
CASE LAW REVIEW

Payment of Monetary Obligation under a Floating Exchange Rate Regime

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With its Decision No. 22/818 of November 5 1999 the Appellate Court repealed Tbilisi Isani-Samgori District Court Decision of 20 July 1999 and delivered a new decision. The Appellate Court partially satisfied the plaintiff's demand regarding the payment of interest (penalty) and obliged the defendant (State Customs Department) to pay the interest for overpaid charges in favour of a plaintiff.

1. Circumstances of the Case

In his claim the plaintiff demanded the return of the sum overpaid during customs clearance of the fuel imported to Georgia from the Republic of Azerbaijan according to the exchange rate of GEL against USD for the date of payment, i.e. reimbursement of damages caused by difference in exchange rates. The plaintiff based his claim on Article 389 of the Civil Code of Georgia. The defendant did not acknowledge the claim and demanded its dismissal.

The plaintiff's claim was satisfied by the appealed decision and the defendant was obliged to pay UDS 11 656.27 as damages. The motivation of the district court was the following: the Georgian Parliament ratified an Agreement between Georgia and the Republic of Azerbaijan on Free Trade on 16 April 1997, but the court considered that the obligations under this agreement should be fulfilled starting from 10 July 1996, pursuant to the Presidential Ordinance N 408 of 24 June 1996, which adopted the above mentioned governmental agreement. The agreement provided for the exemption of imported products from the payment of customs duties, but the defendant failed to comply with requirements of the agreement and imposed on the plaintiff the payment of excessive charges in an amount of GEL 44 438,18 which was returned to the latter on 4 March 1999. The district court decided that the plaintiff paid customs charges in USD – total USD 32 617,67. The difference between the paid and returned sums made USD 11 656,27 given the difference in the exchange rate of the national currency Lari against USD. The plaintiff was caused damages in amount of the above sum. The court referred to Article 42.9 of the Georgian Constitution and Article 389 of the Civil Code of Georgia.

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State Customs Department of Georgia appealed against the above-mentioned decision and demanded its revocation. The motivation for the adoption of a new court decision was as follows: Customs Department had not received the Agreement between Georgia and Azerbaijan on Free Trade and consequently the agreement was not circulated among customs authorities as a guiding instrument. Thus the customs authorities could not have taken account of its requirements and applied custom benefits to the importers. The appellant considered that the customs authorities and their officers were not guilty of their actions and they should not bear the responsibility for damages.

The legal part of the appeal is non-consideration and non-application of Articles 412 and 997 of the Civil Code of Georgia, insofar as under these provisions only the damage that a debtor could have foreseen is subject to reimbursement and the imposition of liability without fault was unlawful.

In his counter action against appellant's appeal the plaintiff increased his demand on the grounds of Article 252 of the Tax Code of Georgia and demanded the payment of a penalty in amount of GEL 2 283 for overpaid charges.

The appellate court examined the case file and evidenc submitted by the parties and obtained under the court initiative. After hearing the explanations of the parties and court proceedings, the court arrived at the conclusion that the appellant's claim was sound and it should be satisfied; that Tbilisi Isani-Samgori District Court decision of 20 July 1999 was not lawful; that it should be repealed and the appellate court should deliver a new decision due to the following circumstances:

The Appellate Court considered that the district court violated the provisions of substantial and procedure law upon delivery of the appealed decision, namely, the requirements of Articles 393 and 394 (a) of the Civil Procedure Code of Georgia. The court applied the law it should not have been applied and did not apply the law it should have been applied and misinterpreted it. Thus, the decision was not adequately founded from the legal point of view.

2. Motivation of the Court

The appellate court has not upheld the statement of the district court, that the plaintiff paid customs charges in USD because under the Ordinance No. 363 of the Head of the State of Georgia (16 September 1995) national currency "Lari" has been declared as the legal payment instrument on the whole territory of Georgia since 2 October 1995; also according to the amendment made on 19 September 1995 to Article 36 of the Law of Georgia on the National Bank of the Republic of Georgia of 23 June 1995, "Lari is the currency unit of Georgia", while under paragraph 2 of the same Law "Lari is the only legal payment instrument on the whole territory of Georgia". Consequently, by virtue of the customs legislations all customs charges are paid in national currency – Lari starting from 2 October 1995. In accordance with the Customs Code of Georgia it is the duty of a declaring person to fill in a customs declaration and as far as a taxpayer paid charges in national currency according to the above quoted normative acts, the customs authority returned the overpaid sum

in Lari as well. Taking the above said into consideration the appellate court considered that the decision of the district court to oblige the defendant to pay the sum in foreign currency – in USD was against the legislation in force.

