CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF EKO-ELDA AVEE v. GREECE

(Application no. 10162/02)

JUDGMENT

STRASBOURG

9 March 2006

FINAL

09/06/2006

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In the case of Eko-Elda AVEE v. Greece,

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

Loukis Loucaides, *President*,
Christos Rozakis,
Françoise Tulkens,
Peer Lorenzen,
Nina Vajić,
Snejana Botoucharova,
Anatoly Kovler, *judges*,
and Søren Nielsen, *Section Registrar*,
Having deliberated in private on 14 February 2006,

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

PROCEDURE

1. The case originated in an application (no. 10162/02) against the Hellenic Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a limited company, Eko-Elda AVEE ("the applicant company"), on 28 February 2002.

2. The applicant company was represented by Mr P. Rizos, Mr S. Miratos and Ms E. Miha, of the Athens Bar. The Greek Government ("the Government") were represented by the delegates of their Agent, Mr S. Spyropoulos, Adviser at the State Legal Council, and Ms S. Trekli, Legal Assistant at the State Legal Council.

3. The applicant company complained, under Article 1 of Protocol No. 1, of the refusal by the State to pay it default interest in respect of an amount unduly paid in income tax.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 27 May 2004, the Chamber declared the application admissible.

6. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1).

7. The applicant company and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant is a limited company specialising in petroleum products. Its predecessor was called Greek petroleum, oil and lubricants – Industrial and commercial limited company (EKO AVEE).

9. On 8 May 1987 the applicant company paid the tax authorities 137,020,491 drachmas (GDR) (approximately 402,338 euros (EUR)) as an advance payment on the income tax due for the tax year 1987. On 11 May 1987 the tax authorities granted the applicant company a 10% reduction on the amount paid, as a bonus for paying the full advance payment due without requesting to pay by instalments. Accordingly, the advance tax payment ultimately paid by the applicant company amounted to GDR 123,387,306 (approximately EUR 362,105).

10. On 10 May 1988 the applicant company filed its tax return with the tax authorities for the year 1987. The return showed that the company had sustained a substantial loss of profit, which meant that the authorities had to refund the applicant company the amount paid as an advance payment since it had been unduly paid.

11. On 24 June 1988 and 9 December 1991 the applicant company sought a refund of GDR 123,387,306 from the Athens tax authorities dealing with limited companies, which was the amount levied in income tax for the year 1987. On an unspecified date the State refused to comply with its request.

12. On 27 December 1991 the applicant company brought proceedings against the State in the Athens Administrative Court. It requested a refund, under section 38(2) of Law no. 1473/1984, of the sum of GDR 123,387,306 that had been unduly paid in income tax. It also claimed default interest on that amount accruing from 10 May 1988, when the State had been informed that the tax had been unduly paid, up until payment. The applicant company based its claims on Article 345 of the Civil Code, which provides for the payment of default interest in the event of a pecuniary debt.

13. Law no. 2120/1993 was published on 4 March 1993. Section 3 of that Law provides that the State will pay interest in the event of a refund of tax unduly paid. With regard to cases pending at the time of publication of the Law, it provides that interest shall start to accrue on the first day of the month following a period of six months after its publication.

14. On 12 November 1993, prior to the hearing in the case listed for 23 September 1994, the State refunded the applicant company GDR 123,387,306, which corresponded to the tax it had paid. In its submissions before the Administrative Court, the applicant company limited its claims to statutory interest for the delay in paying the refund.

15. On 26 January 1995 the Administrative Court declared the applicant company's application inadmissible (decision no. 512/1995). On 3 November 1995 the applicant company appealed.

16. On 6 June 1996 the Athens Administrative Court of Appeal declared the applicant company's appeal admissible, but held that it was ill-founded on the ground that at the material time the Code for the Collection of Public Revenues did not provide that the State was liable to pay interest in the event of a delay in refunding tax unduly paid. Moreover, the court held that Article 345 of the Civil Code did not apply to the present case, since the provision governed only civil-law relations (decision no. 4042/1996).

