



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Pristina, 6 April 2011
Ref. No.: 89/11

JUDGMENT

in

Case No. KI 55/09

Applicant

N.T.SH Meteorit

**Constitutional review of the Decision No. 2407/2006 of the Supreme Court of
Kosovo, dated 30 September 2009**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy President
Robert Carolan, Judge
Altay Suroy, Judge,
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Cukalovic, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

The Applicant

1. The Applicant is NTSN Meteorit with offices at Prizren, through its owner Tahir Hoxha of Prizren, represented by Sahit Bibaj, Lawyer also of Prizren.

The Challenged Decision

2. Decision of the Supreme Court of Kosovo, No. 2407/2006, dated 30 September 2009.

Legal Basis

3. The Referral is based on Article 113.7 and of the Constitution, Article 20 of the Law No. 03/L-121 on the Constitutional Court of the Republic Kosovo (hereinafter referred to as: the Law) and Rule 57 (1) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Rules of Procedure).

Procedure before the Constitutional Court

4. The Applicant filed a referral to the Constitutional Court that seeks to invalidate and annul Supreme Court of Kosovo decision A.Nr.2407/2006, dated 30 December 2009, as a violation of its constitutional right to a fair and impartial trial as detailed in Article 31 of the Constitution of the Republic of Kosovo due to the Supreme Court's failure to annul the Independent Review Board ("IRB") decision A.Nr. 439/2006 dated 24 August 2006 regarding the tax liabilities of the Applicant.
5. The President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and appointed a Review Panel comprising Judges Altay Suroy, presiding, Kadri Kryeziu and Gjyljeta Mushkolaj. The Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the admissibility of the Referral. The full Court deliberated and voted in a private session on the Referral on 13 December 2010.

Summary of the Facts

6. From 1 September 2003 until 8 October 2003, officials of the Tax Administration of Kosovo ("TAK") performed an examination of the accounts and tax affairs and returns of the Applicant regarding tax declarations and tax payments made for the period of 2000/2003. In the its report, issued 8 May 2003, TAK found the Applicant had not properly declare its turnover of goods for tax purposes, and accordingly assessed the corresponding taxes, penalties, and interest. Specifically, based on irregularities in Applicant's accounting records concerning the purchase entries, sale entries, and declared income tax for certain inventory, TAK utilized the inventory's expiration period of sixty (60) days to calculate the appropriate turnover for the time periods in question. The report contained detailed charts of the accounting methods used in TAK's tax assessment based on the physical quantity of the Applicant's stock of goods and reported turnover.
7. The Applicant originally filed an appeal against the TAK findings to the Appeals Department of the Tax Administration. After reviewing the Applicant's information and comparing it with the facts provided by the Tax Administration the Department of Appeals rendered its decision Nr.426 on 9 January 2004 and rejected the Appeal.
8. The Applicant then appealed the Department of Appeals' Decision to the Independent Review Board (IRB). The IRB reviewed the case and pursuant to the Regulation on Tax Administration and Procedures RB rendered a decision Nr.62/2004 on 14 April 2004 rejecting Meteorit's appeal as unfounded. In its Decision the IRB *inter alia* stated:

N.T.Sh Meteorit during the development of business was not abiding by the regulations and procedures of taxes and instructions of tax inspectors. The documentation presented in the hearing, which was the key element of the control ... show[ed] the taxpayer had understated its income.

The calculation of additional tax income was determined by the difference of the declared tax compared to the real turnover based on the records of the taxpayer, preliminary interview, declarations of taxpayers for the contested period, activities of the inspectors with the indirect site inspection of the business, and information from third parties. The data presented in the hearing was analyzed and compared with the data obtained by the Peja Brewery. It is determined that the tax inspector has acted correctly and has applied the [correct] method of supply analysis and declared sales in relation to the chronology of the date of use.

The purchase and sales books were not kept in accordance with the Regulation.

