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

THIRD SECTION

DECISION

Application no. 78572/17
BOURIKAS AVEE
against Greece

The European Court of Human Rights (Third Section), sitting on 19 November 2024 as a Committee composed of:

Lətif Hüseynov*, President*,
Ioannis Ktistakis,
Darian Pavli*, judges*,
and Olga Chernishova, *Deputy Section Registrar,*

Having regard to:

the application (no. 78572/17) 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") on 1 November 2017 by BOURIKAS AVEE ("the applicant"), a company which was established in 1991 in Amarynthos, Evia, and was represented by Mr V. Chirdaris, a lawyer practising in Athens;

the decision to give notice of the application to the Greek Government ("the Government"), represented by their Agent, Ms N. Marioli, President of the State Legal Council, and their Agent's delegate, Ms A. Magrippi, Legal Representative at the State Legal Council;

the parties' observations;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The applicant is a company which ceased operation in 2002. Following several tax audits of different financial periods, the tax authorities imposed fines on the applicant company for the registration of false invoices and ordered it to pay additional tax for the errors in its tax returns.

2. Decisions nos. 340/2006, 341/2006 and 342/2006 imposed fines of respectively 106,362 euros (EUR), EUR 524,344 and EUR 997,970 on the applicant company, in accordance with Articles 2 § 1, 12 § 1, 9, 11

and 18 §§ 2 and 3 of Presidential Decree no. 186/1992 taken in conjunction with Article 19 §§ 1, 2 and 4 of Law no. 2523/1997, for the registration in its accounting books of false invoices during different financial periods from 1998 to 2002.

3. Additionally, by audit record no. 6/2007 the tax authorities assessed the income tax of the applicant company for the financial year of 1999 and ordered it to pay EUR 22,691.34. The applicant company was also found, following errors in its tax returns, liable to pay an additional 3% surcharge per month of the tax which the company had evaded, for 87 months, which amounted to EUR 54,218.71. By audit record no. 7/2007 the tax authorities also assessed the income tax due by the applicant company for the financial year 2002 and ordered it to pay EUR 38,272 while it was found, following errors in its tax returns, liable to pay an additional 3% surcharge per month of the tax which the company had evaded, for 51 months, which amounted to EUR 55,225.

4. The applicant company lodged recourses against the aforementioned decisions of the tax authorities before the Chalkida Administrative Court of First Instance. By judgments nos. 458/2010, 453/2010 and 457/2010 the court dismissed on the merits the recourses against the decisions imposing the fines (see paragraph 2 above). By judgments nos. 454/2010 and 455/2010 it partially accepted the recourses against the audit records which ordered the company to pay income tax and surcharges (see paragraph 3 above). It considered that the applicant company's declared taxable income was lower than that calculated by the tax authorities and reduced the income tax and surcharges in both cases.

5. The applicant lodged appeals before the Piraeus Administrative Court of Appeal against the aforementioned judgments relying on wrong interpretation of the relevant tax legislation by the court of first instance and lack of sufficient reasoning of the impugned judgments. By its judgments nos. A1338/2016, A1339/2016, A1340/2016, A1341/2016 and A1342/2016 (served on the applicant company on 2 May 2017), the Piraeus Administrative Court of Appeal declared the appeals inadmissible due to the failure of the applicant company to pay 50% of the amounts owed on account of the judgments delivered at first instance in tax disputes until the first hearing on the appeals, as it was provided by Article 93 § 3 of the Code of Administrative Procedure. It was further held in the appeal judgments that the relevant requirement was not contrary to Article 20 § 1 of the Constitution (right to judicial protection) and Article 6 § 1 of the Convention.

6. Relying on Article 6 § 1 of the Convention, the applicant company complains that it was deprived of access to the Court of Appeal owing to having had its appeals declared inadmissible because it had not paid the required disproportionate amounts, which, according to its calculations, amounted to about 1,000,000 EUR for the five appeals. It complains that the appellate court's judgments impaired the very essence of the applicant

company's right of access to a court as it had been bankrupt and its president's and vice-president's annual income was too low to cover the amounts required for lodging the appeals.

THE COURT'S ASSESSMENT

7. The Court considers it unnecessary to determine in the present case whether the criminal limb of Article 6 of the Convention is applicable to the proceedings relating to the imposition of fines and surcharges since, in any event, the application must be declared inadmissible.

8. The Court further notes that the Government raised the objection that the application is incompatible *ratione personae*. It does not however consider it necessary to examine this objection as the application is in any event inadmissible for the reasons stated below.

9. The Government also raised a non-exhaustion objection in respect of several aspects. The Government contended that the applicant company had not made before the domestic courts, at least in substance, its complaint about the alleged violation of Article 6 § 1 of the Convention in respect of the requirement to pay 50% of the amount owed when lodging its appeals. They argued that the applicant company had not paid the required amounts and had not put before the appellate court any reasons justifying this. It had also not complained that the requirement at issue had infringed its right of access to a court either by its notice of appeal or at the hearing on its appeal or in a memorandum submitted after the hearing of its case. The applicant company had also not raised the alleged lack of financial means to pay the required amounts, or that their payment would be a disproportionate burden for it.

