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JUDGMENT
OF THE SUPREME COURT EN BANC

No. of the case	3-1-3-13-03
Date of judgment	6 January 2004
Composition of court	Chairman Jaano Odar and members Tõnu Anton, Jüri Ilvest, Henn Jõks, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Lea Laarmaa, Jaak Luik, Jüri Põld, Harri Salmann, Tambet Tampuu and Peeter Vaher
Court Case	Criminal case on charges against Tiit Veeber under §§ 148^1(7), 166(1) and 143(1) of the Criminal Code
Disputed judgment	Judgment of the Criminal Chamber of the Supreme Court of 8 April 1998 in criminal matter no. 3-1-1-50-98, judgment of the Tartu Circuit Court of 12 January 1998 in criminal matter no. 2-1-16-98 and judgment of the Tartu City Court of 13 October 1997 in criminal matter no. 1-356-96
Petitioner and type of petition	Petition for the correction of court errors by Karina Lõhmus-Ein, clerk of sworn advocate, criminal defence counsel of Tiit Veeber
Date of hearing	5 November 2003
Persons participating at the hearing	Criminal defence counsel of Tiit Veeber sworn advocate Andrus Lillo, public prosecutor Norman Aas and representatives of the Chancellor of Justice Madis Ernits and Mihkel Allik

DECISION

1. To re-open the proceeding of criminal matter concerning the conviction of Tiit Veeber pursuant to § 148[1](7) of the Criminal Code for the acts committed before 1995.

2. To annul the judgment of the Criminal Chamber of the Supreme Court of 8 April 1998, the judgment of the Tartu Circuit Court of 12 January 1998 and the judgment of the Tartu City Court of 13 October 1997 concerning the conviction of Tiit Veeber pursuant to § 148[1](7) of the Criminal Code in that during the period of taxation of financial years of 1993 and 1994 he had reduced the amount of income and value added taxes payable without legal basis, using for that purpose fictitious sale/purchase contracts between the AS Giga and the AS Toruarmatuur; also in that in November - December of 1994 he had given an order to formalise the payment of remuneration to persons who had worked in the AS Giga in the form of fictitious sale/purchase contracts. To acquit Tiit Veeber in that respect.

3. To refuse to hear the civil action of the Tartu Tax Board Office partly, that is in the amount of 262 085 (two hundred and sixty two thousand eighty five) kroons.

4. To satisfy the petition of Tiit Veeber's criminal defence counsel partly.

5. To return the security.

FACTS AND COURSE OF PROCEEDING

1. Tiit Veeber was convicted pursuant to §§ 148[1](7), 166(1) and 143(1) of the Criminal Code (hereinafter "the CrC") by the judgment of the Tartu City Court of 13 October 1997. The city court punished T. Veeber under § 1481(7) of the CrC by three years' imprisonment, and under § 166(1) of the CrC by six months' imprisonment and deprivation of the right of employment in state and local government agencies and in government or local government invested enterprises for two years. Under § 143(1) of the CrC the court punished T. Veeber by six months' imprisonment. Pursuant to § 40 of the CrC the city court partly aggregated the imposed punishments and punished T. Veeber by the imprisonment of three years and six months. Under § 47 of the CrC the court did not enforce the prison sentence conditionally with probation period of two years. The court also ordered that T. Veeber pay 853 550 kroons to Tartu Tax Board Office and 8669 kroons and 50 cents to the AS Tartu Jõujaam. The court recognised the 100 000 kroons' action of the Tartu City Government but left it to be heard pursuant to civil court procedure.

2.1. Tiit Veeber was convicted under § 148[1](7) of the CrC in the following:

1) during the taxation period of fiscal years 1993 and 1994 he, in the capacity of the owner and chairman of the management board of the AS Giga, had wilfully and intermittently reduced the income and value added taxes payable to the state by 793 706 kroons through fictitious sale/purchase contracts with the AS Toruarmatuur;

2) in November - December 1994 he, in the capacity of the owner and chairman of the management board of the AS Giga, had wilfully given an order to formalise the payment of remuneration to persons who had forked in the AS Giga in the form of fictitious sale/purchase contracts, as a result of which social tax and health insurance tax in the total amount of 44 994 kroons were not paid to the state;

3) on 12 May 1995 he, in the capacity of the chairman of the management board of the AS Tartu Jõujaam, had wilfully and with the objective of concealment of objects of taxation concluded a sale/purchase contract instead of a contract for services, on the basis of which he had contracted K.-P. Bõstrov and T. Kotov for conducting a survey of economic purposefulness of building a power station and had paid them remuneration for the survey in the amount of 45 000 kroons, as a result of which social tax and health insurance tax in the total amount of 14 850 kroons were not paid to the state.

The court pointed out, inter alia, that when qualifying the referred three criminal episodes under § 1481(7) of

the CrC the court had taken into account that the commission of the crime had started in the third quarter of 1993 and the last episode took place in 12 May 1995. The court held that T. Veeber had committed an intermittent crime, because his actions had the same necessary elements of a criminal offence, were aimed against one and the same object - the state taxation system - and resulted in a single criminal consequence. Also, all tax frauds were committed wilfully and in the same manner. The city court noted further that a prior punishment under administrative procedure was not a necessary element of a criminal offence established in § 1481(7) of the CrC.

