

## CASE TRANSLATION: ESTONIA

Case citation:  
**3-15-2557**

Name and level of the court:  
**Tallinna Ringkonnakohus (Tallinn Circuit Court)**

Date of decision:  
**12 January 2017**

Members of the court:  
**Maret Altnurme, Oliver Kask and Kaire Pikamäe**

Appellant: **Goodwin SH OÜ**

Respondent: **Estonian Tax and Customs Board**

Lawyer for the appellant: **Madis Truber**

Lawyer for the respondent: **Andreas Aas**

### ***Estonia; admissibility of digital evidence; trustworthiness of digital evidence; tax procedure***

IN THE NAME OF THE REPUBLIC OF ESTONIA

Tallinn Circuit Court

Decision

RESOLUTION

Dismiss the appeal by Goodwin SH OÜ and let the decision of Administrative Court of Tallinn stand.

The parties are to pay their own costs for the procedural proceedings.

FACTS

1. On 19th February of 2015 the Tax and Customs board (TCB) challenged the validity of the value-added tax and income tax accounting and declaration made by Goodwin SH OÜ (GW) during the period from November to December 2014.

2. TCB reflected the facts relevant to taxation in its 04.06.2015 inspection report, to which GW presented a dissenting opinion.

3. TCB increased the amount needed to pay value-added tax by 8533,72 euros in its tax decision dated 04.09.2015. By the assessor's (inspector of taxes) valuation, the documents presented by GW were untrustworthy and in reality, the turnover during the inspection period was larger than declared by the company, with the value added tax rate of 20%. Without giving any notice to GW, the assessor made photographs of the cash-register program, called R-Keeper 7, accounting report which showed that taxable amount of cash was 22 662,91 euros greater

in November 2014 and 20 005,72 greater in December 2014 than declared by the company.

4. GW appealed against the tax decision in Tallinn Administrative Court on 09.10.2015 to rescind the decision.

The appellant has not concealed any taxable turnover and has declared the turnover correctly, the occurrence of turnover is documented. In November and December of 2014, the cash turnover was 25 940,42 euros and 29 904,27 euros, which was declared by the appellant and which concurs with the data from the ledger account 500/1 'Kassa Restoran'. The appellant has referred to the possibility of submitting the original accounting documents, e.g. cheques, but the assessor has not taken them into account. The assessor has only considered the evidence collected during the 19.02.2015 inspection, which was conducted without advance notification. Considering § 6 of the Accounting Act, the assessor has violated the principle of investigation. The printouts of the cash register program Posmaster during the control period concur with the declared cash turnover. Insofar as the assessor has to rely on the documents of the taxable person foremost when conducting the tax inspection, the assessor had to give reasons why the documentation presented by the taxable person was held untrustworthy. In the opinion of the assessor, the cash turnover is verifiable by summary documents. Considering that the basis of the summary documents are the source documents, it is possible to verify the trustworthiness of the summary documents. The cheques presented enable the determination of the cash turnover. At the same time, the features of Posmaster do not allow the cheques to be printed according the respondents requests, e.g. showing which register program was

used, the numeration and the date of printing. Considering that the Accounting Act does not require cheques to include the aforementioned data, the assessor cannot enact additional requirements to the Accounting Act.

The explanation that the turnover data from the photographs of the card payments does match and the cash payments do not match with the general ledger, is because the assessor based his control on a cash-register program that the appellant does not use. It is incomprehensible, why, on the one hand, the respondent can consider data from R-Keeper 7 program trustworthy and on the other hand believe that printouts from Posmaster program were tampered with. The cash-register program R-Keeper 7 is untrustworthy, because there are no possibilities in Estonia to service, maintain and update it. The printouts presented by the appellant from the Posmaster program are substantiated with accounting source documents (cheques), which in turn prove that economic transactions have been made and which goods have been sold in specific quantities. The assessor has not indicated the transactions of the turnover that were supposedly hidden from taxation. Hidden turnover could not have been made from transactions that have not taken place. The supposed trustworthiness of R-Keeper 7 would also mean that the amount of cheques varies up to 2,6 times in places. Considering that November and December are tranquil months in the catering business, it is not plausible that twice as many people paid in cash during these months. The appellant has not bought twice as many goods or sold the service for twice as much.

