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## CASE LAW REVIEW

### The Balance of Private and Public Interests in Lawmaking Process

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On 16 May 2000, the Appellate Court repealed the decision of Didube-Chugureti District Court of Tbilisi of 27 January 2000 and adopted a new decision that dismissed the claim of Tbilisi Regional Customs Office and released the respondent from the payment of GEL 920.31 imposed by the applicant's Act of 21 September 1999.

#### 1. Circumstances of the Case

The object of the claim was to impose payment of GEL 920.31 due to the state budget by the respondent. As for the grounds for the claim, it was the imposition of a payment of GEL 1098.16 prescribed by the legislation in force instead of GEL 177.85 imposed for customs clearance of imported vehicle. The respondent rejected the claim and demanded its annulment because he believed that changes and amendment made on 23 July 1999 to the Tax Code should not have been applied thereto.

The decision satisfied the claim and imposed payment of GEL 920.31 by the respondent, which the District Court contended as follows. The law of 23 July 1999 on Changes to the Tax Code, imposing 20% additional VAT for customs clearance of vehicles was published on 4 August, 1999 in the official gazette *Sakartvelos Sakanonmdelbo Matsne*; The court considered that the requirement of Article 38.6 of the Law on Normative Acts was observed, but as far as according to Article 45.1 of this law, the amendment entered into force on 5 August 1999, its fulfilment was obligatory from the date of entry of the law into force. The court ignored the respondent's argument about unawareness of the law by the customs officers and stated that as per Article 3.2 of the Civil Code, unawareness of the law shall not be an excuse for not applying the law.

The respondent appealed against this decision. He claimed the repeal of the Act as being groundless and unlawful and dismissal of the claim by the new decision of the Appellate Court under the following argument: He, as an (ordinary) citizen, could not have been in knowledge of the law published on 4 August 1999 in the official gazette *Sakartvelos Sakanonmdelbo Matsne*. Even the customs employees were unaware of it. None of the customs officers warned him about the increased duty, otherwise the respondent would not have paid the clearance duty. The appellant believed that the official

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gazette Sakartvelos Sakanonmdeblo Matsne could not ensure full public awareness provided for in Article 3 of the Civil Code and thus the increased duty should not have been applied.

The defendant – Tbilisi Regional Customs Office – ignored these arguments and claimed to uphold the appealed decision as being lawful. The amendment was published on 4 August 1999 and, as prescribed, entered into force after 24 hours i.e. from 5 August 1999. Thus, the respondent should have been imposed to pay not GEL177.85 but GEL 1 098.16.

The Appellate Court examined the case files and after hearing the parties found the following. On 5 August 1999 the respondent paid customs clearance duty for his own vehicle and a total of other various taxes was imposed to pay GEL177.85. On 21 September 1999, according to the Act the respective customs agencies checked the accuracy of the taxes and duties for clearance of the vehicle imported on behalf of the respondent and found out that he should have been imposed GEL 1 098.16 for clearance of the vehicle subject to payment within three days which the respondent failed to comply with.

Having studied the reasons for the appeal and analysed the evidence in the case and conducted the hearing, the Appellate Court concluded that the appellant's claim was substantiated and thus was awarded. The appealed decision repealed the unlawful one and the Appellate Court delivered a new decision. The appeal was satisfied and the respondent was released from payment of GEL 920.31 imposed by the Act of 21 September 1999 of Regional Customs Office.

The Appellate Court considered that when delivering the appealed decision the District Court had violated the norms of substantive and procedural laws. The Court did not observe the requirement of Article 393.2.a of the Civil Procedure Code and did not apply the appropriate law, namely Articles 28, 36, 45.3, 51 of the Law on Normative Acts as of 29 October 1996.

## 2. Reasoning of the Appellate Court

The Law of 23 July 1999 made changes to the Tax Code including the chapter on Final and Transitional Provisions of the Code. Namely, Article 271.2.d which read as follows: "Articles 112 and 130 concerning taxation of importation of vehicles shall enter into force from 1 January 2000". After the changes, the words "Article 112 and 130" were replaced by the words "Article 130".

