



THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

Riga, October 21, 2002

JUDGMENT in the name of the Republic of Latvia

in case No. 2002 – 05 – 010306

”On the Compliance of Articles 4 (Item 3) and 10 (the Fifth Part) of the Law ”On Excise Tax” as well as the Compliance of Item 24 (in the Part on Customs Payments to be Applied to Means of Transport) of the Cabinet of Ministers October 10, 2000 Regulations No. 349 ” The Process of Implementation of the Customs Procedure – Temporary Admission” with Articles 89, 91 and 105 of the Republic of Latvia Satversme (Constitution); with the Second Part of Article 2 of the Istanbul Convention of June 26, 1990 ”On Temporary Admission” as well as Articles 7 and 9 (the Second Part) of Annex C to the Convention and with Standards 30 and 34 of Annex F3 to the May 18, 1973 Kyoto International Convention on Simplification and Harmonizing of Customs Procedures.””

The Republic of Latvia Constitutional Court in the body of the Chairman of the Court session Aivars Endziņš, justices Ilma Čepāne, Romāns Apsītis, Juris Jelāgins, Andrejs Lepse, Ilze Skultāne and Anita Ušacka,

under Article 85 of the Republic of Latvia Satversme (Constitution) as well as Paragraphs 3 and 6 of Article 16 and Article 17 (Paragraph 8 of the first part) of the Constitutional Court Law

holding the proceedings in writing reviewed the case:

”On the Compliance of Articles 4 (Item 3) and 10 (the Fifth part) of the Law ”On Excise Tax” as well as the compliance of Item 24 (in the Part on Customs Payments to be Applied to Means of Transport) of the Cabinet of Ministers October 10, 2000 Regulations No. 349 ”The Process of Implementation of the Customs Procedure – Temporary Admission” with Articles 89, 91 and 105 of the Republic of Latvia Satversme; with the

Second Part of Article 2 of the Istanbul Convention of June 26, 1990 "On Temporary Admission" as well as Articles 7 and 9 (the Second Part) of Annex C to the Convention and with Standards 30 and 34 of Annex F3 to the May 18, 1973 Kyoto International Convention on Simplification and Harmonizing of Customs Procedures."

The establishing part

On November 25, 1999 the Saeima passed the Law "On Excise Tax", which took effect on December 9, 1999. At the moment of submission of the claim, wording of Article 4 (Item 3) is the following:

"The taxpayers are:

/.../

3) physical or legal persons or groups of physical or legal persons related through the contract who/which, in compliance with the Customs Law, are importing automobiles or motorcycles for the period of time;"

/.../."

In its turn wording of the fifth part of Article 10 of the Law at the time of submission of the claim reads:

" Physical persons or legal entities shall pay that tax calculated for automobiles and motorcycles imported temporarily in accordance with the Customs Law."

On October 10, 2000 - on the basis of Articles 24 (the second part), 25 and 36 (the second part) of the Customs Law and Item 18 of Article 22 of the Law "On Customs Duty" – the Cabinet of Ministers passed Regulations No. 349 "The Process of Implementation of the Customs Procedure – Temporary Admission", which came into effect on November 1, 2000. Item 24 of the Regulations establishes:

" A Latvian physical person, when importing a vehicle belonging to a foreign person for the period of time for private use and not for commercial purposes (henceforth – a private means of transport), receives a permission to do so in the procedure envisaged in Items 14 and 15 of the Regulations. The particular means of transport may be granted partially relief from the payment of customs duties".

Article 35 of the Customs Law determines that temporary import is a Customs procedure, allowing utilizing the goods in the territory of the Customs or behind it, partially or completely relieving them from the payment of customs duties in the procedure determined by the Cabinet of Ministers and not applying any trade policy undertakings on them.

By the Saeima May 20, 1999 Law "On the Istanbul Convention of June 26, 1990 "On Temporary Admission"" the above Convention (henceforth –the Istanbul Convention) was ratified and became valid in the territory of Latvia on October 16, 1999. The second part of Article 2 of the Convention envisages that without prejudice to the provisions of Annex E, temporary admission shall be granted with total conditional relief from import duties and taxes and without application of import restrictions or prohibitions of economic character.