The assessor has not evaluated the evidence in the aggregate, but excluded the appellant's explanations and has not collected any necessary evidence related to the case. The respondent has not taken into consideration that from January 2014 the appellant used the Posmaster program with cashier module, which meant that it is understandable that employees possibly did not know how to use R-Keeper 7. The data from R-Keeper 7 was transmitted over to Posmaster program by AT. With a touch of a button, data from R-Keeper 7 was sent to Posmaster's warehouse program, which in turn was operated by the accountant, i.e. the accountant did not work with the cashier-program. The use of two programs simultaneously is not technically possible.

The photographs of the R-Keeper 7 cash-register program are unreliable. Considering that the accountant did not operate with the cash-register program, it is credible to believe that he did not possess the passwords for this program and could not have explained the data that was photographed. R-Keeper 7 was a test program, which was used for communication between waiters and kitchen staff, and was used to train employees, also by adding and deleting data from it. No factual data on the cash turnover was held in the test program. Since R-Keeper 7 was used as a test program, the appellant is not responsible for the trustworthiness of the data stored in it. During the 19.02.2015 inspection, the test program was accessed with KK's passwords and KK was not present himself. The passwords were given by ES. ES was not given his own passwords, which points that he did not know how to use it. The respondent had not asked for a representative of the company to be present. It is a fact that the cash register program was broken on 16.02.2015 and is proven by the e-mail sent on 15.05.2015 and with a receipt from the acquisition of a new server. The failure of the server is proven by the statements of AK, JN and AT during court hearing on 27.01.2016. Therefore, the program R-Keeper 7 was used temporarily and no data was inputted during the control period.

Cheque numbering is lacking from the summary document because the clients wish to share the invoices, due to which the first cheque is cancelled but the numeration continues. Some of the numbers in the cash register cheque summary printout are lacking due to the mutual numeration of cash register and bank cheques.

The pagers of the waiters were connected to the Posmaster program on the control period. The program R-Keeper 7 was not serviced, the invoice dated 10.11.2014 UCS Estonia OÜ refers to the repair of pagers.

5. The TCB argued against the appeal in its 17.11.2015 and 20.01.2016 responses and requests the appeal to be dismissed. The appellant has not proven the inaccuracy of the taxable amount. The summary-printout from the Posmaster program has to reflect the same data that the cash-register checks to enable the verification of the numbering and continuation of cheques. The appellant submitted that it is not possible to identify which program the cheques came from, or whether these were all the cheques from a specific business day.

The fact that data from the turnover reports generated by cash-register program R-Keeper 7 and the general ledger on the card payments concur, but on the cash payments they do not. This cannot be incidental. Additionally, it cannot be accidental that there is a match of data in the 'test-program' on card payments, but not cash payments. The appellant has not explained the usefulness of using two different cash-register programs at the same time.

The training of employees with the R-Keeper 7 program is doubtful, because the appellant argued that he does not use the program. It would be plausible to train employees on the same program, which would be used later during work, i.e. with Posmaster, not with a program, which from its functionalities and solutions differs from a program used in the everyday work process. KK, who handed the printout from R-Keeper 7 to the assessor, understood the subject and purpose of the inspection. It is not plausible that a worker deliberately enters the cash-register programs test version to display the data on the screen. Even more, the administrator shuts the common exchange at the end of the shift and gets a printout, which means that the administrator must have known which program was really used in everyday business procedures. Hence, there did not exist a test program at all.

It is incomprehensible as to why the program R-Keeper 7 had the data from the whole control period, not just the two weeks it was supposedly used to train employees. More so, the data on the card transactions are identical with the bank account statement.

Although the appellant has claimed that the cash-register program R-Keeper 7 was used temporarily, he has also stated on p 2.11 of the appeal, that the pagers of the waiters were tied to R-Keeper 7. If food was prepared on the basis of the data on R-Keeper 7, then the program also has to reflect actual economical performances, i.e. turnover. Additionally, the reseller of R-Keeper 7 in Estonia, UCS Estonia OÜ, had issued an invoice on the repair and maintenance office hardware in November 2014. If the program was not used it is unintelligible why there is an invoice.

6. The Administrative Court of Tallinn dismissed the appeal with its 29.02.2016 decision and let the procedural expenses be paid by the respective parties:

The assessor has justified why he considers data collected during the inspection was trustworthy and not the data from the appellant's tax accounting. The court consents with the appellant, that the correctness of the data presented from tax person has to be presumed, but it does not mean that in case of controversy and the emergence of other evidence, the assessor cannot leave aside data presented by the tax person and proceed with other evidence that has been collected. As in current case, the assessor has substantiated the deviation from the data presented by the appellant, the burden of proof shifts to the appellant in accordance with § 150 of the Taxation Act.