2.2. Under § 166(1) of the CrC T. Veeber was found guilty in that in 1994 he, in the capacity of the sole owner and the chairman of the management board of the AS Giga, had wilfully and intermittently counterfeited three sale/purchase contracts with a non-existent AS Toruarmatuur, signing the contracts, instead of J. Jestignejev who had been referred to as the director of the AS Toruarmatuur, himself. By this conduct T. Veeber caused the state the damage of 576 615 kroons in the form of foregone income and value added tax, i.e. significant material damage.

2.3. Under § 143(1) of the CrC the court found T. Veeber guilty in that in March 1994, with the aim of obtaining shares of the AS Tartu Jõujaam, he submitted to the accounting department of the AS Tartu Jõujaam invoice no. 45 in the amount of 8669 kroons and 50 cents, issued to the AS Giga on 5 July 1993, although he knew that the invoice was unpaid and the Tartu Forest District had revoked the invoice. Also, T. Veeber lied that according to the referred invoice the AS Giga had paid the Tartu Forest District for the obligations of the AS Tartu Jõujaam. This way the AS Giga fraudulently obtained shares of the AS Tartu Jõujaam with the value of 8669 kroons and 50 cents, and caused the latter significant material damage.

3. Assistant prosecutor Ene Timmi and criminal defence counsel of T. Veeber, sworn advocate Uno Lõhmus, filed appeals against the judgment of the Tartu City Court of 13 October 1997. The prosecutor applied for aggravation of the punishment imposed on T. Veeber and for the final punishment of four years' imprisonment in a medium-security prison and deprivation of the right of employment as an official in state and local government agencies and in government or local government invested enterprises for two years.

The counsel applied for the annulment of the city court's judgment and for the acquittal of T. Veeber on all charges, because his conduct lacked necessary elements of a criminal offence.

4. By the judgment of the Tartu Circuit Court of 12 January 1998 the judgment of the Tartu City Court of 13 October 1997 was partly annulled, i.e. in regard to the supplementary punishment imposed on T. Veeber under § 166(1) of the CrC. Further, the judgment of city court was specified and the pre-trial period during which T. Veeber was held in custody was deducted from the final punishment. The judgment of the city court was upheld in all other respects.

The circuit court held, among other things, that as T. Veeber had committed the crime incriminated to him under § 148^1(7) of the CrC wilfully, it is irrelevant that the accused at trial had not previously been punished for these offences under administrative procedure. The circuit court considered erroneous the opinion of the criminal defence counsel that T. Veeber could not be convicted under § 148^1(7) of the CrC because the provision entered into force only on 13 January 1995. Differently from the city court the circuit court argued that all the acts incriminated to T. Veeber under § 148^1(7) of the CrC constitute continuous criminal offences. The circuit court found that since the third quarter of 1993 when T. Veeber concluded the first fictitious sale/purchase contract with the AS Toruarmatuur, he had wilfully concealed the objects of taxation referred to in the charges and did not pay the prescribed taxes. Thus, it was already in 1993 that the accused at trial entered into a continuous criminal state, which lasted up to 1996, when the Tax Board Office discovered the violations.

5. T. Veeber's counsel sworn advocate U. Lõhmus and Toive Vee, prosecutor of the State Prosecutor's office, filed appeals in cassation against the judgment of the Tartu Circuit Court of 12 January 1998.

In his appeal in cassation the counsel applied for the annulment of the circuit court judgment and referral of

the criminal matter to the same court for a new hearing.

In his appeal in cassation the prosecutor applied for the annulment of the city court and circuit court judgments to the extent these imposed the punishment and referral of the matter to the Tartu Circuit Court for a new hearing.

6. By the judgment of the Criminal Chamber of the Supreme Court of 8 April 1998 the appeals were satisfied partly. The Criminal Chamber annulled the judgments of the city court and the circuit court in regard to the supplementary punishment imposed under § 166(1) of the CrC, and on the basis of § 39 of the CrC did not impose the supplementary punishment. Also, the Supreme Court specified the term of T. Veeber's pre-trial detention. In other respects the judgments were upheld.

The chamber did not, among other things, consent to the counsel's argument that concealment of revenue or of taxation objects can not be a continuous offence. The Supreme Court considered that a person can create a state wherein he continuously conceals an object of taxation or his revenue, and in such a state he continuously and intermittently violates the obligation to disclose his sources of income and pay prescribed taxes.

7. On 28 September 1998 T. Veeber filed an application against the Republic of Estonia with the European Court of Human Rights under Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention"). The applicant argued that his conviction for acts committed in 1993 - 1994 under the rules of criminal law that entered into force on 13 January 1995 constituted retroactive application of criminal law, which is in conflict with Article 7(1) of the Convention.

8. The European Court of Human Rights found in its judgment *Veeber versus Estonia (no. 2)* of 21 January 2003, which entered into force on 21 April 2003, that the Republic of Estonia had violated Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Under Article 41 of the Convention the Court held that the Republic of Estonia was to pay T. Veeber 2000 euros in respect of non-pecuniary damage.