Article 5 of Annex C establishes that "for the facilities granted by this Annex to apply:

(a) means of transport for commercial uses must be registered in a territory other than that of temporary admission, in the name of a person established or resident in a territory other than that of temporary admission, and be imported and used by persons operating from such a territory;

(b) means of transport for private use must be registered in a territory other than that of temporary admission, in the name of a person established or resident in a territory other than that of temporary admission, and be imported and used by persons resident in such a territory.

Article 7 of Annex C to the Istanbul Convention in its turn determines that "notwithstanding the provisions of Article 5 of this Annex,

(a) means of transport for commercial use may be used by third person, even if established or resident in the territory of temporary admission, who are duly authorized by the persons granted temporary admission and who operate on their behalf;

(b) means of transport for private use may be used by third persons who are duly authorized by the persons granted temporary admission. Each Contracting Party may permit the use by a person resident in its territory, in particular, where the means of transport is used on behalf and on the instructions of the person granted temporary admission.

The second part of Article 9 of the Annex to the Istanbul Convention envisages that means of transport for private use may remain in the territory of temporary admission for a period, continuous or not, of six months in every period of twelve months.

By the Saeima October 15, 1998 Law "On the May 18, 1973 Kyoto International Convention on Simplification and Harmonizing of Customs Procedures" the above Convention (henceforth – Kyoto Convention) was ratified and took effect in Latvia on October 3, 1999. In conformity with this Law the Republic of Latvia undertook the liability of applying also Standards 30 and 34 of Annex F3 to the Kyoto Convention. Standard 30 envisages that – in compliance with the Kyoto Convention - the facilities granted to means of transport for private use "shall be applied if they are the property of non-residents, are hired by them and if they are admitted together with, before or after the travelers." Standard 34, in its turn, determines that on the request of the concerned person and because of reasons, which the Customs institutions consider as well-grounded, the initially fixed time-limit for temporary admission shall be extended.

The applicant – the State Human Rights Bureau (henceforth – the applicant of the claim) – challenges the conformity of Articles 4 (Item 10), and 10 (its fifth part) as well as the conformity of Item 24 of the Cabinet of Ministers Regulations No. 349 (in the part on payments applied to means of transport) with Article 89, 91 and 105 of the Republic of Latvia Satversme, with the second part of Article 2 of the Istanbul Convention as well as Articles 7 and 9 (the second part) of Annex C to the above Convention and Standards 30 and 34 of the Kyoto Convention Annex F3. The applicant of the claim points out that – if the resident of Latvia needs to bring into the territory of Latvia his own, hired or rented car for his private and not commercial use for six months, or if a foreign person wants to bring into the territory of Latvia his own, hired or rented car for his private and not commercial use for six months then the norms of the Law "On Excise Tax" groundlessly infringe his/her rights. To the mind of the applicant the procedure, established by Articles 4 (Item 3) and 10 (its fifth part) of the Law "On Excise Tax", is unconformable with the norms of the above Conventions.

The applicant holds that the second part of Article 2 of the Istanbul Convention, read together with the second part of Annex C Article 9 of it, determines that a foreign person, who brings into the Customs territory means of transport, which the person owns and has registered it on his/her name in his/her state for six months, then the temporary admission shall be granted with total relief from import duties and taxes. However, to the viewpoint of the applicant of the claim, the first part of Article 8 of the Law "On Excise Tax", which envisages that "the tax paid for an automobile or a motorcycle, which a physical person or a legal entity are removing from Latvia within three months after its import is refunded" contradicts the Istanbul Convention, as it sets the time limit under which the person may temporarily bring means of transport into the Republic of Latvia territory, receiving total customs payment exemption.

The applicant of the claim stresses that Standard 30 of the Kyoto Convention Annex F3 envisages a six month term for temporary admission of a car for private use, if the person is not the resident of the state. In addition Standard 34 of the Annex establishes that " on the request of the concerned person and because of reasons, which the Customs institutions consider as well-grounded, the initially fixed time limit for temporary admission shall be extended".

