



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina, 2 June 2017
Ref. no.: RK 1079/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI133/16

Applicant

Limited Liability Company “3CIS JSC“

Constitutional review of Judgment A. A. No. 232/2015 of the Court
of Appeals of Kosovo in Prishtina of 9 March 2016

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy-President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërzhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral was submitted by the Limited Liability Company “3CIS JSC“ (hereinafter: the Applicant), which is represented by Petrit Prekazi, based on the power of attorney issued by general director of the Applicant.

Challenged decision

2. The Applicant challenges Judgment (A. A. No. 232/2015 of 9 March 2016) of the Court of Appeals of Kosovo in Prishtina, which was served on the Applicant on 25 July 2016.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly violated the Applicant's rights guaranteed by Articles 3 [Equality Before the Law], 22 [Direct Applicability of International Agreements and Instruments], 24 [Equality Before the Law] and 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: ECHR).

Legal basis

4. The Referral is based on Article 21.4 and 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 16 November 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 14 December 2016, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.
7. On 12 January 2017, the Court notified the Applicant about the registration of the Referral, and sent a copy of the Referral to the Court of Appeals of Kosovo in Prishtina.
8. On 8 May 2017, the Review Panel, after having considered the report of the Judge Rapporteur, unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

9. On 7 August 2013, the Applicant received a Notification on Reassessment of Taxes issued by the Tax Administration of Kosovo (hereinafter: TAK).
10. By this Notification, after the verification made based on the registration books of the Applicant, TAK determined that the Applicant was obliged to pay the obligations of the Value Added Tax (hereinafter: VAT) in the amount of 424,321.98 €, for tax periods of fiscal years 2008, 2009 and 2010

11. On 12 August 2013, the Applicant filed a complaint (No. 243/2013) with TAK Department of Appeals, in which he pointed out that the application of the legislation by TAK was incorrect because TAK had not analyzed the specific transactions that were performed abroad.
12. On 19 September 2013, TAK Department of Appeals (Decision No. 243/2103) rejected the Applicant's complaint as ungrounded.
13. On 17 October 2013, the Applicant filed a claim against the respondent TAK with the Basic Court in Prishtina-Department for Administrative Matters.
14. In its claim, the Applicant stated that TAK, when charging the Applicant as a VAT payer, has incorrectly interpreted and applied the provisions of the Law on VAT.
15. On 24 June 2015, the Basic Court in Prishtina (by Judgment A. no. 1350/13) approved the statement of claim of the Applicant as grounded, and annulled the Decision (no. 243/2013) of TAK - Department of Appeals in Prishtina, and Notification on Reassessment of Taxes, by which the Applicant was charged with VAT in the amount of € 424,321.98.
16. TAK filed an appeal with the Court of Appeals, due to essential violations of the provisions of the contested procedure, erroneous and incomplete determination of the factual situation, and erroneous application of the substantive law.
17. On 9 March 2016, the Court of Appeals of Kosovo in Prishtina (Judgment A. A. No. 232/2015) approved TAK appeal and ordered the following:
 - I. *"The Appeal of the Respondent – Tax Administration of Kosovo in Prishtina is approved.*
 - II. *Judgment A. No. 1350/13 of the Basic Court in Prishtina – Department for Administrative Matters – Fiscal Division, of 26 June 2015, is annulled.*
 - III. *The Claim of the Claimant – "3CIS", (JSC), with its headquarters in Prishtina, is rejected.*
 - IV. *Decision No. 243/2013 of the Department of Appeals of the Tax Administration of Kosovo in Prishtina, of 19 September 2013, is upheld."*
18. On 5 October 2016, the Applicant filed a request for protection of legality with the Office of the Chief State Prosecutor requesting him to initiate proceedings before the Supreme Court against the Judgment (A. A. No. 232/2015) of the Court of Appeal in Prishtina.
19. On 07 October 2016, the Office of the Chief State Prosecutor by Notification KMLA. No. 7/2016 notified the Applicant as follows:

"Following the review of the case file, we hereby inform you that your proposal has not been approved, due to the reason that in accordance with the assessment of the Office of the Chief State Prosecutor, there are no sufficient legal grounds for raising the Request for protection of legality,

as foreseen by Article 247, paragraph 1, item a) and b) of the Law on the Contested Procedure.”

