Constitutional judgment 3-4-1-2-98

3-4-1-2-98

**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
of 23 March 1998**

Review of the petition of the Chancellor of Justice of 19 January 1998 to declare subsections (3) and (5) of § 15 of the Customs Tariffs Act 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, Jaano Odar and Jüri Põld,
at its open session of 11 March 1998,
with the Chancellor of Justice Eerik-Juhan Truuväli and Minister of Justice Paul Varul appearing,
and in the presence of the secretary to the Chamber Piret Lehemets
reviewed the petition of the Chancellor of Justice of 19 January 1998 to declare subsections (3) and (5) of § 15 of the Customs Tariffs Act invalid.

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

On 12 December 1997 the Chancellor of Justice made a proposal to the Riigikogu that it bring subsections (3) and (5) of § 15 of the Customs Tariffs Act into conformity with § 113 of the Constitution. The proposal found no support at the session of the Riigikogu on 17 December 1997 and the Act was not amended, and the Chancellor of Justice, proceeding from § 142 (2) of the Constitution and § 17 of the Chancellor of Justice Activities Organisation Act, proposed that the Supreme Court declare invalid, on the basis of § 152 (2) of the Constitution, subsections (3) and (5) of § 15 of the Customs Tariffs Act, passed by the Riigikogu on 14 October 1997.

The petition of the Chancellor of Justice was registered with the Supreme Court on 21 January 1998.

The Chancellor of Justice reasoned his petition as follows:

1. Pursuant to § 113 of the Constitution state taxes, duties, fees, fines and compulsory insurance payments shall be provided by law. § 113 of the Constitution applies to all taxes, including the customs duties. Pursuant to the Constitution the levying and abolishment of state taxes is a sovereign and inalienable right of the Riigikogu, which it is not entitled to delegate to the executive. According to § 15(3) of the Customs Tariffs Act the customs tariff rates to be applied between zero and the maximum rates set forth in the Annex

to the Act shall be established or abolished by the Government of the Republic. On the basis of § 15(5) of the same Act specific customs tariff rates shall also be established or abolished by the Government of the Republic.

2. Pursuant to § 1(2) of the Taxation Act the provisions of the Act apply to all taxes, consequently also to customs duties. Proceeding from §§ 3, 7, and 8 of the Taxation Act in their conjunction taxpayers are required to pay only such taxes as are prescribed and levied by law.

According to § 3 of the Taxation Act the tax system consists of state taxes provided and levied by tax Acts and local taxes levied by a rural municipality or city council in its administrative territory pursuant to law. Pursuant to § 5(8) of the same Act customs duty is a state tax. § 7 of the Taxation Act establishes the requirements for Acts concerning taxes, including elements of tax law relations, which are obligatory to be provided for in a tax Act. Pursuant to § 8 of the same Act taxpayers are required to pay only such state and local taxes as are prescribed by law at the rates and pursuant to the procedure provided for in tax Acts and council regulations.

Thus, subsections (3) and (5) of § 15 of the Customs Tariffs Act do not take into consideration the general rules provided for in the Taxation Act. In this concrete case subsections (3) and (5) of § 15 of the Customs Tariffs Act delegate to the Government of the Republic the right to establish the concrete object, amount and duration of tax, and – through this – the right to levy customs duties in general. If a concrete object of taxation nor precise and clear bases for tax liability have not been determined, a tax as a financial obligation can not be regarded as having been provided for.

3. The Customs Tariffs Act has created a situation where the Government of the Republic will essentially fulfil legislative functions within a sphere which, under § 113 of the Constitution, has been placed within the exclusive competence of the Riigikogu, thus violating the principle of separate and balanced powers, the principle of a state based on democracy and rule of law, and principle of legality, established by §§ 3, 4 and 10 of the Constitution.