Besides in accordance with Article 7 Sub clause "b" of the Istanbul Convention Annex C means of transport for private use may be used by third persons, who are duly authorized by the persons granted temporary admission. However Item 24 of the Cabinet of Ministers Regulations determines that - if a Latvian physical person brings in means of transport, belonging to a foreign person and temporarily uses it for private and not commercial needs, the particular vehicle is granted only a partial relief of the customs payment.

The applicant of the claim holds that imposition of excise tax on the means of transport, which is temporarily brought in is at variance with Article 91 of the Satversme – the Constitution (henceforth – the Satversme) as in other states the above tax is not to be paid. Thus the Latvian physical and legal persons find themselves in an unequal situation. Besides the Republic of Latvia citizens find themselves in an unequal situation when compared with foreign citizens as the latter – in accordance with Item 61 of the Cabinet of Ministers Regulations No. 349 - when temporarily bringing means of transport into the territory of Customs, are granted with total relief from Customs duties. In the same way, to the applicant's viewpoint, the procedure of imposing the challenged excise tax limits the person's right to own the property, envisaged by Article 105 of the Satversme, as, by imposing ungrounded encumbrance on the property, the right of the owner to peacefully enjoy his property is limited.

To his mind the challenged norms are also at variance with Article 89 of the Satversme, as it is conformable with neither the Istanbul Convention in accordance with which the Republic of Latvia has undertaken the liability to facilitate temporary admission by simplifying and harmonizing the procedure and thus reaching economic, humanitarian, cultural, social and tourist objectives nor the Kyoto Convention, the aim of which is to facilitate the procedure of border crossing and staying in the Convention member countries for the travelers and workers, who reside in one country but work in another one.

The institution, which has passed the norms of the challenged Law "On Excise Tax" – the Saeima in its written reply expresses the viewpoint that Article 4 (Item 3) of the Law "On Excise Tax" establishes the range of persons, who are excise taxpayers. In its turn Article 10 (the fifth part) determines that a person shall pay excise tax for automobiles and motorcycles imported for a period of time. Besides, the Customs Law and incorporated into

it delegation to the Cabinet of Ministers (Article 35) regulates those cases when a person shall be granted full or partial relief from customs payment. To the viewpoint of the Saeima members, the term "customs payment" refers also to the excise tax, which shall be paid for cars and motorcycles.

In its written reply the Saeima points out that Annex C to the Istanbul Convention "Concerning Means of Transport" envisages those kinds of means of transport and requirements, which the above means of transport have to meet to be granted temporary admission without customs duties. In compliance with Article 7 (Item "b") of the above Annex C Latvia has been given the right of determining whether to grant to residents of Latvia relief from the import duties for temporary use of a car, which belongs to a foreign person.

The second part of Article 9 of the Annex C to the Istanbul Convention establishes time limit of use of the temporarily imported car in the state territory. However, norms of the challenged Law "On the Excise Tax" do not regulate this issue.

The Saeima expresses the viewpoint that Standards 30 and 34 of the Annex F3 to the Kyoto Convention refer to travelers – non-residents, i.e. to persons, who enter the state in which they do not reside for some time. To their mind the above standards do not refer to travelers – residents, who are returning, i.e. – to persons, who after a temporary stay in a foreign country, return in the territory of the state in which they live permanently. Standard 30 of Annex F3 refers to a particular case and it does not forbid applying partial relief from customs payment in other cases, not envisaged in the Convention. In its turn, issue, regulated by Standard 34 of Annex F3, is not the subject of regulating the challenged norms of the Law "On Excise Tax" but shall be regulated by the Cabinet of Ministers Regulations, passed on the basis of the Customs Law.

Thus the Saeima holds that the legal regulation, established by Articles 4 (Item 3) and 10 (its fifth part) does not contradict the legal norms, mentioned by the applicant of the claim and requests to declare the claim in the part on the Law "On Excise Tax" as ungrounded and dismiss it.

