Constitutional judgment 3-4-1-5-98

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**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
of 17 June 1998**

Review of the petition of the Tartu Circuit Court to declare clauses 3.5, 3.6 and 7 of the Government of the Republic Regulation no. 95 of 7 March 1995 entitled "Amendments to the Government of the Republic Regulation no.348 of 18 December 1992", invalid.

The Constitutional Review Chamber sitting in a panel
presided over by the Chairman of the Chamber Rait Maruste
and composed of members of the Chamber,
justices Tõnu Anton, Lea Kalm, Ants Kull and Jüri Põld,
at its session of 3 June 1998,
in the presence of the secretary to the Chamber Piret Lehemets
reviewed the petition of the Tartu Circuit Court of 27 April 1998.

From the documents submitted to the Constitutional Review Chamber **it appears, that:**

I. The Viljandi County Office of the Tax Board issued a precept to HP Meteks requiring that unpaid income tax and interests on it be transferred to the state budget. According to the precept the private limited company had violated § 13(1) of the Income Tax Act, by having deducted undocumented expenditure from the income. The legal instruments of transfer and receipt of timber, drawn by the private limited company do not conform to clauses 3.5 and 3.6 of the requirements approved by the Government of the Republic Regulation no. 95 of 7 March 1995, entitled "Rules for transactions with timber".

The private limited company filed a complaint with the Tax Board against this precept, requesting that it be repealed. The Tax Board upheld the precept.

The private limited company filed an action with the Viljandi County Court, asking that the court declare the precept and the decision of the Tax Board illegal. The complainant argued that it had precisely observed the requirements established for the source documents of accounting by § 8 of the Accounting Act and § 11 of the statutes for accounting. The legal instruments of transfer and receipt drawn by the private limited company contained all requisites obligatory for source documents of accounting. Clause 7 of the Regulation has been issued exceeding competence and is in conflict with the Taxation Act and the Income Tax Act, and that is why the Tax Board can not proceed from the Regulation when applying § 13 (1) of the Income Tax Act. At the court session the complainant requested that clause 7 of the Regulation be declared to be in

conflict with §§ 87(3), 3(1), 113 and 139 of the Constitution, §§ 1, 8 and 44 of the Taxation Act, and §§ 13 and 38 of the Income Tax Act.

By the judgment of 23 January 1998 the administrative judge of the Viljandi County Court dismissed the action of the private limited company.

In its appeal the private limited company requested the annulment of the judgment and rendering a new judgment declaring the contested precept and decision of the Tax Board illegal in their entirety.

II. In its judgment of 7 March 1995 concerning administrative matter no. II 3-50/98 the Tartu Circuit Court did not apply clauses 3.5, 3.6 and 7 of the Government of the Republic of Regulation no. 95 of 7 March 1995, entitled "Amendments to the Government of the Republic Regulation no. 348 of 18 December 1992", due to their conflict with § 87 6) of the Constitution, and the court initiated a constitutional review proceeding for the declaration of invalidity of the provisions.

The circuit court motivated its judgment with the fact that § 87(6) of the Constitution provides that the Government of the Republic shall issue regulations and orders on the basis of and for the implementation of law. This provision presupposes that the Government of the Republic may issue regulations only when a law contains a delegation norm prior to the issuance of a regulation. The Regulation of the Government of the Republic of 18 December 1992, establishing "Rules for transactions with timber" did not contain a reference to a provision of law under which the Regulation was issued. Regulation no. 95 of the Government of the Republic of 7 March 1995 amended Regulation no. 348 of 18 December 1992, and established in clause 1 that "Rules for transactions with timber" shall apply to transfer of timber (purchase, sale, brokering, transfer without charge), to receipt of timber for processing and to storage of timber outside the registered immovable property of the owner of the timber or outside the territory used by the owner of the timber. Pursuant to clause 2 of the Regulation the recipient of timber shall check whether the timber was acquired legally. Clause 3 establishes the obligatory list of data in the legal instrument of transfer and receipt.

"The Forest Act, Code of Administrative Offences and Criminal Code Amendment Act", passed on 24 May 1995, amended § 18 of the Forest Act, subsection (6) of which provides that the Government of the Republic shall establish the rules of transactions with and transportation of timber. It was not provided by the amendments to the Forest Act that the new wording is to sanction the previously issued regulations of the Government of the Republic, namely Regulations no. 348 of 1992 and no. 95 of 1995. The circuit court is of the opinion that it is not allowed to retroactively sanction administrative legislation of general application, posing additional obligations and duties on persons and restricting the rights and freedoms of persons. "The Forest Act, Code of Administrative Offences and Criminal Code Amendment Act" did not legalise, for the purposes of § 87(6) of the Constitution, the amendments to the Government of the Republic Regulation no. 348 of 18 December 1992, approved by the Government of the Republic Regulation no. 95 of 7 March 1995.