In this context the principle of legal certainty, proceeding from § 10 of the Constitution, has to be underlined. The Act gives the Government of the Republic extensive and wide margin of appreciation, including the right to change tax rates repeatedly and without advance notice. Taxpayers are being put in a situation where their position is uncertain, because they are not required to pay taxes solely on the basis of law. The taxpayer is unable to predict, on the basis of law, the creation, change or termination of tax liability.

At the hearing of the Constitutional Review Chamber the Chancellor of Justice adhered to his petition. The representative of the Riigikogu and the Minister of Justice argued that the petition of the Chancellor of Justice should be dismissed.

Specialist Lasse Lehis expressed the opinion that subsections (3) and (5) of § 15 of the Customs Tariffs Act were in conflict with the Constitution.

Having examined the materials submitted and having given a fair hearing to the Chancellor of Justice, the representative of the Riigikogu and the Minister of Justice and the specialist, **the Constitutional Review Chamber found:**

I.

A state tax has two main functions: namely, it guarantees the accruement of state revenue and affects the activities of taxpayers. Due to the fact that the function of a customs duty in economic policy is directed towards free trade or protectionism, it has peculiar features as compared to other state taxes. Functional differences of customs duty are expressed in § 11 to 14, § 15(1) and (2), and § 16 and 17 (1) of the Customs Tariffs Act. In several countries (e.g. Sweden and Greece), for this reason, the Governments have been empowered to establish customs tariffs in exceptional cases. In German tax law the customs duties are differentiated from other state taxes, although laws pertaining to taxes are applied to customs duties.

§ 2 of the Taxation Act explains the term “tax” as follows: ““tax” means a financial obligation imposed on taxpayers by an Act concerning a tax or by a local government council regulation issued pursuant to an Act for the performance of the public law functions of the state and local governments or to obtain revenue required therefor and which is subject to performance pursuant to the procedure, in the amount and on the due dates prescribed, without direct compensation therefor. A financial obligation which does not have all of the aforementioned attributes is not a tax for the purposes of this Act”. Irrespective of the special features of a customs duty a reference to it is made in the list of state taxes enumerated in § 5 of the Taxation Act. According to § 1(4) of the Customs Act “import and export charges” means customs duties and other charges payable on the importation and exportation of goods which do not include fees payable for customs services. § 1 of the Customs Tariffs Act determines that the purpose of the Act is to create the legal bases for levying customs duties and defines a customs duty as a tax established on the basis of a customs tariff. § 5 of the same Act provides that customs duties are subject to payment pursuant to the procedure provided for in the Customs Act, § 4 establishes that importers and exporters of goods are payers of customs duties, and § 6(1) stipulates that customs duties accrue to the state budget.

Consequently, in Estonia a clearly expressed opinion exists that customs duty constitutes a state taxes.

Historically, too, in Estonian financial law there is a view that customs duty is a state tax. In a research, published in 1934, entitled “Basic problems of Estonian state tax law” and in the doctoral theses on the same subject a scholar of international renown professor Juhan Vaabel indicated that in its essence customs duty belongs among state taxes.

II.

§ 3 of the Taxation Act distinguishes between the terms “to provide for a tax” and “to levy a tax”. To provide for a tax means to resolve issues enumerated in § 7 of the Taxation Act, i.e. establishment of the name of the tax, the objects of taxation, the tax rate, the tax payers, the place of receipt of the tax, the due date or term for payment of the tax, the procedure for payment of the tax, the possible tax incentives and the procedure for provision thereof. It proceeds from §§ 3 and 6(1) of the Taxation Act that to provide for a tax means to create tax law legal relations between the state or local government and the taxpayer.

The term “provide a tax” of § 113 of the Constitution has to be understood as both, the provision for and levying a tax. § 3 of the Taxation Act conforms to this interpretation of the constitutional provision when providing that the tax system consists of state taxes provided and levied by tax Acts and local taxes levied by a rural municipality or city council in its administrative territory pursuant to law.

Consequently, tax law legal relation can actually be created only if the object of taxation, the tax rate, the taxpayers, the place of receipt of the tax, the due date or term for payment of the tax and the procedure for payment of the tax have been determined.

