

IN THE NAME OF THE RUSSIAN FEDERATION

CONSTITUTIONAL COURT  
OF THE RUSSIAN FEDERATION

Judgment

of 11 November 1997 No. 16-II

in the case concerning the review of the constitutionality of Article 11<sup>1</sup> of the Law of the Russian Federation “On the State Border of the Russian Federation” of 1 April 1993 as amended on 19 July 1997.

Moscow, 11 November 1997

The Constitutional Court of the Russian Federation composed of Presiding Judge V. G. Yaroslavtsev and Judges N. V. Vitruk, G. A. Gadzhiev, L. M. Zharkova, A. L. Kononov, Yu. D. Rudkin, O. I. Tiunov, B. S. Ebzeev,

in the attendance of A. G. Pevzner, PhD in Law, representative of the Head of Administration (Governor) of the Khabarovsk Territory who submitted his constitutional request to the Constitutional Court of the Russian Federation; representatives of the Federal Assembly of the Russian Federation A. I. Aleksandrov, PhD in Law, F. S. Kheifets, PhD in Law, I. N. Shumsky, PhD in Law,

pursuant to Subsection (a), Section 2, Article 125 of the Constitution of the Russian Federation, Subsection 1(a), Section 1, Article 3, Subsection 1(a), Section 2, Article 22, Articles 36, 74, 85 and 86 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”,

in an open hearing, examined the constitutionality of the provisions of Article 11<sup>1</sup> of the Law of the Russian Federation “On the State Border of the Russian Federation” of 1 April 1993 as amended on 19 July 1997.

The reason for the consideration of the case is a request of the Head of Administration (Governor) of the Khabarovsk Territory to review the constitutionality of the provisions of Article 11<sup>1</sup> of the Law of the Russian Federation “On the State Border of the Russian Federation”.

Having heard the report of Judge-Rapporteur A. L. Kononov, statements by the parties, expert opinion of S. G. Pepelyaev, interventions by expert Yu. N. Maleev, testimony of the witnesses V. L. Mashinsky and M. L. Sleptsov, interventions by S. M. Shakhray, Plenipotentiary Representative of the President of the Russian Federation to the Constitutional Court of the Russian Federation, A. M. Eremin for the Federal Border Service of the Russian Federation,

V. V. Postnov for the Ministry of Foreign Affairs of the Russian Federation, Ye. A. Presnova for the Ministry of Finance of the Russian Federation, L. N. Kozyrev for the Ministry of Transport of the Russian Federation, V. A. Trusov for the Ministry of Railways of the Russian Federation; and having considered written submissions and other materials, the Constitutional Court of the Russian Federation

e s t a b l i s h e d :

1. In January 1997, the Head of Administration (Governor) of the Khabarovsk Territory filed with the Constitutional Court of the Russian Federation a request to review the constitutionality of Article 11<sup>1</sup> of the Law of the Russian Federation “On the State Border of the Russian Federation” of 1 April 1993 as amended by the Federal Law “On Amendments to the Law of the Russian Federation ‘On State Border of the Russian Federation’” of 29 November 1996.

The challenged Article imposes a border clearance fee for the border control procedure (Section 1); sets a fee amount to be levied on persons who cross the border and on vehicle and cargo owners for the inspection of automobile, air, sea and railway transport (Section 2). Section 2 also provides that the procedure for collecting the fee shall be determined by the Government of the Russian Federation.

*De facto* the border clearance fee has never been collected due to failure of the Government of the Russian Federation to regulate the procedure.

On 19 July 1997, the Federal Law “On amendments to Article 11<sup>1</sup> of the Law of the Russian Federation ‘On the State Border of the Russian Federation’” was adopted. The provisions of Section 1 of Article 11<sup>1</sup>, which impose a border clearance fee for the border control procedure, were not amended. The amended version of Section 2 of Article 11<sup>1</sup> specified that the Government of the Russian Federation shall determine the fee amounts, the procedure to collect the fee, and categories of vehicle and cargo owners and other persons exempted fully or partly from payment of the fee. In this respect, the Head of Administration (Governor) of the Khabarovsk Territory filed with the Constitutional Court of the Russian Federation a second request, clarifying his opinion on the issue.

According to the applicant, the border clearance fee impermissibly restricts the constitutional right of every person to freely leave the territory of the Russian Federation and to freely return to the Russian Federation. Moreover, this fee does not conform to the norms of international law and provisions of certain treaties concluded by the Russian Federation, and violates the freedom of economic activity. Finally, a federal fee and its essential elements, such as a taxation basis, withholding rate and exemptions shall be determined only by a federal law

and the legislator may not delegate such authority to the Government. In the applicant's opinion, the challenged provisions are inconsistent with Articles 8, 10, 15, 17, 27, 55 and 76 of the Constitution of the Russian Federation.

Thus, the provisions of Sections 1 and 2, Article 11<sup>1</sup> of the Law of the Russian Federation "On the State Border of the Russian Federation" as amended on 19 July 1997 are the subject matter of review by the Constitutional Court of the Russian Federation in the present case.

2. According to Article 71 (Subsection "m") of the Constitution of the Russian Federation, determination of the status and protection of the state border is within the exclusive competence of the Russian Federation. Pursuant to Article 3 of the Law of the Russian Federation "On the State Border of the Russian Federation", protection of the state border is part of national security of the Russian Federation and guarantees of the vital interests of a person, society, and State. A border clearance fee was imposed by the federal legislator in order to financially support the protection of the state border. As a rule, taxes do not have a designated purpose when transferred to the state budget, because public expenses should not be conditioned to the collection of certain tax payments. However, in some cases a tax may have a designated purpose predetermined by the interests of certain groups of persons, industries, or authorities. For instance, according to Article 44 of the reviewed Law, the border clearance fee is to be transferred to a federal budget trust fund for the development of the Federal Border Service of the Russian Federation.