The Court observed that according to the text of § 1481 of the Criminal Code before its amendment in 1995, a person could be held criminally liable for tax evasion only “if an administrative penalty had been imposed on him or her for a similar offence.” The Court concluded from this that the condition was thus an element of the offence of tax evasion without which a criminal conviction could not follow. The Court further observed that a considerable number of the acts of which the applicant was convicted took place exclusively within the period prior to January 1995. The sentence imposed on the applicant – a suspended term of three years and six months' imprisonment – took into account acts committed both before and after January 1995. The Court argues that it cannot be stated with any certainty that the domestic courts' approach had no effect on the severity of the punishment or did not entail tangible negative consequences for the applicant. In these circumstances, the European Court of Human Rights found that the domestic courts applied the 1995 amendment to the law retrospectively to behaviour which did not previously constitute a criminal offence, and thus violated Article 7(1) of the Convention.

9. On 20 June 2003 Karina Lõhmus-Ein, the counsel of T. Veeber, filed with the Supreme Court a petition for the correction of court errors, in which she requested that the judgment of the Criminal Chamber of the Supreme Court of 8 April 1998, the judgment of the Tartu Circuit Court of 12 January 1998 and the judgment of the Tartu City Court of 13 October 1997 be annulled and T. Veeber be acquitted under §§ 143(1), 148^1(7) and 166 of the CrC. The counsel applied for the dismissal of civil actions.

10. By its ruling of 24 September 2003 the Criminal Chamber of the Supreme Court referred T. Veeber's criminal matter to the Supreme Court *en banc* for hearing. According to the decision of the Criminal Chamber the hearing of the petition of T. Veeber's counsel requires that the Supreme Court *en banc* answer the question of whether a finding of the European Court of Human Rights that a person's rights granted under Convention were violated upon his conviction constitutes a ground for a new hearing of the matter. If

the answer to this question is negative, the Supreme Court *en banc* should, in the opinion of the Criminal Chamber, express its opinion on whether the Code of Criminal Court Appeal and Cassation Procedure (hereinafter "the CCCACP") is in conformity with § 15 of the Constitution in conjunction with § 14, and also with § 10 of the Constitution to the extent that the Code does not allow to revise a judgment, which has entered into force, after the European Court of Human Rights has found that the rights granted under the Convention have been violated upon conviction of a person.

11. Because of the reasoning of the Criminal Chamber, the Supreme Court *en banc* involved in the proceeding the subjects referred to in clauses 1), 3), 5) and 6) of § 10(1) of the Constitutional Review Court Procedure Act, with the aim of obtaining the opinion thereof concerning the referred question.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDING IN THE SUPREME COURT

Opinion of the criminal defence counsels of Tiit Veeber

12. K. Lõhmus-Ein, T. Veeber's counsel, is of the opinion that her petition should be proceeded as a petition for the correction of court errors on the ground referred to in § 777(1)1) of the CCCACP. The petitioner requests that the term for submission of petition for correction of court errors be restored due to the judgment *Veeber versus Estonia (no. 2)* of the European Court of Human Rights of 21 January 2003, which entered into force on 21 April 2003. The counsel is of the opinion that the judgment constitutes a sufficient ground for the restoration of the term, because human rights, the guarantee of which is a characteristic of a state based on rule of law, have been violated.

It is argued in the petition that if international courts have reviewed the activities of domestic courts and have established violations of individuals' rights by the courts' activities, one of the objects of a proceeding is also the judgment of the Supreme Court which violates individual rights. The counsel observes that by acceding to the Convention the Republic of Estonia has undertaken to protect the human rights of its residents and to allow the European Human Rights Court to assess its activities. The petitioner is of the opinion that the Republic of Estonia would not be fully performing the obligation if a person lacked a possibility to realise on the domestic level the rights obtained on the international level. The counsel argues that if a judgment of the European Court of Human Rights, establishing wrong application of law and unlawful conviction of a person, did not constitute a ground for the correction of errors in a Supreme Court judgment, it would create a situation where the judgments of the Human Rights Court would have no practical significance. It is argued in the petition that the refusal to revise the Supreme Court judgment in the criminal matter of T. Veeber would be especially strange, because in this case the Human Rights Court has found that Estonian courts have violated one of the foundations of penal law nobody shall be convicted for a criminal offence which did not constitute a criminal offence under national law at the time when it was committed.

13. The counsel is of the opinion that T. Veeber should be acquitted on all charges against him. The petitioner argues that until 13 January 1995 a person could be held criminally liable under § 148^1 of the CrC only if an administrative penalty had been imposed on him or her for a similar offence. As T. Veeber had not been punished under administrative procedure for tax offences, he can not be found guilty under § $148^1$of the CrC for the acts that he had committed before 13 January 1995. The counsel observes that the act committed after 13 January 1995 also lacks the necessary elements of a criminal offence. That is why the counsel is of the opinion that T. Veeber should be acquitted under § 148^1(7) of the CrC.

The petitioner points out that although the Human Rights Court could not assess the conviction of T. Veeber under 143(1) of the CrC, the charges in that respect were groundless, too. The counsel argues that the judgment of the Criminal Chamber of the Supreme Court of 8 April 1998 did not contain answers to the allegations of appeal in cassation about wrong application of criminal law. Thus, the petitioner argues, V. Veeber should be acquitted under § 143(1) of the CrC.

The counsel is of the opinion that because of the reasons referred to in the appeal in cassation the conviction

of T. Veeber under § 166(1) of the CrC is wrong, too.

