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

Prishtina, 11 tetor 2021
Ref. no.:AGJ 1860/21

JUDGMENT

in

Case No. KI100/21

Applicant

Moni Commerce L.l.c

Constitutional review of Decision ARJ-UZVP-No. 72/2020 of the Supreme Court of Kosovo of 28 October 2020

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Gresa Caka-Nimani, President
Bajram Ljatifi, Deputy President
Selvete Gërxhaliu-Krasniqi, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by Moni Commerce L.l.c based in Podujeva (hereinafter: the Applicant), which with power of attorney is represented by Kushtrim Bytyqi, a lawyer in Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of Decision ARJ-UZVP-No. 72/2020 of the Supreme Court of Kosovo of 28 October 2020 in conjunction with Judgment AA. No. 682/2019 of 10 July 2020 of the Court of Appeals and Judgment A. No. 1470/17 of 17 April 2019 of the Basic Court in Prishtina – Department for Administrative Matters.

3. The Applicant was served with the challenged decision on 26 January 2021.

Subject matter

4. The subject matter is the constitutional review of the challenged decision, whereby the Applicant alleges that its fundamental rights and freedoms guaranteed by Article 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: the ECHR) have been violated.

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles} and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 24 May 2021, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 25 May 2021, based on item 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu resigned as a judge before the Constitutional Court.

8. On 4 June 2021, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Safet Hoxha (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

9. On 9 June 2021, the Court notified the Applicant and the Supreme Court about the registration of the Referral. On the same date, the Court requested the Basic Court in Prishtina to attach the acknowledgment of receipt proving the date when the Applicant was served with Decision ARJ-UZVP-no. 72/2020, of 28 October 2020 of the Supreme Court.

10. On 11 June 2021, the Basic Court in Prishtina attached the acknowledgment of receipt which proves that the Applicant was served with Decision ARJ-UZVP. 72/2020 of the Supreme Court on 26 January 2021.

11. On 26 June 2021, pursuant to paragraph 4 of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21 of the Court, Judge Gresa Caka-Nimani took over the duty of the President of the Court, while based on item 1.1 of paragraph 1 of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi ended the mandate of the President and Judge of the Constitutional Court.

12. On 24 September 2021, the Review Panel considered the report of the Judge Rapporteur, and by majority recommended to the Court the admissibility of the Referral. On the same date, the Court decided by majority that (i) the Applicant's Referral is admissible; (ii) that Decision ARJ-UZVP-no. 72/2020 of the Supreme Court of Kosovo, of 28 October 2020, is not in compliance with Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

Summary of facts

13. Based on the case file, the Applicant imports chewing gums from "Company L", as an export company originating from China (hereinafter: "Company L").

14. On 16 June 2017 on the occasion of the declaration for customs clearance of this goods, through the Single Customs Declaration (hereinafter: SCD) with reference R13844 and on the occasion of the presentation of other relevant documents, Kosovo Customs (Central Admission Office) in the procedure of customs post-clearance, has disputed the value of the goods and re-evaluated it based on method 6 of evaluation, assigning a new customs value, based on the data of Kosovo Customs, namely previous customs clearance.

15. On 20 June 2017, the Applicant files an appeal against Decision R13844 of 16 June 2017, in the Decisions Review Sector of Kosovo Customs.

16. On 25 July 2017, Kosovo Customs by Decision No. 01.3.2.2/419, rejected the Applicant's appeal reasoning that the Central Admission Office acted correctly because (i) the value of the goods declared for customs post-clearance is not the real value paid for the goods for import purposes, because the value was declared less than the real paid value, in view of Article 33 of Code no. 03/L-109 Customs and Excise Code of Kosovo (hereinafter: Customs and Excise Code); (ii) has made the evaluation of the goods based on the valuation method 6 of Article 35 of the Customs and Excise Code, because the information obtained in the regular customs post-clearance reflects the real value of the disputed goods and in this case the reference value is taken the price of the goods from the value file, respectively the prices taken from reuters as stock market prices at the time of purchase of the goods. Further, Kosovo Customs stated that the contract presented by the subject in the procedure, has not been signed and stamped by the parties, and the latter does not differ from the invoice proforma, except the change "Proforma Invoice" in the "Contract", therefore the same is not reliable document. Regarding the application of Article 33 of the Customs and Excise Code, Kosovo Customs reasoned that the entity must prove that the declared value is the real value of the transaction

and contrary to the claims of the Applicant show the prices of previous customs post-clearance.

17. On 25 August 2017, the Applicant filed a lawsuit against Decision No. 01.3.2.2/419, of 25 July 2017 of the Kosovo Customs, stating that in the case of customs clearance of goods, the Applicant possessed and presented to the customs officials all mandatory documents for the declaration of goods. The Applicant alleged (i) violation of the provisions of the Customs and Excise Code because Article 33 of this Code has not been applied, even though the relevant documents have been presented; (ii) violation of Administrative Instruction 11/2009, namely Articles 60-68 and 123 because the verification and acceptance of documents has not been done; (iii) erroneous and incomplete determination of factual situation due to the way in which the value of the goods was determined; (iv) violation of the provisions of the administrative procedure because according to him, the customs officials at the Kosovo Customs have not acted objectively in the case of disputing the value of this goods, by not giving due weight to the facts presented in the case of declaration; (v) erroneous application of substantive law, namely Article 35 of the Customs and Excise Code.

18. On 17 April 2019, the Basic Court in Prishtina - Department for Administrative Matters (hereinafter: the Basic Court) by Judgment A. No. 1470/17 rejected the Applicant's statement of claim as ungrounded, and upheld Decision No. 01.3.2.2/419 of 25 July 2017 of the Kosovo Customs. The Basic Court first stated that (i) it was acted correctly when the determination of value of goods was based on method 6 of the evaluation of Article 35 of the Customs and Excise Code, based on data obtained from Kosovo Customs because these data were obtained from regular customs post-clearance examinations at branches, and as a reference value is the prices taken from reuters as stock exchange prices at the time of purchase of goods SCD R13880/2016; (ii) the accompanying documentation of the material goods was assessed as insufficient evidence because the contract presented by the Applicant was not signed and stamped by the parties and which did not differ by any letter from the invoice proforma. Second, the Basic Court reasoned that the evidence administered (i) does not dispute the fact that the banking transactions presented in the case file are the subject of "Company L" in China, but the value of these transactions could not be reconciled by the Basic Court. with the declared value of the goods according to the accompanying invoice of the goods declared with SCD R13844/ of 16 June 2017 in ZBK Merdare; (ii) The court could not reconcile the declared value of the material goods with the paid value of the transaction presented according to the bank transfers of 09 March 2017 and 06 June 2017 to TEB Bank and the Applicant in its lawsuit and the court hearing did not explain why the value of these banking transactions in the amount of 7,600 USD and 5,400USD, are not reconciled with the value of the accompanying invoice of customs goods no. SHX/MONI01 of 20 April 2017 which has a total value of 22,000 USD, and the Contract of 24 February 2017 which has the same value. Consequently, the Basic Court stated that since from the administered evidence it could not conclude that the Applicant paid to "Company L" the real value of the goods, then the Kosovo Customs acted correctly when applying the 6th method of assessment according to Article 35 of the Customs and Excise Code.