III.

It proceeds from §§ 1(2) and 3, and also from other provisions of the Customs Tariffs Act the customs tariff is the basis for imposition of customs duties, and that a customs duty is a tax established on the basis of the customs tariff. According to § 2 of the same Act the customs tariff is a list of goods which comprises the nomenclature of commodities and respective rates of duty. Consequently, in this constitutional review case, the customs tariff can be viewed as a rate of a state tax.

It proceeds from the concept of the customs tariff and from the Customs Tariffs Act that the title of the Act is misleading and in substance this Act amounts to a Customs Duty Act. For the purposes of this Act the customs tariff is the list of objects of taxation and maximum amounts of taxes provided for in the Appendix to the Act.

§ 15 of the Customs Tariffs Act is entitled “Application of customs tariff rates”. At the same time

subsections (3) and (5) of this section provide for the establishment and abolishment of customs tariff rates by the Government of the Republic. Thus, the title of § 15 of the Customs Tariffs Act is misleading, because it does not correspond to the contents of the section.

IV.

Pursuant to § 113 of the Constitution state taxes, duties, fees, fines and compulsory insurance payments shall be provided by law. This provision is included in Chapter VIII entitled “Finance and the State Budget”, and for the purposes of the chapter the provision constitutes a part of the system of measures to guarantee the drafting, adoption and execution of the budget of all state revenue and expenditure. Proceeding from the aforesaid the requirement that a state tax shall be provided by law has to be understood so that it also comprises tax rates. Otherwise the Riigikogu would not be able to decide on state revenue. This conclusion is supported by § 3(1)1) of the State Budget Act, pursuant to which state budget revenue is revenue received from state taxes in accordance with Acts concerning taxes. The State Budget Act is an act enumerated in §104(2)11) of the Constitution, i.e. a constitutional law, with which the Customs Tariffs Act must be in conformity.

§§ 106 and 110 of the Constitution also express the requirement to provide state taxes by law. These provisions are included in Chapter VII entitled “Legislation”, and contain additional measures to protect the principle that state taxes must be provided by law. According to § 106(1) of the Constitution issues regarding taxation shall not be submitted to a referendum, and according to § 110 the Acts which establish state taxes shall not be enacted, amended or repealed by a decree of the President of the Republic.

The requirement to provide taxes, including tax rates, by law is also expressed in § 7 of the Taxation Act entitled “Requirements for Act concerning tax”, which establishes that the tax rate be provided for by law, and in § 8 pursuant to which 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.

Consequently, the delegation of the provision of customs duty and tax rates to the Government of the Republic is in conflict with § 113 of the Constitution. This conflict, in turn, means a violation of § 102 of the Constitution, because the requirement thereof that laws shall be passed in accordance with the Constitution has not been observed.

V.

§ 113 of the Constitution does not exclude the possibility of providing for minimum and maximum tax rates under certain conditions. For example, pursuant to § 5 of the Land Tax Act the rate of land tax shall be 0.5 – 2.0 per cent of the assessed value of land annually, and as a rule a uniform tax rate is established by the local government council for all of the land liable to taxation in the territory of a local government, whereas the tax rate may be amended only as of the start of the budgetary year. Proceeding from the functional differences of customs duty the provision of customs duty as minimum and maximum rates would be justified and constitutional, too, whereas the concrete tax rates would be established by the Government of the Republic on the basis of a respective delegation norm and pursuant to conditions established by law.

VI.

Tax burden is directly dependent on the provision of taxes and tax rates. That is why provision of taxes and tax rates affects fundamental rights, freedoms and obligations. § 11 of the Constitution allows for the restriction of rights and freedoms only in accordance with the Constitution. Consequently, conformity with § 113 of the Constitution is necessary. Pursuant to § 19 of the Constitution everyone shall observe the law in exercising his or her rights and freedoms and in fulfilling his or her duties. That is why only law can be the basis for tax liability.

VII.