Article 112.1 of the Tax Code specifies the amount of VAT rates. It states that "the rate of VAT makes up 20% of the amount of taxable turnover or taxable import". In order to have these changes entered into force the legislator has laid down a special date 1 January, 2000, whereas Article 273.2 of the Code (covering transitional provisions) specifies that before 31 December 2000, two types of taxes for importation of vehicles should be paid: a) excise duty in the amount of GEL 0.1 for each cubic centimetre of the engine capacity of

an imported vehicle; b) VAT in the amount of 5%. On 24 December 1999, the words of Article 271.2.d of the Tax Code “from 1 January 2000” were replaced by the words “from 31 December 2000”. In other words, before the entry of Article 112 of the Tax Code into force the tax rate for importation of vehicles was determined by Article 273.2. The Law of 25 June 1999 made changes to Paragraph 2 of this Article. The second type of tax – VAT in the amount of 5% was removed. However the Law of 25 June 1999 entered into force on 15<sup>th</sup> day from its publication i.e. 19 July 1999 and consequently from that date the importation of vehicles ceased to be taxable by VAT.

Article 1 of the Law on Normative Acts, lays down general rules for the drafting, adoption, publication, operation, registration and systematisation of normative acts. Article 2.3 gives the definition of a normative act which reads that it is a legal act adopted by an authorised state body or by an official of body of local self-government in accordance with the rule prescribed by legislation setting a general rule for the permanent or temporary and recurrent application of this act. In addition Article 3.2 contains a peremptory rule providing that a normative act shall be adopted (issued) by observing the requirements envisaged by the Constitution, this Law and normative acts adopted on the grounds thereof. As per Article 28.1 of this Law, “the procedures for drafting, adoption, publication and operation of the law... shall be defined by the Constitution of Georgia, this Law and Parliamentary Regulations”, whereas as per Article 36, “drawing up, adoption (issuance) and entry into force of the amendments and additions to a normative act shall be made according to the procedures prescribed for drafting, adoption (issuance) and entry into force of the amended/supplemented normative act”.

Article 271.1 of the Tax Code defines the procedure of entry of this Code into force. Namely, it says: “The Tax Code of Georgia shall enter into force on the 15<sup>th</sup> day from its publication, except the Articles and Titles specified in Paragraph 2 of this Article”, which provides for later entry into force of respective norms, including Articles 112 and 130, under Article 271.2.d of the Code. On 25 July 1999 change was made to Article 271 which was published on 4 August and its entry into force was defined upon its publication. The special date prescribed by the mentioned changes for the entry into force of Articles 112 and 130 of the Code – 1 January, 2000 and then 31 December 2000, were upheld only with regard to Article 130. Consequently, Article 112 of the Code shall enter into force from 4 August.

Pursuant to Article 68.6 of the Georgian Constitution, a law shall take effect on the 15<sup>th</sup> day from its publication in the official gazette, unless another period is stipulated. This provision was incorporated in Article 42 of the Law on Normative Acts whose first paragraph states that a legislative act shall take effect on the 15<sup>th</sup> day from its publication in the official gazette, unless the legislative act itself stipulates otherwise. Article 45.1 of the Law on Normative Acts allows and defines the mechanism for entry into force of a normative act upon its publication. A normative act takes effect at 24:00 on the day it is published. Under Paragraph 2 of this Article, a normative act may stipulate a special date on which a specific chapter or article of the act will take effect.

According to Article 45.3 of this law, a legislative act introducing or aggravating the legal liability takes effect not earlier than the 15<sup>th</sup> day from its publication.

The Appellate Court considered that by introducing this regulation the legislator would protect any (natural or legal) person against aggravation of legal liability when it stipulates that a regulation providing for such a liability may not take effect earlier than 15<sup>th</sup> day from its publication. In other words, a person is allowed to be informed and prepared for a legislative novelty that introduces or aggravates legal liability leading to a corresponding legal consequence.

Legal liability means the imposition by the state to fulfil legal requirements. It is a kind of social liability that is related to the state's ability to use compulsory measures expressed in the form of a legal sanction. The Appellate Court took into account the fact that legal liability exists in every field of law whether it is criminal, civil, administrative, disciplinary, material, or tax.

According to Article 3 of the Tax Code, a natural or legal person is obliged to pay those taxes, which are laid down by this Code.

The Appellate Court considered that legal liability of a taxpayer occurs when he is obliged to pay a tax. In other words, the obligation to pay taxes is imposed upon him. The rules of fulfilment of this obligation are stipulated in Chapter 3 of the Tax Code. In particular, Article 30 says that fulfilment of obligation to pay taxes is an obligation of a taxpayer. Paragraph 4 of this Article prohibits the unilateral refusal to pay taxes or unilateral alteration of the rule of fulfilment of obligation to pay taxes by a taxpayer or other responsible person. In addition, the type of liability prescribed by Paragraph 5 reads as follows: A taxpayer or other responsible person shall be liable for fulfilment of obligation to pay taxes with all his property. In this case a person becomes a payer of customs duty at the moment of customs clearance of goods.

