Constitutional judgment 3-2-1-143-03

JUDGMENT
OF THE SUPREME COURT *EN BANC*

No. of the case	3-2-1-143-03
Date of judgment	17 June 2004
Composition of court	Chairman Tõnu Anton, and members Jüri Ilvest, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Julia Laffranque, Jaak Luik, Jüri Põld, Harri Salmann, Tambet Tampuu and Peeter Vaher.
Court Case	Action of the Estonian Health Insurance Fund against the AS Laverna claiming the payment of 46 051 kroons.
Disputed judgment	Judgment of the Tallinn Circuit Court of 26 August 2003 in civil matter no. 2-2/111/03.
Petitioner and type of action	Appeal in cassation of the AS Laverna.
Type of proceeding	Written proceeding

DECISION

1. To declare that § 4(2) of the Estonian Health Insurance Fund Act in the wording in force from 1 January 2001 until 1 October 2002 was in conflict with §§ 32 and 11 of the Constitution in their conjunction.

2. To satisfy the appeal in cassation of the AS Laverna.

3. To annul the judgment of Lääne County Court of 14 October 2002 and the judgment of the civil chamber of Tallinn Circuit Court of 26 August 2003, and to render a new judgment in the matter.

4. To dismiss the action of Estonian Health Insurance Fund against the AS Laverna claiming the payment of 46,051 kroons and 70 cents.

5. To return to the AS Laverna the security on cassation of 461 kroons paid on 22 September 2003.

FACTS AND COURSE OF PROCEEDING

1. The Estonian health insurance fund (hereinafter “the health insurance fund”) filed an action with the Lääne County Court on 25 June 2002, in which it requested that the court order that the AS Laverna pay the fund 46,051 kroons and 70 cents. According to the statement of claim the plaintiff has, on the basis of § 3(5) of the Estonian Health Insurance Fund Act (hereinafter “the HIFA”) paid for the medical treatment expenses

of the defendant's employees pursuant to health service invoices 42,310 kroons and 70 cents, and 3,741 kroons of sickness benefits pursuant to certifications for sick leave. According to § 4(2) of the Estonian Health Insurance Fund Act the health insurance fund was entitled to collect the costs which the health insurance fund had incurred upon payment of health insurance benefits to the insured persons from the payer of social tax for the benefit of the health insurance fund, if the payer of social tax has been in arrears with social tax.

2. The Lääne County Court satisfied the action with its judgment of 14 October 2002. The court ascertained that the defendant had not paid social tax since July 2001, and that the plaintiff had paid for the medical treatment expenses of the defendant's employees and as sickness benefits the total of 46,051 kroons and 70 cents. The court found that the restriction of rights arising from § 4(2) of the HIFA was in conformity with § 11 of the Constitution. The plaintiff has fulfilled the obligation towards the employees of the defendant, established in § 3(5) of the HIFA, at the expense of persons who have paid social tax in time.

3. On 2 November 2002, the AS Laverna filed an appeal with the Tallinn Circuit Court against the judgment of the Lääne County Court.

4. By its judgment of 26 August 2003 the Tallinn Circuit Court upheld the judgment of the county court. The circuit court agreed with the reasoning of the county court without reiterating it. The objective of § 4(2) of the Estonian Health Insurance Fund Act was to give the health insurance fund a possibility to guarantee the financing of its activities, irrespective of the receipt of social tax to the state budget. From the finances received the health insurance fund was to fulfil its duties upon arranging health insurance, including paying the health insurance benefits to insured persons within the terms prescribed by law. The application of § 4(2) of the Estonian Health Insurance Fund Act can not be called double taxation, because the claim arising on the basis of the provision can not be regarded as a claim arising on the basis of a tax relationship. The right of the health insurance fund to claim the payment of the expenses from the person who owes social tax arrears made it possible for the health insurance fund to cover the expenses of its activities and did not constitute a sanction for the purposes of lax laws.

The defendant has not been treated unequally in comparison to other tax payers, as unequal treatment would require different treatment in similar circumstances. The legal situation of the defendant can not be identified with the situation of those tax payers who had paid social tax pursuant to established procedure and in good time.