The appellant was not reproached for not submitting the accounting source documents in the tax decision. The assessor has deemed sufficient the summary document created on the basis of source documents. The assessor has not relied on the contradiction between the source and summary documents, but foremost on the fact that the turnover data collected during inspection does not conform with the data from the appellants accounting.

The assessor has relied upon the concealment of cash turnover multiple times, i.e. on the grounds that this type of turnover is easy to conceal, if it is not reflected in the accounting, unlike card transactions, which always appear on the appellant's bank account. It is characteristic that this kind of turnover is not reflected in any documents, therefore only identifiable through testimony, inspection or coincidence. The court also agrees with the conclusion of the assessor, that due to the nature of cash turnover, it is possible to manipulate both source and summary documents, partially leaving the transactions out of the accounting.

The analysis on the quantity of clients from the accounting documents and R-Keeper 7 was only submitted during the written procedure. At the same time, the appellants claim that November and December are the 'quiet' months of the year, which is not in accordance with the testimony of AK, according to whom the turnover is higher, when more tourists are present and there are more tourists at the end of the year. In the opinion of the courts, the increase of turnover in catering businesses at the end of the year due to Christmas and New Year period is a well-known fact.

The appellant does not dispute the legitimacy of an inspection without a notification in advance, and the

conflict between the conduct of an inspection and § 72 of the Taxation Act is also not apparent to the court. A protocol about the inspection was created in accordance with § 72(4) of the Taxation Act, and photographs taken during the inspection were added. The protocol says that the assessor and administrator both tried to extract information from the cash register program, but made pictures of them, since printing the reports was not possible. The computer was logged in under KK's profile, whose password was known to the administrator and a photograph was taken accordingly. No statements or appeals were made during the inspection. Pursuant to the annexes of the protocol, photographs of the general turnover data were taken with the restaurant name Goodwin Steak House. On the last page, both the program name R-Keeper 7 and the date of the inspection are shown. The court has no reasonable doubt that the data originates from anywhere but the inspection conducted in the appellant's restaurant. The appellant has not argued the occurrence of the inspection. The representative of a company or the accountant could not have made any explanations afterwards. As seen from the tax procedure, neither the accountant, AK or EK could explain the R-Keeper 7 data, since neither of them supposedly has had any contact with it. Therefore, their inclusion would not have altered the result of the tax procedure.

The court agrees with the tax decision, that the appellant did not reasonably explain the discrepancy of data collected during the inspection with the data in the accounting documents. The court agrees that the use of R-Keeper 7 software before 2014 and during two weeks in February 2015 is questionable, since the appellant did not understand the logic behind the program. Also, it remains unintelligible as to why the appellant might have used such an uncontrollable and untrustworthy program before 2014 and later for two weeks to count its turnover if his employees could not use it.

In a dissenting opinion, the appellant has argued that the data collected during the inspection was from a test environment. At the same time, AT, an employee of the appellant, has testified that every waiter remembered how to use R-Keeper 7.

The court agrees with the respondent that no evidence was presented to prove the use of the program as a test environment. If it was a test environment, it is not understandable why the claim was made in the dissenting opinion and why the

administrator gave the assessor access to a test environment, not the system used in business operations. The use of this program as a test environment is also questionable, since it contradicts the appellant's statements: i.e. why use a uncontrollable and untrustworthy program to train employees. The appellants claim during court procedure that the program was used for training. This contradicts his statement during the tax procedure that the employees did not know how to use the program, and with the testimony of AT, according to which employees did not need any instruction to use the program. Since the statements in relation to the purpose of using R-Keeper 7 are contradictory, none of them can be held plausible.

The appellant failed to clarify how the data was input into the appellant's cash register system. None of the witnesses offered explanations during the tax procedure. Additionally, during the court hearing none of the witnesses was able to explain how the data got into R-Keeper 7 during the period when nobody supposedly used the program. As the assessor has justifiably concluded in the tax control-report, the sums collected during the inspection and the sums in the appellants accounting software match, and this kind of match cannot be incidental. This circumstance also proves the validity of the data collected during the inspection, since in comparison with hiding cash turnover, the turnover from card payments cannot be concealed in general. The appellant claims that the program was used for training, therefore data was added and deleted from the program. The court agrees with the conclusion made in the tax decision that it is not credible, or that the employees were only trained to use the program with cash, but not with card payments.