The institution, which has passed the challenged norm of the Cabinet of Ministers Regulations No. 349 – the Cabinet of Ministers – in their written reply states that Article 7 (Item "b") of the Istanbul Convention bestows upon Latvia the right of taking the decision on granting a person, who resides in the territory of the state, permission of using the means of transport, belonging to a foreign citizen on behalf and on the instructions of the foreign person. Therefore in Item 71 of the Cabinet of Ministers Regulations No.349 the state has determined that a Latvian physical person is allowed to use the means of transport for private use in cases, if it does not take place regularly and if the physical person acts on behalf or in the name of the person, who is a foreigner and has arrived in Latvia. Neither the second part of Article 2 of the Istanbul

Convention, nor Article 7 of Annex C make Latvia responsible for granting the residents, who temporarily import goods in the territory of their residence, relief from customs duties. The Cabinet of Ministers points out that the provision of Article 9 (its second part) of Annex C to the Istanbul Convention has been incorporated into Item 64 of the Cabinet of Ministers Regulations No. 349.

The Cabinet of Ministers holds that Standard 30 of Annex F3 to the Kyoto Convention shall be applied in cases, when a non-resident i.e. a person, who comes to a country, where he/she does not reside permanently, privately uses the means of transport. Standard 34 of Annex F3 to the Kyoto Convention has been incorporated into Item 12 of the Cabinet of Ministers Regulations No. 349.

When preparing the case for review, explanations from the State Revenue Service were required. The State Revenue Service in their reply expressed the viewpoint that in conformity with the sense and objective of the Istanbul Convention no facilitation is envisaged for the resident, who temporarily imports goods into the territory of his/her permanent residence. In conformity with Article 7 (Item "b") of Annex C to the Convention, the Republic of Latvia itself is allowed to assess whether to apply the facilitation also to its residents. Item 71 of the Cabinet of Ministers Regulations No.349 establishes such a case.

The State Revenue Service holds that in Member States Standards 30 and 34 of Annex F3 to the Kyoto Convention shall be applied to travelers – non-residents. The State Revenue Service stresses – if a person imports into Latvia the means of transport in conformity with Item 63 of the Cabinet of Ministers Regulations No. 349, the person does not have to pay excise tax. If a physical person of Latvia temporarily brings into Latvia the means of transport belonging to a foreign person, partial relief from customs duties, including the excise tax, shall be granted.

On September 20, 2002 the Constitutional Court received the application from the authorized representative of the submitter of the claim Valdis Cielavs, requesting to dismiss proceedings in the part on compliance of the challenged norms with the Republic of Latvia Satversme.

The concluding part

1.

Taking into consideration the application of the authorized representative of the submitter of the claim, conformity of Articles 4 (Item 3) and 10 (the fifth part) of the Law "On Excise Tax" and Item 24 of the Cabinet of Ministers

Regulations No.349 in the part on customs duties to be applied to the means of transport with Articles 89, 91 and 105 is not evaluated.

2.

The Law "On Excise Tax" determines the types of merchandise to be imposed with tax, tax rates and the procedure in which excised merchandise is imposed with tax. The Constitutional Court agrees with the viewpoint of the Saeima, that Article 4 (Item 3) of the Law "On Excise Tax" does not incorporate the acknowledgement that any physical or legal entity, who imports into Latvia an automobile or a motorcycle for temporary use has the obligation of paying excise tax, it only envisages that the excise taxpayer may be physical or legal persons, who/which in compliance with the Customs Law, are importing automobiles or motorcycles for the period of time.

In its turn, the fifth part of Article 10 of the Law "On Excise Tax" includes the remark that physical persons or legal entities shall pay that tax calculated for automobiles and motorcycles imported temporarily in accordance with the Customs Law. Well-grounded is the viewpoint expressed in the Saeima written reply that just the Customs Law regulates those cases, when persons – temporarily bringing in automobiles and motorcycles – have to pay the excise tax or are exempt from paying it. Therefore to establish the duty of a physical person or a legal entity of paying excise tax for automobiles or motorcycles, which are temporarily imported, it is necessary to analyze the contents of several norms of the Customs Law.

The term "Customs payment" is defined in Article 1 (Item 12) of the Customs Law. It is a duty or tax, which – in accordance with the Law is collected by the customs institution. Therefore, as the Saeima states in its written reply, the excise tax shall also be considered as customs payment.

Article 35 of the Customs Law incorporates the definition of the customs procedure named "admission for a period of time" (or - in conformity with the Istanbul Convention - the "temporary admission") and delegates the right of determining the procedure of granting full or partial customs tax relief for temporary admission of automobiles and motorcycles to the Cabinet of Ministers.