§ 15(3) of the Customs Tariffs Act stipulates: “Customs tariff rates to be applied between zero and the maximum rates set forth in the Annex to this Act shall be established or abolished by the Government of the Republic”, and § 15(5) establishes: “Specific customs tariff rates up to the rates shall be established or abolished by the Government of the Republic regardless of the time of their application”. Thus, by this Act the right to provide the object of taxation, the tax rate and customs duty has been delegated to the Government of the Republic. Failure to provide the object of taxation and the tax rate or taxation with zero rate amounts to failure to provide a tax, because tax law legal relation with taxpayer is not created. Thus, by subsections (3) and (5) of § 15 of the Customs Tariffs Act the Riigikogu delegates to the Government of the Republic the right to provide a customs duty and a customs tariff, i.e. the object of taxation and tax rates. As this delegation is in conflict with the Constitution, the issuance of regulations on the basis of this delegation would also be unconstitutional. Such *praeter legem* regulation would be in conflict with the principle established in § 3(1) of the Constitution, pursuant to which the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith.

VIII.

Delegation of provision of customs duty and customs tariff to the Government of the Republic by the Customs Tariffs Act is in conflict with the fundamentals of Estonian state, namely with the principle of separation and balance of powers, declared in Chapter I entitled “General Provision” (§ 4) of the Constitution. Pursuant to § 59 of the Constitution the legislative power is vested in the Riigikogu, and pursuant to § 65 16) the Riigikogu shall resolve other national issues, not mentioned in this provision, which the Constitution does not vest in the President of the Republic, other state bodies or local governments. § 65 of the Constitution does not refer to provision and levying of state taxes among the issues within the competence of the Riigikogu; “other national issues” referred to § 65 6) are to be understood as including the issue referred to in § 113 of the Constitution. According to § 3 of the Constitution the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. The Riigikogu is not allowed to delegate to the Government of the Republic the resolution of issues which, pursuant to Constitution, are to be resolved by law.

IX.

The violation of the principle of separate and balanced powers by the Riigikogu by delegating the provision and levying of a state tax to the Government of the Republic constitutes a violation of the principle of a state based on democracy and the rule of law, stipulated in § 10 of the Constitution, as this constitutes a threat to everyone’s fundamental rights, to legal certainty and to the legality of public administration.

In its judgment of 30 September 1994 the Constitutional Review Chamber of the Supreme Court pointed out the following: “The Constitution, and Acts and other legislation adopted in accordance therewith, are intended to create order and stability in society. Thereby a solid and stable basis for legal exercise of fundamental rights and freedoms is created, and legal certainty as a social value is formed.” In the judgment of 20 December 1996 the Constitutional Review Chamber stated that “The purpose of the right to issue regulations, vested in the Government of the Republic, is to decrease the legislator’s workload, and to transfer the function of technical elaboration of norms to the government, in order to guarantee flexibility of administrative activity and to avoid overloading the laws with useless regulations of individual matters. At the same time, it is necessary to restrict the authority of the executive by laws, to ensure that state power is exercised democratically, to guarantee general legal certainty, and to protect constitutional rights and freedoms.”

The delegation of provision and levying of a state tax to the Government of the Republic can not be regarded as a mere technical elaboration of norms. Neither does the delegation of provision and levying of taxes to the executive serve the objective of creating order and stability in a society. Such regulatory provision is also in conflict with the purpose of the right to issue regulations, and prejudices legal certainty as a social value.

Consequently, for the above reasons subsections (3) and (5) of § 15 of the Customs Tariffs Act are in conflict with §§ 113, 102, 4 and 10 of the Constitution. The Chancellor of Justice's petition is to be satisfied.

On the basis of § 19(1)2) of the Constitutional Review Court Procedure Act **the Constitutional Review Chamber has decided:**

To satisfy the petition of the Chancellor of Justice of 19 January 1998 and to declare subsections (3) and (5) of § 15 of the Customs Tariffs Act null and void.

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

Rait Maruste
Chief Justice of the Supreme Court