The assessor does not have to establish, regarding concealed turnover, the sale of particular goods or service that generated the turnover and how the assets to provide such goods or services were obtained. Considering the essence of concealed turnover, it might not even be possible to ascertain the circumstances. The assessor has also clarified how the concealed cash turnover might have been used, which is why, considering the appellants economic activity, the concealment of such turnover is not impossible. The appellant can only withhold input value added tax according to a proper invoice.

Consequently, it is not important whether the accountant had access to R-Keeper 7 or not, because

regardless of the access or the absence of the complainant, none of the employees or the appellant can explain how the data from the control period got into R-Keeper 7 when the program was supposedly not used.

Furthermore, the information related to cheques and numeration is not substantive to the case, since according to the tax decision, the assessor has deemed trustworthy the data they collected during the inspection. The explanations of the appellant on the cheques and lack thereof is contradictory, therefore cannot be held trustworthy. The appellant explained on 15.05.2015 that the missing cheques are related to 100% discounts, free goods and the catering of business partners. During the court hearing, employee JN testified that there also exist separate bank cheques with common numbering. The same explanations were given by AT. During written procedure the appellant clarified that the situation happens due to the desire of clients to share their invoices.

#### THE OPINIONS OF PARTIES TO THE PROCEEDING DURING APPEAL PROCEDURE

7. In its appeal, GW asks the circuit court to annul the 29.02.2016 decision of the Tallinn Administrative Court, satisfy the appeal and order the respondent to pay its procedural expenses.

The administrative court has not evaluated facts that are essential to the case and violated the § 61(1) and (2) of the Code of Administrative Court Procedure. The appellant has declared the amount taxable by the value-added tax correctly in the period of November to December 2014 and in accordance with accounting source documents and actual economic performance. The evidence related to turnover is inconsistent because the cash-register program R-Keeper 7 was not used in the control period and it was not used to compute turnover in cash. These statements were proved during both the tax procedure and during the court hearing by witnesses.

If the respondent had asked for persons with rights of representation, then the respondent would have been able to make sure that the data collected from the R-Keeper 7 program was not trustworthy and reliable and the program was not used. In this case the respondent would not have had contradictory evidence. The respondent is mistaken due to its own actions and looked for cash turnover data from a program that was not used during the control period.

The appellant does not agree with the court's opinion that the accountant's, AK's or EK's invitation to the inspection would not have altered the outcome of the inspection. If the inspection was conducted in the presence of representatives, they would have explained to the assessor the actual situation and the program which included the control periods turnover.

The appellant has not concealed any taxable turnover. The bank data is transferred to the program automatically, it cannot be tampered with. It is possible to change the data in the cash register program (add additional checks, delete lines). Since the ordering is made through the cash register program, then all of the orders are visible and the proceeds are also verifiable. The inputted orders are automatically transferred to the kitchen and warehouse program, where the accounting takes place. It is impossible that some of the orders are not inputted to the program. The opinion of the respondent that since the program R-Keeper 7 was used to communicate with the kitchen and therefore it also includes the correct taxable amount is wrong. A waiter, having received an order, inserts all the foods ordered into the program Posmaster (used during the control period of November to December 2014) that was installed to the computer located on the first floor. All the movements are reflected and every transaction leaves a trace. This was confirmed by witness JN during the court hearing. The cash register program Posmaster reflects all of the turnover. The accounting source documents have been presented during the tax procedure that were not added to the tax dossier by the respondent. The appellant has submitted the necessary value added tax returns, which reflected the turnover to the full extent.

From November to December 2014 the restaurant only used the Posmaster program. The correct data registered in cash register program R-Keeper 7 is from February 2015 only, because it was needed to use the program on technical grounds. When the program Posmaster's operation was restored, R-Keeper 7 was turned off. R-Keeper 7 was used to train employees and the data inputted and deleted during the training was the only data stored there. The data from card payments cannot be changed and it remained the same. It is technically impossible to communicate with the kitchen in one program (via R-Keeper 7) and account the turnover and goods via Posmaster.

The fact that during the control period 2 to 2,6 times more cash transactions were made is not plausible

considering the continuous decline of cash payments in economic activity in recent times.

The respondent has not credibly explained from which goods or services sale the concealed turnover occurred. This explanation is needed to establish whether the plausible amount of turnover was concealed to the same extent that the cash turnover was declared.