5. On 29 September 2003, the AS Laverna filed an appeal in cassation against the judgment of the Tallinn Circuit Court.

6. By its ruling of 2 February 2004 the Civil Chamber of the Supreme Court refused to review the judgment of the Tallinn Circuit Court of 26 August 2003 and referred the matter to the Supreme Court *en banc* for hearing. The Chamber was of the opinion that for the hearing of the appeal in cassation it would be necessary to give a legal opinion on the conformity of § 4(2) of the Estonian Health Insurance Fund Act to § 32 of the Constitution in conjunction with § 11 of the Constitution.

JUSTIFICATIONS OF PARTICIPANTS IN THE PROCEEDING IN THE SUPREME COURT

7. According to the appeal in cassation of the AS Laverna, the opinion of the circuit court that the defendant had not been treated unequally in comparison to other tax payers, and that the restriction established in § 4(2) of the HIFA was necessary and proportional to the established aim, is erroneous. The restriction arising from § 4(2) of the Estonian Health Insurance Fund Act was not in conformity to § 11 of the Constitution, because it disproportionally restricted the right of ownership established in § 32 of the Constitution. Furthermore, § 4(2) of the HIFA put the defendant in unequal situation in comparison to those who had paid social tax in good time, because in addition to the obligation to pay health insurance benefits it retained the obligation to pay social tax.

When collecting the medical treatment expenses, the Estonian Health Insurance Fund Act did not take into consideration that the employer was still under obligation to pay the amount of social tax. The receipt of social tax was guaranteed by the Social Tax Act and other Acts regulating taxation. On the basis of the Taxation Act a fine for delay on tax arrears was calculated if the payment of social tax was delayed. On the basis of § 141(6) of the Code of Administrative Offences it was possible to impose a fine for the failure to comply with tax liability. The additional obligation of a person owing tax arrears to pay the health insurance benefits already paid by health insurance fund, was unjustified and unnecessary for guaranteeing finances to the health insurance fund.

According to the appeal in cassation the circuit court had violated a procedural norm to a material extent.

8. The Riigikogu is of the opinion that § 4(2) of the HIFA was in conformity to §§ 11 and 32 of the Constitution in their conjunction.

The objective of § 4(2) of the Estonian Health Insurance Fund Act was to guarantee the performance of duties imposed on the health insurance fund pursuant to law, and to guarantee the receipt of financial resources necessary for that. The health insurance fund has no possibilities to collect social tax from those who owe social tax arrears. At the same time, the funds necessary for the disbursement are formed of the receipts of social tax. The performance of the duties of health insurance fund upon guaranteeing health insurance must not depend on whether or not an employer has paid social tax for the insured persons. Failure to pay social tax may result in a situation where the health insurance fund lacks money for the performance of its functions. The measure established in § 4(2) of the Estonian Health Insurance Fund Act was suitable, necessary and proportional in the narrow sense, in order to guarantee the funds necessary for the health insurance fund for the performance of its duties.

9. The health insurance fund is of the opinion that the objective of § 4(2) of the HIFA was to avoid a situation where the health insurance fund would have problems with the payment of health insurance benefits because of social tax arrears. The duties imposed on the health insurance fund by law give rise to the need to take measures to balance its income and expenses. The interest imposed on a tax payer to guarantee the fulfilment of the obligation to pay social tax is not received in the budget of health insurance, and thus the health insurance can not use these funds for balancing its budget.

The person who owes social tax arrears uses the funds accrued through non-payment of social tax in its economic activities, including for earning additional income. That is why there was no violation of the ownership right established in § 32 of the Constitution, and the provisions of § 4(2) of the HIFA were in conformity with §§ 11 and 32 of the Constitution in their conjunction.