19. The Basic Court also stated that the Applicant did not find that the value of the goods in question is close to the value of identical or similar goods sold for export to Kosovo, presented at the same time, in which case the provision of Article 34 paragraph 2 points (a) and (b) of the Customs and Excise Code, and the Applicant has not managed to prove the value of the transaction, therefore, the allegations that the accompanying documentation is in accordance with Article 123 of Administrative Instruction 11/2009 cannot be approved for the implementation of the Customs and Excise Code (hereinafter Administrative Instruction 11/2009).

20. On an unspecified date, the Applicant filed an appeal against Judgment A. No. 1470/17 of the Basic Court, considering that the latter contians (i) an essential violation of the provisions of the procedure, stating that after assessing and evaluating only the evidence submitted by the Applicant and did not oblige Kosovo Customs to establish the facts and upholding the challenged decision of the latter, and moreover, the Basic Court has erred in calculating the payments from the bank payment orders; (ii) erroneous and incomplete determination of factual situation because according to him, the first instance court erred in reading the contents of the bank transfer of 6 June 2017 after considering that the amount paid is **5,400 USD**, but from the documents of the case is seen to be **15, 400 USD**, and emphasizes that the value indicated on the invoice SHX/MONI01 of 24 February 2017 is 22,000.00 USD and payment of 1,000.00 USD on behalf of the labels of the case products and which does not enter the customs base, and that both payment orders in the amount of 23,000.00 USD were paid on behalf of the subject invoice which is in line with the payment values with this invoice; (iii) erroneous application of substantive law when Article 35 of the Customs and Excise Code was applied and Article 33 thereof had to be applied. Also, the Applicant alleged a violation of Article 123 of Administrative Instruction No. 11/2009.

21. On 10 July 2020, the Court of Appeals by Judgment AA. No. 682/2019 rejected as ungrounded the Applicant's appeal and upheld Judgment A. No. 1470/17 of the Basic Court, accepting the legal position of the latter as grounded. Regarding the allegations of essential violations of the provisions of the procedure, the Court of Appeals assessed that it is ungrounded because the steps were respected according to the provisions of the Law on Administrative Conflicts (hereinafter: LAC) and of the Customs and Excise Code. Subsequently, with regard to the allegations concerning erroneous and incomplete determination of the factual situation, the Court of Appeals considered that the Basic Court had produced sufficient evidence to prove that the Applicant's allegations were ungrounded and stated that it could not prove another factual situation from the situation found by Kosovo Customs. The Court of Appeals refers to the issue of non-reconciliation of the declared value of the material goods paid with the transaction of 09 March 2017 and 06 June 2017 in TEB Bank and the fact that the latter in the amount of 7600 USD and 5400 USD are not reconciled with the value of accompanying invoice of customs goods no. SHX/MONI01 of 20 April 2017 in the total value of 22,000 USD and the contract with the same value. For this reasoning, the Court of Appeals was based on Article 35 and Article 34 paragraph 2 items (a) and (b) of the Customs and Excise Code. Secondly, regarding the value of 22,000 USD

and 1,000 USD for placing tickets, the Court of Appeals did not approve them because according to it, the Applicant was not able to prove the value of the transaction paid for the goods, therefore the allegations that the documentation was submitted in accordance with Article 123 of the Administrative Instruction cannot be accepted.

22. On 29 September 2020, the Applicant filed a request for extraordinary review alleging essential violation of the provisions of the procedure and erroneous application of substantive law. The Applicant stated that the Court of Appeals did not establish the facts and evidence on which it based the reassessment, initially the Kosovo Customs, and then the documents by which it allegedly supported its decision in the appeal procedure to the Kosovo Customs and in conflict procedure in the court. The Applicant stated that initially the Basic Court has erroneously determined the factual situation in this regard, considering it as insufficient documents, on the grounds that the bank payments made in the name of the invoice for the goods did not match the value of the invoice. It states that from paragraph 6, of page 2 of the reasoning of the Judgment of the Basic Court, the value of the bank transfer of 6 June 2017 was erroneously evidenced, determining incorrectly its value of **5,400 USD**, instead of the real amount of **15,400 USD**. In relation to this point, the Applicant states that (i) the value of the goods declared by SCD R-13844 of 16 June 2017, is also recorded in the SHX/MONI01 invoice of 24 February 2017, and that amount of 22,000 USD, and in this invoice is added the value of the goods of 1,000 USD due to the placement of labels on the products. Therefore, the Applicant states that it paid on 9 March 2017 the amount of 7,600 USD, while on 6 June 2017 the amount of 15,400 USD and both payment orders form the amount of 23,000 USD. Therefore, the Applicant considers that the finding of the Basic Court that the Applicant could not reconcile bank payments and invoices is ungrounded. Finally, regarding the issue of payment of 1,000 USD, paid on behalf of the tickets, the Applicant considers that it does not enter the customs base for the calculation of import duties and therefore states that the Court of Appeals has not applied legal provisions under Article 33 of the Customs and Excise Code and Article 123 of Administrative Instruction 11/2009.

23. On 28 October 2020, the Supreme Court, by Decision ARJ-UZVP-no. 72/2020, rejected as ungrounded the Applicant's request for extraordinary review. The Supreme Court stated that the lower instance courts have rightly concluded that no evidence could be found in the case file which would prove that the Applicant paid the real value of the transaction of the imported goods as provided by Article 33 of the Customs and Excise Code and that the accompanying documentation of the material goods is not in accordance with Article 123 of Administrative Instruction 11/2009. The Supreme Court clarified to the Applicant that to accept the value of the goods under Article 34 paragraph 2 items (a) and (b) of the Customs and Excise Code, the Applicant must prove that the value of the goods in question is approximately equal to the value of the identical or similar goods sold for export to Kosovo and also stated that the court could not reconcile the declared value of subjected goods with the paid value of the bank transfer transaction on 9 March 2017 the amount of 7,600 USD, while on 6 June 2017 the amount of 5,400 USD although the value of these transactions is not reconciled with the

accompanying invoice SHX/MONI01 of 20 April 2017 in the amount of 22,000 USD. Finally, the Supreme Court stated that: (i) it could not approve the allegation from the lawsuit that the declared value of the goods represents its real value; (ii) acknowledges the findings of the Kosovo Customs that the Applicant has not submitted the complete documentation which would prove that the declared price is at the same time the real value of the goods under Article 34 paragraph 2 items (a) and (b) of the Customs and Excise Code; (iii) as it has not been established the Applicant paid to "Company L" the real value based on the invoices, then Kosovo Customs has acted rightly regarding the new determination of value of the goods and the application of method 6 provided by Article 35 of the Customs and Excise Code.

Applicant's allegations

24. The Applicant alleges that by the challenged decision, it was deprived of its fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a trial). regular) of the ECHR.

25. The Applicant initially alleges that when declaring the goods for import, it presented all the mandatory documents to make convincing the real value of the goods, and these documents were not taken into account by the Kosovo Customs officials, who disputed the value of the goods and re-evaluated it.

