

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

FOURTH SECTION

DECISION

Application no. 65611/09
KESKO OYJ
against Finland

The European Court of Human Rights (Fourth Section), sitting on 25 September 2012 as a Committee composed of:

Ledi Bianku, *President,*
Päivi Hirvelä,
Zdravka Kalaydjieva, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having regard to the above application lodged on 9 December 2009,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant company,

Having deliberated, decides as follows:

THE FACTS

1. The applicant company, Kesko Oyj, is a Finnish public limited liability company which has its seat in Helsinki. It was represented before the Court by Mr Ossi Haapaniemi, a lawyer practising in Helsinki.

2. The Finnish Government ("the Government") were represented by their Agent, Mr Arto Kosonen of the Ministry for Foreign Affairs.

A. The circumstances of the case

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

4. The Large Taxpayers' Office (*Konserniverokeskus*, *Koncernskattecentralen*) conducted a tax inspection of the applicant company, which is a large wholesale firm. On 13 May 2002 the applicant company was informed of the preliminary tax inspection report. The Large Taxpayers' Office found in its report that the applicant company had given its Swedish subsidiary millions of Finnish marks (FIM) in financial support between 1997 and 2000. The subsidiary had been founded in 1996. In its accounting, the applicant company had recorded the sums as miscellaneous expenses, which had reduced its financial results for each year. Even though the applicant company had explained that the sums paid to the Swedish subsidiary had been marketing support, the Large Taxpayers' Office found that they had in fact been paid to cover general costs for starting and expanding the operations of the Swedish subsidiary. The sums were, therefore, not deductible. The provisional inspection report was sent to the applicant company for comments. The applicant company submitted comments to the Large Taxpayers' Office.

5. By letter dated 1 November 2002 the final inspection report, dated 25 October 2002, was sent to the applicant company for comments. It contained proposals for changes to be made to the applicant company's taxation and mentioned that additional taxes and tax surcharges (*veronkorotus, skatteförhöjning*) would be imposed.

6. On 27 February 2003 the Large Taxpayers' Office received the applicant company's comments on the final inspection report.

7. The Large Taxpayers' Office carried out tax reassessments concerning the applicant company. The reassessments were based on the findings of the final inspection report, and additional taxes were levied on the applicant company. On 12 September 2003 the Office, in three separate decisions, reassessed the applicant company's taxation for the fiscal years of 1997, 1998 and 1999. In the decisions, the following tax surcharges were also levied: FIM 651,900 (EUR 109,642) for 1997, FIM 1,551,000 (EUR 260,859) for 1998 and FIM 2,673,700 (EUR 449,684) for 1999. The tax surcharges corresponded to 5% of the amounts of taxable income that the applicant company had been found to have deducted without justification.

8. The applicant company appealed against the reassessment decisions to the Large Taxpayers' Tax Rectification Committee (*konserniverokeskuksen verotuksen oikaisulautakunta, koncernskattecentralens skatterättelse-nämnd*). The appeals were received by the Committee on 19 December 2003 concerning the fiscal year 1997, on 28 December 2004 concerning the fiscal year 1998 and on 30 December 2005 concerning the fiscal year 1999.

9. On 25 August 2004 the Large Taxpayers' Tax Rectification Committee gave its decision concerning the fiscal year 1997 and on

14 June 2006 two separate decisions concerning the fiscal years 1998 and 1999. The Committee rejected all the appeals.

10. On 2 November 2004 and 4 August 2006 the applicant company appealed against the decisions to the Helsinki Administrative Court (*hallinto-oikeus, förvaltningsdomstolen*).

11. On 8 November 2007 the Helsinki Administrative Court upheld the decisions of 25 August 2004 and 14 June 2006 by the Large Taxpayers' Tax Rectification Committee. The court found that the applicant company had continuously sold current assets to its Swedish subsidiary, and on the day following the due date for payment, it had transformed the receivables into debts, which in turn had been recorded as expenses at the end of the year. The court considered this arrangement to be artificial, as no company would normally continue to sell current assets to another company year after year when it was clear that the buyer would not be able to pay for them. The court also found that the sums paid by the applicant company to its Swedish subsidiary were not marketing support but capital investments which were not tax-deductible.

12. On 9 January 2008 the applicant company sought leave to appeal to the Supreme Administrative Court (*korkein hallinto-oikeus, högsta förvaltningsdomstolen*).

13. On 9 June 2009 the Supreme Administrative Court refused the applicant company leave to appeal.

B. Relevant domestic law

14. Section 64 of the Tax Assessment Procedure Act (*laki verotusmenettelystä, lagen om beskattningsförfarande*, Act no. 1558/95 as in force at the relevant time) provides that a taxpayer may seek rectification within a five-year time-limit which starts running from the beginning of the year following the termination of the taxpayer's taxation. Regardless of this time-limit, rectification can also be sought within a 60-day time-limit if a taxation decision has been changed.