On 7 March 1995, neither § 18 nor any other provision of the Forest Act contained a norm delegating authority to the Government of the Republic to establish the rules of transactions with and transportation of timber by a regulation.

Judge Peeter Jerofejev submitted his dissenting opinion to the judgment of the circuit court. In his dissenting opinion the judge agrees with the court's position that the application of the Government of the Republic Regulation no. 348 of 18 December 1992 and of clauses 3.5 and 3.6 of Regulation no. 95 of 7 March 1995 before the amendments to § 18 of the Forest Act became effective on 25 June 1995 was unconstitutional because there was no norm delegating relevant authority. After 25 June 1995 the application of clauses 3.5 and 3.6 of these Regulations was legal. The fact that the applicable Regulation has an earlier date than the norm delegating authority is but of formal connotation.

Having examined the materials submitted the Constitutional Review Chamber found:

I.

The circuit court is applying for the declaration of invalidity of clauses 3.5, 3.6 and 7 of the Government of the Republic Regulation no. 95 of 7 March 1995 entitled “Amendments to the Government of the Republic Regulation no. 348 of 18 December 1992”.

The petition of the Circuit Court is inaccurate. The Government of the Republic Regulation no. 95 of 7 March 1995 amended “Rules for transactions with timber”, approved by the Government of the Republic Regulation no. 348 of 18 December 1992, and a new wording of the rules was provided under the title “Instructions for transactions with timber”. The provisions referred to by the Circuit Court are not included in the Government of the Republic Regulation no. 95 of 7 March 1995, instead these are in the new wording of the rules established by this Regulation.

This inaccuracy does not hamper the understanding of the petition.

II.

Pursuant to clause 3.5 of the “Rules for transactions with timber” the legal instrument of transfer and receipt of timber must contain the data concerning the transferor of timber, specified in the same provision.

Clause 3.6 requires that the legal instrument must contain the data concerning the origin of timber, specified in the same provision.

Clause 7 establishes that if clause 3 of the rules has been violated upon the transfer and receipt of timber, the legal instrument of transfer and receipt of timber and other documents drawn on the basis of the instrument shall not be regarded as proving expenditure upon calculating income tax.

III.

Pursuant to § 87(6) of the Constitution the Government of the Republic shall issue regulations on the basis and for the implementation of law. This constitutional provision means, *inter alia*, that the Government of the Republic may issue regulations solely on the basis of a norm delegating authority, previously provided for by the legislator.

On 7 March 1995 when the Government of the Republic Regulation no. 95 of was issued, neither the Forest Act nor any other Act contained a norm delegating authority to the Government of the Republic to establish rules for transactions with timber. Consequently, the Government of the Republic issued this Regulation in violation of § 87(6) of the Constitution.

The norm delegating relevant authority was inserted into the Forest Act (§ 18(6) by “The Forest Act, Code of Administrative Offences and Criminal Code Amendment Act” which was passed on 24 May 1995 and became effective on 25 June 1995. There is no provision in the new wording of the Forest Act to the effect that the former rules for transactions with timber shall remain in force.

Legal theory differentiates between delegating the right to issue legislation and sanctioning the legislation already issued. In its essence a norm delegating authority is directed towards the future. Sanctioning a legislation means recognition of an act which has already been issued, and as a consequence this act can and must be applied in the future. Proceeding from the future-oriented nature of a norm delegating authority it can not sanction previously issued administrative acts. That is why the fact that a delegation norm was inserted into the Forest Act could not legalise a Regulation of the Government of the Republic issued prior to the issuance of the norm delegating authority.

For the aforementioned reasons clauses 3.5, 3.6 and 7 of the “Rules for transactions with timber” are in conflict with § 87(6) of the Constitution.

Establishing requirements concerning legal instruments of transfer and receipt of timber by a regulation of

the Government of the Republic after § 18(6) of the Forest Act became effective would constitute the implementation of the provision by the Government of the Republic.

IV.

