



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF POLIMERKONTEYNER, TOV v. UKRAINE

(Application no. 23620/05)

JUDGMENT

STRASBOURG

24 November 2016

FINAL

24/02/2017

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Polimerkonteyner, TOV v. Ukraine,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Angelika Nußberger, *President*,

Khanlar Hajiyeu,

Ganna Yudkivska,

André Potocki,

Faris Vehabović,

Yonko Grozev,

Carlo Ranzoni, *judges*,

and Milan Blaško, *Deputy Section Registrar*,

Having deliberated in private on 3 November 2016,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 23620/05) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Kharkivskyy Zavod Polimerkonteyner Ltd. (“the applicant company”) on 22 June 2005.

2. The applicant company was represented by Mr S.Y. Syrotenko, a lawyer practising in Kharkiv. The Ukrainian Government (“the Government”) were represented by their Agent, most recently Mr I. Lishchyna.

3. The applicant company complained, in particular, of the continuing practice of the customs office to attribute a wrong code to its imported goods, entailing a higher customs duty, contrary to the factual findings of numerous final judgments in the applicant company’s favour.

4. On 25 January 2010 the applicant company’s complaint under Article 6 § 1 of the Convention concerning the non-enforcement of the domestic courts’ judgments in its favour was communicated to the Government under Rule 54 § 2 (b) of the Rules of Court. At that stage of the proceedings the Government were not invited to submit observations on the case, as it concerned an issue covered by the pilot judgment of 15 October 2009 in *Yuriy Nikolayevich Ivanov v. Ukraine* (no. 40450/04).

5. On 15 March 2016 the Court invited the Government to submit observations on the admissibility and merits of the applicant company’s complaint under Article 1 of Protocol No. 1 concerning the customs office’s continuous disregard for the judicial decisions in the applicant company’s favour by the assignation of the wrong code to its imported goods. The

remainder of the application (unrelated to the communicated complaints) was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

6. The applicant company is a limited liability company registered in Ukraine which produces containers and other packaging items.

7. In 1999 it started importing into Ukraine, on a regular basis, a fabric of the same type required for its manufacturing activities. Each time the State Customs Office assigned a classification code to its imported goods, on the basis of which the applicant company had to pay a customs tariff of 5%. The applicant company challenged each such decision before the domestic courts and sought the recovery of the overpaid duty. It claimed that, had the classification been correct, it would have had to pay only a 1% customs tariff. The goods in question remained impounded pending the outcome of the judicial proceedings.

8. Each time the courts found in the applicant company's favour. Specifically, the case file contains eight final judgments setting aside fourteen respective decisions of the customs office of various dates between 2001 and 2006 and ordering the return to the applicant company of the overpaid tax.

9. The domestic courts stated on many occasions that the issue in question had already been examined many times and that the continued practice of the customs office of wrongly assigning the "more expensive" code to the applicant company's imported goods undermined both the finality of those judgments and the courts' authority.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

10. The applicant company complained that there had been an interference with the peaceful enjoyment of its possessions, within the meaning of Article 1 of Protocol No. 1, which reads as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest

and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

A. Admissibility

11. The Court does not agree with the Government’s submission that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that this complaint is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

12. The applicant company submitted that it had been regularly forced to pay the wrong customs tariff because of the customs office’s practice of assigning the wrong classification code to its goods contrary to the numerous final judicial decisions in that regard.

13. The applicant company admitted that each individual domestic judgment in its favour had been enforced as regards the payment of the amounts awarded. It maintained, however, that the customs office had continued to disregard the factual findings of those judgments in its subsequent practice in the identical circumstances. As a result, the courts had had to adjudicate on the same factual issue many times, which they had themselves acknowledged. Meanwhile, the applicant company had not been able to use the imported goods, which had been impounded pending the outcome of the judicial proceedings. Likewise, it could not use its funds used to pay the wrong customs duty until their recovery through the courts.

14. The Government emphasised that it had been the exclusive competence of the customs authorities to assign a classification code to the imported goods with a view to determining the customs duty. As regards the judgments relied on by the applicant company, each of them concerned a particular case and had no binding power in respect of any future disagreement between the applicant company and the customs authorities regarding the correct classification of goods.

15. The Government further drew the Court’s attention to the fact that the claims raised by the applicant company at the domestic level had been duly adjudicated by the courts and that their judgments had been enforced.

16. The Court emphasises that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful (see *Iatridis*

v. Greece [GC], no. 31107/96, § 58, ECHR 1999-II). The requirement of lawfulness, within the meaning of the Convention, demands compliance with the relevant provisions of domestic law and compatibility with the rule of law, which includes freedom from arbitrariness (see *Hentrich v. France*, 22 September 1994, § 42, Series A no. 296-A, and *Kushoglu v. Bulgaria*, no. 48191/99, §§ 49-62, 10 May 2007).