17. On 27 June 1997 the applicant company lodged an appeal on points of law.

18. On 8 November 2000, by judgment no. 3547/2000, the Supreme Administrative Court dismissed the appeal. It found that the State was not bound to pay late-payment interest in the event of tax unduly paid. Such an obligation did not derive from the relevant provisions of the Civil Code relating to late-payment interest because these did not apply to a debt arising from a public-law relationship. Furthermore, the Supreme Administrative Court pointed out that no such obligation had been incumbent on the State prior to Law no. 2120/1993, published on 4 March 1993 (see paragraphs 21 and 22 below). That judgment was finalised and certified by the court on 26 October 2001.

II. RELEVANT DOMESTIC LAW AND PRACTICE

19. The relevant Articles of the Civil Code provide:

Article 345

"A creditor of a pecuniary debt is entitled, when serving notice to pay, to claim default interest stipulated by law or by the legal document concerned without having to prove loss. Subject to any contrary statutory provision, a creditor who also establishes other loss is entitled to claim compensation for that as well."

Article 346

"A debtor owing a pecuniary debt, even if not served with a notice to pay, shall be liable to pay statutory interest accruing from the date of service of legal proceedings relating to the debt due."

Article 904

"Anyone who has been unjustly enriched by means of or to the detriment of another's property shall make restitution of the gain. This obligation shall apply, *inter alia*, in the event of a payment made unduly or a service rendered for a purpose that has not been realised or has ceased to exist or is illegal or immoral. ..."

Article 911

"Anyone who benefits [*inter alia* from unjust enrichment] shall be subject to the same obligations as if a writ of action had been served on him: (1) in the event of a claim for an amount unduly received, if he was aware that the debt did not exist or from the time when he became aware; (2) in the event of a claim on grounds of an illegal or immoral purpose."

20. Article 6 of Legislative Decree no. 356/1974 provides:

"Debts due and owing from the State shall be subject to a late-payment surcharge that shall accrue from the first working day following the date on which the debt falls due. The surcharge shall accrue at a rate of 1% per month's delay."

21. Section 38(2) of Law no. 1473/1984 provided that the State was bound to refund tax unduly paid without having to pay interest. Section 3 of Law no. 2120/1993 amended section 38(2) of Law no. 1473/1984. That provision, as amended, now provides:

"Any direct or indirect, principal or additional, tax or duty, or any fine, recognised in a final decision of an administrative court as having been unduly paid ... shall be offset or refunded with interest at the rate applicable to State bonds for a three-month period. ... With regard to cases pending at the time of publication of this statute, interest shall start to accrue from the first day of the month following a period of six months after publication of the said statute."

22. In two judgments (nos. 1274 and 1275/2002) the Supreme Administrative Court held that the State had an obligation to pay default interest even in respect of cases that were pending, that is, those in which the tax unduly paid had not yet been refunded on the date of publication of Law no. 2120/1993 (4 March 1993). According to the Greek Supreme Administrative Court, that obligation was incumbent on the State from the date on which proceedings were brought in the relevant courts.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

23. The applicant company complained of the tax authorities' refusal to pay it interest in compensation for the late payment of a tax credit in its favour. It relied on Article 1 of Protocol No.1, which provides:

"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."

24. The Government alleged that the applicant company had not had a "possession" within the meaning of Article 1 of Protocol No. 1. They submitted that its obligation to pay tax for the year 1987 had been based on an administrative provision. That provision was presumed legal until annulment by the administrative or judicial authorities. The State had refunded the applicant company the entire sum paid in tax on 12 November 1993, that is, before the case was heard before the Administrative Court. Consequently, the debt claimed by the applicant company had never been acknowledged by a judicial decision as definite and immediately payable. Furthermore, the Government asserted that, in its judgment no. 3547/2000, the Supreme Administrative Court had held that the authorities were not under an obligation to pay late-payment interest on tax unduly paid. In their submission, the Court could not substitute its own point of view for the decision reached by the domestic courts.