14. The counsel argues that as the conviction of T. Veeber was unlawful, the judgments should be annulled also in the part concerning civil action, because a prerequisite of satisfaction of a civil action is the conviction of a person on the charges against him. The petitioner argues that if a company fails to pay taxes or does not pay the full amount, it is only the company who is liable and not an employee of the company.

15. In the supplementary opinion of T. Veeber's counsel, sworn advocate A. Lillo, submitted to the Supreme court, he argues that effective protection of persons' fundamental rights is not guaranteed when the Code of Criminal Court Appeal and Cassation Procedure does not provide that finding of a violation of a person's rights by the European Court of Human Rights is a ground for revision of a case. The legislative power has failed to fulfil a positive obligation proceeding from §§ 14 and 15 of the Constitution to guarantee fundamental rights to persons. The counsel is of the opinion that a situation where the state is aware that it has violated the fundamental rights of a person but refuses to eliminate the violation, is not in conformity with the principle of rule of law.

Opinion of the Riigikogu

16. The Constitutional Committee, speaking on behalf of the Riigikogu, is of the opinion that the review of Estonian court judgments on the basis of the judgments of the European Court of Human Rights should take place on the basis of law and pursuant to the objectives and within the limits established by law. At the same time the Constitutional Committee refers to the fact that in the nearest future a pertinent draft shall be submitted to the Riigikogu for legislative proceeding.

The Constitutional Committee upholds the opinion it expressed in administrative matter no. 3-3-2-1-03 pending before the Supreme Court *en banc*. In the referred opinion the Committee pointed out, among other things, that the European Convention for the Protection of Human Rights and Fundamental Freedoms is an inseparable part of Estonian legal order. Consequently, the rights and freedoms of the Convention are also a part of Estonian legal order and the guarantee of those rights and freedoms is also the duty of courts. In a situation where the law does not provide for a possibility of revision of a court judgment against a person whose application has been satisfied by the European Court of Human Rights, the courts have no possibility to fulfil the obligation established in § 14 of the Constitution. The Constitutional Committee is of the opinion that the problem can be solved only by amending the law.

Opinion of the Chancellor of Justice

17. The Chancellor of Justice is of the opinion that the Code of Criminal Court Appeal and Cassation Procedure is not unconstitutional, because the valid law allows for the review of the Supreme Court judgments, which have entered into force, after the European Court of Human Rights has found that the rights, conferred by the Convention, have been violated upon the conviction of a person.

18. The Chancellor of Justice argues that § 77^7(1)1) of the CCCACP offers a ground for the Supreme Court for correction of court errors on the basis of judgments of the European Court of Human Rights. The Chancellor of Justice is of the opinion that it is possible to correct courts errors even if the term provided for in § 77^7(1)1) of the CCCACP has expired. It is also argued in his written opinion that when applying § 77^7 (1)1) of the CCCACP in conjunction with Article 35 of the Convention, §§ 15 and 123(2) of the Constitution and with the practice of the Supreme Court, it is possible to correct court errors also in the judgments of the Supreme Court which have entered into force.

19. The Chancellor of Justice points out that should the Supreme Court *en banc* come to the conclusion that a violation of the rights conferred by the Convention, found by the European Court of Human Rights judgment, is not a ground for correction of court errors, the Supreme Court*en banc* should - before reviewing the constitutionality of the Code of Criminal Court Appeal and Cassation Procedure - check whether the valid law allows for the review of judgments on some other basis. The Chancellor of Justice is of the opinion

that in such a case a matter could be heard by way of review on the grounds established in § 77^7(3)5) of the CCCACP. Should the Supreme Court consider it impossible to hear the petition of T. Veeber's counsel by way of correction of court errors or by way of review, the Chancellor of Justice argues that the petition could be accepted on the basis of §§ 14 and 15 of the Constitution in conjunction with Articles 13 and 46(1) of the Convention.

20. The Chancellor of Justice admits that if the Supreme Court *en banc* finds that the valid law does not permit the revision of judgments, which have entered into force, on the basis of judgments of the European Court of Human Rights, it should be concluded that the Code of Criminal Court Appeal and Cassation Procedure violates the fundamental right to recourse to the courts if a person's rights and freedoms are violated, established in the first sentence of § 15(1) of the Constitution. It is argued in the written opinion that every restriction of the right to recourse to the courts constitutes an infringement of the fundamental right provided for in § 15(1) of the Constitution. It may consist both in an activity or an omission of the addressee of the fundamental rights, because procedural laws both formulate and restrict the right to recourse to courts. In the given case the infringement of § 15(1) of the Constitution consists in the omission by the state - the legislator has failed to create a possibility to have a recourse to the courts in a situation where the European Court of Human Rights has found that a person was convicted in violation of the Convention. The Chancellor of Justice is of the opinion that the force of law of a judgment and legal peace as values of constitutional ranking could serve as legitimate basis for the described infringement. At the same time the Chancellor of Justice argues that the prohibition to apply for a revision of a national judgment on the basis of a judgment of the European Court of Human Rights would be disproportional in criminal law.