10. The Chancellor of Justice is of the opinion that the wording of § 4(2) of the HIFA, in force from 1 January 2001 until 1 October 2002, was in conflict with §§ 32 and 11 of the Constitution in their conjunction. § 4(2) of the Estonian Health Insurance Fund Act infringed upon the legal position of the AS Laverna, protected under § 32 of the Constitution, as a person’s possibility to freely use and dispose of his or her property was impeded.

The objective of health insurance fund was to guarantee health insurance benefits to insured persons, including, on the basis of § 3(5) of the HIFA, to those persons in regard of home the persons liable to pay social tax had failed to do so. The funds necessary for financing compulsory health insurance system are mainly accrued from the receipts of social tax. Thus, the receipt of social security contributions in a timely manner is of essential importance for the health insurance fund in the discharge of its duties. § 4(2) of the Estonian Health Insurance Fund Act enabled the health insurance fund to actually collect from the persons owing tax arrears the disbursed health insurance benefits. The covering of the costs did not, however, release a person from the social tax liability. This amounted to an additional financial obligation, the aim of which was to guarantee the receipt of social tax payments in a timely manner, and to create an additional possibility, parallel to social tax, to accrue income necessary for health insurance.

§ 11 of the Constitution establishes that the restrictions of fundamental rights must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted.

Performance of tax obligations is extensively guaranteed in Estonian legal order. At the material time of the dispute the timely receipt of social tax was guaranteed by the Taxation Act, the Code of Administrative Offences and the Criminal Code. Thus, the obligation imposed on a person owing social tax arrears by § 4(2) of the HIFA was excessive and not necessary for the achievement of the aim.

The measure established in § 4(2) of the Estonian Health Insurance Fund Act infringed upon a person's right of ownership materially and indefinably, at the time when the achievement of the aim – payment of social tax in a timely manner – was sufficiently guaranteed by the regulatory framework of the referred legislation.

Compulsory health insurance system was and is built upon the principle of solidarity and is financed, almost to full extent, by social security contributions accrued through the social tax system. It follows from the principle of solidarity that the amount of contributions paid by a person or on his or her behalf is not directly dependent on the amount of payments to be made in future in the form of social insurance benefits. The obligation of a person owing social tax arrears, arising from § 4(2) of the HIFA, was not based on the principle of solidarity, instead it imposed an additional obligation on certain persons to compensate for the actual medical treatment expenses. Such an obligation, encumbering persons liable to pay social tax, was not necessary to guarantee the funds necessary for the performance of the duties of the health insurance fund.

11. The Minister of Justice is of the opinion that § 4(2) of the HIFA may not indeed have been in conformity with the constitutional requirement of proportionality.

The aim of the contested provision was to guarantee the funds necessary for the performance of the duties of the health insurance fund. The provision in fact imposed an additional financial obligation on social tax payers. The payment of health insurance benefits did not release a person from the payment of social tax arrears, and the interest and fine proceeding from the Taxation Act. Organisation of health insurance is a duty of the state, which has been delegated to a person in public law – to health insurance fund. But this does not mean that the health insurance fund is entitled, if it lacks necessary financial resources, to collect additional payments. § 4(2) of the Estonian Health Insurance Fund Act was not necessary, because it was possible to achieve the desired aim in a way less encumbering on persons liable to pay social tax. The fact that social tax collected *ex post facto* was not directly accrued into the funds of health insurance is not a sufficient reason for imposing an additional financial burden on a person owing social tax arrears.

Social tax is a tax established on the principle of solidarity. However, § 4(2) of the Estonian Health Insurance Fund Act distorted the meaning of social tax, by imposing – in essence – an obligation to pay double taxes. Thus, the disputed regulation disproportionally interfered with the inviolability of ownership, established in § 32 of the Constitution.

Pursuant to § 12 of the Constitution everyone is equal before the law. The functioning of the health and pension insurance systems directly depend on regular and continuous receipts of social tax. Differently from § 4(2) of the HIFA, the legislator has not considered it necessary to impose an additional right of claim in regard to the pension system. The regulatory framework established by the State Pension Insurance Act and other Acts concerning taxes have been considered sufficient guarantees for the functioning of the system. The legislator has treated similar situations differently, whereas the reasonable cause for different treatment is questionable.

