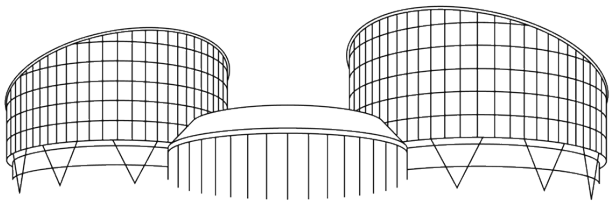

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

Application no. 10114/06
OOO 'KHABAROVSKAYA TOPLIVNAYA KOMPANIYA'
against Russia
lodged on 17 February 2006

STATEMENT OF FACTS

The applicant company, OOO "Khabarovskaya Toplivnaya Kompaniya", is a Russian legal entity incorporated under the Russian law in 2000 and running its business in Khabarovsk.

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

A. Transactions with company A.

In 2003-2004 the applicant company regularly purchased oil products from different Russian suppliers including a company A. and exported them abroad through a foreign company B. H. According to the Russian Tax Code, no value added tax (VAT) payment is required on goods subject to export from "the customs territory" of the Russian Federation (see details below). The applicant company's suppliers in Russia issued invoices which the applicant's company paid in full including the VAT.

On 20 April 2004 the applicant company submitted a VAT declaration to the tax authorities, claiming deduction of VAT paid to A. for the oil products exported from Russia in March 2004.

1. Tax assessment

Between 20 April and 16 July 2004 the Tax Office for the Khabarovsk Region *(Управление МНС РФ по Хабаровскому краю,* "the Tax Office") conducted a tax inspection of the VAT declaration in order to check the validity of the VAT deduction claim. The inspection included a cross-check of the company A. in order to ascertain whether the latter had properly

reported and recorded the transactions in its accounting records. As a result, on 16 July 2004 the Tax Office denied the applicant company's claim for deduction of the VAT it had paid to A. ("the input VAT") amounting to 386,436 Russian Roubles (RUB). The Tax Office justified its decision by the fact that A. had not been found at its registered address as indicated in its statute.

2. Judicial proceedings in commercial courts

On 20 October 2004 the applicant company challenged the Tax Office's decision in the Commercial Court of the Khabarovsk Region, alleging that its claim for the VAT refund was in full conformity with the Russian Tax Code. It submitted, in particular, that it had paid the VAT when purchasing the goods, stored the originals of the invoices and diligently filed all the VAT forms with the Tax Office. As to the Tax Office's argument about the absence of A. at its registered address, the applicant company submitted that the Russian tax law did not impose on taxpayers an obligation to check their partners' compliance with the tax law requirements in all taxable transactions. Consequently, in the applicant company's view, the reason invoked by the tax authorities could not be a ground for refusal of the VAT refund. Moreover, the Tax Office only alleged the supplier A.'s absence at its registered address in the course of the inspection, but not at the time when the transactions were made.

The Tax Office, in response, justified its decision to dismiss the applicant's claim by A.'s failure to pay the output VAT to the State budget and its absence at its registered address.

On 31 January 2005 the Commercial Court of the Khabarovsk Region granted the applicant's company's claim in full, concluding that the Tax Office had not proved A.'s acting in bad faith.

The Tax Office did not appeal against the judgment to the competent court of appeal but lodged instead a cassation appeal with the Federal Commercial Court for the Dalnevostochniy Circuit. On 3 June 2005 the latter quashed the judgment of 31 January 2005 and referred the case back to be reconsidered on the merits. The court's decision relied on A.'s absence at its registered address and its failure to pay the output VAT to the State budget.

On 5 September 2005 the Commercial Court of the Khabarovsk Region re-examined the case and rejected the applicant's claim. The judgment was upheld on 11 November 2005 and on 15 February 2006 by the Commercial Court of Appeal and the Federal Commercial Court for the Dalnevostochniy Circuit respectively, which found it to be in accordance with the law in force at the material time. Both these courts also relied on the A.'s failure to pay the VAT to the budget to conclude that the applicant had no right to claim the relevant VAT deduction.

The applicant company did not apply for supervisory review of those judgments to the Supreme Commercial Court of Russia.