8. The TCB argues against the appeal in a written answer and requests the appeal be dismissed. The respondent shares the opinion of administrative court and remains to his earlier positions.

#### THE REASONING OF THE CIRCUIT COURT

9. The circuit court is of the opinion that the administrative court's decision is legal and justified and there is no legal ground to alter or annul it. The circuit court agrees with the administrative court opinions and reasoning and does not hold it necessary to repeat them to full extent according to § 201(4) of the Code of Administrative Court Procedure Act. In response to the appeal, the circuit court notes the following.

10. The circuit court agrees with the administrative court and the assessor that GW has not proven the taxable amount to be falsely determined (§ 150(1) of Value-Added Tax Act). The appellant's explanations, according to which the data collected from the R-Keeper 7 program during the inspection does not conform with reality, do not convince the circuit court. The appellant's allegation that the aforementioned program has not been used since the beginning of 2014 cannot be truthful, since the data collected from the program about the November and December 2014 period on card payments conformed to full extent with the data from the appellants bank statement, accounting documents and declared information. The differences appear solely between cash turnover. Thus, somebody has to have been using program R-Keeper 7 in November and December 2014, since the correct data on card payments could not have been emerged from itself. The appellant was not able to submit a plausible explanation about the input of data into R-Keeper 7 when nobody allegedly used it.

11. On 15.05.2015 the appellant responded to the questions asked in TCB's 05.05.2015 order and submitted that R-Keeper 7 is an unfamiliar program, they do not understand its logic and do not know how the program works. It emerged only on 18.06.2015 in

a dissenting opinion to the control report that the first version of the statement that R-Keeper 7 should have said that it was just a test program to teach new employees (and therefore wrong data might be present). Until this point, none of the persons who gave explanations during the tax procedure alleged it. The appellant's 15.05.2015 and 18.06.2015 statements are clearly illogical – there is no point in teaching new employees an unknown computer program.

12. As a result of and considering what is previously stated, the allegations of the appellant on the untrustworthiness of R-Keeper 7 programs data is not credible. From the 18.06.2015 dissenting opinion appears that until the start of 2014 when the R-Keeper 7 cash register program was used, the data was automatically transmitted to a warehouse program called Posmaster operated by the accountant. Hence the R-Keeper 7 cash register module and Posmaster warehouse module were compatible between each other, which makes the assessors theory on the continuous usage of both programs likely. The use of both programs simultaneously would also explain the increase in cash turnover in November and December of 2014 – since the period before that was not controlled by the assessor, the appellant's argument on the implausible increase of cash turnover cannot be held reliable. As the assessor has reasoned, the use of alternative cash register programs in order to conceal the true cash turnover is habitual, because even considering the fact of concealment, the taxable person still needs some kind of internal, plausible accounting. The suspicion is reaffirmed by the inspection without prior notification and with the fact that the data was presented by the appellant's worker in the program R-Keeper 7, who opened it as a program for everyday use. It is doubtful, that on 19.02.2015 when the respondent conducted the inspection in the appellant's restaurant, the program was used on a temporary basis. It appears that on 17.02.2015 a new computer was acquired for the appellant, which enables it to take a position that on 19.02.2015 a new computer was already in use and the appellant's worker opened his everyday working program, namely R-Keeper 7 to the assessor's officials. During the inspection on 19.02.2015 the worker did not allege any problems with the cash register program nor the computer. However, irrespective of whether on 19.02.2015 a new or old computer was used, there is no evidence or opinions that would credibly

disprove the assessor's version about the concealed cash turnover. The credibility of the assessor's version is confirmed by the fact that the amount of concealed turnover for cash is of similar magnitude on both months. If the data on card payment turnover corresponds with real life, the ground to dispute the turnover of cash depicted in R-Keeper 7 is also lacking.

13. The circuit court agrees with the administrative courts approach that in case of concealed turnover the assessor does not need to separately identify from which goods or services the turnover occurs or the origin of means necessary to obtain certain goods or to prove that a service happens. The circuit court does not believe it is necessary to repeat these arguments.

14. The appellant has paid attention to the numeration of cheques and explained his business model in the appeal. As the administrative court has already stated correctly, it does not hold any substantive significance to the case matter. Therefore, the circuit court will not examine the issue any further.

Consequently, the appeal is dismissed with accordance of § 200 p 1 of the Code of Administrative Court Procedure Act and leaves the procedural expenses to be paid by the parties themselves.

Signed digitally

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