

**Appeal brought on 26 November 2009 by Territorio Histórico de Guipúzcoa — Diputación Foral de Guipúzcoa against the judgment of the Court of First Instance (Fifth Chamber, extended composition) delivered on 9 September 2009 in Joined Cases T-227/01 to T-229/01 and T-265/01, T-266/01 and T-270/01 Territorio Histórico de Álava — Diputación Foral de Álava and Comunidad Autónoma del País Vasco — Gobierno Vasco and Others v Commission of the European Communities**

**(Case C-473/09 P)**

(2010/C 37/15)

*Language of the case: Spanish*

## Parties

*Appellant:* Territorio Histórico de Guipúzcoa — Diputación Foral de Guipúzcoa (represented by: I. Sáenz-Cortabarría Fernández and M. Morales Isasi, lawyers)

*Other parties to the proceedings:* Comunidad Autónoma del País Vasco — Gobierno Vasco, Territorio Histórico de Vizcaya — Diputación Foral de Vizcaya, Territorio Histórico de Álava — Diputación Foral de Álava, Confederación Empresarial Vasca (Confebask), Cámara Oficial de Comercio, Industria y Navegación de Vizcaya, Cámara Oficial de Comercio e Industria de Álava, Cámara Oficial de Comercio, Industria y Navegación de Guipúzcoa, Commission of the European Communities and Comunidad Autónoma de la Rioja

## Form of order sought

- declare the present appeal to be admissible and well founded;
- set aside the judgment under appeal;
- grant the form of order sought at first instance, that is the alternative claim to annul Article 3 of the contested decision
- alternatively, refer the case back to the Court of First Instance and, order it to examine the evidence rejected;
- order the Commission to pay the costs of the proceedings at first instance and on appeal and the intervener, the Comunidad Autónoma de la Rioja, to pay the costs of the proceedings at first instance.

## Pleas in law and main arguments

1. The CFI erred in law by holding, in this case, that there are no exceptional circumstances which give rise to a legitimate expectation that the tax measure at issue is lawful, so as to preclude an order to recover the aid in accordance with

Article 14(1) of Regulation No 659/1999 <sup>(1)</sup> which relates to the principle of the protection of legitimate expectations. The CFI distorted the issues in the case and infringed the rule that the parties should be heard. It also misinterpreted the case-law concerning the duty to give reasons for a decision. The Court of First Instance erred in law by failing to comply with the procedural rules relating to the assessment of evidence by disregarding the substantive content of documents submitted for the purposes of the written procedure.

Neither the formal difference between the tax measure at issue and the measure which is the subject of Decision 93/337 <sup>(2)</sup>, nor the fact that the Commission could have justified the selectivity criterion on information other than that which is explicitly mentioned in Decision 93/337, nor the finding of incompatibility in Decision 93/337, constitute sufficient reasons in law for the CFI not to determine whether there existed an exceptional circumstance that by itself or in combination with other circumstances in this case could preclude the Commission from ordering the recovery of the aid to which the contested decision relates.

By holding that the measures at issue in Joined Cases T-30/01 to T-32/01 and T-86/02 to T-88/02 are not analogous to the tax measure at issue for technical tax reasons and the because of amount of the subsidy, the CFI has distorted the issues between the parties, has disregarded the rule that the parties should be heard and has clearly misinterpreted the case-law specifically relating to the duty to state reasons.

The CFI erred in law by holding that the Commission's attitude with respect to the tax exemption and/or the 1993 tax credit — which, as is clear from the from the case file, has not been assessed by the CFI, contrary to the Rules of Procedure — does not constitute an exceptional circumstance which could have justified some kind of legitimate expectation that the tax measure was lawful which would have precluded the recovery of the aid under Article 14(1) of Regulation on the ground that it would be contrary to the principle of the protection of legitimate expectations.

2. The CFI erred in law by failing to comply with Article 14(1) of Regulation No 659/1999 with respect to the principle of proportionality that precludes the recovery of investment aid which does not exceed the limit for regional aid.

The CFI has breached the general principle of proportionality by not finding that the Commission breached that principle by demanding the recovery of all the amounts granted in accordance with the tax credit of 45 % of the investments rather than only the amounts which exceeded the maximum limit for regional aid in the Basque Country.

3. The CFI erred in law by failing to comply with the procedural rules regarding the assessment of evidence and by deciding not to require disclosure of the evidence requested by the applicant with respect to certain Commission documents that, in the light of the arguments used by the CFI in order to dismiss the applicant's application, are essential to the defence of its interests. The CFI also infringed the right to a fair trial, the principle of equality of arms and the rights of defence.

The CFI, by failing to order the disclosure of the evidence requested, has infringed the fundamental right to a fair trial to which the applicant is entitled, by refusing to assess evidence which is essential to the applicant's case thereby infringing its rights of defence, since its application was dismissed on the ground that it had not proved what it specifically sought to establish with the evidence which was not produced: if not the Commission's final position with respect to the complaint of 1994 against the tax rules of 1993 (including a tax credit), which are measures which are essentially the same as the contested measure, which rejected that complaint, then at least the attitude of the Commission which would constitute an exceptional circumstance in so far as its conduct gave rise to a legitimate expectation that the 1993 tax measures were lawful, which led to the adoption of the contested tax measure.

- (<sup>1</sup>) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).  
 (<sup>2</sup>) Commission Decision of 10 May 1993 concerning a scheme of tax concessions for investment in the Basque country (OJ 1993 L 134, p. 25).

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(Case C-474/09 P)

(2010/C 37/16)

*Language of the case: Spanish*

## Parties

**Appellant:** Territorio Histórico de Vizcaya — Diputación Foral de Vizcaya (represented by: I. Sáenz-Cortabarría Fernández and M. Morales Isasi, lawyers)

**Other parties to the proceedings:** Comunidad Autónoma del País Vasco — Gobierno Vasco, Territorio Histórico de Álava — Diputación Foral de Álava, Territorio Histórico de Guipúzcoa — Diputación Foral de Guipúzcoa, Confederación Empresarial Vasca (Confebask), Cámara Oficial de Comercio, Industria y Navegación de Vizcaya, Cámara Oficial de Comercio e Industria de Álava, Cámara Oficial de Comercio, Industria y Navegación de Guipúzcoa, Commission of the European Communities and Comunidad Autónoma de la Rioja

## Form of order sought

- declare the present appeal to be admissible and well founded;
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- order the Commission to pay the costs of the proceedings at first instance and on appeal and the intervener, the Comunidad Autónoma de la Rioja, to pay the costs of the proceedings at first instance.

## Pleas in law and main arguments

1. The CFI erred in law by holding, in this case, that there are no exceptional circumstances which give rise to a legitimate expectation that the tax measure at issue is lawful, so as to preclude an order to recover the aid in accordance with Article 14(1) of Regulation No 659/1999 (<sup>1</sup>) which relates to the principle of the protection of legitimate expectations. The CFI distorted the issues in the case and infringed the rule that the parties should be heard. It also misinterpreted the case-law concerning the duty to give reasons for a decision.

Neither the formal difference between the tax measure at issue and the measure which is the subject of Decision 93/337 (<sup>2</sup>), nor the fact that the Commission could have justified the selectivity criterion on information other than that which is explicitly mentioned in Decision 93/337, nor the finding of incompatibility in Decision 93/337, constitute sufficient reasons in law for the CFI not to determine whether there existed an exceptional circumstance that by itself or in combination with other circumstances in this case could preclude the Commission from ordering the recovery of the aid to which the contested decision relates.