26. The Applicant further alleges that the Basic Court erred in reading the contents of the transfer because in fact the bank transfer of 6 June 2017 is 15,400 USD and not 5,400 USD, and this error was also followed in the other two court instances, therefore, according to the Applicant the finding that it could not reconcile bank payments and invoices is ungrounded.

27. Accordingly, based on Article 31 of the Constitution, the Applicant states that it challenges the findings of the Supreme Court, stating that the banking transaction in the amount of 15,400.00 USD was read as 5,400.00 EUR and this does not represent an erroneous assessment of the evidence and the factual situation, but the inability of the judge to see the exact content of this document, therefore considers that this consists of an irregular judicial process. The Applicant states that in three court instances, it stated that the content of the bank transfer was read erroneously.

28. The Applicant considers that with regard to the allegations related to the lack of financial documentation to establish the price of the goods, the Supreme Court has upheld the position of the lower instances despite the fact that bank transfers prove compliance with the invoice and prove the price of the goods.

29. Further, the Applicant alleges that the Supreme Court did not provide a reasoned decision namely, it (i) did not provide a reasoning for its decision; (ii) based on the case law of the European Court of Human Rights (hereinafter: the ECtHR), the courts are required to consider a party's substantive arguments; and that (iii) the courts' silence regarding the Applicants' substantive allegations can be used as a rejection.

30. Consequently, the Applicant alleges that the decision of the Supreme Court was rendered in violation of the Applicant's right to a reasoned court decision because it failed to address the Applicant's substantive allegations of a violation of the applicable law, namely Article 33 of the Customs and Excise Code, in conjunction with Article 123 of the Administrative Instruction.

31. The Applicant, more specifically states that the Supreme Court, has not clarified why the value of these banking transactions in the amount of 7,600.00 and 5,400.00 USD are not reconciled with the value of the accompanying invoice of customs goods no. SHX/MONI01 of 20 April 2017 with the total amount of the invoice 22,000.00 USD and the Contract of 24 February 2017 which has the same value. However, in this case there is no justification regarding the Applicant's allegation that the invoice actually has a value of 22,000.00 USD and 1,000.00 USD for the labeling of goods in total 23,000.00 USD, which was paid through two bank transfers, one in the amount of 7,400.00 USD and the other 15,400.00 and not 5,400.00, as it was read by all the judges so far, read incorrectly.

32. The Applicant further states that it also alleges a violation of its right to fair and impartial trial, because no hearing was held on the appeal, and such violation was not noted by the Supreme Court, which takes care *ex officio*.

33. Finally, the Applicant requests the Court to (i) declare the Referral admissible; (ii) to hold that there has been a violation of Article 31 of the Constitution and Article 6 of the ECHR; (iii) to declare invalid Decision ARJ-UZVP-no. 72/2020 of the Supreme Court of 28 October 2020; Judgment AA. No. 682/2019 of the Court of Appeals, of 10 July 2020 and Judgment A. No. 1470/17 of the Basic Court, of 17 April 2019, as well as to remand the case for reconsideration.

Relevant constitutional and legal provisions

THE CONSTITUTION OF THE REPUBLIC OF KOSOVO

Article 31
[Right to Fair and Impartial Trial]

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.

[...]

EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 6
(Right to a fair trial)

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
[...]

CODE No. 03/L-109 CUSTOMS AND EXCISE CODE OF KOSOVO

Article 33

1. The customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to Kosovo, adjusted, where necessary, in accordance with Articles 36 and 37, provided:

a) that there are no restrictions as to the disposal or use of the goods by the buyer, other than restrictions which:

- are imposed or required by a law or by the public authorities in Kosovo,

- limit the geographical area in which the goods may be resold, or

- do not substantially affect the value of the goods;

b) that the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued;

c) that no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with Article 36; and

d) that the buyer and seller are not related, or, where the buyer and seller are related, that the transaction value is acceptable for customs purposes under paragraph 2.

2. For the purposes of paragraph 1, the following shall apply:

a) In determining whether the transaction value is acceptable, the fact that the buyer and the seller are related shall not in it self be sufficient grounds for regarding the transaction value as unacceptable. Where necessary, the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship did not influence the price. If, in the light of information provided by the declarant or otherwise, the Customs have grounds for considering that the relationship influenced the

price, they shall communicate their grounds to the declarant and he shall be given a reasonable opportunity to respond. If the declarant so requests, the communication of the grounds shall be in writing.

b) In a sale between related persons, the transaction value shall be accepted and the goods valued in accordance with paragraph 1 wherever the declarant demonstrates that such value closely approximates to one of the following occurring at or about the same time:

(i) the transaction value in sales, between buyers and sellers who are not related in any particular case, of identical or similar goods for export to Kosovo;

(ii) the customs value of identical or similar goods, as determined under Article 34 (2) (c);

(iii)) the customs value of identical or similar goods, as determined under Article 34 (2) (d).

In applying the foregoing tests, due account shall be taken of demonstrated differences in commercial levels, quantity levels, the elements enumerated in Article 36 and costs incurred by the seller in sales in which he and the buyer are not related and where such costs are not incurred by the seller in sales in which he and the buyer are related.

c) The tests set forth in subparagraph (b) are to be used at the initiative of the declarant and only for comparison purposes. Substitute values may not be established under the said subparagraph.

3. The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods and includes all payments made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller. The payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instrument and may be made directly or indirectly.
Activities, including marketing activities, undertaken by the buyer on his own account, other than those for which an adjustment is provided in Article 36 are not considered to be an indirect payment to the seller, even though they might be regarded as of benefit to the seller or have been undertaken by agreement with the seller, and their cost shall not be added to the price actually paid or payable in determining the customs value of imported goods.

Article 34

1. Where the customs value cannot be determined under Article 33, it is to be determined by proceeding sequentially through subparagraphs (a), (b), (c) and (d) of paragraph 2 to the first subparagraph under which it can be determined, subject to the proviso that the order of application of subparagraphs (c) and (d) shall be reversed if the declarant so requests;

It is only when such value cannot be determined under a particular subparagraph that the provisions of the next subparagraph in a sequence established by virtue of this paragraph can be applied.

2. The customs value as determined under this Article shall be:

a) the transaction value of identical goods sold for export to Kosovo and exported at or about the same time as the goods being valued;

b) the transaction value of similar goods sold for export to Kosovo and exported at or about the same time as the goods being valued;

c) the value based on the unit price at which the imported goods for identical or similar imported goods are sold within Kosovo in the greatest aggregate quantity to persons not related to the sellers;

d) the computed value, consisting of the sum of:

- the cost or value of materials and fabrication or other processing employed in producing the imported goods,

- an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to Kosovo,

- the cost or value of the items referred to in Article 36 (1) (e).

3. Any further conditions and rules for the application of paragraph 2 above shall be determined in the Administrative Instruction implementing this Code.

Article 35

1. Where the customs value of imported goods cannot be determined under Articles 33 or 34, it shall be determined, on the basis of data available in Kosovo, using reasonable means consistent with the principles and general provisions of:

- the agreement on implementation of Article VII of the General Agreement on Tariffs and Trade of 1994;.

