 112(2) of the APA, to a specific Act if so prescribed by the specific Act. The courts, on the other hand, as shown by their practice, hold that in order that a specific procedure be regarded as “administrative procedure regulated by a specific Act” referred to in § 112(2) of the Administrative Procedure Act, the special regulation must be of volume, density and particularity comparable to the regulation of the Administrative Procedure Act itself and it must guarantee a person legal protection

comparable to that ensured by the Administrative Procedure Act. In the case of an administrative procedure not meeting the referred requirements the Administrative Procedure Act is applicable even if the specific Act does not contain a reference norm to that effect (see judgment of the Administrative Law Chamber of the Supreme Court of 4 April 2003, in matter no 3-3-1-32-03 – RT III 2003, 11, 111, points 12–14, and judgment of the Constitutional Review Chamber of the Supreme Court of 8 June 2007, in matter no 3-4-1-4-07 – RT III, 25, 202, point 25).

The Liquid Fuel Stocks Act does not contain a reference norm for the application of the Administrative Procedure Act. The Chamber agrees with the administrative court in that the Liquid Fuel Stocks Act does not expressis verbis provide for a procedure for payment of stockpiling fees that would guarantee the fundamental rights of a person, the outcome of procedure is not formalised in the form of a reasoned administrative act, the challenge procedure has not been legally regulated, etc. Due to the aforementioned the procedural law regulation of the Liquid Fuel Stocks Act can not be regarded as equivalent by nature to the legal procedure established by the Administrative Procedure Act. The Chamber admits that the procedural law provisions of the Liquid Fuels Stocks Act alone do not guarantee the persons' constitutional right to procedure.

In the light of the above facts it is necessary to assess whether the referred deficiencies of the Liquid Fuel Stocks Act can be bridged by application of the principles and concrete provisions of the Administrative Procedure Act to the procedure concerning stockpiling fee. Such application is possible when relevant regulation of a specific Act is not in direct conflict with the provisions of the Administrative Procedure Act, and if the supplementing of the procedure established in a specific Act with the norms of the Administrative Procedure Act does not bring about a situation of legal ambiguity.

19. The Chamber holds that it is not possible to apply the provisions of the administrative procedure to the stockpiling fee procedure, as established in the Liquid Fuel Stocks Act, because that would result in the conflict of norms as well as – eventually – in the lack of legal clarity. Thus, for example, the imperative provision of § 9(3) of the Liquid Fuel Stocks Act precludes the stockholder, who is performing an administrative function, from issuing the requirement to pay stockpiling fee in the form that could be regarded as an administrative act; the requirement of fine for delay established in subsection (5) and the requirement of security established in subsection(7) of the same provision are ambiguous in their legal form. The Liquid Fuel Stocks Act, especially the stockpiling fee procedure established in § 9 thereof, precludes any legally guaranteed possibility not only to challenge the claims of the stockholder but also to receive information concerning the justifications of the claims.

On the basis of the aforesaid the Chamber holds that the Liquid Fuels Stocks Act has failed to specify the general principles of administrative law to the extent necessary for their implementation in practice, and that bearing in mind the specificity of relevant procedure in the Liquid Fuel Stocks Act the required regulation can not be achieved by the application of the Administrative Procedure Act, either. The liquid fuel stockpiling fee procedure neither meets the principle of good administration nor guarantees the constitutional right to procedure.

20. That is why the Chamber hereby declares § 9 and § 8(2) of the Liquid Fuel Stocks Act insofar as they do not guarantee sufficiently effective stockpiling fee payment procedure, in the wording in force from 9 March 2005 until 30 November 2006(incl.), unconstitutional and invalid.

The Chamber considers it necessary to point out that as far as procedural rules are concerned the presently valid Liquid Fuel Stocks Act does not substantially differ from the contested wording of the Liquid Fuel Stocks Act.