The appellate court held that, when considering the dispute, the district court had not applied Article 222 of the Tax Code of Georgia, which states, that “transaction made in foreign currency shall be converted into Lari: a) if available, according to the official exchange rate of the National Bank of Georgia for the date of transaction; b) if no such official rate is available, at a rate established on the basis of the published exchange rates of foreign currency against Lari.” The rules of charging and payment of customs duties are regulated by the Law of Georgia on Customs Fees and Tariffs of 20 March 1998. Under Article 19 of this Law the grounds for the payment of customs charges is shipment-customs declaration. Part 3 of this Article states that upon the calculation of customs charges, foreign currency is converted into the national currency of Georgia at an official exchange rate of the National Bank of Georgia for the date of drawing up a shipment-customs declaration. Under the assessment of the appellate court the exchange rate of USD against Lari, mentioned in the customs declaration took account of this circumstance and not of the statement of the plaintiff. The district court agreed to the former assessment. Namely, the goods underwent customs clearance in USD and since the overpaid sum was returned according to the exchange rate effective for that period, the plaintiff was caused damage in amount of USD 11 656,27. Thus the appellate court cannot agree with the statement of the district court, as it is not established what was the actual damage, and consequently, the appealed decision is not substantiated in this part from the legal point of view.

The appellate court considered it established that the plaintiff overpaid customs charges, though customs legislation provides for the rules of filling in the customs declaration, rights and obligation of a declaring person, the format and the procedure of acceptance of a customs declaration. The main principle is that all the necessary information for the calculation of customs charges and customs clearance is submitted by a declaring person, i.e. a person moving goods. Under Article 90 of the Customs Code of Georgia a customs declaration is accepted and registered by a customs authority in accordance with the established procedure. From the moment of its registration the customs declaration becomes a document evidencing the facts of legal importance. In 1998, the plaintiff, who subjected goods imported from Azerbaijan into Georgia to customs clearance on the grounds of a customs declaration, did not complain of overpayment of charges and as is evidenced by the case materials and the court proceedings, both he and the customs authority became aware of the overpayment of customs charges later on. Thus, it is not proved what kind of damage was actually caused to the plaintiff through over payment of charges before the return of this sum. The appellate court believes that upon overpayment of customs charges the plaintiff did not bear any contingencies, as it was assumed, that he paid charges in the established amount and he was not aware of existing benefits and exemptions. It should be mentioned that the defendant asserted that the above-mentioned agreement was not familiar, either to customs authorities or to their public officials and thus it was not fulfilled – only the Enactment No. 991 of the

Georgian President of 29 December 1999 made it possible to regulate the repayment of mutual indebtedness arising between the Budget and the importers during the implementation of the agreements on free trade.

The appellate court did not uphold with the district court deliberations on entering into force and enforcement of the Agreement between Georgia and the Republic of Azerbaijan on Free Trade, under which the assumed obligations were to be fulfilled starting from 10 July 1996. When deliberating about the above issue the court did not assess the fact that Georgian Parliament ratified the agreement only on 16 April 1997 and adoption of 10 July 1996 as the date of entering the agreement into force is the violation of the Georgian Constitution and the special Law of Georgia of 11 February 1993 on Entering into, Ratification and Denouncement of the International Agreements of the Republic of Georgia, as the necessary precondition for the entry into force of the above agreement is the ratification by the supreme legislative body of the country – the Parliament. Consequently the court did not apply the law it should have applied for the assessment of the entry into force of the mentioned Agreement and for the establishment of the enforcement date.¹

The district court applied the law it should not have applied, namely, Article 389 of the Civil Code and misinterpreted this provision when it considered that the dispute concerned the obligatory relations, arising on the grounds of the damage caused as a result of an unlawful action and considered it reasonable to recourse to Article 389 of the Civil Code. Due to incorrect interpretation of the provision, the claim was acknowledged as sound.

The appellate court considered that the above provision should not have been applied in this case given a very simple reason: in 1998-1999 currency unit (its rate) did not increase or decrease; the increase or decrease of a currency unit means the change of its nominal value as it was the case in Russia not long ago, when 100 Rubles were restated to 1 Ruble, i.e. currency unit (its rate) decreased. But the same did not happen in Georgia for the same period, and the currency unit was not changed. The above quoted Article did not say that the change of currency unit (its rate) means the change of the exchange rate of the national currency – Lari for some other currency. Thus the application of this provision, moreover its incorrect interpretation upon settlement of a dispute is inadmissible.

According to Article 170 of the Customs Code of Georgia, the customs authorities and their officials are responsible for the damage caused to a natural or a legal person and their property through their unlawful decisions, actions or omission while performing official duties. Damage should be reimbursed on a general basis in accordance with the procedure, established by the law. In the opinion of the appellate court, in the case of establishing the damage, it would be logical to apply the provisions of the civil law concerning damages, also to make a reference to Article 42.9 of the Constitution.