17. Furthermore, any instance of interference, including one resulting from a measure to secure payment of taxes, must strike a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole. The requisite balance will not be found if the person concerned has had to bear an individual and excessive burden (see, among other authorities, *Sporrong and Lönnroth v. Sweden*, 23 September 1982, §§ 69 and 73, Series A no. 52).

18. Turning to the present case, the Court notes that, as established by the domestic courts, during the period between 2001 and 2006 the customs authorities kept assigning the wrong classification code to the same commodity imported by the applicant company, which had led to a considerable increase in the customs duty payable by the latter. This caused the applicant company to apply to the courts on a regular basis with identical claims. Although in every single case the courts found in the applicant company’s favour and set aside the impugned decisions, this did not prevent the customs authorities from continuing to assign the same, wrong code to the same commodity when subsequently imported by the applicant company. In other words, the judicial action pursued was devoid of any remedial effect and was confined to *post factum* redress only.

19. The Court attaches weight to the statements of the domestic courts that such a practice undermined both the finality of their judgments and the courts’ authority in general (see paragraph 9 above). There are no reasons to question that conclusion. The Court interprets it as an indication that, firstly, the customs authorities acted in an arbitrary manner and, secondly, there were no mechanisms for putting an end to that practice.

20. The Court notes that it examined a somewhat comparable situation in the case of *Intersplav v. Ukraine*, where the applicant company had been obliged to institute judicial proceedings in respect of numerous instances of the authorities’ failure to confirm the VAT-refund amounts payable to it (no. 803/02, §§ 38-40, 9 January 2007). The Court found that the systematic nature of the failings of the State authorities had resulted in an excessive burden being imposed on the applicant company (*ibid.*, § 39).

21. The same criticism holds true for the present case. Like in the cited case, the applicant company had to go through rounds of judicial proceedings to recover the overpaid customs duty. Furthermore, during

those proceedings it could not use the imported goods belonging to it, which had been impounded and were held until a resolution in the case.

22. There has therefore been an interference with the peaceful enjoyment of the applicant company's possessions in the present case, which, as confirmed by the domestic courts on several occasions, was unlawful.

23. Accordingly, there has been a violation of Article 1 of Protocol No. 1.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

24. The applicant company further complained, under Article 6 § 1 of the Convention, that the final domestic judgments in its favour had not been duly enforced, as their factual findings had remained disregarded.

25. The Court reiterates its case-law, according to which tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer (see *Ferrazzini v. Italy* [GC], no. 44759/98, §§ 29-31, 12 July 2001). As customs duties or charges for imported goods must be regarded as falling within the realm of taxation, and as tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant, the Court considers that tax disputes, including disputes about the determination of import duties or charges, fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer (see *Emesa Sugar N.V. v. the Netherlands* (dec.), no. 62023/00, 13 January 2005; *Ketko and Mroz v. Ukraine* (dec.), no. 31223/03, 3 April 2006; and, for a more recent reference, *Kalavros v. Greece* (dec.), no. 27602/14, §§ 42-46, 17 November 2015).

26. It follows that this part of the application must be rejected as being incompatible *ratione materiae* with the provisions of the Convention, pursuant to Article 35 §§ 3 and 4.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

27. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

28. The applicant company claimed 3,000 euros (EUR) in respect of non-pecuniary damage.

29. The Government contested that claim as exorbitant and unsubstantiated.

30. The Court reiterates that it may award pecuniary compensation for non-pecuniary damage to a commercial company. Non-pecuniary damage suffered by such companies may include aspects that are to a greater or lesser extent “objective” or “subjective”. Aspects that may be taken into account include the company’s reputation, uncertainty in planning, disruption in the management of the company (for which there is no precise method of calculating the consequences) and lastly, albeit to a lesser degree, the anxiety and inconvenience caused to the members of the management team (see *Comingersoll S.A. v. Portugal* [GC], no. 35382/97, § 35, ECHR 2000-IV, and *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 221, ECHR 2012).

31. Having regard to the circumstances of the present case and the nature of the violation found, the Court considers it reasonable to award the applicant company the claimed amount of EUR 3,000 in respect of non-pecuniary damage.

B. Costs and expenses

32. The applicant company also claimed EUR 150 for the costs and expenses incurred before the Court. In substantiation, it submitted copies of the postal receipts for some of its letters to the Court.

33. The Government contended that the applicant company had failed to duly substantiate the entire amount claimed under this heading. They left the matter to the Court’s discretion.

34. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court allows the applicant company’s claim in full.

C. Default interest

35. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 1 of Protocol No. 1 admissible and the complaint under Article 6 § 1 of the Convention inadmissible;
2. *Holds* that there has been a violation of Article 1 of Protocol No. 1;
3. *Holds*
 - (a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 150 (one hundred and fifty euros), plus any tax that may be chargeable to the applicant company, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 24 November 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Angelika Nußberger
President