Opinion of the Minister of Justice

21. The Minister of Justice is of the opinion that the Supreme Court has no legal ground, proceeding from law, to accept T. Veeber's petition for a hearing. It is stated in the written opinion that petitions applying for the revision of earlier judgments that have entered into force and the hearing thereof on the merits should take place only if the Supreme Court is of the opinion that there is sufficient danger of violation of a person's rights. The Minister points out the fact that the term for the enforcement of the punishment imposed on T. Veeber has expired and that his criminal record has been expunged from the punishment register on the basis of § 25(1)5) of the Punishment Register Act. The European Court of Human Rights has ordered the payment of non-pecuniary compensation of a just amount to T. Veeber. The Human Rights Court did not find that the whole conviction of T. Veeber was in conflict with the Convention. That is why the Minister of Justice is of the opinion that the judgment of the European Court of Human Rights does not constitute a ground for re-assessing the significance of the expunged punishment and the way society assessed T. Veeber because of the punishment. That is why there is no reason to hear the petition of T. Veeber, because there is no need to eliminate the violation and compensate for the damage caused thereby.

22. At the same time the Minister of Justice argues that the regulation of the Code of Criminal Court Appeal and Cassation Procedure, which does not permit a person to submit a petition for the correction of court errors or for review of a judgment violating or permitting a violation of his rights, after the European Court of Human Rights has found a violation of the person's rights conferred by the Convention, is in conflict with §§ 14 and 15 of the Constitution in their conjunction. The Minister of Justice also points out the fact that in the nearest future the Ministry of Justice is going to submit a bill to the Government of the Republic which shall amend the procedural laws. Among other grounds for review the amendments will provide for a violation of the Convention, found by the European Court of Human Rights, on the condition that the violation might have affected the adjudication and that the violation can not be eliminated or the damage caused by the violation can not be compensated for by no other means than review.

Opinion of the Public Prosecutor's Office

23. The Public Prosecutor's Office is of the opinion that the Code of Criminal Court Appeal and Cassation Procedure does not allow for a hearing on the merits of the petition for the correction of court errors filed by T. Veeber's counsel, because the petition was not submitted within the prescribed time limits. It is pointed

out in the written opinion that differently from cassation and review procedures the law does not provide for a possibility to restore the one year term established by § 77^7(1) of the CCCACP. The Public Prosecutor's Office argues that a court may hear a petition violating the term only if § 77^7(1) of the CCCACP is declared unconstitutional to the pertinent extent by way of constitutional review procedure.

24. At the same time the Public Prosecutor's Office is of the opinion that in the given case the one year term of appeal, established in § 77^7(1) of the CCCACP, is not unconstitutional. The Public Prosecutor's Office argues that although the referred term infringes upon T. Veeber's right under § 15 of the Constitution to the recourse to the courts if his rights and freedoms are violated, the infringement may be justified by other constitutional values, such as the force of law of judgments and judicial efficiency. It is argued in the written opinion that in the case under discussion it will not be possible to eliminate any material violations of fundamental rights by exercising the fundamental right established in § 15(1) of the Constitution, and thus the restriction proceeding from § 77^7(1) of the CCCACP is a proportional measure for the guarantee of legal peace and judicial efficiency. The Public Prosecutor's Office also points out the fact that by now the conditional sentence imposed on T. Veeber is fully served, more than three years have passed since the expiry of the period of probation, and his punishment has been expunged from the punishment register on the basis of § 25(1)5) of the Punishment Register Act. That is why today, in regard to T. Veeber, the wrong application of criminal law, found by the European Court of Human Rights, has neither penal law consequences nor does it result in a violation of fundamental rights.

Opinions of plaintiffs

25. The Tax Board Office argues that a finding of the European Court of Human Rights may serve as a ground for the correction of court errors also in the judgments of the Supreme Court. At the same time the Tax Board Office is of the opinion that the arguments justifying the non-observance of the one year term of appeal established in § 77^7 of the CCCACP should be proportional to the desired aim. At that the requirement of legal peace and the rights of other parties to a proceeding (e.g. victims or plaintiffs) should be considered. It is important to weigh whether and to what extent the infringement of fundamental rights is taking place at the present time, and what could be the consequences of a revision of and possible amendment of a judgment for the fundamental rights of a person.

26. The Tartu City Government argues that the fact that the Code of Criminal Court Appeal and Cassation Procedure does not permit the revision of a judgment, which has entered into force, after the European Court of Human Rights has found a violation of rights conferred by the Convention is no reason to regard the Code unconstitutional. The city government is of the opinion that the valid law does not allow to revise Supreme Court judgments, which have entered into force, neither does the European Court of Human Rights constitute a part of Estonian court system.

27. The AS Tartu Jõujaam is of the opinion that the Code of Criminal Court Appeal and Cassation Procedure is in conflict with §§ 10, 14 and 15 of the Constitution if the Code does not permit the revision of a national judgment after the European Court of Human Rights has decided in favour of a person.

OPINION OF THE SUPREME COURT EN BANC

I.

28. First, the Supreme Court *en banc* shall have to decide whether and under which procedure the Supreme Court is competent to hear the petition of T. Veeber's counsel. If the Supreme Court *en banc* finds that the Supreme Court is competent to hear the petition, the next question to answer shall be whether it is necessary to re-open criminal proceedings after the European Court of Human Rights has found a violation of a person's right under the Convention.

29. The counsel of T. Veeber argues in the petition for the correction of court errors submitted to the

Supreme Court that if an international court has found violations of a person's rights in the activities of courts, it is the judgment of the Supreme Court that is the object of the procedure for the correction of court errors, if the judgment violates the person's rights. The counsel is of the opinion that the finding of the European Court of Human Rights of a wrong application of criminal law constitutes a sufficient ground for restoration of the term for filing petitions for the correction of court errors.