The Constitutional Review Chamber is of the opinion that a delegation norm in a law is not merely an authorisation to the executive to issue regulations for the implementation of law. A norm delegating authority is also an order to the executive to issue regulations which are necessary for the implementation of law. Implementation of law would prove impossible unless the regulations that the legislator deems necessary are established. It is unacceptable form the point of view of constitutional review for the Government of the Republic to hamper the realisation of a law by failure to act.

Regulation of the Government of the Republic proceeding from a delegation norm has to be issued during *vacatio legis*, so that the Act would be implemented immediately after it becomes effective. The new wording of § 18(6) of the Forest Act took effect as of 25 June 1995. Up to now, the Government of the Republic has not established rules for transactions with timber on the basis of this provision.

V.

The Constitutional Review Chamber considers it necessary to point out that the application of the Regulation of the Government of the Republic, issued prior to the delegation norm, constitutes a violation of the principle of legal certainty. Bearing in mind the future-oriented substance of a delegation norm, an addressee of law is entitled to expect that a pertinent act of general application of the executive has to be looked for in the time following the issuance of the delegation norm. An addressee of law can not be required - for the organisation of his or her conduct - to look for the acts of the executive which have been issued before the adoption of a law which requires that this or that field be more specifically regulated by the acts of the executive.

An addressee of law must be certain that the act of the executive which is obligatory for him or her is in conformity with the law and that he or she will not have to check the legality of the act. If the applicable act of the executive has been issued before the delegation norm, the addressee of law will not have this certainty and he or she is in a situation where he or she is forced to check the legality of the act.

Proceeding from the principle of a state based on democracy and the rule of law, the system of legal acts must be comprehensible to the addressee of law. Clause 7 of the “Rules for transactions with timber” is not issued on the basis of the Income Tax Act but on the basis of the Forest Act. § 8 of the Taxation Act establishes that taxpayers are required to pay only such state taxes as are prescribed by law at the rates and pursuant to the procedure provided for in tax Acts. This provision gives taxpayers the grounds to expect that their liability to pay state taxes proceeds from an Act concerning tax, and that this liability may be specified on the basis of regulations issued on the basis of an Act concerning tax. The Forest Act is not a tax Act, as it does not meet the obligatory requirements established for Acts concerning taxes by § 7 of the Taxation Act. As the Forest Act is not a tax Act, a regulation of the Government of the Republic issued pursuant to the Forest Act must not affect the tax liability of taxpayers. Also, the taxpayer may not be able to find a single norm affecting his or her tax liability outside the limits prescribed by a tax Act.

VI.

The petition of Tartu Circuit Court is justified and is to be satisfied.

Pursuant to § 4(3) of the Constitutional Review Court Procedure Act the Supreme Court shall resolve cases only to the extent requested in the petition. That is why only the new wording of clauses 3.5, 3.6 and 7 of the “Rules for transactions with timber”, approved by the Government of the Republic Regulation no. 96 of 7 March 1995 entitled “Amendments to the Government of the Republic Regulation no. 348 of 18 December 1992” is to be declared invalid due to conflict with § 87(6) of the Constitution.

Proceeding from § 152(2) of the Constitution and § 19(1)2) of the Constitutional Review Court Procedure Act, **the Constitutional Review Chamber has decided:**

To satisfy the petition of the Tartu Circuit Court of 27 April 1998 to declare clauses 3.5, 3.6 and 7 of the Government of the Republic Regulation no. 95 of 7 March 1995 entitled "Amendments to the Government of the Republic Regulation no. 348 of 18 December 1992" invalid.

The judgment is effective from the date of pronouncement, is final and is not subject to further appeal.

R. Maruste
Chairman of the Constitutional Review Chamber

DISSENTING OPINION
of justice Rait Maruste
to the judgment of the Constitutional Review Chamber of 17 June 1998

I agree with most of the main views of the Chamber, but I do not agree with the conclusions of the Chamber.

I find that constitutional issues have to be treated not from a narrowly formal legalistic point of view, but more widely.

