AS TO THE ADMISSIBILITY OF

Application No. 21354/93
by SCHNEIDER AUSTRIA GmbH
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 30 November 1994, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 4 December 1992 by SCHNEIDER AUSTRIA GmbH against Austria and registered on 9 February 1993 under file No. 21354/93;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant is a limited company, with seat in Vienna, trading mainly in car accessories. In the proceedings before the Commission the applicant company is represented by Mr. K. Bielau, a lawyer practising in Graz.

A. The particular circumstances of the case

On 21 August 1991 the Salzburg Regional Court (Landesgericht) convicted H.S. of tax evasion under the Tax Offences Act (Finanzstrafgesetz), imposed a fine of AS 600,000 and ordered him to pay AS 4 million as compensation in lieu of confiscation (Wertersatzstrafe). The Court further stated that the applicant company, who had participated in the proceedings as a liable party (Haftungsbeteiligter), was liable for the fine as well as for the compensation under S. 28 para. 1 of the Tax Offences Act.

The Court found that H.S., acting as the managing director of the applicant company, had between July 1983 and January 1986 evaded import taxes of altogether AS 1,046.864, including customs duties of AS 449,024, import turnover tax of AS 593,594 and export subsidy

contributions of AS 4,246. In particular he had, when importing car radios, in altogether forty-eight cases, presented bills to the customs authorities stating a lower price than was actually paid to the German export firm.

The applicant company and H.S. each brought a plea of nullity (Nichtigkeitsbeschwerde) and an appeal (Berufung) before the Supreme Court (Oberster Gerichtshof).

The applicant company submitted inter alia that a legal persons' liability for a fine and compensation in lieu of confiscation imposed on one of its organs, as provided for in S. 28 para. 1 of the Tax Offences Act, was unconstitutional as it amounted to a penalty without fault. Further, confiscation (Verfall) and compensation in lieu of confiscation as such violated the principle of equality before the law and the right to property, as someone evading e.g. income taxes will only be fined, whereas someone evading import taxes faces confiscation of the imported goods, or where this is not possible any more, has to pay compensation in lieu of confiscation in addition to the fine.

Moreover, the applicant company objected to the calculation of the compensation in lieu of confiscation, as applied by the Regional Court, which it considered to be excessive.

On 31 July 1992 the Supreme Court, on the appeals of the applicant company and of H.S., reduced the fine imposed on H.S. to AS 300,000. The Supreme Court found that the Regional Court had not sufficiently taken into account that the entire amount of taxes evaded had been paid back.

Furthermore, upon the plea of nullity of H.S., the Supreme Court reduced the compensation in lieu of confiscation to AS 2,5 million. The Court found that in some of the cases at issue no confiscation could have been ordered and, thus, there was no room for compensation in lieu of confiscation. The Supreme Court further based its calculation on a lower value of the goods in respect of which taxes had been evaded.

However, the Court dismissed the applicant company's plea of nullity concerning its liability for the fine and the compensation in lieu of confiscation under S. 28 para. 1 of the Tax Offences Act. It found that confiscation and compensation in lieu of confiscation were not arbitrary sanctions but adequate consequences based on considerations of legal policy, taking the particularities of the respective offences into account. The same held true for S. 28 para. 1 of the Tax Offences Act, establishing liability without fault (Haftung ohne Verschulden). As legal persons were not themselves liable to tort (deliktsfähig), the provision aimed at withdrawing financial gains from legal persons, which they had derived from tax offences committed by their organs in the exercise of their functions. Such a liability did not have the character of a penalty.

B. Relevant domestic law

S. 28 para. 1 of the Tax Offences Act states that legal persons are liable for fines and compensation in lieu of confiscation imposed on their organs, if the latter has committed the offence in exercising his functions as one of their organs. The legal person and its organ have joint and several liability (Haftung zur ungeteilten Hand).

COMPLAINTS

1. The applicant company complains under Article 1 of Protocol No. 1 about the Supreme Court's decision to hold it liable for a fine of AS 300,000 and compensation in lieu of confiscation of AS 2,5 million, which were imposed on their former manager H.S., who was convicted for tax evasion.

The applicant company submits that S. 28 para. 1 of the Tax Offences Act, on which its liability was based, is unconstitutional. Moreover, the amount of AS 2,5 million as compensation in lieu of confiscation was excessive, as it was disproportionate with regard to the amount of taxes evaded, which it had already entirely paid back. Finally, the applicant company complains that S. 28 para. 1 of the Tax Offences Act establishes a liability of a legal person without any fault on its part.