B. Transactions with companies G. and T.

Between August and November 2003 the applicant company also purchased oil products from Russian companies G. and T. with a view to

their subsequent export abroad. It paid the invoices issued by both suppliers in full, including the VAT.

1. Tax assessment

On 22 December 2003 the applicant company submitted to the Tax Office a VAT declaration applying 0% VAT rate for the period of November 2003.

Between 22 December 2003 and 18 March 2004 the Tax Office conducted a tax inspection of the VAT declaration with a cross-check of the applicant company's suppliers, including G. and T. On 19 March 2004 the Tax Office refused the applicant company's claim for refund of the VAT it had paid to G. and T., amounting to RUB 327,436, that is RUB 11,352 to G. and RUB 316,084 to T. The Tax Office argued that the supplier G. had not been found at its registered and postal addresses during the inspection, and that it had failed to provide its accounting reports from the very date of its incorporation. As to the supplier T., the Tax Office established that the latter had not paid to the budget the relevant VAT amount it had received from the transaction with the applicant company.

At the same time, the Tax Office did not challenge the applicant company's compliance with all necessary requirements for the VAT refund provided for by the Russian law. However, it referred to the suppliers' non-compliance with their obligations to pay the input VAT to the State budget and therefore concluded that the claim for deduction of the VAT paid by the applicant to those suppliers was unfounded.

2. Judicial proceedings in commercial courts

The applicant company applied to the Commercial Court of the Khabarovsk Region challenging the above decision of the Tax Office. In its application it stated that the Russian Tax Code did not impose on taxpayers any additional duties - and consequently, did not grant them any powers - to control the supplier's compliance with the requirements of the tax law. It also invoked divergent case-law on the matter, quoting conflicting decisions given by Federal Commercial Courts of different circuits in essentially similar factual situations. Moreover, the applicant company supported its position by interpretations contained in letters of the Supreme Commercial Court and the Tax Ministry. The applicant company referred as well to the information obtained from the tax authorities that the company G. was registered in Vladivostok and that the Tax Office had not proved the its absence at its registered address. The applicant company further argued that the supplier's failure to provide the accounting and tax reports was not a sufficient evidence to prove that the transaction between them had not taken place.

On 15 February 2005 the Commercial Court of the Khabarovsk Region ("the Commercial Court") rejected the applicant's claim, finding the Tax Office's decision lawful and justified. The judgment was upheld on appeal and cassation on 14 April and on 15 August 2005 respectively.

The courts found that the suppliers had not paid the output VAT to the budget and that G. had not been found at its registered address. They concluded that the invoice contained inadequate information about the

suppliers and, therefore, made it legally impossible for the Tax Office to grant VAT deduction to the applicant company. Referring to the documents submitted by the Tax Office, the courts also found that the person indicated as a founder and director of G. had been alien to its declared activities and had denied her involvement in the company. The Commercial Court and the appeal court founded that conclusion on the questioning records established by the Economic Crime Department of the Police Directorate for the Khabarovsk Region without examining the director in person. Lastly, the Commercial Court concluded that there was no sufficient evidence that the applicant company had actually purchased oil products from G.

On 10 November 2005 the Supreme Commercial Court of Russia, sitting in a committee of three judges, dismissed the company's application for supervisory review of the above judgments.

The Tax Office brought no separate action to annul G.'s state registration or to declare its transactions with the applicant company null and void.

C. Relevant domestic law

According to Article 3 § 7 of the Tax Code, any taxpayer is presumed to act in good faith. The law-enforcement authorities cannot construe the notion of "good faith" as imposing any additional duties on the taxpayer which are not provided for by law.

The Second Part of the Tax Code (in force from 1 January 2001) sets up the rules for calculation, payment management of the VAT. The VAT rate is set at 0 % if the goods are exported and physically removed from the custom territory of the Russian Federation (Article 164 § 1). The taxpayer may claim refund of the "incoming" (input) VAT which it has already paid in respect of the exported goods.

In order to benefit from the zero rate of VAT and to obtain the VAT refund, a tax-payer must justify its claim by the following documents to be submitted to the tax authorities: the export contract concluded between the taxpayer and a foreign purchaser, a bank statement confirming receipt of the funds from the foreign purchaser by a Russian bank duly registered with the tax authorities, the relevant customs declaration bearing the stamp of the customs bodies confirming the export of the goods from the customs territory of Russia, and copies of the relevant transport bills and shipping documents, bearing the stamps of the customs bodies, confirming the export of goods from the customs territory of Russia (Article 165 of the Tax Code).