First of all it is worth bearing in mind that it was private limited company Meteks that disputed the specific provisions, and that already the name of the company indicates what the basic activities of the company are and it is possible to conclude that the company is directly interested in cancelling some rules which regulate and check the activities of the company. The company is seeking that the provisions, requiring that the following data be included in the legal instrument of transfer and receipt of timber, be declared invalid: (3.5) *– surname and family name of natural person or of the person authorised to represent him or her, personal identification code, permanent address pursuant to identity document, the name, date of issue and the issuer of the document; name of the legal person, enterprise register number, address, surname and family name of the person authorised to represent the legal person, personal identification code, address pursuant to identity document, number, date of issuance and issuer of the document, bases for authorisation or the number and date thereof*; data concerning the origin of timber (3.6) *– (issuer of logging permit, number and date of the permit, name and address of the person from who the timber has been acquired, and the number and date of the legal instrument of transfer and receipt of timber).*

It is clear that until 25 June 1995 there was no norm correctly delegating the authority necessary for the issuance of regulations. I have to agree, basically, with the theoretical view that it is impossible and incorrect to retroactively sanction administrative legislation by legislation of general application. At the same time this is not prohibited and this is not an absolute rule. The fact that this is possible in principle is referred to by the spirit of § 2 of the Constitution of the Republic of Estonia Implementation Act, which establishes that legislation which had been enacted before the Constitution became effective shall be valid until it is either repealed or brought into complete conformity with the Constitution.

I agree with the view expressed by the Chancellor of Justice in his written opinion submitted after the court session and by judge P. Jerofejev in his dissenting opinion added to the judgment of the circuit court that beginning from 25 June 1995 the violation is but formal. The Chamber argues that the "price" of such formal, technical incorrectness is annulment of central rules for several transactions with timber immediately, that is as of the pronouncement of the judgment. This means that existing, essentially acceptable legal regulation which is incorrect in the form it was established, is annulled. I find that the consequence of this measure is a manifest damage to legal situation, legal order and legal certainty.

The requirement that norms have to be established so that they are correct theoretically, constitutionally and

technically, can not be denied. The guarantee of this is one of the central functions of constitutional review. But this may not become an absolute objective, for the achievement of which other legal and constitutional values are sacrificed. Constitution has to be interpreted as a whole and, as far as possible, so that the conflicting values are preserved. Consequently, in this case, we should try to maintain the requirement that the activities of the executive be legal, as well as legal certainty, stability of legal order, security, and protection of property. A way to achieve this in the given case would be to admit the technical incorrectness of the activities (more precisely, failure to act) of the government when establishing the procedure for transactions with timber. At the same time, considering the formal nature of the incorrectness and the fact that the referred norms have been in force already for three years and there are no considerable arguments for immediate annulment of the legislation, the entry into force of the judgment should be postponed. Although the procedural law does not provide for the possibility of postponement, the Supreme Court has postponed the effective date of its judgment in the case concerning the so called administrative boards. Postponement would be necessary in order to give the government time to make necessary preparations and to establish a correct regulation pursuant to its competence.

Postponement of the effective date of the decision would avoid annulment of essential provisions and creation of useless mess and damage to the existing legal order. The referred provisions are indispensable for the implementation of § 1553 of the Criminal Code and for preceding administrative conviction necessary for the incrimination of the section. Since 17 June 1998 the possibility to prove violations of rules for transactions with timber for the application of administrative and criminal liability will become more than questionable. Bearing in mind the high level of offences related to timber I consider this an important argument. Everyone has the right to expect that the state, as well as the courts, take all necessary and possible steps to protect property (forest) and avoid damage to it. Especially considering that there is a way to maintain and protect both of the essential objectives. The principle of legal certainty, referred to in the judgment, has this essential aspect, too.

It is not right to strive for the system of legislation using so called one-dimensional approach, bearing in mind only legality in the formal sense and excluding other constitutional principles and the essence of the case. This would constitute the use of the out-dated ideology of a state based on legality. Contemporary legal theory and constitutional jurisdiction have discarded this approach long ago.

Giving arguments within the framework of what has been expressed in the judgment I have to point out that it does not become evident from the judgment what exactly does the conflict of clause 3.6, 3,7 and 7 with the Constitution lie in. No arguments to this effect have not and can not be given, because there are none. In fact, the object of assessment is not the substance of these three provisions, but instead the activities of the government and more precisely the failure to establish the legislation pursuant to required procedure. Thus, it would be right and in accordance with the reasoning of the judgment to assess the regulation (the activities) of the government as a whole, which would mean that the regulation as a whole should be declared unconstitutional.

Despite the fact that the government as the body that issued the contested legislation expressed its attitude by not sending its representative to the court session and did not notify of its non-appearance, and that despite the fact that the case was pending before the court the government did not take any steps to do away with the problem already during the proceedings, I still find that the formal method and reaction chosen by the Chamber are not proportional with the essence of the problem and do not meet the general purpose of constitutional jurisdiction.