9. Applicant then filed an appeal to the Supreme Court seeking to nullify the Decisions of the Department of Appeals and the IRB. In the Appeal it was claimed that the TAK's accounting methods utilizing the expiration period for beer of sixty (60) days for purposes of turnover without evidence of the stock's actual sale unfairly burdened the Applicant with twice the tax liabilities. The Applicant submitted a letter from N.P "Brewery" Peja detailing that that if Peja Beer was stored in optimal conditions, it may be served past its expiration date of sixty (60) days. However, that letter did not detail how long past the expiration date the beer could be maintained and served.
10. The Supreme Court issued decision A.Nr.233/2004 on 17 May 2006 in favor of the Applicant "to approve the lawsuit" and "annul the decision of the Independent Review Board" dated 14 April 2004. The verdict stated the IRB "did not abide by the rules of procedure on taxes and instructions of tax inspectors" due to its failure to reference specific rules and regulations that Applicant failed to adhere to in his records. In addition, the Supreme Court held the IRB failed to provide sufficient reasons concerning the "legal basis of the tax obligation, type, amount, and time of settlement of tax obligation, which data are relevant for the fair adjudication of the present administrative affair." The Supreme Court ordered a retrial of the matter to address the deficiencies in the record.
11. The IRB held a further hearing, pursuant to the Supreme Court decision, on 28 July 2006. After hearing the merits of the matter, the IRB issued its retrial decision A.Nr.439/2006, dated 24 August 2006, rejecting the Appeal. In its decision, the IRB analyzed the evidence presented by the Applicant, the written appeal, evidence presented at the hearing, and "cross-examined the evidence presented by both parties." The IRB made a determination that the Applicant "did not present the real turnover and understated the declarations in the category of prejudiced tax for the . . . [control] period." All evidence presented by the parties in the hearing were analysed and compared with the information obtained by Peja Brewery. This analysis resulted in the determination that the tax inspector had acted properly in its "analysis method of supply and declared sales" in regards to the expiration dates of the goods in question for the control report. In addition, the IRB held the Applicant's purchase and sales books were not held in accordance with regulation, resulting in a 125 EUR fine on 2 June 2004, and the calculated tax reassessment and penalties were valid.
12. The Applicant then appealed the second IRB Decision A.Nr.439/2006 to the Supreme Court. The Applicant in its Appeal stated that the both parties to the Appeal rendered additional explanations regarding the facts. The Applicant maintained that it had fulfilled all obligations far arose from the regulation and other legal provisions as proved by the documentation and evidence included in the case files. The Applicant continued to maintain that the tax assessment was not correct.
13. The Supreme Court in its decision A.Nr.2407/2006 of 30 September 2009 rejected this further Appeal as unfounded. The Supreme held the IRB "followed the [required legal] format provided under Article 206 of the Law on General Administrative Procedure

("LGAP"), the introduction of the [IRB] decision was drafted in accordance with Article 207 para 1 of LGAP, and the reasoning complied in accordance with Article 209 para 2 of LGAP". The Supreme Court held that the IRB's retrial reviewed the evidence presented by Applicant, the TAK representative, evidence presented at the hearing, and case file, when the IRB approved the conclusion of the initial IRB decision Nr.62/2004 of 14 April 2004. In addition, the Supreme Court held the IRB observed the rules of procedure, factual situation, and presented evidence, when "determin[ing] undoubtedly plaintiff made tax violations" for which he was assessed a fine and interest. It was from this final Decision of the Supreme Court that the Applicant filed a referral to the Constitutional on 19 October 2009.

Admissibility

14. In order to be able to adjudicate the Applicant's Referral the Constitutional Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution. In this regard, the Court refers to Article 113.7 of the Constitution, which provides:

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;

and to Article 47.2 of the Law, stipulating that:

The individual may submit the referral in question only after he/she has exhausted all legal remedies provided by the law.

15. It is apparent that the Applicant is an authorized party; it exhausted all legal remedies provided by law before having filed its Referral, within the legal deadline. Also the Applicant clarifies what rights and freedoms have been violated, indicating what concrete act of a public authority is subject to challenge; and he justifies the referral, attaching the necessary supporting information and documents. Therefore, the Court concludes that the case is admissible.