Federal government bodies determine and carry out a fiscal policy in accordance with the Constitution of the Russian Federation. From the perspective of separation of powers and division of competence principles, the imposition of a border clearance fee by the federal legislator is in compliance with the Constitution of the Russian Federation. At the same time the Constitutional Court of the Russian Federation does not review the reasonableness of any fiscal charges imposed.

The border clearance fee is essentially a tax, i.e. prescribed by law monetary taking of property for the purpose of securing public expenditure. Also, it has all the features of a tax, namely it is compulsory, non-repayable, unrelated to the amount of budgetary payments and services received by an individual, and transferable to a special budgetary fund.

These features demonstrate that, by its legal nature, the border clearance fee falls within the constitutional concept of "federal taxes and duties", which, according to Article 71 (Subsection "h") and Article 57 of the Constitution of the Russian Federation are within the competence of the federal legislator.

3. The Constitutional Court of the Russian Federation in its decisions repeatedly explored the constitutional concept of "legally established taxes and duties" (Article 57 of the Constitution

of the Russian Federation). Elaborating on the legal content of this concept, the Court highlighted that a tax or a duty may be imposed only by a law, any tax imposed on other than statutory basis may not be considered as “legally established”. The Constitution of the Russian Federation precludes the power of executive bodies to impose taxes and duties. The imposition of a tax shall go beyond formally assigning a title and shall cover all essential elements of a tax in a law (see, e.g., Judgments of 4 April 1996 and 18 February 1997). Some of the essential elements are specified by Section 1, Article 11 of the Law of the Russian Federation “On Fundamental Principles of the Taxation System in the Russian Federation” of 27 December 1991, namely: taxpayer (subject of taxation), taxation basis, unit of taxation, tax rate, payment deadlines, budgetary or non-budgetary fund a tax shall be transferred to.

Therefore, a tax or a duty may be considered as “legally established” only if a law specifically defines all essential elements of the tax obligation, i.e. it is possible to impose a tax only by specifying all essential elements of a tax obligation in a law.

The constitutional powers of the legislative body of the Russian Federation to impose taxes also presuppose its obligation to exercise such powers on its own behalf. On the other hand, the Government of the Russian Federation, within its competence, ensures implementation of a uniform financial policy, including fiscal policy, in the Russian Federation (Subsection “b”, Section 1, Article 114 of the Constitution of the Russian Federation), and exercises other powers vested in it by federal laws (Subsection “g”, Section 1, Article 114 of the Constitution of the Russian Federation). Therefore the Government of the Russian Federation may, on the basis of a federal law, determine a manner in which the border clearance fee is to be collected and provide detailed regulation of the essential elements of a tax obligation set by the legislator.

Section 1, Article 11<sup>1</sup> of the Law of the Russian Federation “On the State Border of the Russian Federation” provides for the federal fee, but does not specify its essential elements, which cannot be considered imposition of a tax or a duty within its constitutional meaning. Delegation of the power to set the essential elements of a tax obligation to the Government of the Russian Federation under Section 2 of that Article does not comply with the distribution of competence between the legislative and executive bodies.

The constitutional requirement on imposing taxes and duties exclusively by a statute is one of the principles of the rule of law, democratic State, which is aimed to protect in particular the rights and legitimate interests of taxpayers against arbitrariness and unlawful interference by the executive branch.

Only the law is capable of providing the taxpayer with reliable information on exercise of his tax obligations, due to its clarity, stability and a special manner of adoption. If essential elements of a tax or a duty are to be set by the executive branch, then the principle of clarity of

tax obligations are put at risk since these obligations may be altered to the taxpayer's detriment through a simplified procedure.

Consequently, the challenged provisions of Section 2, Article 11<sup>1</sup> of the Law of the Russian Federation "On the State Border of the Russian Federation", contradict the constitutional principles of taxation and do not conform to the constitutional concept of "legally established taxes and duties".

Concluding from the above and pursuant to Section 1 and 2, of Article 71, Articles 72, 75 and 87 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", the Constitutional Court of the Russian Federation

h e l d :

1. To recognize the provision of Section 1, Article 11<sup>1</sup> of the Law of the Russian Federation "On the State Border of the Russian Federation" concerning the imposition of fiscal payment (border clearance fee) as conforming to the Constitution of the Russian Federation.

2. To recognize the provision of Section 2, Article 11<sup>1</sup> of the Law of the Russian Federation "On the State Border of the Russian Federation" concerning the determination, by the Government of the Russian Federation, of border clearance fee amounts and categories of vehicle and cargo owners, and other persons exempted fully or partly from payment of the fee as non-conforming to the Constitution of the Russian Federation and its Article 57.

3. To recognize the provision of Section 2, Article 11<sup>1</sup> of the Law of the Russian Federation "On the State Border of the Russian Federation" concerning the determination by the Government of the Russian Federation of the procedure to collect the border clearance fee as conforming to the Constitution of the Russian Federation.

4. Pursuant to Sections 1 and 2, Article 79 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", this Judgment shall be final and shall not be subject to any appeal, it shall come into force immediately upon pronouncement, and shall be directly applicable.

5. Pursuant to Article 78 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", this Judgment shall be published in the Collection of Laws of the Russian Federation, *Rossiyskaya Gazeta*, official publications of the Khabarovsk Territory bodies of state power. The Judgment shall also be published in the Bulletin of the Constitutional Court of the Russian Federation.

Constitutional Court  
of the Russian Federation