2. The applicant company further complains under Article 6 of the Convention, invoking in particular the second paragraph of this Article, that the Supreme Court had imposed a fine on it without proof of guilt.

THE LAW

1. The applicant company complains under Article 1 of Protocol No. 1 (P1-1) about the Supreme Court's decision to hold it liable for a fine of AS 300,000 and compensation in lieu of confiscation of AS 2,5 million, which were imposed on their former manager H.S.

Article 1 of Protocol No. 1 (P1-1) 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."

The Commission finds that the decision in issue constitutes an interference with the applicant company's peaceful enjoyment of its possessions. The applicant company's liability for penalties relating to the evasion of import taxes, is a measure designed to enforce the payment of taxes or of penalties, respectively. Thus, the present case falls within the scope of the second paragraph of Article 1 of Protocol No. 1 (P1-1).

The Commission recalls that this paragraph requires that the interference with a person's peaceful enjoyment of his possessions, is lawful and serves a legitimate aim (see Eur. Court H.R., Fredin judgment of 18 February 1991, Series A no. 192, pp. 16-17, paras. 48-50). Moreover the interference must be proportionate, achieving 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 (Fredin judgment, loc. cit., p. 17, para. 51; Agosi judgment of 24 October 1986, Series A no. 108, p.18, para. 52).

As regards the lawfulness of the interference, the Commission notes that the Supreme Court's decision was in accordance with S. 28 para. 1 of the Tax Offences Act. The applicant company's submissions that this provision is unconstitutional, are not substantiated. Moreover, the Supreme Court, when dismissing the applicant company's plea of nullity, did not share its view that the legislation concerned was unconstitutional.

The Commission further considers that the interference at issue pursued a legitimate aim, namely securing the payment of import taxes or of penalties related to the evasion of such taxes.

As regards the proportionality of the interference, the applicant company complains that the compensation in lieu of confiscation of AS

2,5 million, for which it was held liable, was excessive. The applicant company submitted in particular that this sum was not proportionate to the damage caused. The applicant also complains that S. 28 para. 1 of the Tax Offences Act established a liability of a legal person for fines or compensation in lieu of confiscation imposed on its organs, without any fault on its own part.

The Commission recalls that there must be a reasonable relationship of proportionality between the means employed and the aim pursued, whereby the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question (Fredin judgment, loc. cit., p. 17, para. 51; Agosi judgment, loc. cit., p. 18, para. 52).

In the present case the Supreme Court explained the purpose of S. 28 para. 1 of the Tax Offences Act, namely to withdraw financial gains from legal persons, which they had derived from tax offences committed by their organs in exercising their functions. According to the Supreme Court, this liability did not have the character of a penalty.

The Commission finds that a measure, aiming at securing the payment of import taxes by means of a liability of a legal person for penalties imposed on its organs, even if this measure applies irrespective of any fault on the legal person's part, still falls within the wide margin of appreciation left to the State in such matters. Moreover, the proceedings at issue gave the applicant company the possibility to defend its interests. It participated as a party and could appeal against the Regional Court's decision to the Supreme Court on the same grounds as the convicted person himself.

Moreover, the Commission notes that the Supreme Court carefully examined the applicant company's arguments as to the allegedly excessive amount of compensation in lieu of confiscation. Regarding the amount concerned, the Supreme Court applied a more favourable calculation. Considering all circumstances, the Commission finds no indication of disproportionality.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant company further complains under Article 6 (Art. 6) of the Convention, invoking in particular the second paragraph of this Article, that the Supreme Court had imposed a fine on it without proof of guilt.

Even assuming that Article 6 para. 1 (Art. 6-1) of the Convention applied to the proceedings at issue, the Commission finds that there is no indication that the applicant company, represented by counsel, could not duly present its arguments or that the proceedings were otherwise unfair.

Moreover, the Supreme Court's decision confirming the applicant company's liability, stating explicitly that the said liability under S. 28 para. 1 of the Tax Offences Act did not depend on any fault on the applicant company's part, did not amount to any finding of guilt. Therefore, the Commission finds that the contested decision was not contrary to the presumption of innocence.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission unanimously

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber	President of the First Chamber
(M.F. BUQUICCHIO)	(A. WEITZEL)