12. The Minister of Social Affairs is of the opinion that § 4(2) of the HIFA was not in conflict with §§ 11 and 32 of the Constitution in their conjunction.

The objective of § 4(2) of the Estonian Health Insurance Fund Act was to guarantee the performance of duties arising on the basis of the Republic of Estonia Health Insurance Act (Hereinafter "the HIA"), the statutes of the health insurance fund, and other legislation. Whereas, proceeding from the principle of

solidarity, the health insurance fund had to pay health insurance benefits also to such persons in regard to whom a person liable to pay social tax had failed to do so.

Because of the non-receipt of social tax the health insurance fund could have had difficulties in performing the duties imposed on it. As the health insurance fund in the capacity of an insurer had no individual right to collect social tax from a person owing social tax arrears, the collection of the actual expenses was the only effective and speedy measure for the health insurance fund for guaranteeing the funds necessary for the fulfilment of its duties.

PERTINENT PROVISION

13. § 4(2) of the Estonian Health Insurance Fund Act, in the wording in force from 1 January 2001 until 1 October 2002, reads as follows:

§ 4. Competence of health insurance fund for ensuring purposeful use of health insurance funds

[…]

(2) If a payer of social tax has been in arrears with social tax for at least 14 calendar days and the tax arrears are not subject to payment in instalments, the health insurance fund may collect the costs which the health insurance fund has incurred upon payment of health insurance benefits to the insured person from the payer of social tax for the benefit of the health insurance fund. The payment of such costs does not release the payer of social tax from the duty to pay social tax.

[…]"

OPINION OF THE SUPREME COURT EN BANC

14. First of all, the Supreme Court *en banc* shall form an opinion on the pertinence of § 4(2) of the Estonian Health Insurance Fund Act (part I). Next, the Supreme Court *en banc* shall deal with the infringement of the ownership right (part II) and the proportionality thereof (part III), and then the Supreme Court en banc shall adjudicate the civil matter (part IV).

I.

15. According to § 3(3) of the Constitutional Review Court Procedure Act the Supreme Court *en banc* shall hear a matter transferred to it by one of the Chambers of the Supreme Court, if the Chamber has a reasonable doubt as to the constitutionality of a pertinent legislation of general application. An act which is of decisive importance for the adjudication of a case is pertinent (see judgment of Supreme Court *en banc* of 22 December 2000, case no. 3-4-1-10-00 – RT III 2001, 1, 1, paragraph 10). An Act is of decisive importance when in the case of unconstitutionality of the Act a court should render a judgment different from that in the case of constitutionality of the Act (see judgment of Supreme Court *en banc* of 28 October 2002, case no. 3-4-1-5-02 – RT III 2002, 308, paragraph 15).

16. The contested norm is the wording of § 4(2) of the Estonian Health Insurance Fund Act, in force from 1 January 2001 until 1 October 2002. The claim of the health insurance fund against the AS Laverna was filed on the basis of § 4(2) of the HIFA. If the provision were unconstitutional, the health insurance fund would not have a possibility to demand the AS Laverna, who owed tax arrears, that it pay back the health insurance benefits the fund had disbursed. The AS Laverna has admitted that it had social tax arrears. Thus, the wording of § 4(2) of the HIFA, in force from 1 January 2001 until 1 October 2002, is pertinent.

II.

17. The AS Laverna argues that § 4(2) of the HIFA infringed on its right of ownership, as the Act did not allow to take into consideration, when collecting medical treatment expenses from a person owing tax

arrears, that the person was still under obligation to pay social tax.

18. The right of ownership as a fundamental right is established in § 32 of the Constitution. According to the first indent of § 32 the property of every person is inviolable and equally protected. § 32(2) of the Constitution establishes the right of everyone to freely possess, use and dispose of his or her property. Restrictions on the referred fundamental right shall be provided by law.