25. The applicant company alleged that the State had owed it a debt from the time it had been proved that the tax had been unduly paid. Accordingly, the State had to honour that obligation on the basis of the provisions relating to unjust enrichment (Articles 345, 346 and 904 of the Civil Code). Moreover, refunding the tax payment in 1993 without late-interest payment – despite the State having been informed in June 1988 that the tax was not owing – amounted to a practice contrary to Article 1 of Protocol No. 1. In the applicant company's submission, the State, through the courts, had not complied with the principle of lawfulness. Articles 345, 346 and 911 of the Civil Code expressly provided for payment of default and statutory interest. Furthermore, in the present case the Supreme Administrative Court had not followed its own case-law, which obliged the State to pay interest even where the case in question was still pending, that is, in cases where the tax unduly paid had not yet been refunded on the date of publication of Law no. 2120/1993.

26. The Court reiterates that a debt can be a "possession" within the meaning of Article 1 of Protocol No. 1 if it is sufficiently established to be enforceable (see, *inter alia*, *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, § 59, Series A no. 301-B).

27. In the present case the Court observes that, in accordance with section 38(2) of Law no. 1473/1984, the State must refund any tax or duty recognised by a final court decision as having been unduly paid. On 24 June 1988 the applicant company applied to the tax authorities for the first time for a refund of GDR 123,387,306. After the applicant company had instituted legal proceedings, the authorities refunded the amount that had been unduly paid on 12 November 1993. In doing so, the authorities acknowledged that they owed the applicant company the tax that had been unduly paid. There is no doubt that the applicant company had a pecuniary

interest amounting to a "possession" within the meaning of Article 1 of Protocol No. 1 regarding the refund of the tax unduly paid (see, *mutatis mutandis*, *Buffalo S.r.l. in liquidation v. Italy*, no. 38746/97, §§ 28-29, 3 July 2003).

28. It therefore remains to be determined whether the State's refusal to pay the applicant company interest to compensate for the delay in refunding the tax unduly paid is compatible with Article 1 of Protocol No. 1. In the Court's view, this question falls to be examined under the first sentence of the first paragraph of Article 1 of Protocol No. 1, which lays down the principle of the peaceful enjoyment of property in general terms (see, among many other authorities, *Almeida Garrett, Mascarenhas Falcão and Others v. Portugal*, nos. 29813/96 and 30229/96, § 48, ECHR 2000-I).

29. In that connection the Court points out that in its case-law it has consistently linked the payment of default interest to delays by the authorities in refunding credits. In particular, the Court has held on several occasions that the adequacy of compensation would be diminished if it were to be paid without reference to various circumstances liable to reduce its value, such as unreasonable delay (see *Angelov v. Bulgaria*, no. 44076/98, § 39, 22 April 2004, and *Almeida Garrett, Mascarenhas Falcão and Others*, cited above, § 54). In such a case the Court will mainly have regard to whether the authorities have paid late-payment interest to offset the depreciation of the amount due on account of the time that has elapsed (see, among other authorities, *Akkuş v. Turkey*, 9 July 1997, § 29, *Reports of Judgments and Decisions* 1997-IV). In short, under Article 1 of Protocol No. 1 the payment of interest is intrinsically linked to the State's obligation to make good the difference between the amount owed and the amount ultimately received by the creditor.

30. With particular regard to the payment of taxes, the Court reiterates that the financial obligation arising out of the levying of taxes or contributions may infringe the rights guaranteed in Article 1 of Protocol No. 1 if the conditions for a refund impose an excessive burden on the person or entity concerned or fundamentally interfere with their financial security (see, to that effect, *Buffalo S.r.l. in liquidation*, cited above, § 32). In that case the Court, examining a question similar to the one under consideration here, held that there had been a breach of Article 1 of Protocol No. 1 on the sole ground that the prolonged unavailability of the tax that had been unduly paid by the applicant company had had a definite and considerable impact on its financial situation (ibid., § 37).