3.

The Cabinet of Ministers Regulations No. 349 regulates the process of applications and implementation of the customs procedure – temporary admission also with regard to automobiles and motorcycles. Item 24 of the above Regulations in the part on payments applied to means of transport determines that the physical person of Latvia (in the interpretation of the Istanbul and Kyoto Conventions – the resident of Latvia), when temporarily

bringing in for private use means of transport, belonging to a foreign person shall be granted partial customs tax relief. However, the norms of the Istanbul and Kyoto Conventions, mentioned in the claim of the applicant, regulate only those cases, when means of transport is temporarily brought into Latvia by a non- resident , a foreign physical person or legal entity . Thus the subject of legal regulation of Item 24 (in the part on payment applied to means of transport) of the Cabinet of Ministers Regulations No. 349 differs from both – the legal subject of Article 2 (its second part) of the Istanbul Convention and the Annex C to it as well as of that incorporated into Standards 30 and 34 of the Annex F3 to the Kyoto Convention.

Article 1 of the Annex E to the Istanbul Convention establishes that:

”(a) the term ”goods imported with partial relief” means: goods which are mentioned in the other Annexes to this Convention but which do not fulfill all the conditions stipulated therein for the granting of temporary admission with total relief from import duties and taxes, and goods which are not mentioned in such other annexes and which are imported to be temporarily used for, for example, production or work projects;

(b) the term ”partial relief” means: relief from payment of a part of the total amount of import duties and taxes which would otherwise be payable had the goods been cleared for home use on the date on which they were placed under the temporary admission procedure.”

In its turn Article 2 of the Annex envisages that ” the goods referred to in Article 1, paragraph (a) of this Annex shall be granted temporary admission with partial relief in accordance with Article 2 of this Convention”. It follows from the above norms of the Istanbul Convention that in case if the resident of Latvia brings in for private temporary use means of transport, registered in a foreign country and belonging to a foreign person, then – in compliance with Annex E of the Convention – partial relief from the customs payment shall be applied to the means of transport. Thus, Item 24 (in the part on means of transport) of the Cabinet of Ministers Regulations No. 349 complies with Annex of the Istanbul Convention.

4.

One should take into consideration that the facilities, referred to in the second part of Article 2 of the Istanbul Convention, namely, full relief from the customs payment for temporary admission of means of transport for private use, shall be applied if they conform with the criteria, enumerated in Article 5 (”b”) of the Annex C:

- 1) the means of transport is brought in by a foreign person;
- 2) it belongs to a foreign person and

3) the means of transport is registered in a territory other than that of temporary admission.

Regulation, incorporated into Item 63 of the Cabinet of Ministers Regulations No. 349, complies with the above norms of the Istanbul Convention, because they determine that temporary admission with full relief from customs payment shall be applied to private means of transport, if it is imported by a foreign person, if the foreign person needs it for private use and the means of transport is registered in a foreign territory, in the name of the foreign person or if the person proves with documents that the means of transport, not registered in Latvia, belongs to a foreign person.

Article 7 ("b") of the Annex C to the Istanbul Convention envisages provisions for the possibility of using the means of transport by the third person. Besides, in conformity with this norm, each Contracting Party may permit the use by a person resident in its territory, in particular, where the means of transport is used on behalf and on the instructions of the person granted temporary admission. The Republic of Latvia has regulated preconditions for usage of such means of transport by the residents of Latvia in Item 71 of the Cabinet of Ministers Regulations No. 349, envisaging that a Latvian resident, if he/she is duly authorized by the owner of the means of transport or operates on their behalf but does not use it regularly shall experience the above possibilities.

Article 9 (the second part) of the Annex C to the Istanbul Convention and to which the applicant of the claim has made reference, regulates the ordinary period, which the means of transport, temporarily imported in the Member State of the Convention, may remain in the territory. In accordance with the above norm, the period, continuous or not, is six months in every period of twelve months. The Cabinet of Ministers in its written reply rightly states that the corresponding period has been also envisaged in Item 64 of the Cabinet of Ministers Regulations No. 349.

5.