- Article VII of the General Agreement on Tariffs and Trade of 1 1994;

- the provisions of this chapter.

2. No customs value shall be determined under paragraph 1 on the basis of::

a) the selling price in Kosovo of goods produced in Kosovo;

b) a system which provides for the acceptance for customs purposes of the higher of two alternative values;

c) the price of goods on the domestic market of the country of exportation;

d) the cost of production, other than computed values which have been determined for identical or similar goods in accordance with Article 33 (2) (d);

e) prices for export to a country other than Kosovo;

f) minimum customs values; or

g) arbitrary or fictitious values.

ADMINISTRATIVE INSTRUCTION No 11/2009, ON IMPLEMENTATION OF CUSTOMS AND EXCISE CODE

HEADING IV
CUSTOMS VALUE
CHAPTER 1

General provisions
Article 60

1. For application of provisions from article 32 up to 35 of the Customs and Excise Code, as well as those in this heading, Kosovo Customs shall comply with provisions specified in Annex 12. Provisions specified in the first column of Annex 12, shall be applied in view of the explanatory note indicated in the second column.
2. If necessary to refer to the general accepted principles of accounting in order to determine the customs value, then provisions from Annex 13 shall be applied.

Article 61
1. For the purposes of this heading:
a) „Agreement" means the Agreement for Implementation of Article VII of the General Agreement for Tariff and Trade reached in the framework of multilateral trade negotiations from 1973 until 1979 and referred in the beginning of Section 3 5.1 of the Code;
b) „Produced goods" include the cultivated goods, produced or extracted from the underground or mineral resourced;
c) „identical goods" means the goods produced in the same place, which are identical in every aspect, including the physical features, quality and reputation. Small visible changes do not comprise a cause to be considered non-identical;
d) „similar goods" means the goods produced in the same place, which even if not the same in all the aspects, have similar features and similar material components, that enables them to perform the same functions and from the commercial aspect are unalterable; the quality of goods, their prospect and the existence of protection sign are factors among others to be considered in the definition if the goods are similar;

e) "goods of same type or class" means the goods that are qualified within the group or range of goods produced by the special industry or industrial sector, including also identical or similar goods.
2. „identical or similar goods", as appropriately are not applied for goods, which are incorporated or submit an engineering work, development, artistry, design, as well as drawing and sketching, for which no arrangement is performed according to article 36.1 (b) (iv) of the Code, so long as such elements are not undertaken in Kosovo.

Article 62

1. For the purposes of Heading II, Chapter 3 of the Code and this Heading, persons shall be considered to be regarded only if:
a) They are officials or managers of other's businesses;
b) According to law that are recognized as business partners;
c) They are employer and employee;
d) Any person, who directly or indirectly has possession, controls or maintains 5% or more of the voting power from funds or holding of both;
e) One of them directly or indirectly controls the other;
f) Both of them directly or indirectly are controlled by the third person;
g) Them together directly or indirectly control the third person, or
h) They are members of the same family. Persons are to be considered as members of the same family, only if they are related in one of the following with each other:
[...]

2. For the purposes of this heading, persons joined in a business with each-other, since one of them is a sole agent, distributor or other's concessionary, whatsoever the designation may be, shall be considered to be related, only if they are included in one of the relations from paragraph 1.

Article 63

In order to determine the customs value of goods according to article 33 of the Code, the goods for which the price is not paid in the set out time to pay the obligation at the set out time, as per the rule is taken as a base for the customs value.

Article 64

1. When the declared goods for free circulation are part of a huge quantity of same goods, bought in a single transaction, the actual price paid or payable, according to article 33.1 of the Code, will be the price presented proportionally of the general price for goods that has the same quantity for the purchased goods.

Separation of paid or payable price may also be applied in the event of losing a part of the consignment or when goods while being assessed, are damaged before release to free circulation.

2. After the release to free circulation, price aligning which is indeed paid or payable for goods, when the seller executes for the buyer, may be considered

for determination of the customs value in accordance to article 33 of the Code, if they proof to customs that;

a) Goods were damaged at the moment set out in Section 71 of the Code;

b) The seller has arranged (exchanged) the execution of the guarantor obligations as set out in the transaction contact, which is bound prior to releasing goods to free circulation;

c) Goods deficiencies are not considered in the relevant transaction contract.

3. The paid or payable price for the goods adjusted in accordance to Paragraph 2, may be taken under advisement only if the adjustment is performed within 12 months from the date of receiving the declaration for release to free circulation.

Article 65

When the paid or payable price for the purposes of article 33.1 of the Code includes the amount (value) in relation to the applicable internal tax of the country of origin or export regarding the actual goods, the provided amount is not included in the customs value provided that can be proven to Customs, that the actual goods are released or will be released from this tax in behalf of the buyer.

Article 66

1. For the purposes of article 33 of the Code, the fact that goods are object to sale are presented for free circulation, which is considered as an appropriate indicator that they are sold for export in Kosovo. For successive sales, only the last sale that resulted with the entry of goods in Kosovo or their sale, performed in Kosovo prior to be being released for free circulation, should comprise an indicator as such.

When the declared price has to do with the performed sale prior to the last sale on which basis the goods have entered in Kosovo, then it should be proven to Customs that this goods sale is performed for export in Kosovo:

2. When the goods are used in another place between the sale period of time and the time of entering to free circulation, the customs value shall not be the transaction value.

3. The buyer doesn't have to fulfil any other condition from what it was part of the transaction contract.

Article 67

When applying article 33.1 (b) of the Code, it is ascertained that the imported goods transaction or price is subject to a condition or value compensation, which is determined, and this value is considered as indirect payment of the buyer for the seller and the part or paid or payable price, if conditions are fulfilled or subsequently doesn't have to do with:

a) The activity on what the article 33.3 (b) of the Code is applied; or

c) Factors which have to be added to the paid or payable price according to provisions of article 36.1 until 36.5 of the Code.

Article 68

1. For the purposes of article 33.3 (b) of the Code, the term "marketing activities" means all the activities regarding advertising and promotion of goods sale and all the activities regarding the rights and guarantees related to them.
2. Such undertaken activities by buyers should be considered to be undertaken in its own account, even if they are conducted in accordance to the obligation taken by the buyer, being in agreement with the seller.

[…]

Article 91
The person referred in Article 88 (a) of this act, must submit to customs the copy of the invoice based on what he presents the imported goods value. When the customs value is declared in writing, Customs shall keep a copy of it.

Documents to attach to the customs declaration
Article 123

1. The following documents should be attached to the customs declaration for placing goods into free circulation*:*

a) the invoice based on what the customs value of goods is declared, as required according to article 91 of this act;
b) when requested by Article 88 of this act, the declaration for customs value of goods is done in accordance with terms delivered in the provided article;
c) the requested documents for application of tariff preferential arrangements and other measures that derive from applicable legal rules for declared goods;
d) All the other requested documents for application of provisions that regulate relief to free circulation of declared goods.

2. Customs may require at the moment of submitting the declaration to submit the transport documents or in the event of, submission of documents related to the previous customs procedure. When a single item is displayed in two or more packing's, customs may require the submission of a packing list or a document equivalent to the contents display for each of the packaging's.

