Communication concerning the decision of the Curia of Hungary
in administrative case n° Kfv.V.35.392/2012

Taking into account the opinion of the Expert Institute of the National Tax and Customs Authority and as a result of the control conducted in the public warehouse of the plaintiff, the authority established that there was a surplus amount of tobacco of unidentified origin in the warehouse, there was no indication of origin on the packaging, and it was not the unprocessed leaf tobacco indicated in the documents of the entry into storage but some other tobacco product of 2403109000 TARIC code, which belongs to the category of "other tobacco product" under Article 96, paragraph (1), point g) of Act CXXVII of 2003 on Excise Taxes and Special Regulations on the Distribution of Excise Goods. The authority ordered the plaintiff to pay an excise fine of 627 227 000,- HUF. In its decision on the merits the authority argued that the plaintiff possessed the excise goods unlawfully, the presented customs documents were not suitable to identify their origin, as the product designated on them was not identical with the product seized in the course of customs control.

According to the plaintiff's standpoint the provisions of Act CXXVII of 2003 are not applicable to the above excise goods under customs procedure as long as they have the status of non-community goods, i.e. as long as they are under supervision according to the Customs Code. The product concerned cannot be classified as ready for use processed tobacco anyway and the product did not become unidentified because of the fact that the authority subsequently changed its position in respect of classification, but it remained the product that had been entered into storage.

The Curia quashed the final decision that rejected the plaintiff's claim and ordered the first instance court to restart the proceeding and deliver a new decision. Its legal standpoint was as follows.

The final decision was right in claiming that the authority did not breach any legal rule when it asked for the opinion of the Expert Institute and that according to Article 177 of the Code of Civil Procedure the expert opinions attached by the parties can only be evaluated as the standpoint and statement of the parties (BH1992.270.). The contentious proceeding should follow the principle of free proof, which in the present case is not contrary to the substantive and procedural rules of administrative cases as they do not stipulate regulated provision of evidence either. The burden of proof can be established based on the applicable substantive provisions and the circumstances of the case.

In view of Article 96, paragraph (1), points f) and g) and Article 96, paragraph (2) of Act CXXVII of 2003 the customs classification, i.e. under which heading the product shall be classified, is not crucial since from the aspect of Act CXXVII of 2003 it is the description of the product, the features or the lack of those of the product as stipulated by law that count. In the present case, however, there are no data at disposal based on which the description of the product according to the above provisions of Act CXXVII of 2003 could be provided. The Expert Institute opinion does not make it clear if, for example, the product is pipe or cigarette tobacco, if it is to be further processed, or what is the basis of the statement according to which it is ready for use. In respect of the

opinion filed by the plaintiff the first instance court correctly explained why the opinion is not suitable to prove the soundness of the claim.

To be able to establish what physical features the given product has, which is a significant fact or circumstance in the proceeding, one needs special expertise that the court does not have (Article 177 of the Code of Civil Procedure). No decision on the merits of the case can be reached without the examination of the given product by a judicial expert. It is only as a result of such an examination that the facts of the case can be established lawfully, factual and legal consequences can be drawn, i.e. a decision can be made in the disputed legal issues, including whether the product examined is identical with the product entered into storage, whether the product was imported illegally, therefore whether there was a basis for the imposition of the excise fine. Concerning the latter issue the Curia pointed out that if the product was subject to illegal importation, it has to be regarded as a product that has been released into circulation and therefore the customs warehousing proceeding does not justify the status of tariff suspension (Article 4, paragraph (8) and Article 7, paragraph (2), point d) of Council Directive 2008/118/EC, as well as decisions C-230/08, C-195/03, C-138/10 of the European Court of Justice). However, no examination of the product by a judicial expert was commissioned in the first instance proceeding and this failure cannot be remedied in the framework of an extraordinary review procedure. In terms of Article 275 of the Code of Civil Procedure no new evidence or arguments can be evaluated in the extraordinary review procedure.

In the new proceeding the parties have to provide the evidence necessary to adjudicate the case. The court cannot take evidence ex officio, therefore, in lack of a claim therefor it cannot commission the examination of the product in question by a judicial expert. However, as Article 3, paragraph (3) and Article 164 of the Code of Civil Procedure stipulates, the court is obliged to inform the parties about the facts to be proved, about the burden of proof and about the consequences of the lack of evidence. If no judicial expert is included in the process of producing evidence because the court failed to provide information or provided incomplete information, this failure constitutes a substantial breach of procedural rules that serves as a basis for the restart of the procedure. A decision on the merits of the case can be reached based on the data at disposal only if the parties do not resort to producing evidence in spite of having been adequately informed about it.

Budapest, the 10th of February 2014

Administrative and Labour Department of the Curia of Hungary