10. The Government further submitted that the applicant company had failed to avail itself of the possibility to seek the suspension of the enforcement of the judgments of the first instance, before the appellate court, as provided by Article 209A of the Code of Administrative Procedure. In case these were granted, the applicant company would have been exempted from the obligation to pay the amounts owed until the delivery of the judgments on appeal. The Government submitted a case-law example in which a similar application was accepted.

11. Lastly, the Government argued that the applicant company had not lodged appeals on points of law against judgments nos. A1338/2016, A1339/2016, A1340/2016, A1341/2016 and A1342/2016 of the Piraeus Administrative Court of Appeal (see paragraph 5 above).

12. The applicant did not provide any response to the above submissions. It merely maintained that "no ordinary remedy would have been effective, because there was standard practice with regard to the issue of the payment of 50% of the owed amount for lodging an appeal in tax disputes". It cited judgment no. 1619/2012 of the Plenary of the Supreme Administrative Court, which found that the relevant requirement was not contrary to Article 20 § 1

of the Constitution (right to judicial protection) and Article 6 § 1 of the Convention.

13. The general principles on exhaustion of domestic remedies have been summarised in *Vučković and Others v. Serbia* (preliminary objection) ([GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014), and *Gherghina v. Romania* ((dec.) [GC], no. 42219/07, §§ 83-89, 9 July 2015). It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time. Once this burden has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact used, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances exempting him or her from this requirement (see, *Vučković and Others*, cited above, § 77, with further references). Article 35 § 1 further requires that the complaints intended to be made subsequently in Strasbourg should have been made to the appropriate domestic body "at least in substance". If the applicant has not relied on the provisions of the Convention, he or she must have raised arguments to the same or equivalent effect on the basis of domestic law, in order to have given the national courts the opportunity to redress the alleged breach in the first place. It is not sufficient that a violation of the Convention is "evident" from the facts of the case or the applicant's submissions. Rather, he or she must complain (expressly or in substance) about it in a manner which leaves no doubt that the same complaint that was subsequently submitted to the Court had indeed been raised at the domestic level (see *Farzaliyev v. Azerbaijan*, no. 29620/07, § 55, 28 May 2020, with further references).

14. The Court firstly notes that the applicant had not paid the required amounts when lodging the appeals and had not raised any arguments relating to the proportionality of the amounts or its lack of financial means as it did before the Court. It had not raised in the appeals and its relevant observations the complaint relating to a violation of Article 6 § 1 of the Convention, even in substance. In addition, it did not reply to the Government's relevant arguments or try to argue that in its appeals it had complained of a violation of the right of access to court or that doing so would have been devoid of any prospect of success.

15. Further, as was stipulated in Article 93 § 3 of the Code of Administrative Procedure, for an appeal in tax disputes with pecuniary value to have been lodged in an admissible manner (at the material time), an appellant should have paid 50% of the amount owed on account of the judgment delivered at first instance until the first hearing on the appeal. Article 93 § 3 further provided an exception to that rule in case a suspension of the enforcement of the impugned judgment had been granted following an application before the court pursuant to Article 209A of the same Code. In accordance with Article 209A, in tax disputes, in which the time-limit or the

exercise of a remedy does not have suspensive effect by law against the enforcement of the impugned judgment, the court may decide with summary reasoning to suspend the enforcement of the said judgment, upon an application by the litigant and only provided that the main remedy is considered manifestly well-founded.

16. The Court considers that the Government have shown to a sufficient extent that the remedy provided for in Article 209A of the Code of Administrative Procedure cannot be disregarded on the grounds that it was unavailable or ineffective. They argued that the application for the suspension of enforcement of the impugned judgment was effective; it had a specific basis in domestic law, it could provide redress in respect of the obligation to pay the required amounts when lodging the appeals, and it was confirmed by practice. However, the applicant company did not reply to these arguments, and it did not raise any points showing the ineffectiveness of the said remedy. It did not argue that the remedy was for certain reasons inadequate and ineffective in its particular situation or that there existed special circumstances absolving it from the requirement to attempt the remedy proposed by the Government when it lodged the appeals (see *Akdivar and Others v. Turkey*, 16 September 1996, § 68, *Reports of Judgments and Decisions* 1996-IV.). In view of the failure of the applicant company to exercise the remedy suggested by the Government combined with the fact that it had not adduced any arguments at domestic level when lodging the appeals relating to a violation of Article 6 § 1 of the Convention, the Court accepts the Government's objection of non-exhaustion of domestic remedies.

17. The application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 12 December 2024.

Olga Chernishova Deputy Registrar	Lətif Hüseynov President