Applicant’s allegations

20. First, the Applicant considers that the main issue concerning the tax obligations is whether the Applicant can be a VAT taxpayer in Kosovo at all, taking into account that this company offers professional services from distance for clients abroad in the field of telecommunication networks, configuration and design, testing and expertise equipment, as well as the integration and management of telecommunications networks with advanced technology.
21. Further, the Applicant states that the determination of the place of supply of electronic services constitutes a basis for determining the tax. It further alleges that there is lack of clarity as to the legal regulative and the accompanying regulations on VAT for this specific type of transactions that are performed by the Applicant and for that reason one should have applied Directive 2006/112/EC of the European Union of 28 November 2006, which the Basic Court in Prishtina did apply.
22. The Applicant considers that the challenged Judgment of the Court of Appeals has not determined the place of supply of services; it has not reasoned the Applicant’s obligation to pay VAT; the Court of Appeals has taken into consideration the appeal allegations of TAK only and it has not respected the principle of the equality of arms; the Court of Appeals should have engaged an expert with regard to the interpretation of the legal norms; the Judgment was based exclusively on the application of Article 9 paragraph 2 of Regulation 2002/17 on VAT and as supplemented by Law no. 30/L-114 on VAT; these provisions cannot be applied to the Applicant’s case; these provisions are completely in contradiction with the purpose and spirit of Law no. 2004/48; the Court of Appeals could not clearly determine the intention of the legislator with respect to the place of supply of electronic services and for that reason in this case the Court of Appeals should have applied the European Union Directive 2006/112/EC of 28 November 2006.
23. The Applicant considers that the challenged judgment of the Court of Appeal did not *“provide a clear and complete response in relation to the main question regarding the determination of the payment of VAT for services offered to foreign clients outside of Kosovo, and that presents a violation of the right of the Applicant to a fair and impartial trial.”*
24. Setting from the abovementioned allegations, the Applicant concludes that the erroneous interpretation of Article 9 paragraph 2 of Regulation 2002/17 at the beginning by TAK, which was later upheld by the Judgment of the Court of Appeal, led to the violation of the rights provided for in Articles 3, 22, 24 and 31 of the Constitution and Article 6 of the ECHR.
25. The Applicant requests the Court to declare the Referral admissible and to declare invalid the Judgment (AA No. 232/2015) of the Court of Appeals of Kosovo in Prishtina

Admissibility of the Referral

26. The Court first examines whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, and as further specified in the Law and in the Rules of Procedure.
27. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establish that,
- “(1) The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.
[...]
(7) Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.”*
28. In addition, the Court refers to paragraph 4 of Article 21 [General Principles] of the Constitution which provides:
- “4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.”*
29. The Court further refers to Article 48 [Accuracy of the Referral] of the Law, which provides:
- “In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge”.*
30. Furthermore, the Court takes into account Rule 36 (1) d) and (2) a) of the Rules of Procedure, which foresees:
- (1) The Court may consider a referral if:
[...]
(d) the referral is prima facie justified or not manifestly ill-founded.*
- (2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:
[...]
(a) the referral is not prima facie justified.*
31. In this case, the Court considers that the Applicant is an authorized party to file a referral with the Constitutional Court, it has exhausted the effective legal remedies, it has therefore met the procedural requirements of Articles 21.4 and 113.7 of the Constitution. Moreover, the referral has been submitted with a legal deadline of four months, as required by the Article 49 of the Law.
32. However, in order to determine the admissibility of the Referral, the Court should further assess whether the Applicant has fulfilled the requirements of Article 48 of the Law and the admissibility requirements established in Rule 36 of the Rules of Procedure.

33. In this direction, the Court observes that the Applicant has built its case on legality grounds, claiming mainly that the judgment on its case was rendered based on incomplete and erroneous interpretation by the regular courts of the relevant laws.
34. In fact, the Court notes that the Applicant refers to Articles 3, 22, 24 and 31 of the Constitution and Article 6 of the ECHR. However, in essence all the claims of the Applicant are in connection with violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution.
35. The Court notes that the Applicant reiterates the same allegations, which he also emphasized in the proceedings before the regular courts, where the Court of Appeals (by Judgment A.A. no. 232/2015) provided a detailed response to all Applicant's allegations, reasoning that:

"... Pursuant to Article 9, paragraph 2 of UNMIK Regulation No. 2001/17, amended by UNMIK Regulation No. 2002/17, and amended and supplemented by Law No. 03/L – 114 on VAT, the following is specified: "Except as otherwise provided in the present regulation, a supply of services, including transportation service, takes place at the place of business of the supplier or, if this cannot be ascertained, then the place where the services are rendered". By interpreting this Article, the panel considers that everything is clear and that there are no ambiguities for the time period starting from 2008 until 30 June 2010, as long as this law was in force, the obligation for providing transportation services and such supplies as in the present case of the Claimant for services provided outside Kosovo, the Claimant should be charged with VAT as the place of supply and headquarters of the claimant."