3. When the goods fulfil the terms for relief from customs import duties, the documents mentioned in paragraphs 1(a), (b) and (c) shall not be requested, except if customs considers it as necessary for the purpose of implementing provisions that regulate the placement of goods into free circulation.

LAW No. 04/L-102 ON AMENDING AND SUPPLEMENTING THE LAW ON TAX ADMINISTRATION AND PROCEDURE No 03/L-222

Article 81.G
Hearing

1. The Fiscal Divisions of the Administrative Department of the Basic Court and the Court of Appeal shall hold a public hearing where parties are heard and evidence is reviewed.
2. The court may hold a closed session, when there are appropriate reasons concerning security and confidentiality issues involved.

Admissibility of the Referral

34. The Court first examines whether the Referral has met the admissibility requirements established in the Constitution, foreseen in the Law and further specified in the Rules of Procedure.

35. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establish:

> *"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."*

36. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which provides: *"Fundamental rights andfreedoms set forth in the Constitution are also valid for legal persons to the extent applicable".*

37. In this regard, the Court notes that the Applicant has the right to file a constitutional complaint, referring to the alleged violations of its fundamental rights and freedoms, which apply to both individuals and legal entities as far as they are applicable (see case of the Court KI41/09, Applicant *University AAB-RIINVEST L.L.C.,* Resolution on Inadmissibility of 3 February 2010, paragraph 14; and see case KI26/19, Applicant *Xhavit Thaqi owner of the company "NTP INTERBAJ",* Resolution on Inadmissibility of 7 October 2020, paragraph 56).

38. The Court also examines whether the Applicant has met the admissibility requirements as established in the Law. In this regard, the Court refers to Articles 47 (Individual Requests), 48 (Accuracy of the Referral) and 49 (Deadlines) of the Law, which stipulate:

> Article 47
> (Individual Requests)
>
> *"1. Every individual is entitled to requestfrom the Constitutional Court legal protection when he considers that his/ her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*
>
> Article 48
> [Accuracy of the Referral]

"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."

Article 49
[Deadlines]

„The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision…".

39. As regards the fulfillment of these requirements, the Court finds that the Applicant is an authorized party, challenging the act of the public authority, namely Decision ARJ-UZVP-no. 72/2020 of the Supreme Court, of 28 October 2020, after the exhaustion of all available legal remedies provided by Law. The Applicant also clarified the rights and freedoms it claims to have been violated, in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

40. The Court also finds that the Applicant's Referral meets the admissibility criteria set out in paragraph (1) of Rule 39 of the Rules of Procedure and that it cannot be declared inadmissible on the basis of the requirements set out in paragraph (3) of Rule 39 of the Rules of Procedure. The Court also notes that the Referral is not manifestly ill-founded on constitutional basis, as set out in paragraph (2) of Rule 39 of the Rules of Procedure, therefore, it must be declared admissible and its merits must be examined.

Merits

41. The Court recalls that the Applicant as an importing company has declared for customs post-clearance examination of the goods from "Company L" through the relevant SCD. The value of the goods submitted by the Applicant to ZBD Merdare, was challenged by Kosovo Customs which re-assessed the value of the goods based on method 6 of assessment under Article 35 of the Customs and Excise Code. This decision was challenged by the Applicant in the second instance at the Kosovo Customs, which stated that the Central Admission Office acted correctly because (i) the value of the goods declared for customs post-clearance examination is not the real value paid for the goods with import value, because declared a value less than the real value paid, in view of Article 33 of the Customs and Excise Code of (ii) the evaluation of the goods has been made based on method 6 of the evaluation of Article 35 of the Customs and Excise Code, because the information received at the regular customs post-clearance examinations reflects the real value of the disputed goods and in this case as a reference value is taken the price of the goods from the value file, namely the prices received by Reuters as stock exchange prices at the time of purchase of goods. Further, Kosovo Customs stated that the contract presented by the subject in the procedure, has not been signed and stamped by the parties, and it does not differ from the invoice proforma, except the change "Proforma Invoice" to "Contract", therefore, the latter is not a reliable document.

42. The Applicant complained to the regular courts, where the Basic Court initially stated that (i) it was acted correctly when in assessing the goods it was based on method 6 of assessment of Article 35 of the Customs and Excise Code, based on data received from Kosovo Customs because these data were obtained from regular customs post-clearance examination at the branches, and as reference value was taken the prices received from Reuters as stock exchange prices at the time of purchase of goods SCD R13880/2016; (ii) the accompanying documentation of the material goods was assessed as insufficient evidence because the contract presented by the Applicant was not signed and stamped by the parties and which did not differ by any letter from the invoice proforma. While all three court instances in essence referred to the issue of non-reconciliation of the declared value of the goods paid with the transaction of 09 March 2017 and 06 June 2017 in TEB Bank and the fact that the latter in the amount of 7,600 USD and 5,400 USD are not reconciled with the value of the accompanying invoice of customs goods no. SHX/MONI01 of 20 April 2017 in the total value of 22,000 USD and the contract with the same value. The Applicant, in its appeal to the Court of Appeals, and its request for extraordinary review before the Supreme Court alleged erroneous and incomplete determination of factual situation because according to it, the first instance court erred in the case of reading the contents of the bank transfer of 6 June 2017 after considering that the amount paid is **5,400 USD**, but from the case file it can be seen that it is **15, 400 USD**, and emphasizes that the value listed on the invoice SHX/MONI01 of 24 February 2017 is 22,000.00 USD and payment of 1,000.00 USD in the name of labels of material products and which is not entered in the customs base, and both payment orders in the amount of 23,000.00 USD are paid in the name of the material invoice which is in line with the payment values with this invoice;

43. Therefore, the Applicant's main allegation before the Court is the issue of determination of factual situation, stating that the Supreme Court did not address, namely did not substantiate its allegation regarding the real amount paid in the transaction of 6 June 2017, because all instances have erroneously read the amount of 15, 400 USD which in court decisions is marked as 5,400 USD. In this regard, the Applicant considers that regarding the allegations related to the lack of financial documentation to prove the price of goods, the Supreme Court has approved the position of lower instances despite the fact that bank transfers prove compliance with the invoice and certify the price of goods.

44. Second, the Applicant alleges that the Supreme Court should have *ex officio* taken care to find a violation because the Court of Appeals did not hold a hearing under Article 81G of Law no. 04/L-102 on amending and supplementing the law on Tax Administration and Procedures no. 03/L-222. Consequently, the Court will address the Applicant's allegations of violation of its right to fair and impartial trial by first addressing the general principles developed by the case law of the ECtHR and the case law of this Court regarding the reasoning of court decisions by addressing the allegation about the factual situation, and the issue of holding the court hearing.