30. Pursuant to chapters VIII and IX of the Code of Criminal Court Appeal and Cassation Procedure the revision of a judgment, which has entered into force, is possible on the basis of a petition for review and by way of correction of court errors. Grounds for review are established by § 77^7(3) of the CCCACP and grounds for correction of court errors by § 77^7(1) of the same Code.

The Supreme Court *en banc* observes that these grounds for review and correction of court errors contain the grounds for the revision of judgments, which have entered into force, that can be ascertained by Estonian courts. The Supreme Court en banc is of the opinion that even a broad interpretation of the grounds for review and correction of court errors, established in the Code of Criminal Court Appeal and Cassation Procedure, does not permit a new hearing of a criminal matter after a judgment of the European Court of Human Rights.

31. § 123(2) of the Constitution establishes that if laws or other legislation of Estonia are in conflict with international treaties ratified by the Riigikogu, the provisions of the international treaty shall apply. On 13 March 1996 the Riigikogu passed the "Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by protocols no. 2, 3, 5 and 8) and additional protocols 1, 4, 7, 9, 10 and 11 Ratification Act", proclaimed by the President of the Republic on 22 March 1996 (RT II 1996, 11/12, 34). Thus, the European Convention for the Protection of Human Rights and Fundamental Freedoms constitutes an international treaty, ratified by the Riigikogu, which has priority over Estonian laws and other legislation.

Analysing, whether the court is competent to hear the petition of T. Veeber's counsel irrespective of the fact that the Code of Criminal Court Appeal and Cassation Procedure does not provide a ground for that, the Supreme Court points out that proceeding from the aforesaid the European Convention for the Protection of Human Rights and Fundamental Freedoms constitutes an inseparable part of Estonian legal order and the guarantee of the rights and freedoms of the Convention is, under § 14 of the Constitution, also the duty the judicial power. The Supreme Court *en banc* argues that the best fulfilment of this duty would require the amendment of procedural laws so that it would be unambiguous whether and in which cases and how the new hearing of a criminal matter should take place after a judgment of the European Court of Human Rights. The Supreme Court *en banc* points out that the Ministry of Justice has prepared a draft Act amending procedural laws, which shall grant a possibility to revise the judgments of Estonian courts by way of review, after the European Court of Human Rights has found a violation of rights granted under the Convention.

32. The aforesaid does not give rise to the conclusion that the Supreme Court is not competent to hear the petition of T. Veeber's counsel.

In its judgment of 17 March 2003 in case no. 3-1-3-10-02 (RT III 2003, 10, 95) the Supreme Court *en banc* has recognised the possibility of a criminal proceeding in the Supreme Court even when a procedural code does not provide for a direct ground for that. The Supreme Court can refuse to hear a person's petition only if there are other effective ways available to the person for the exercise of his right to judicial protection, guaranteed by § 15 of the Constitution.

The judgment rendered in the referred criminal matter does not directly give rise to the right to re-opening of a proceeding in an Estonian court after the European Court of Human Rights has found any violation of a right guaranteed under the Convention.

The Supreme Court *en banc* argues that in deciding on re-opening of proceedings it must be ascertained whether the re-opening of a proceeding would be a necessary and appropriate remedy of a violation of a Convention right or of a violation which has a causal link to the former, found by the European Court of

Human Rights. In doing this it will be necessary to weigh whether the finding of a violation or award of just satisfaction by the Human Rights Court would be sufficient for the person. The Supreme Court *en banc* is of the opinion that re-opening of a proceeding would be justified only in the case of continuing and substantial violation and only if this will remedy the legal status of the person. The need to re-open a judicial proceeding must overweigh the legal peace and possible infringement of other persons' rights in the new hearing of the matter. Furthermore, a prerequisite for the revision of a judgment, which has entered into force, shall be that there are no other effective means to remedy the violation.

II.

33. The counsel of T. Veeber is applying for the hearing of the criminal matter to the full extent, for the annulment of the contested judgments and for the acquittal of T. Veeber on all charges. The counsel requests that the civil action be dismissed.

34. In its judgment *Veeber versus Estonia (no. 2)* the European Court of Human Rights held that conviction of T. Veeber under the wording of § 148^1(7) of the CrC which entered into force on 13 January 1995 for the acts he committed before the entry into force of the provision was in conflict with Article 7(1) of the Convention. The violation of Article 7(1) of the Convention, consisting in the conviction of a person for a criminal offence which did not constitute a criminal offence under national law at the time the offence was committed, also amounts to a violation of the fundamental right established in § 23(1) of the Constitution.

Proceeding from the judgment of the European Court of Human Rights the violation of T. Veeber's rights under the Convention consisted in the fact that he was convicted under § 148^1(7) of the CrC for

1) unfounded reduction of the amount of income and value added tax payable by the AS Giga during the taxation period of fiscal years 1993 and 1994 through fictitious sale/purchase contracts between the AS Giga and the AS Toruarmatuur;

2) the order given in November - December of 1994 to pay the remuneration to persons who had worked in the AS Giga in the form of fictitious sale/purchase contracts.