This is a norm protecting general proprietary rights, the protection of which extends, among movable and immovable things, also to monetarily appraisable rights and claims. The Civil Chamber of the Supreme Court has found in its judgment of 23 October 1997, case no. 3-2-1-116-97 (RT III 1997, 31/32, 332), that the term "property" used in § 32 of the Constitution includes, among other things, money.

According to § 9(2) of the Constitution the rights, freedoms and duties shall extend to legal persons in so far as this is in accordance with the general aims of legal persons and with the nature of such rights, freedoms and duties. In conformity with the general aims of legal persons and with the nature of the protection of property, the provisions of § 32 of the Constitution also extend to legal persons.

19. On the basis of § 4(2) of the Estonian Health Insurance Fund Act the health insurance fund collected from persons owing social tax arrears the costs it had born when paying health insurance benefits. At the same time a person owing tax arrears was not exempted from paying the social tax arrears. In essence, § 4(2) of the HIFA established an additional financial obligation on a tax payer, which determined the purpose of the use of the income of the person, and restricted the freedom of the person to decide on the manners of using the property it owned. The Supreme Court en banc is of the opinion that the disputed regulation restricted the constitutional right of a person to freely possess, use and dispose of his or her property.

III.

20. In its judgment of 11 October 2001 in case no. 3-4-1-7-01 (RT III 2001, 26, 280) the Supreme Court *en banc* has found that § 11 of the Constitution is a norm embracing all fundamental rights, setting limits to the restrictions of fundamental rights. In the first place, it is allowed to restrict rights and freedoms only in conformity with the Constitution, and secondly, the restrictions must be necessary in a democratic society, and thirdly, the restrictions must not distort the nature of the rights and freedoms.

A restriction of a fundamental rights is proportional if a measure is suitable for the achievement of the aim, and if it is necessary and proportional in the narrow sense (see judgment of the Constitutional Review Chamber of the Supreme Court of 6 March 2002, case no. 3-4-1-1-02 – RT III 2002, 8, 74). If a measure is manifestly unsuitable or not necessary, the review of proportionality in the narrow sense is useless.

21. One of the aims of § 4(2) of the Estonian Health Insurance Fund Act was to guarantee sufficient finances for the health insurance fund for the performance of the duties imposed on it pursuant to law. § 4(2) of the Estonian Health Insurance Fund Act bore in mind a situation wherein, under § 3(5) of the HIFA, the health insurance fund was under the obligation to pay health insurance benefits for a person for whom the payer of social tax had failed to pay the social tax.

22. A measure which fosters the achievement of an aim, is suitable. A measure which in no case fosters the achievement of an aim, is indisputably disproportional.

According to § 1 (in the wording in force from 1 April 1994 until 1 October 2002) of the Republic of Estonia Health Insurance Act (RT I 1999, 7, 113 … 2001, 47, 260) health insurance was a state-guaranteed system for the payment of the costs related to preserving the health of residents of the Republic of Estonia, the costs related to their temporary incapacity for work and their medical treatment as a result of illness or injury, and benefits in the event of pregnancy and childbirth. Pursuant to § 3 of the Health Insurance Act compulsory health insurance was organised by the health insurance fund.

According to § 5 of the Estonian Health Insurance Fund Act the health insurance fund is a legal person in public law, who shall be liable for its obligations with all its assets, unless otherwise provided by law. Pursuant to subsection (4) of the same section the state shall be liable for performance of the obligations of the health insurance fund in the cases and under conditions provided by law: if the legal reserve of the health insurance fund is insufficient or if there is no possibility of or grounds for using the legal reserve, also if the health insurance fund cannot perform its contractual obligations or pay health insurance benefits because the receipt of tax in public revenue for health insurance benefits is lower than prescribed in the state budget for health insurance.

The measure included in § 4(2) of the Estonian Health Insurance Fund Act was aimed at guaranteeing the funds necessary for the performance of duties of the health insurance fund. The objective of the provision was to avoid the financial difficulties of the health insurance fund. What was provided for in § 4(2) of the Estonian Health Insurance Fund Act was one of the possible measures, capable of guaranteeing necessary funds for the performance of the duties of the health insurance fund, and was, thus, a suitable measure.