Merits

Right to a Fair Trial

16. The right to a fair and impartial trial is one of the hallmarks of a country based on the rule of law. That right is enshrined in the Constitution and in the European Convention on Human Rights and Fundamental Freedoms (the Convention). Article 31 of the Constitution of Kosovo provides for the right to a fair and impartial trial in the following terms:

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.*
- 3. Trials shall be open to the public except in limited circumstances in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger public order, national security, the interests of minors or the privacy of parties in the process in accordance with law.*

4. *Everyone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence.*
 5. *Everyone charged with a criminal offense is presumed innocent until proven guilty according to law.*
 6. *Free legal assistance shall be provided to those without sufficient financial means if such assistance is necessary to ensure effective access to justice.*
 7. *Judicial proceedings involving minors shall be regulated by law respecting special rules and procedures for juveniles.*
17. Article 6.1 of the European Convention on Human Rights and Fundamental Freedoms which was incorporated into the Law of Kosovo pursuant to the provisions of Article 22 of the Constitution of Kosovo provides as follows:
- 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.*
18. The Constitutional Court, when assessing the constitutionality of the decision of the Independent Review Board and of the Supreme Court, is only permitted to review whether there was a violation of the Applicant's constitutional rights. Therefore, the Constitutional Court can only intervene in the case of a violation of a specific fundamental right protected by the constitutional law. As long as no fundamental right has been infringed, the Constitutional Court is bound by the decision of the Supreme Court.
19. The Applicant in this case was given an oral hearing by the Independent Review Board at which the representatives of the Tax Administration were heard, the evidence was presented and cross examination was allowed. Following this the Independent Review Board found that the Applicant did not present the real turnover and that he understated the declarations for the relevant tax period. In essence the Applicant was not believed in relation to the evidence that he presented. The Board was within its authority to make that finding.
20. The Supreme Court in its second Decision considered the second Decision of the Independent Review Board and the arguments of the Applicant's representatives. It noted that the Independent Review Board had made a finding after the hearing that undoubtedly the Applicant had violated the taxation provisions. That Court was satisfied that that the format of the Decision was correct and that the requirement of the Taxation Laws and the reasoning were complied with.
21. It is not the task of the Constitutional Court to assess the legality and accurateness of decisions made by competent judicial institutions, unless there is clear evidence that such decisions have been rendered in an obviously unfair and inaccurate manner.
22. The Court's task with regard to alleged violations of constitutional rights is to examine whether the proceedings, taken as a whole, were fair and complied with the specific safeguards stipulated by the Constitution. The Constitutional Court is, therefore, not a fourth instance of appeal, and has no jurisdiction to reopen court proceedings or to substitute decisions of regular courts with its own findings. As stated by this court in its

Decisions in the case of Demë Kurbogaj and Besnik Kurbogaj of 19 May 2010, Case No KI 07/09 and in the case of X of 17 June 2010, Case No. KI 06/09 “The mere fact that the Applicant/s is/are dissatisfied with the outcome of the case cannot of itself raise an arguable claim of a breach of Article 31 of the Constitution (see mutatis mutandis Judgment ECHR Appl. No. 5503/02, Mezotur Tiszazugi Tarsulat v. Hungary, Judgment of 26 July 2005.)”

23. There is no evidence in the instant case that the Supreme Court has assessed the evidence provided by the Applicant in an unfair or an inaccurate manner. The Applicant has failed to prove that the Supreme Court has violated Article 6 of the European Convention on Human Rights and Article 31 of the Constitution.
24. Taking into account the reasoning as set out above and the findings of the Independent Review Board and the Supreme Court the Constitutional Court therefore finds that there was no violation of a right to a fair hearing and no violation of the Applicant's right to a fair trial as provided for in Article 6.1 of the Convention.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 20 of the Law on the Constitutional Court, and Rule 56 (1) of the Rules of Procedure, by majority,

DECIDES

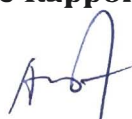
- I. TO DECLARE the Referral admissible
- II. That there has been no violation of the right to a fair and impartial trial as guaranteed by Article 31 of the Constitution of Kosovo in conjunction with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Law.

This Decision is effective immediately.

Judge Rapporteur

Almiro Rodrigues



President of the Constitutional Court

Prof. Dr. Enver Hasani