45. Therefore, based on the specifics of the present case, the Court will apply the standards of case law of the ECtHR, in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

I. Regarding the allegation of unreasoned court decision

(i) General principles regarding the reasoning of court decisions

46. As to the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court first notes that it already has a consolidated case-law. This case-law was built based on the case law of the ECtHR, including but not limited to the cases of *Hadjianastassiou v. Greece*, Judgment of 16 December 1992; *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994; *Hiro Balani v. Spain*, Judgment of 9 December 1994; *Higgins and others v. France*, Judgment of 19 February 1998; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999; *Hirvisaari v. Finland*, Judgment of 27 September 2001; *Suominen v. Finland*, Judgment of 1 July 2003; *Buzescu v. Romania*, Judgment of 24 May 2005; *Pronina v. Ukraine*, Judgment of 18 July 2006; and *Tatishvili v. Russia*, Judgment of 22 February 2007. Moreover, the fundamental principles concerning the right to a reasoned court decision have also been elaborated in the cases of this Court, including but not limited to KI22/16, Applicant *Naser Husaj*, Judgment of 9 June 2017; KI97/16, Applicant *"IKK Classic",* Judgment of 9 January 2018; KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018; KI87/18, Applicant *IF Skadiforsikring*, Judgment, of 27 February 2019, and KI24/17, Applicant *Bedri Salihu*, Judgment, of 27 May 2019; KI35/18, Applicant "*Bayerische Versicherungsverbrand",* Judgment of 11 December 2019; and case of the Court KI230/19, Applicant *Albert Rakipi*, Judgment of 9 December 2020, paragraph 135).

47. In principle, the Court notes that the guarantees embodied in Article 6 of the ECHR include the obligation of courts to provide sufficient reasons for their decisions. (See the ECtHR case, *H. v. Belgium*, Judgment of 30 November 1987, paragraph 53; and see case of th Court KI230/19, Applicant *Albert Rakipi,* cited above, paragraph 139 and case KI87/18, Applicant *IF Skadiforsikring,* paragraph 44).

48. The Court also notes that based on its case law, which refers to the proper administration of justice, the court decisions must contain the reasoning on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. It is the substantive arguments of the Applicants that need to be addressed and the reasons given need to be based on the applicable law (see similiarly ECtHR cases *Garcia Ruiz v. Spain*, application no. 30544/96, Judgment of 21 January 1999, paragraph 29; *Hiro Balani v. Spain*, judgment of 9 December 1994, paragraph 27; and *Higgins and Others v. France*, paragraph 42, see also the case of the Court KI97/16, Applicant *IKK Classic*, cited above, paragraph 48; and case KI87/18 *IF*

Skadeforsikring, cited above, paragraph 48). By not seeking a detailed response to each complaint raised by the Applicant, this obligation implies that the parties to the proceedings may expect to receive a specific and explicit response to their claims that are crucial to the outcome of the proceedings (see case *Morerira Ferreira v. Portugal*, Judgment of 5 July 2011, paragraph 84, and all references used therein; and case of the Court KI230/19, Applicant *Albert Rakipi,* Judgment of 9 December 2020, paragraph 137).

49. In addition, the Court refers to its case law where it is established that the reasoning of the decision must state the relationship between the merit findings and the examination of evidence on the one hand, and the legal conclusions of the court, on the other. A judgment of a court will violate the constitutional principle of ban on arbitrariness in decision-making, if the reasoning given fails to contain the established facts, the legal provisions and the logical relationship between them (the Constitutional Court, cases: no. KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012, paragraph 61; no. KI135/14, *IKK Classic*, Judgment of 9 February 2016, paragraph 58, and KI96/16 *IKK Classic*, Judgment of 8 December 2017, see Court cases KI87/18 Applicant *"IF Skadeforsikring"*, Judgment of 27 February 2019, paragraph 44; KI138/19 Applicant *Ibish Raci*, cited above, paragraph 45, as well as the case of Court KI230/19, Applicant *Albert Rakipi*, Judgment of 9 December 2020, paragraph 138).

(ii) Application of these principles in the circumstance of the present case

50. The Court recalls that the Applicant complains about the reasoning given by the regular courts regarding the value of the transaction, namely, the fact that the first instance court erred in reading the contents of the bank transfer of 6 June 2017, after considering that the amount paid is **5,400 USD**, but from the case file it can be seen that it is **15, 400 USD**, and emphasizes that the value listed in the SHX/MONI01 invoice of 24 February 2017 is 22,000.00 USD and the payment of 1,000.00 USD on behalf of the labels of the products and which does not enter the customs base, and that both payment orders in the amount of 23,000.00 USD were paid on behalf of the substantive invoice which is in line with the payment values with this invoice. According to the Applicant, this error was also forwarded to the Judgment of the Court of Appeals and the Supreme Court. Second, the Applicant alleges that the Supreme Court found no violation regarding the fact that the Court of Appeals did not hold a hearing as required by Article 81G of Law no. 04/L-102 on amending and supplementing the law on Tax Administration and Procedures no. 03/L-222, not reasoning on this point.

51. In this regard, the Court first recalls the reasoning of the regular courts regarding the rejection of the Applicant's allegations. In this respect, the Court recalls that the Court of Appeals by Judgment AA. No. 682/2019, rejected as ungrounded the Applicant's appeal, reasoning as follows:

> *"[...] with regard to the appealing allegations of erroneous and incomplete determination of factual situation, this panel considers that the court of first instance in the case of the claimant's lawsuit, has administered sufficient evidence which proves that the claimant's allegations are ungrounded, because from the administered evidence, the court could not*

prove another factual situation from the situation found by the respondent during the administrative proceeding, because the court does not challenge the facts that in the banking transactions presented in the case file as the beneficiary of the means is the exporter - the entity ["Company L"], but the value of these transactions of goods declared in the Single Customs Declaration R-13844 of 16.06.2017 in ZBD Merdare. The court could not reconcile the declared value of the material goods with the paid value of the transaction presented according to the bank transfers of 09.03.2017 and 06.06.2017 of TEB Bank, the claimant also in the court session did not explain why the value of these banking transactions in the amount of 7600 USD and 5400 USD, are not reconciled with the value of the accompanying invoice of customs goods no. SHX/MONI01 of 20.04.2017 which has a total value of 22000 USD, and the contract of 24.02.2017 which has the same value. Therefore, the court from the administered evidence could not prove that the claimant paid the exporter the real value of the material goods according to the accompanying invoice of the goods. Therefore, the first instance court correctly decided when it assessed that the respondent acted correctly when by the challenged decision it confirmed the re-evaluation of the material goods by the central admission office, applying the 6th evaluation method from Article 35 of the Customs and Excise Code, namely available data to Kosovo Customs (SCD R-13880/2016). Therefore, it is rightly concluded that the claimant in this administrative conflict has not proved that the value of the material goods is approximate to the value of identical or similar goods sold for export in Kosovo, presented at the same time, which in this case the provision of Article 34 par.2 item a) and b) of the Customs and Excise Code of Kosovo would be applied.

