



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

FOURTH SECTION

Application no. 11828/11
Mikko Tapani NYKÄNEN
against Finland
lodged on 17 February 2011

STATEMENT OF FACTS

The applicant, Mr Mikko Tapani Nykänen, is a Finnish national, who was born in 1972 and lives in Espoo. He is represented before the Court by Mr Atte Niemi, a lawyer practising in Lahti.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Taxation proceedings

The tax inspector conducted a tax inspection in a company in 2005.

On 28 November 2005 the tax authorities considered that the applicant had received 33,000 euros as disguised dividends from that company during the tax year 2003. He was imposed an additional tax and a tax surcharge (*veronkorotus, skatteförhöjning*) of 1,700 euros.

The applicant sought rectification from the local Tax Rectification Committee (*verotuksen oikaisulautakunta, prövningsnämnden i beskattningsärenden*).

On 25 January 2006 the Tax Rectification Committee rejected the applicant's application.

The applicant appealed to the Kuopio Administrative Court (*hallinto-oikeus, förvaltningsdomstolen*).

On 29 May 2008 the Kuopio Administrative Court rejected the applicant's appeal.

The applicant appealed to the Supreme Administrative Court (*korkein hallinto-oikeus, högsta förvaltnings-domstolen*).

On 1 April 2009 the Supreme Administrative Court refused the applicant leave to appeal.

2. Criminal proceedings

On 19 August 2008 the public prosecutor brought charges against the applicant of, *inter alia*, tax fraud (*veropetos, skattebedrägeri*) concerning the tax year 2003. According to the charges, the applicant was accused of tax fraud as he had under-declared his income. The undeclared income amounted to 33,000 euros for the tax year 2003 and, consequently, the tax imposed in 2003 had been 12,420 euros too low.

On 13 February 2009 the Tuusula District Court (*käräjäoikeus, tingsrätten*) convicted the applicant of tax fraud and imposed a conditional prison sentence of 8 months. He was also ordered to pay to the tax authority 9,500 euros plus interest. The court found that the amount of disguised dividends was 26,882.90 euros and that the tax due amounted to 9,500 euros.

By letter dated 26 April 2010 the applicant appealed to the Helsinki Appeal Court (*hovioikeus, hovrätten*), requesting that the charges be dismissed.

On 25 March 2010 the Helsinki Appeal Court convicted the applicant as charged and sentenced him to a prison sentence of 10 months. It ordered the applicant to pay the tax authorities 12,420 euros plus interest. The court found that, contrary to the opinion of the District Court, the value-added tax was to be included in the amount of disguised dividends. The correct amount of disguised dividends was thus 33,000 euros and the tax evaded amounted to 12,420 euros.

By letter dated 24 May 2010 the applicant appealed to the Supreme Court (*korkein oikeus, högsta domstolen*), requesting that the charges and the compensation claim be dismissed without examining the merits or that they alternatively be rejected. He claimed, by referring to Article 4 of Protocol No. 7 to the Convention and to the Court's case-law, that the *ne bis in idem* principle had been violated as he had already been imposed tax surcharges for the same acts by a decision which had become final.

On 1 September 2010 the Supreme Court refused the applicant leave to appeal.

B. Relevant domestic law and practice

Section 57, subsection 1, of the Tax Assessment Procedure Act (*laki verotusmenettelystä, lagen om beskattningsförfarande*, Act no. 1558/1995, as amended by Act no. 1079/2005) provides that if a person has failed to make the required tax returns or has given incomplete, misleading or false information to tax authorities and tax has therefore been incompletely or partially levied, the tax payer shall be ordered to pay unpaid taxes together with an additional tax and a tax surcharge.

According to Chapter 29, sections 1 and 2, of the Penal Code (*rikoslaki, strafflagen*; as amended by Acts no. 1228/1997 and no. 769/1990), a person who (1) gives a tax authority false information on a fact that influences the assessment of tax, (2) files a tax return concealing a fact that influences the assessment of tax, (3) for the purpose of avoiding tax, fails to observe a duty

pertaining to taxation, influencing the assessment of tax, or (4) acts otherwise fraudulently and thereby causes or attempts to cause a tax not to be assessed, or too low a tax to be assessed or a tax to be unduly refunded, shall be sentenced for tax fraud to a fine or to imprisonment for a period of up to two years. If by the tax fraud (1) considerable financial benefit is sought or (2) the offence is committed in a particularly methodical manner and the tax fraud is aggravated when assessed as a whole, the offender shall be sentenced for aggravated tax fraud to imprisonment for a period between four months and four years.

The Supreme Court took a stand on the *ne bis in idem* principle in its recent precedent case *KKO 2010:46* which concerned tax surcharges and aggravated tax fraud. In that case it found, *inter alia*, that even though a final judgment in a taxation case, in which tax surcharges had been imposed, prevented criminal charges being brought about the same matter, such preventive effect could not be accorded to pending cases (*lis pendens*) crossing from administrative proceedings to criminal proceedings or vice versa.

COMPLAINT

The applicant complains under Article 4 of Protocol No. 7 to the Convention that the *ne bis in idem* principle was violated in his case. Charges have been brought about the same acts which have been subject to taxation proceedings in which tax surcharges were imposed. The taxation proceedings became final on 1 April 2009 and the criminal proceedings on 1 September 2010.

QUESTION TO THE PARTIES

Has the applicant been tried or punished twice for the same offence in the territory of the respondent State, as prohibited by Article 4 § 1 of Protocol No. 7? If so, did the proceedings fall within the exceptions envisaged by Article 4 § 2 of Protocol No. 7?