35. The European Court of Human Rights did not find a violation of T. Veeber's rights in his conviction under §§ 143(1) and 166(1) of the CrC. Neither does the judgment of the Human Rights Court affect the conviction of T. Veeber for having, in the capacity of the chairman of the management board of the AS Tartu Jõujaam, wilfully and with the objective of concealment of objects of taxation concluded a sale/purchase contract instead of contract for services. Consequently, the Supreme Court *en banc* lacks a ground for re-opening the criminal proceeding concerning these charges.

36. Next, the Supreme Court *en banc* shall assess whether the re-opening of criminal proceeding against T. Veeber concerning his conviction under § 148^1(7) of the CrC for acts committed before 1995 (see paragraph 34 of the judgment) would be justified on the basis of judgment*Veeber versus Estonia (no. 2)* of the European Court of Human Rights. The Supreme Court *en banc* is of the opinion that to answer this question it has to be ascertained first whether the violation of T. Veeber's rights under the Convention, found by the European Court of Human Rights, or a violation having a causal link to the found violation is a material and continuing one, and whether it would be possible to eliminate the violation by re-opening of the criminal proceeding. Also, it has to be found out whether there are any other means to remedy the possible violation.

37. The Supreme Court *en banc* is of the opinion that the fact that T. Veeber was convicted for acts which were not punishable at the time the acts were committed does not in itself constitute a ground to argue that that at the present time T. Veeber's rights are still materially violated. And that is because we can speak of continuous and material violation of rights when the tangible negative consequences still exist for the person. Furthermore, the Supreme Court *en banc* points out that the European Court of Human Rights ordered the Estonian Republic to pay T. Veeber 2000 euros' compensation for non-pecuniary damage (see

paragraph 45 of European Court of Human Rights judgment in *Veeber versus Estonia (no. 2)*).

38. The judgment of the European Court of Human Rights refers to the fact that a considerable amount of the acts of which T. Veeber was convicted were committed before January 1995. The Court of Human Rights observed that as the sentence imposed on T. Veeber took into account acts committed both before and after January 1995 it could not be stated with any certainty that the domestic courts' approach had no effect on the severity of the punishment or did not entail tangible negative consequences for the applicant.

That is why the Supreme Court *en banc* shall check whether the violation of T. Veeber's rights, found by the Human Rights Court, may still continually and materially infringe upon T. Veeber's rights because of the sentence imposed on him.

The Supreme Court *en banc* points out that the aggregate punishment of three years' and six months' imprisonment was imposed on T. Veeber for all the offences he was found guilty of. Inter alia, a three years' imprisonment was imposed on him under § 148^1(7) of the CrC. Under § 47 of the CrC the enforcement of the imposed aggregate punishment was conditionally postponed for two years' period of probation. At the present time T. Veeber is not serving the imposed punishment, also the two years' probation period established by court has expired, and the criminal record has been expunged from the punishment register. That is why the Supreme Court *en banc* is of the opinion that it will not be possible to mitigate the punishment or to grant commutation to T. Veeber.

39. Simultaneously with the conviction under § 148^1(7) of the CrC T. Veeber was ordered to pay to the Tartu Tax Board Office 853 500 kroons for the damage caused by the criminal offence. According to court judgment T. Veeber had caused the damage by the following:

1) during the taxation period of fiscal year 1993 he in the capacity of the owner and chairman of the management board of the AS Giga had reduced the income and value added taxes payable to the state by 217 091 kroons through fictitious contracts;

2) during the taxation period of fiscal year 1994 he in the capacity of the owner and chairman of the management board of the AS Giga had reduced the income and value added taxes payable to the state by 576 615 kroons through fictitious contracts;

3) in November - December 1994 he had wilfully given an order to formalise the payment of remuneration to persons who had forked in the AS Giga in the form of fictitious sale/purchase contracts, as a result of which social tax and health insurance tax in the total amount of 44 994 kroons were not paid to the state;

4) on 12 May 1995 he in the capacity of the chairman of the management board of the AS Tartu Jõujaam had concluded a sale/purchase contract instead of a contract for services, as a result of which social tax and health insurance tax in the total amount of 14 850 kroons were not paid to the state.

40. Pursuant to § 269 of the Code of Criminal Procedure (hereinafter "the CCP") it is possible to satisfy a civil action within a criminal procedure only if the person is convicted pursuant to criminal procedure for the acts by which the damage was caused. If a judgment of acquittal is made due to the absence of necessary elements of a criminal offence, the court shall refuse to hear a civil action. If a criminal act has not been established or the participation of the accused at trial in the commission of a criminal offence has not been proved, the court shall dismiss a civil action.

41. The European Court of Human Rights held that proceeding from Article 7(1) of the Convention T. Veeber must not have been convicted under § 148^1(7) of the CrC for the acts committed before 1995. Thus, upon re-opening of the criminal proceeding, T. Veeber should be acquitted under § 148^1(7) of the CrC for the acts committed before 1995 due to the absence of necessary elements of a criminal offence. Pursuant to § 269(3) of the CCP such acquittal should be accompanied by partial refusal to hear the civil action. Civil action should not be heard in regard to those claims that are based on T. Veeber's activities by which in 1993 he had without legal basis reduced the tax liability of the AS Giga by fictitious contracts and organised in

November - December 1994 the payment of remuneration to persons who had worked in the AS Giga on the basis of fictitious sale/purchase contracts. Thus, the civil action of the Tartu Tax Board Office should not be heard in the total amount of 262 085 kroons.