Member States of the Kyoto Convention, in accordance with its Article 2 (taking into consideration the amendments to the Kyoto Convention, envisaged in the ratified Protocol on amendments to the Convention), undertake the obligation of observing the standards and recommended practices incorporated into Annexes to the Convention. Both standards, to which the applicant has referred, may be found in the Section "Entry Provisions" (Sub-section "a" – "Non-residents") of the Annex F3. The above standards refer to cases when a non-resident or a foreign person enters the Convention Member State. In the Republic of Latvia both the standards shall be applied when a foreign person, who is not a resident of Latvia, enters the territory of the State.

Standard 30 of the Annex F3 to the Kyoto Convention grants non-residents, who enter the Convention Member State certain facilities as regards use of their private means of transport even in cases when the non-residents have hired or rented the above means of transport or if the means of transport are brought in before, after or together with the non-residents. Contents of this norm can be found in Item 63 of the Cabinet of Ministers Regulations No. 349. The above Item includes into the range of criteria of temporary admissible means of transport also the possibility of the means of transport belonging to another foreign person and not to the person, who imports it. Besides Article 18 of the Customs Law permits persons to accomplish the Customs procedure with the help of the representative. It gives the foreign person – if the latter is delayed by some circumstances- the possibility of accomplishing of the Customs procedure – temporary admission – without being present, with the help of an authorized representative.

Standard 34 of Annex F3 to the Kyoto Convention envisages that- on the request of the concerned person - the Customs institution shall extend the term of temporary admission, if there are reasons the Customs institution finds motivated. As the Cabinet of Ministers has pointed out in its written reply, Item 12 of the Cabinet of Ministers Regulations No. 349 also envisages the above obligation for the Republic of Latvia Customs institutions.

6.

Taking into consideration all the above, Articles 4 (Item 3) and 10 (its fifth part) as well as Item 24 of the Cabinet of Ministers Regulations No. 349 in the part on payments applied to means of transport are not at variance with Article 2 (its second part) of the Istanbul Convention, Articles 7 and 9 (the second part) of Annex C to the Istanbul Convention as well as with Standards 30 and 34 of Annex F3 to the Kyoto Convention.

7.

From the documents attached to the case follows that – as concerns application of the customs procedure of temporary admission to automobiles and motorcycles imported into Latvia- imperfections or even errors perhaps might be found. In compliance with Articles 1 and 16 of the Constitutional Court Law, the duty of evaluating application of legal norms is not within the competence of the Constitutional Court. Institutions of the executive power and their officials, who apply legal norms of customs shall take into consideration the first part of Article 7 of the Law ” On Taxes and Duties”, which establishes if international agreements affirmed by the Saeima stipulate another procedure for the calculation or payment of taxes than in the Republic of Latvia tax laws, rules of these international agreements are implemented. The institutions and officials shall also bear in mind Article 5 of the Customs Law, which envisages – ” if an international agreement, affirmed by the Saeima, establishes other

provisions than those incorporated into this Law, rules of the international agreement shall be applied.”

The substantive part

On the basis of Articles 29 (Item 1 of the first part), 30, 31 and 32 the Court

decided:

1. To terminate proceedings of the case in the part on the compliance of Item 3 of Article 4 and the fifth part of Article 10 of the Law "On Excise Tax" as well as on the conformity of the Cabinet of Ministers October 10, 2000 Regulations No 349 "The Process of Implementation of the Customs Procedure – Temporary Admission" with Articles 89, 91 and 105 of the Satversme.

2. To declare Item 3 of Article 4 and the fifth part of Article 10 of the Law "On Excise Tax" as well as Item 24 (in the part on Customs payments to be applied to means of transport) of the Cabinet of Ministers October 10, 2000 Regulations No. 349 "The Process of Implementation of the Customs Procedure – Temporary Admission" as being in compliance with the second part of Article 2 of the Istanbul Convention of June 26, 1990 "On Temporary Admission" , with Articles 7 and the second part of Article 9 of Annex C to the Convention and as being in compliance with Standards 30 and 34 of Annex F3 to the May 18, 1973 Kyoto International Convention on Simplification and Harmonizing of Customs Procedures.

The Judgment is final and allowing of no appeal.

The Chairman of the Constitutional Court

Aivars Endziņš