36. Further, the Court of Appeals (by Judgment A.A. no. 232/2015) provided a detailed reply why the Basic Court in Prishtina has erroneously applied the substantive and procedural law by reasoning:

"The panel cannot accept the interpretation of the legal provisions by the first instance Court as correct, which considers Article 9.2 mentioned above as incomplete and unclear, including the place of supply of services, in particular when the question is about electronic services, since this provision clearly determines that the place from which the services are offered is the place of business of the supplier, and if this cannot be ascertained, then the place where the services are rendered. Therefore, the panel does not accept as fair the fact that on this basis, the decision of the first instance court is based on the provisions of Law No. 03/L – 146 on VAT, for the period between 2008 and 30 June 2010, because this law was not applicable for the period for which the claimant has been charged with VAT on the legal grounds as mentioned above"

37. The Court reiterates that it is not its task to deal with errors of facts or law allegedly committed by the regular courts when assessing evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). When alleging violation of his constitutional rights and freedoms protected by the

Constitution by the public authority, the Applicant must present a reasoned allegation and a convincing argument.

38. The Court recalls that it is not the role of the Constitutional Court to deal with the alleged material errors or legal flaws of the regular courts, unless these errors, may have infringed rights and freedoms protected by the Constitution, and only to the extent that such violations have occurred.
39. Furthermore, the role of the Constitutional Court is to ascertain whether the regular courts' proceedings were fair in their entirety, including the way the evidence was taken (see: *Case Dukmedjian v. France*, Application no. 60495/00, paragraph 71, ECtHR Judgment of 31 January 2006).
40. In addition, the Court also reiterates that the role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments, and not to deal with the interpretation and application of the domestic law, because that is the task of the regular courts (See case: *Garcia Ruiz vs. Spain*, No. 30544/96, ECHR, Judgment of 21 January 1999; see also case KI70/11 of the Applicants: *Faik Hima, Magbule Hima and Bestar Hima*, Constitutional Court, Resolution on Inadmissibility of 16 December 2011).
41. The Court considers that the Applicant had the opportunity to present before the regular courts its arguments and reasons, both material and legal, for the resolution of the dispute; its arguments were duly heard and duly examined by the Tax Administration of Kosovo and the regular courts; the proceedings viewed in entirety were fair and the decisions rendered were fully reasoned.
42. The Court further notes that the Applicant disagrees with the outcome of the proceedings before the regular courts. However, the mere dissatisfaction of the Applicant with the outcome of the proceedings conducted by the regular courts cannot of itself raise an arguable claim for breach of the constitutional right to fair and impartial trial (See *mutatis mutandis* case *Mezotur-Tiszazugi Tarsulat vs. Hungary*, paragraph 21, ECtHR, Judgment of 26 July 2005).
43. The Court notes that the Applicant did not present a concrete and substantiated allegation of violation of its rights and did not explain how and why the judgment of the Court of Appeals may have violated its constitutional rights; he only emphasized that there has been a violation of its constitutional rights. He did not provide any *prima facie* evidence which would indicate a violation of its constitutional rights (see *Trofimchuk v. Ukraine*, ECtHR, paragraph 50-55, Judgment no. 4241/03, of 28 October 2010).
44. The Court considers that the Applicant has not substantiated the allegations that the relevant proceedings have been unfair or arbitrary, and that the challenged decision violated its constitutional rights and freedoms guaranteed by the Constitution and the ECHR (see *mutatis mutandis* *Shub vs. Lithuania*, no. 17064/06, ECHR, Decision of 30 June 2009).
45. Therefore, the Court considers that the admissibility requirements, specified in the Law and foreseen in the Rule of Procedure, have not been met.

46. Therefore, the Court concludes that the Applicant's Referral is inadmissible, as manifestly ill-founded on constitutional basis.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.7 of the Constitution, Article 48 of the Law, and Rules 36 (2) (a) and 56 of the Rules of Procedure, in its session held on 08 May 2017, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law; and
- IV. This Decision is effective immediately.

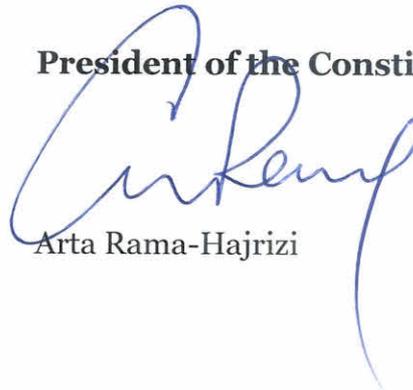
Judge Rapporteur



Bekim Sejdiu



President of the Constitutional Court



Arta Rama-Hajrizi