The panel of this court, based on this situation of the matter, finds that the first instance court did not find grounded facts that argue that the claimant paid the exporters the real value of the goods. Therefore, the first instance court rightly considers that the respondent acted correctly when by the challenged decision it confirmed the re-evaluation of the material goods by applying the method of 6 evaluation method under Article 35 of the Customs and Excise Code of Kosovo, since these data were obtained from regular customs through the branches and as a reference value is taken the price of the goods from the value file, namely the prices received from Reuters as the stock market price at the time of purchase of goods, SCB R-13880/2016. Therefore, based on the current state of the case, this court finds that the first instance court rightly decided when based on the provisions of LAP, LAC, Law no. 04/L-102 on Amending and Supplementing the Law on Tax Administration and Procedures no. 03/L-222, as well as Code no.03/L-109 on Customs and Excise in Kosovo."

52. As to the value of the goods the Court of Appeals reasoned:

"The transaction price and the price actually paid for the goods imported and declared by the contested customs declaration is 22.000.00 USD. Terms of delivery for the goods are determined based on the CFR Durrës parity. The value of these goods is indicated in the invoice SHX/MONI01 dated 24.02.2017, namely the amount of 22.000.00 USD, then in the same invoice from the exporter is added the payment of 1.000.00 USD in the

name of placing labels on the material product. This panel did not approve these appealing allegations, because it assessed the latter are ungrounded, unsubstantiated in concrete evidence and have no legal support to approve the appeal, due to the fact that the first instance court from the administration of all evidence in this procedure of the administrative conflict concluded that the claimant was not able to prove to the court the evidence proving the value of the transaction paid for the goods, so even according to the assessment of the panel of this court, the allegations that the accompanying documentation of the goods is in accordance with Article 123 of Administrative Instruction 11/2009 on the Implementation of the Customs and Excise Code of Kosovo cannot be accepted. Therefore, according to the assessment of the panel of this court, in the present case it has been convincingly and in an uncontested manner that there is no sufficient evidence to prove that the claimant has paid the true value of the transaction of the goods. Therefore, the appealed judgment of the first instance court is clear and understandable and contains sufficient reasons for the decisive facts which this court also accepts, so that the claimant's appeal was rejected as ungrounded while the appealed judgment was upheld as fair and lawful."

53. The Court also recalls that the Supreme Court by its Decision ARJ-UZVP-no. 72/2020, reasoned as follows, referring to the administered evidence, namely the factual situation:

"[...] the lower instance courts [...] have rightly concluded that in the case file could not be found any evidence which would prove that the claimant has paid the real value of the transaction of imported goods as provided by Article 33 of the Kosovo Customs and Excise Code No. 03/L-109 and that the accompanying documentation of the material goods is not in accordance with Article 123 of Administrative Instruction 11/2009. In order to accept the paid value of the transaction according to the method for determining the value of the imported goods, pursuant to Article 34 paragraph 2 items (a) and (b) of the Customs and Excise Code of Kosovo, the claimant in this case must prove that the value of the goods is approximately equal to the value of the identical or similar goods sold for export to Kosovo. In the opinion of this court, according to the banking transactions presented in the case file, it is not disputed that "Company L" is a user, but the court could not reconcile the value of these transactions with the declared value of the goods according to the accompanying invoice presented for the goods declared in [SCD] R13844/16.06.2017 in ZBD Merdare. The court could not reconcile the declared value of the goods with the paid value of the transaction presented according to the bank transfers of 09.03.2017 the amount of 7,600 USD, while on 06.06.2017 the amount of 5,400 USD and why the value of these transactions is not reconciled with the accompanying invoice SHX/MONI01 of 20.04.2017 with the invoice of the total value of 22,000 USD, and the contract dated 24.02.2017 which has the same value".

54. The Supreme Court further noted that:

[...] this court is of the opinion that the claimant has not submitted complete documentation and harmonized with the real value of the paid goods. Respectively, the decisive facts, those the most relevant, such as bank transfers and export declaration, harmonized with the values of the invoices, within the meaning of Article 123 of of Administrative Instruction 11/2009, the court could not certify them, therefore it could not accept the allegation from the lawsuit that the declared value of the goods represents its real value. Therefore, this court accepts the findings of the respondent authority that the claimant did not present the complete documentation which would prove that the declared price is at the same time the real value of the goods (Article 34 paragraph 2 items (a) and (b) of Kosovo Customs and Excise Code). Since the lower instance courts, based on the evidence in the case file, could not substantiate the claimant's allegations that the claimant paid the exporters the fair value on the basis of invoices, it turns out that the lower instance courts rightly established that the respondent has acted legally when it has decided on the new evaluation of the subjected goods and the application of method number 6, provided by Article 35 of the Customs and Excise Code no. 03/L-109, namely the assessment in the database available to customs."

55. The Court recalls that in case when a court of third instance, as in the case of the Applicant, the Supreme Court, which upholds the decisions taken by the lower courts - its obligation to reason decision-making differs from cases where a court changes the decision-making of lower courts. In the present case, the Supreme Court did not change the decision of the Court of Appeals or that of the Basic Court-which rejected the Applicant's lawsuit and appeal but only proved their legality, given that, according to the Supreme Court, there were no essential violations of procedure and erroneous application of substantive law in this procedure (see, *mutatis mutandis,* cases of the Court: KI194/18, Applicants *Kadri Muriqi and Zenun Muriqi*, Resolution on Inadmissibility of 5 February 2020, paragraph 106; and KI122/19, Applicant: *F.M*, Resolution on Inadmissibility, of 9 July 2020, paragraph 100).

56. Based on the above reasoning of the Court of Appeals, and the Supreme Court, the Court notes that both have, in essence, reasoned that (i) to accept the value of the transaction paid according to the method for determining the value of the imported goods pursuant to Article 34, paragraph 2, items (a) and (b) of the Customs and Excise Code, the Applicant must prove that the value of the goods in question is equal to the value of the identical or similar goods sold for export to Kosovo; (ii) as it has not been possible to establish that the Applicant has paid the exporter the fair value on the basis of invoices, then it has been duly decided regarding the new evaluation of the goods and the application of method number 6, provided by Article 35 of the Customs and Excise Code; (iii) the accompanying documentation of the goods is not in accordance with Article 123 of Administrative Instruction 11/2009; (iv) it is not possible to reconcile the declared value of the goods with the paid value of the transaction presented according to the bank transfers to TEB Bank of 09 March 2017 in the amount of 7,600 USD and 06 June 2017 in the amount of 5,400 USD, and that these are not harmonized with the value of the accompanying invoice of customs goods no. SHX/MONI01 of 20 April 2017 which has a total value of 22,000 USD, and the contract of 24 February 2017 which has the same value.

57. The Court of Appeals further stated that the value of the goods was recorded on invoice SHX/MONI01 of 24 March 2017, in the amount of 22,000.00 USD, then in the same invoice from the exporter was added the payment of 1,000.00 USD in name of the label on the subject product. However, the Court of Appeals stated that the Applicant was not able to prove to the court the evidence proving the value of the transaction paid for the goods in question.