¹ It should be mentioned, that for that period there already existed a judgment entered into force No. 03b/16 of 1 September 1999, which established the necessity of ratification of the above-mentioned governmental agreement, for making it legally binding for its parties.

The district court did not apply the law it should have applied, namely, the provisions of the Civil Code, regulating the obligation of damages. According to Article 412, subject to reimbursement is only the damage which the debtor could have foreseen, and which is the direct result of the action causing damage.

The appellate court considered that, customs authorities could not have been aware or foreseen the future exchange rate of the national currency – Lari in relation with other foreign currencies, including USD. Moreover in a market economy the exchange rate of any currency may fluctuate even during a day and this is quite natural for financial-economic relations.

The appellate court stated that the customs authority committed an unlawful action, when it overcharged the plaintiff with customs charges, which was acknowledged by the defendant itself through the return of the overcharged sum. On the grounds of the above statement the court considered that the claim should be met only with respect to penalty (interest): in the case of unlawful levying a customs charge, Article 75 of the Customs Code of Georgia refers to Article 252 of the Tax Code of Georgia. The latter states that in the case of overpayment of a charge through the violation of tax laws, the interest should be payable from the moment of submission of a repayment declaration to a taxpayer until the repayment of the overpaid sum. The paid interest is equalled to the interest rate fixed by the National Bank of Georgia for governmental credits.

It should be mentioned that during the case consideration the defendant acknowledged plaintiff's claim in this part, as well as the legality of obliging a customs authority of the duty to pay the interest in favour of the plaintiff. Consequently the defendant was obliged to pay GEL 2 641,35 as interest.

The appellate court considered groundless the plaintiff's claim on the imposition of USD 11 656,27 upon the defendant as damages, while the increased demand on the imposition of penalty was considered as a sound one and the court obliged the defendant to pay GEL 2 641,35 in favour of the plaintiff.

3. Comments

In our opinion the decision made on the administrative case concerned is notable from the several points of view; but we shall speak about them later on. We would like just to mention that this decision should become a part of case law and it is still unchanged.

a) The issue – the role of the appellate court and its importance for Georgia's judicial system – was rather topical for that period and there was a point of view strongly expressed that the reconsideration of a case on merits by a court with bench of judges would be unreasonably time consuming for otherwise delayed proceedings.

We consider that the above discussed decision is an apparent example of the opposite, because together with the demands and opinions of the parties, conclusions and arguments of the district court and the motives of appellation the decision concerned gives the dissenting opinions and conclusions, as well as legally substantiated criticism of the

appealed decision, which violated the provisions of law and which was changed by a new decision of the appellate court, based on the correct application and accurate interpretation of the law. Well-substantiated criticism of the decision upon the revocation of a former decision by an appellate court is very important and necessary for the lower court not to have a sense of insufficiency and vagueness whether what was the reason of revocation of the decision by the court. The above is compatible with the requirement of Article 389 (d) of the Civil Procedure Code of Georgia under which the decision of the appellate court should indicate the grounds for the revocation of a decision.

b) In the decision concerned that appellate court gave a new interpretation of Article 389 of the Civil Code of Georgia, which was totally different from the one common for judicial practice of that period. We consider that this interpretation of the appellate court was of fundamental importance:

- 1) For correct comprehension of the law;
- 2) For the role and purpose of case law;
- 3) From a public and social point of view, what was manifested in a practical outcome.

Without this new, correct interpretation of Article 389 of the Civil Code of Georgia, taking account of the difference (increasing or decreasing inflation) between the exchange rates of the national currency Lari against USD in settlement relations would have driven out Lari from the circulation and would have made effortless all the measures for declaring national currency as the only legal settlement instrument in Georgia; the state would have lost one of its attributes – the national money. It should be mentioned that upon the interpretation and application of Article 389 of the Civil Code of Georgia the court often equalled the increase or decrease of the currency unit (rate) with the exchange rate of the Georgian national currency for a foreign one, which is closer to the simple understanding of a “money rate” and has nothing to do with legal interpretation. Furthermore, it is worth mentioning, that when satisfying claims on damages caused by the difference between the exchange rates (meaning Lari against USD) the courts disregarded the fact that currency fluctuation is a normal phenomenon in a market economy and what would have happened in the case of increase of Lari for USD? In our opinion it would have caused a total chaos, particularly during the disputes settlement in courts.

The Russian example about financial reform in the Russian Federation, when the nominal value of the currency unit was changed, which the appellate court referred to upon the interpretation of the respective provision of the law, confirms the correct and proper interpretation of the appellate court, reinforces the idea that in this very case the law protects financial interests of a debtor, when it states that the payment should be made in accordance with the exchange rate effective for the date origination of a pecuniary obligation. This is absolutely logical, as the interest of a private law natural or a legal person should be protected at a maximum possible level upon the exercise of state interests. The above is realised in this field by means of Georgian civil law.