23. A measure is a necessary one, if it is impossible to achieve the aim by some other measure, less encumbering on persons, which is at least as effective as the former (see judgment of the Constitutional Review Chamber of the Supreme Court of 6 March 2002, case no. 3-4-1-1-02 – RT III, 2002, 8, 74).

The relationships regulated by health insurance law are public law relationships. The obligation to organise health insurance, arising from § 28 of the Constitution, has been delegated to the health insurance fund. The functioning of the health insurance system shall be guaranteed by the state.

The Social Tax Act (STA, RT I 2000, 102, 675 … 2002, 44, 284) established the obligation to pay social tax. According to § 1 of the Social Tax Act the social tax was a financial obligation which was imposed on taxpayers to obtain revenue required for state pension and health insurance.

According to § 35 of the Estonian Health Insurance Fund Act the assets of the health insurance fund were formed of, among other things, the funds prescribed for health insurance in the state budget. Thus, the performance of the duties imposed on the health insurance fund by law depended directly on regular and continuous receipts of social tax.

24. At the time when the health insurance fund filed its claim the receipt of social tax in state treasury was guaranteed by several Acts. § 15 of the Taxation Act (RT I 1994, 1, 5 … 2001, 65, 378) established the possibility of issuing precepts to taxable persons. Pursuant to § 24 of the Code of Enforcement Procedure (RT I 1997, 43/44, 723 … 2001, 43, 238) a tax authority had the right to address the enforcement department of a county or city court for the collection of tax arrears without court proceedings. § 28 of the Taxation Act included the regulation of calculating interest and § 30 the regulation of imposing fines. § 141(6) of the Code of Administrative Offences (RT 1992, 29, 396 … 2001, 65, 378) established a sanction for the failure to fulfil tax obligations. § 1481(5) of the Criminal Code (RT I 1992, 20, 287 … 2001, 65, 378) provided for the imposition of a fine or detention for a tax offence.

Thus, the tax regulation of the state included a sufficient number of measures for forcing a person owing tax arrears to fulfil his or her obligations.

25. In addition to the referred measures the health insurance fund had also some other possibilities to guarantee the performance of duties related to health insurance. § 37 of the Estonian Health Insurance Fund Act provided for the formation of the cash reserves of the health insurance fund, which had to guarantee the funding of activities in case of temporary cash squeezes.

The measures for guaranteeing funds necessary for the activities of the health insurance fund were, as of 25 June 2002, sufficient without the disputed provision of the Health Insurance Fund Act.

26. On the basis of the aforesaid the Supreme Court *en banc* is of the opinion that the measure established in

§ 4(2) of the Estonian Health Insurance Fund Act was not necessary for the achievement of the aim, because the aim was achievable by ways less encumbering on persons taxable by social tax. The obligation of a person owing tax arrears to pay, in addition to social tax, also the sums paid by the health insurance fund in the form of health insurance benefits, the amount of which can not be foreseen, constitutes a disproportional restriction of the right of ownership. Thus, § 4(2) of the Estonian Health Insurance Fund Act was in conflict with §§ 32 and 11 of the Constitution in their conjunction.

IV.

27. The claim of the health insurance fund was based on § 4(2) of the HIFA, which was in conflict with §§ 32 and 11 of the Constitution in their conjunction. As there is no need to ascertain new facts, the Supreme Court *en banc* shall annul the judgments of the Lääne County Court of 14 October 2002 and of the civil chamber of the Tallinn Circuit Court of 26 August 2003 and shall render a new decision in the matter.

The action of the health insurance fund against the AS Laverna shall be dismissed.

28. As the Supreme Court *en banc* ascertained that § 4(2) of Estonian Health Insurance Fund Act was in conflict with §§ 32 and 11 of the Constitution in their conjunction, and dismissed the action of the health insurance fund against the AS Laverna, it is not necessary to address the arguments of the appeal in cassation of the AS Laverna, specified in paragraph 7 of this judgment, concerning unequal treatment and violation of a procedural norm.