58. From the legal provisions applied in this case by the regular courts, the Court notes that the Customs and Excise Code stipulates in Article 34 paragraph 2 that the customs value determined under this Article shall be under item (a) the transaction value of identical goods sold for export to Kosovo and exported at or about the same time, or approximately, at the same time as the goods being valued and (b) the transaction value of similar goods sold for export to Kosovo and exported at or about the same time as the goods being valued. Subsequently, this Code in Article 35 paragraph 1 stipulates that where the customs value of imported goods cannot be determined under Articles 33 or 34, it shall be determined, on the basis of data available in Kosovo, using reasonable means consistent with the principles and general provisions. In this regard, the Court recalls that the Applicant's allegation that it paid the transaction value of the imported goods as provided by Article 33 of the Customs and Excise Code was not approved and the value of the transaction paid according to the method for determining the value of the imported goods under Article 34 paragraph (a) and (b) of the Customs and Excise Code has not been accepted. Finally, with regard to the documents submitted, the Court recalls that Article 123 paragraph 1 of Administrative Instruction 11/2009 lists the documents to be attached to the customs declaration, which are: (a) the invoice on the basis of which the customs value of the goods is declared , as required by Article 91 of this act; (b) Where required under Article 88 of this Act, declarations of the customs values of the goods declared shall be made in accordance with the conditions laid down in that Article; (c) Documents required for the application of tariff preferential arrangements and other measures that derive from applicable legal rules for declared goods; (d) All other documents required for the application of the provisions governing the relief to free circulation of declared goods. In the Applicant's case, the regular courts considered that the these requirements were not met.

59. In the present case, it is not disputed that the Applicant performed banking transactions (payments) in the account of "Company L", and it is not disputed that the focus of all regular courts was on the value of the imported goods. Disputable are the answers of the regular courts regarding the harmonization of the value of these transactions with the declared value of the goods in question according to the accompanying invoice.

60. In the present case, the Court recalls that the Applicant in its appeal and in its request for extraordinary review claimed that the value recorded as a transaction in the bank transfer of 6 June 2017 is not 5,400 USD but 15,400 USD. The Court of Appeals and the Supreme Court did not explain why they could not reconcile the declared value of the goods with the paid value of the transaction presented according to the bank transfers to TEB Bank of 9 March 2017 in the amount of 7,600 USD and 06 June 2017 in the amount of 5,400

USD, and that these are not reconciled with the value of the accompanying invoice of customs goods no. SHX/MONI01 of 20 April 2017 which has a total value of 22,000 USD, and the contract of 24 February 2017 which has the same value.

61. However, the Court recalls that it is the substantive arguments of the Applicants that need to be addressed and the reasons given must be based on the applicable law (see paragraph 48 above, and the references used therein). By not requesting a detailed response to each complaint raised by the Applicant, this obligation implies that the parties to the proceedings may expect to receive a specific and explicit response to their allegations that are crucial to the outcome of the proceedings (see paragraphs 48 above, and references used therein).

62. While the Court is aware that according to the reasoning of the regular courts regarding the applicability of Articles 33, 34 and 35 of the Customs and Excise Code, the Court also takes into account the Applicant's argument regarding the harmonization of the value paid of transactions through bank transfers, and the value of the accompanying invoice of customs goods no. SHX/MONI01 of 20 April 2017 which has a total value of 22,000 USD. Regarding this point, the Court notes that from the case file, the transfer made to TEB Bank on 06 June 2017 marked in all court instances as a value of 5,400 USD, is actually in the amount of 15,400 USD. This would result in a transaction of 23,000 USD, according to the Applicant's claim 22,000 USD for the accompanying invoice of the customs goods, while 1,000 USD paid on behalf of the labels, which according to the Applicant does not enter the customs base for the calculation of import duties.

63. The Court cannot assess whether the correction of this technical error, namely the replacement of the amount of 5,400 USD, which is actually 15,400 USD in the bank transfer of 6 June 2017, entails in itself any changes regarding the harmonization of the declared value of the goods in question with the paid value of the transaction presented according to bank transfers. The Applicant considers this claim substantial because "*the bank transfers prove compliance with the invoice and certify the price of the goods*". Therefore, the Court considers that this claim of the Applicant is essential and can be decisive regarding the merits of the lawsuit of the Applicant. Regarding this specific allegation of the Applicant, the Court of Appeals and the Supreme Court have remained silent.

64. The silence of the courts regarding the relevant allegations of the respective Applicants has been specifically examined through the case law of the ECtHR. For example, in the following cases: *Ruiz Torija v. Spain*, cited above and *Hiro Balani v. Spain*, cited above, the ECtHR, beyond the general principles regarding the right to a reasoned judicial decision, also addressed the circumstances in which the relevant courts had remained silent on the arguments, which the ECtHR deemed essential. In both cases, the ECtHR considered whether the silence of the relevant court could reasonably be interpreted as an implicit rejection of the parties' arguments. (See the ECtHR case, *Hiro Balani v. Spain*, cited above, paragraph 28). However, in the absence of proper reasoning, the ECtHR stated that it was impossible to

ascertain whether the respective courts had simply neglected to deal with the respective claims or implied their rejection and, if that was its purpose, what were its reasons for such an approach. (See ECtHR cases: *Hiro Balani v. Spain*, cited above, paragraph 28; and *Ruiz Torija v. Spain*, cited above, paragraphs 29 and 30). In both cases, the ECtHR found a violation of Article 6 of the ECHR (see case of the Court KI24/20, Applicant *"PAMEX L.L.C."*, Judgment of 3 February 2021, paragraph 57).

65. Consequently, the Court in the circumstances of the present case, having regard to the fact that the Supreme Court has failed to address and substantiate the Applicant's substantive allegations raised before it, a court decision may not be compatible with the standards of a reasoned court decision, as set out in Article 31 of the Constitution in conjunction with Article 6 of the ECHR and the relevant case law of the Court and the ECtHR.

66. Finally, the Court recalls that the Applicant also alleges that the Supreme Court did not reason and found a violation regarding the holding of a hearing in the Court of Appeals. However, the Applicant did not raise such a claim in its request for extraordinary review, and for this reason the Court will not take into account the latter.

67. Therefore, and finally taking into account the observations above and the procedure as a whole, the Court considers that the Decision of the Supreme Court, namely Decision ARJ-UZVP-no. 7/2020 of the Supreme Court of 28 October 2020 was rendered in violation of the Applicant's right to a reasoned court decision, as an integral part of the right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, because it failed to address the Applicant's substantive allegations regarding the allegation of error in the reading of the banking transaction of 6 June 2017 and the issue of its harmonization with the value of the accompanying invoice of the customs goods no. SHX / MONI01 of 20 April 2017.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 21.4 and 113.7 of the Constitution, Articles 20, 27 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, on 24 September 2021, by majority

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo, in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights;

III. TO DECLARE Decision ARJ-UZVP-no. 72/2020 of the Supreme Court of Kosovo of 28 October 2020 invalid;

IV. TO REMAND Decision ARJ-UZVP-no. 72/2020 of the Supreme Court of Kosovo of 28 October 2020, for reconsideration in accordance with the Judgment of this Court;

V. TO ORDER the Supreme Court to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, by 28 March 2022 about the measures taken to implement the Judgment of this Court;

VI. TO REMAIN seized of the matter pending compliance with that order;

VII. TO NOTIFY this Judgment to the Parties, and in accordance with Article 20 (4) of the Law, to publish it in the Official Gazette.

VIII. This Judgment is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Radomir Laban

Gresa Caka-Nimani