31. In the instant case the Court observes that the tax unduly paid was refunded on 12 November 1993, that is, five years and approximately five months after 24 June 1988, when the applicant company sought a refund of the sum that it had unduly paid from the Athens tax authorities dealing with limited companies. In the light of the foregoing, the Court considers that the authorities' refusal to pay late-payment interest for such a long period upset

the fair balance that has to be struck between the general interest and the individual interest.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

32. 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. Pecuniary and non-pecuniary damage

33. With regard to pecuniary damage, the applicant company submitted to the Court an expert report drawn up at its request by Hadjipavlou Sofianos & Campanis S.A., representatives in Greece of the law firm Deloitte & Touche. The experts established the pecuniary damage sustained by the applicant company for the period between 10 May 1988 and 12 November 1993 as follows:

(i) either EUR 612,524 corresponding to the total simple default interest accrued on the sum of GDR 123,387,306 (EUR 362,105) in respect of the aforementioned period;

(ii) or EUR 1,231,831 for the total compound default interest accrued on the sum of GDR 123,387,306 (EUR 362,105) in respect of the aforementioned period.

34. The applicant company also sought EUR 6,000 for non-pecuniary damage.

35. The Government submitted that a finding of a violation would in itself constitute sufficient just satisfaction.

36. The Court notes that in the instant case the interference in question relates to the State's refusal to pay the applicant company default interest on the tax unduly paid. The failure to pay default interest together with the inability to use the money in question and the resulting uncertainty undoubtedly caused the applicant company to sustain both pecuniary and non-pecuniary damage that must be compensated.

37. Having regard to the uncertainties inherent in any attempt to estimate the actual loss sustained by the applicant company, and ruling on the basis of equitable considerations as required by Article 41 of the Convention, the Court decides to award the applicant company, by way of a lump sum for the period from 24 June 1988 to 12 November 1993, 6% per annum of the sum refunded (EUR 362,105), namely, EUR 120,000, plus any tax that may

be due on that amount (see, *mutatis mutandis*, *Malama v. Greece* (just satisfaction), no. 43622/98, § 11, 18 April 2002).

38. With regard to non-pecuniary damage, the Court considers that the finding of a violation constitutes in itself sufficient just satisfaction.

B. Costs and expenses

39. In respect of the costs and expenses incurred before the domestic courts and the Court, the applicant company claimed EUR 33,386.29, which it broke down as follows:

(i) EUR 2,024.40 for the proceedings in the domestic courts;

(ii) EUR 20,564.89 for the proceedings before the Court;

(iii) EUR 10,797 for the fees and expenses relating to the preparation of the expert report.

The applicant company provided vouchers in support of the expenses referred to under (ii) and (iii), but not those referred to under (i).

40. The applicant company pointed out that, on account of the complexity of the case, it had had to retain three lawyers, whose expertise had been necessary to pursue the case both before the domestic courts and the Court.

41. The Government replied that retaining three lawyers from Deloitte & Touche had not been necessary for this type of case. They submitted that the amount claimed for costs and expenses was excessive.

42. According to the Court's established case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually incurred, were necessarily incurred and are also reasonable as to quantum (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI). In the present case the Court notes that the applicant company has not produced any invoice in respect of the costs incurred before the courts that dealt with the case. This part of its claims must therefore be dismissed. With regard to the costs incurred for the requirements of representing the applicant company before it, the Court observes that the applicant company has provided a breakdown of its claims together with the necessary supporting vouchers. Moreover, the Court points out that it has already held that the use of more than one lawyer may sometimes be justified by the importance of the issues raised in a case (ibid., § 56). However, it considers that, even if the present case was of some complexity, it was not necessary to employ three lawyers. Lastly, the question of the application of Article 41 was not so complex as to require an expert opinion from a specialist firm (contrast *Malama* (just satisfaction), cited above, § 17). Having regard to the foregoing, the Court decides to award the applicant company EUR 4,000 in reimbursement of the costs incurred in the Strasbourg proceedings, plus any tax that may be chargeable on that amount.

C. Default interest

43. The Court considers it appropriate that the default interest 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. *Holds* that there has been a violation of Article 1 of Protocol No. 1;

2. *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:
      (i) EUR 120,000 (one hundred and twenty thousand euros) in respect of pecuniary damage;
      (ii) EUR 4,000 (four thousand euros) in respect of costs and expenses;
      (iii) any tax that may be chargeable on the above amounts;
   (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;

3. *Dismisses* the remainder of the claim for just satisfaction.

Done in French, and notified in writing on 9 March 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Registrar	Loukis Loucaides President