Pursuant to Article 91.3 of the Tax Code, a person carrying out a taxable importation is considered to be a payer of VAT for such importation. Changes to Article 273 of the Tax Code of 25 June 1999 removed Paragraph b) that prescribed VAT in the amount of 5% for the importation of vehicles i.e. now it is taxed with zero VAT. Consequently from 19 July 1999, the importer of the vehicle paid only excise duty and was released from payment of VAT.

Proceeding from this, the Appellate Court concluded that when the Law of 23 July 1999 stipulated the entry into force upon publication it did not take into account and thus violated the requirement of Article 45.3 of the Law on Normative Acts because the immediate entry into force upon publication of Article 112 of the Tax Code stipulates and aggravates taxpayers liability for payment of a tax, because from 19 July 1999 VAT for importation of vehicles was not any more payable and before 19 July amount of VAT was 5%. Article 112 stipulates the rate of VAT in the amount of 20%, which under the law of 23 July 1999 also became applicable to the importation of vehicle and in the case concerned led to the

increase of appellant's obligation to pay a tax of GEL 920.31 (GEL 1 098.16 instead of GEL 177.85). In other words it meant the introduction and aggravation of legal (tax) liability by a normative act.

Article 51 of the Law on Normative Acts specifies that the adoption (issuance) of a normative act in violation of the rules prescribed by legislation is prohibited. This is a peremptory rule which stipulates that if a normative act is adopted in violation of the requirements of the law or if the procedures for adoption and entry into force of a respective normative act are violated, this normative act shall lose legal force and is void.

According to the assessment of the Appellate Court, by this regulation severe consequences are envisaged. As a matter of fact the legislator considered the legal act as a dead regulation for the violation of the procedures for the adoption and entry into force of a normative act and the requirement of this law and thus protected any natural or legal person against unexpected legislative novelty which may stipulate or aggravate his legal liability. This is fully compatible with the criteria laid down in the preamble of the Constitution expressing the strong will of the people of Georgia to establish democratic social order, economic freedom, a social and legal state, guarantee universally recognised human rights and freedoms.

When hearing this case, the Appellate Court guided with the provisions of Articles 6 and 7 of the Constitution, took into account the requirement of Article 8 of the Universal Declaration of Human Rights (1948) that states "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law" and the provision of Article 6 of the Convention for the Protection of Human Rights and Freedoms (1950) that states "in the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing... by an independent and impartial tribunal". In compliance with Article 51.3 of the Law on Normative Acts it settled the case within the competence of general courts and held that the imposition of VAT in the amount of 20% for customs clearance of a vehicle on 5 August 1999 was unlawful and the respondent should be released from the obligation to pay GEL 920.31 imposed under the Act of 21 September 1999 of Regional Customs Office.

### 3. Comment

The importance of the decision adopted with regard to the above administrative case could be assessed from the several points of view:

a) The decision reaches the synthesis of legitimacy and justice. The right of a socially active individual is protected, who for restitution of a violated right properly addressed the court being the guarantee via independent and impartial administration of justice.

b) In settling this dispute, the court considered that the legislator violated the balance of private and public interests. The legislation in force restricts the state in the exercise of

public authority whereas the court is not only the conflict resolution body but it also has the task of judicial review, which guarantees a strict regulation under the law of unlawful actions and decisions of other branches of the government, the necessity to protect equality.

c) Grave social-economic consequences of unstable legislation, legislative changes to the Tax Code listed in the decision in a chronological order clearly demonstrate the low level of legal culture and “Georgian technology of lawmaking”, which hinders the country’s economic, legal and social development. This decision is one of the mechanisms to avoid wrong legislative practice, the establishment of different legislative regimes (in this case taxation) by making changes almost every month. This aggravates an already severe social-economic situation.

The order is the consequence of justice. Justice expressed in the law must take into account and reasonably suit public and private interests. The decision considers the private interest as of higher value, because any person has the right to be prepared and informed about a law that stipulates or aggravates his legal liability.

d) At the time of adoption of the decision the Constitutional Court’s authority to formal constitutional control was not yet prescribed by the law. It is interesting that this legislative shortcoming was eliminated. As a result in a similar case the general court may address the constitutional court with a constitutional submission to assess whether the procedure for adoption, elaboration and publication of a normative act strictly prescribed by law is violated or not.