According to Article 65 of the Code of Commercial Procedure, the burden of proof in public law disputes including tax disputes lays with the public authorities and officials whose actions or omissions are disputed.

COMPLAINTS

1. Referring to Article 1 of Protocol No. 1, the applicant company complains that the authorities' refusal to grant its claim for VAT refund amounted to a breach of its property rights under that provision. Having no

basis in law, the refusal deprived the company of its possessions and undermined its financial situation.

2. The applicant company also complains under Article 6 § 1 that the proceedings regarding the tax assessment were unfair. In particular, they were not truly adversarial and respectful of the equality of arms; the courts excessively relied on the Tax Office's arguments and assessment of evidence and used a formalistic approach. Moreover, the courts imposed the burden of proof on the applicant company compelling it to prove its good faith contrary to the legal presumptions enshrined in the Code of Commercial Procedure and the Tax Code.

QUESTIONS TO THE PARTIES

I. Case-specific questions

1. Has the applicant company exhausted the domestic remedies in both sets of proceedings, i. e. the one concerning the transactions with the supplier A. and the other one concerning the transactions with the suppliers G. and T.? In particular, should the applicant company have applied for supervisory review to the Supreme Commercial Court of Russia in the former set of proceedings given that the impugned decisions by the lower commercial courts were delivered shortly after the reform of Article 304 § 2 of the Code of Commercial Procedure and well before the Court's decisions that considered the application for supervisory review as an effective remedy to be exhausted under Article 35 § 1 of the Convention (see *Kovaleva and others* v. Russia (dec.), 6025/09, 25 June 2009, and *OOO "Link Oil Spb" v. Russia* (dec.,), 42600/05, 25 June 2009)?

2. Do the facts of the case fall within the scope of Article 1 of Protocol No. 1 to the Convention (see *"Bulves" AD v. Bulgaria*, no. 3991/03, 22 January 2009, and *Stefan Nazarev and Others v. Bulgaria*, (*dec.)* of 25 January 2011, nos. 26553/05, 256912/09, 40107/09 and 12509/10)?

3. If so, was there a violation of Article 1 of Protocol No. 1? In particular:

(a) Was there an interference with the applicant's right to the peaceful enjoyment of its possessions, within the meaning of Article 1 of Protocol No. 1?

(b) If yes, was the interference lawful and pursuing a general interest?

(c) Did the interference impose an excessive individual burden on the applicant, thus upsetting a fair balance between the general interest and the individual right at stake (see "Bulves" AD v. Bulgaria, no. 3991/03, 22 January 2009, and Stefan Nazarev and Others v. Bulgaria (dec.), nos. 26553/05, 256912/09, 40107/09 and 12509/10, 25 January 2011)? More specifically, was the authorities' total refusal to deduct the VAT paid by the applicant company in the transaction with the supplier A. justified in view of the fact that part of the VAT had been allegedly repaid by the latter to the budget?

4. Did the applicant company dispose of effective safeguards against the State's interference with its right to the peaceful enjoyment of its possessions? In particular, was there any reasonable possibility for the applicant company prove its good faith and enforce its right to the VAT deduction through judicial proceedings or otherwise?

II. General questions

5. Does the applicant company's complaint about the authorities' failure to deduct the VAT in commercial transactions concerns two isolated instances or reveals a recurrent problem in the Russian law?

6. Was there sufficient uniformity in the case-law of different circuit commercial courts on the issues arising in relation to the VAT refund at the material time? In particular, was the legal presumption of a taxpayer's acting in good faith (Article 3 § 7 of the Tax Code) uniformly upheld by the domestic courts' case-law? If not, were there any inconsistencies in this area and how has the situation evolved since that time?

7. Does the Russian law provide for adequate possibilities for a taxpayer acting in good faith to avoid sanctions for its suppliers' failings in tax matters, such as absence of the latter on its registered address or failure to provide its accounting reports to the tax authorities?

8. Are the sanctions that may be imposed on a taxpayer on account of its suppliers' possible failings contingent on the taxpayer's own abuse? If so, how do the authorities prove such abuses?