COMPLAINTS

15. The applicant company complained under Article 6 § 1 of the Convention that the total length of the domestic proceedings had been incompatible with the reasonable-time requirement.

16. The applicant company complained under the same Article that the Helsinki Administrative Court had not reasoned its decision sufficiently when it stated that the applicant company had been grossly negligent in its accounting. The applicant company also complained that it was unclear

whether and how the Supreme Administrative Court had taken into account new evidence presented by the applicant company.

17. The applicant company complained under Article 7 of the Convention and Article 1 of Protocol No. 1 to the Convention that the decisions of 12 September 2003 by the Large Taxpayers' Office to reassess the applicant company's taxation were contrary to current legal practice and, therefore, against the law. Intent or gross negligence by the applicant company had not been proved. The decisions were unexpected, arbitrary and illogical.

18. Finally, it complained under Article 14 of the Convention that the Helsinki Administrative Court had reached a different outcome in a similar matter concerning another company. The applicant company claimed that it had been discriminated against.

THE LAW

A. Length of the proceedings

19. The applicant company complained under Article 6 § 1 of the Convention that the total length of the domestic proceedings had been incompatible with the reasonable-time requirement.

20. Article 6 § 1 of the Convention reads in relevant parts as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

21. The Government agreed that the proceedings started on 1 November 2002 when the final tax inspection report was sent to the applicant company for comments and ended on 9 June 2009 when the Supreme Administrative Court refused leave to appeal. However, this length was not in its entirety imputable to the Government. The applicant company had sought rectification from the Large Taxpayers' Tax Rectification Committee only about three months, a year and three months and two years and four months after the respective taxation decisions had been delivered on 12 September 2003. These periods of the total length were therefore caused by the conduct of the applicant company and could not be imputable to the Government.

22. The Government also noted that the Administrative Court was not responsible for the length as far as the period before 26 May 2005 was concerned as the case was prepared by the taxation authorities and was ready for decision only on 26 May 2005. The court had decided to examine all three cases simultaneously as they had been closely linked to each other and to some other cases pending before that court which had been of relevance. The cases had been extensive and the facts had been unclear.

The cases had been pending before the Administrative Court for more than two years and five months and one year respectively and before the Supreme Administrative Court for one year and five months.

23. The applicant company did not comment on the merits of the case.

24. The Court notes that, according to Finnish law, a taxpayer may seek rectification within a five-year time-limit which starts running from the beginning of the year following the termination of the taxpayer's taxation. The time-limit is very long and it is at the taxpayer's discretion to choose when to seek rectification, if at all.

25. In the present case, the applicant company sought rectification from the Large Taxpayers' Tax Rectification Committee, by benefiting from the long time-limit, only about three months, a year and three months and two years and four months after the respective taxation decisions were delivered on 12 September 2003. The Court agrees with the Government that these periods of length cannot be imputable to the Government as they were a result of the applicant company's own conduct. Consequently, the proceedings concerning the fiscal year 1997 lasted six years and four months, the fiscal year 1998 five years and four months and the fiscal year 1999 four years and three months at three levels of jurisdiction.

26. The Court considers that, in respect of the proceedings concerning the fiscal years 1998 and 1999, the length of the proceedings imputable to the Government was not excessive. This part of the complaint is thus manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and it must therefore be declared inadmissible.

27. As regards the proceedings concerning the fiscal year 1997, the Court notes that the proceedings lasted about eight months before the Large Taxpayers' Tax Rectification Committee, more than two years and five months before the Administrative Court and one year and five months before the Supreme Administrative Court. The proceedings before the Administrative Court lasted a relatively long time mainly for the reason that the court had decided to examine all three cases simultaneously, which was clearly beneficial to the applicant company. The cases were closely linked to each other and to some other cases pending before the Administrative Court which were of relevance. Once the last appeals were received by the Administrative Court in August 2006, the court was able to deal with the cases quickly and render its decisions on 8 November 2007. Therefore, the Court, taking into account also the complexity of the case, considers that the length of the proceedings concerning the fiscal year 1997 was not excessive. Also this part of the complaint is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and it must therefore be declared inadmissible.

B. Remainder of the application

28. The applicant company complained under Article 6 of the Convention about insufficient reasoning by the Administrative Court and that it was unclear whether and how the Supreme Administrative Court had taken into account new evidence presented by the applicant company. It complained under Article 7 of the Convention and Article 1 of Protocol No. 1 to the Convention that the decisions of 12 September 2003 by the Large Taxpayers' Office had been contrary to current legal practice and, therefore, against the law. Lastly, it complained under Article 14 of the Convention that it had been discriminated against.

29. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. Accordingly, also this part of the application must be rejected as manifestly ill-founded and declared inadmissible pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Fatoş Aracı	Ledi Bianku
Deputy Registrar	President