At the same time the re-opening of the criminal proceeding would not affect the satisfaction of the civil action of the Tartu Tax Board Office concerning 576 615 kroons of income and value added tax not paid to the state by the AS Giga in 1994, because the causation of that damage was incriminated to T. Veeber also under § 166(1) of the CrC.

42. At the present time there is in force the national judgment, on the basis of which the payment of the referred 262 085 kroons could be ordered from T. Veeber, that is the amount concerning which the civil action of the Tartu Tax Board Office should not be heard upon re-opening of the criminal procedure. By that judgment a financial obligation was imposed on T. Veeber in a criminal proceeding for the acts concerning which he should have been acquitted. Consequently, pursuant to § 269(3) of the CCP a civil action based on such acts could not have been satisfied in a criminal proceeding. In the disputed case, concerning the referred 262 085 kroons, it has not been ascertained pursuant to appropriate procedure whether and to what extent it would be possible to require that T. Veeber compensate for the damage caused by the AS Giga through non-performed tax liability. The Supreme Court *en banc* is of the opinion that in the described situation the violation of T. Veeber's right of ownership (§ 32 of the Constitution) is still continuing. Such violation of the right of ownership has a causal link to the violation of T. Veeber's rights under the Convention, found by the European Court of Human Rights. The Supreme Court *en banc*argues that considering the manner of violation and the amount, the violation of the right of ownership under discussion is material enough for re-opening the criminal proceeding in the matter under review. The Supreme Court *en banc* also observes that besides re-opening of the criminal proceeding there are no other effective possibilities for T. Veeber to remedy the violation of the right of ownership.

Upon re-opening the criminal proceeding and refusing to hear the civil action of the Tartu Tax Board Office in the amount of 262 085 kroons it would be possible in principle, pursuant to appropriate procedure, to ascertain whether and to what extent T. Veeber could be held liable for the fact that the AS Giga had not fulfilled its tax liability because of the acts committed by him in 1993 and 1994.

43. For the above reasons the Supreme Court *en banc* holds that the proceeding of criminal matter concerning the conviction of T. Veeber under § 148^1(7) of the CrC for the acts committed before 1995 should be re-opened. The judgments of conviction of the Criminal Chamber of the Supreme Court of 8 April 1998, of the Tartu Circuit Court of 12 January 1998 and of the Tartu City Court of 13 October 1997 shall be annulled in this respect. The Supreme Court *en banc* acquits T. Veeber under § 148^1(7) of the CrC concerning the following:

1) during the taxation period of fiscal years 1993 and 1994 he had, without a basis, reduced the income and value added taxes payable to the state through fictitious sale/purchase contracts with the AS Toruarmatuur;

2) in November - December 1994 he had ordered to pay remuneration to persons who had worked in the AS Giga in the form of fictitious sale/purchase contracts.

T. Veeber was ordered to pay 853 550 kroons to the Tartu Tax Board Office. In connection of partial acquittal of T. Veeber the Supreme Court *en banc* refuses to hear the civil action of the Tartu Tax Board Office to the extent that it is based on the activities of T. Veeber, by which in 1993 he had, without legal basis, reduced, using fictitious contracts between the AS Giga and the AS Toruarmatuur, the tax liability of the AS Giga, and in November - December of 1994 organised the payment of remuneration to persons who had worked in the AS Giga on the basis of fictitious purchase-sale contracts. Thus, the civil action of the Tartu Tax Board Office in the amount of 262 085 kroons shall not be heard and the civil action shall be satisfied in the amount of 591465 kroons.

In other regards the Supreme Court *en banc* shall not re-open the proceeding of the criminal matter.

Dissenting opinion of justice Jüri Põld
To judgment of the Supreme Court *en banc* of 6 January 2004, no 3-1-3-13-03

I consent to the majority of the Supreme Court *en banc* concerning the re-opening of the criminal proceeding. At the same time I am of the opinion that the situation where the Code of Criminal Court Appeal and Cassation Procedure does not provide for a possibility of re-opening a judicial proceeding after the European Court of Human Rights has found a violation of the Convention, is unconstitutional. I argue that the re-opening of a court proceeding need not be worded as an absolute right of a person. But the legislator should provide for the conditions for re-opening a court proceeding in the Code of Criminal Court Appeal and Cassation Procedure. As the state has not established a procedure to regulate the re-opening of court proceedings after the finding of a violation of the Convention by the European Court of Human Rights, the state has - in my opinion - violated § 15 of the Constitution in conjunction with § 14, and the Code of Criminal Court Appeal and Cassation Procedure is unconstitutional to the referred extent. That is why I argue that the Code of Criminal Court Appeal and Cassation Procedure should have been declared unconstitutional to the extent that the Code does not provide for a possibility of reopening court proceedings after the European Court of Human Rights has found a violation of the Convention. I am of the opinion that the present case is in many ways analogous to criminal case no. 3-1-3-10-02, referred to in paragraph 26 of this judgment, in the judgment of which the Supreme Court *en banc* declared the Penal Code Implementation Act unconstitutional to the extent that the Act did not provide for a possibility to mitigate the punishment of a person serving imprisonment, imposed under the Criminal Code, up to the maximum rate of imprisonment established by a corresponding section of the Special Part of Penal Code.

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