

## AUSTRIA

### SEPARATION OF POWERS -- QUESTIONNAIRE --

#### I.

#### 1. Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

##### 1.1. Does your Government have legislative competence on tax matters?

In general, taxes may only be levied on basis of the law (§ 5 Financial Constitutional Law [*Finanz-Verfassungsgesetz; F-VG*]) and law is enacted by Parliament (on a federal or country level). Additionally every administrative authority, and therefore also tax authorities, can within its sphere of action enact legally binding executive orders (regulations) without any further authorisation (Art 18 [2] Federal Constitutional Law [*Bundes-Verfassungsgesetz; B-VG*]). However, these orders are only allowed to specify the law passed by a Parliament. Thus, the government represented by the Minister of Finance has no original legislative competence on tax matters.

##### 1.2. Does your Government draft tax bills proposals and present them to Parliament?

According to the Austrian Constitutional Law there are four different ways of submitting a draft bill:

- Usually a ministry (with respect to tax bills the Ministry of Finance) prepares a draft bill. The draft then undergoes an expertise procedure and is finally submitted to the Parliament by the Government ('government bill').
- Any Member of Parliament (if supported by four more MEP) or the Financial Committee of the Parliament can submit a draft, too.
- Furthermore the Federal Assembly (*Bundesrat*) or one third of the members of the Federal Assembly as well as
- 100.000 eligible voters by way of a petition (*Volksbegehren*) are entitled to submit drafts; however these last two options do not occur very often.

To present a government bill is the most common way to start the legislative procedure in the field of tax law. The Ministry of Finance prepares a draft bill which is then presented to special interest groups in request for their expert opinions. The consultation of the Chambers which represent the workers and professionals (e.g. the Austrian Federal Economic Chamber, Austrian Bar Association, Austrian Medical Association) is even obligatory, if the draft touches interests represented by a particu-

lar Chamber. Beyond this statutory obligation it is common practise to invite various other bodies to comment on the draft. The expertise procedure should make sure that all politically relevant groups agree on the draft to avoid complaints and problems with applying the law afterwards and give everyone affected the possibility to make suggestions for modifications. Usually numerous changes are made in this stage of the legislative process. Afterwards the (in many cases modified) draft is discussed within the Council of Ministers which finally submits the draft by unanimous decision to the Parliament as a 'government bill'.

1.3. In case your answer to 1.1. and 1.2. is positive:

1.3.1. Does your Government usually exercise that competence?

Yes. As mentioned, government bills are the most common way how the legislative procedure in the field of tax law is started. Sometimes tax bill drafts are submitted by five Members of Parliament or the Financial Committee of the Parliament to the Parliament. All other possibilities mentioned above to start the legislative process are used very seldom.

1.3.2. Does your Parliament passively accept the draft bills provided by tax authorities or does it discuss them in detail and introduce changes to them?

Government bills, before discussed by the Parliament in a plenary meeting, are subject to discussion within a meeting of the Financial Committee of the Parliament. The Financial Committee discusses the draft and submits a report to the Parliament. Almost every time suggestions for modifications are made.

1.4. How does the literature in your country and your domestic Courts interpret the situation as you described it in 1.3.?

The very strong position of the Austrian Government in the law making process in general is requested by some authors. In the field of tax law, the vast majority of legislation is based on tax bills drafted by the Government and in most cases only marginal changes are made by the Parliament in a plenary discussion and only small changes are usually made by the Financial Committee of the Parliament. However it must be kept in mind that the Parliament itself does not have the required expertise to draft complex tax bills. Therefore it makes sense to leave the drafting to experts of the Ministry of Finance and to discuss these drafts with other experts before they will be presented to the Parliament by the Government.

Besides, in Austria it is very common that the Government can fall back on a political majority in Parliament. Since 1945 there has only been once (for a period of 18 months) a Government which could not rely on a political majority in Parliament. During the last legislative period lasting from 2006 until 2008 only 39 percent of the legislation were agreed upon unanimously. With respect to tax matters within the last legislative period bills were passed usually without consent of the three of five parties not being member of the Government.

The lack of independence of the Parliament from the Government and the polarisation amongst the parties represented within the Government and the opposition parties within the Parliament are often criticised.

## 2. The meaning of legal indeterminacy in tax matters

- 2.1. Is your domestic tax legislation vague, when defining the tax object, tax subject and/or tax base, leaving a large margin for discretion, or, is it, on the contrary, very detailed, avoiding indeterminate concepts?

The use of undefined/vague legal provisions is quite common in Austrian tax law. In general, it has to be distinguished between undefined/indeterminate provisions on the one hand and provisions, which give the Tax Administration discretion when applying such norm, on the other hand.

Basically, according to Art 18 (1) Constitutional Law “the entire public administration shall be based on law.” The rule of law obliges the legislator to make law which is determined up to such degree, that the administration can act without being arbitrary. However, according to Art 130 (2) Constitutional Law and § 20 Fiscal Code (*Bundesabgabenordnung; BAO*) the legislator may desist from such binding rules concerning administrative acts and leave it to the administrative authority to act in a certain way. Though administrative discretion allows several legitimated ways of administrative acting, legal boundaries and the legislator’s intention have to be taken into account. Within the range given by law the Tax Administration has to make its decisions taking equitableness, expediency and all circumstances of the case into account (§ 20 Fiscal Code).

Unlike administrative discretion, undefined provisions do not entitle the administrative authorities to act in different ways. Although the meanings of these provisions are very abstract and vague, they just allow one possible administrative decision. Strictly speaking these are binding provisions – but they give a certain leeway to the administrative authorities because of the natural linguistic impreciseness and the necessity to formulate rather vague provisions (q.v. chapter I.2.2).

- 2.2. How do you/does the literature in your country evaluate the use of both techniques in tax legislation?

*Niemann* [Steuervereinfachung durch mehr Gesetzesbestimmungen? politicum 105, 2008, 35-38] discusses the two alternative ways of formulating tax law provisions (vague vs detailed tax provisions) with regard to their effects on the costs of collecting taxes. He cannot say, whether vague concepts make the calculation of the tax base easier and therefore cheaper for the tax payers. But, as a result of an analysis of 1734 decisions passed by the Austrian Administrative (High) Court from 2001 until May 2006, it seems to be clear that the use of vague tax concepts as for example “business expenses” brings forward many disputes with the Tax Administration. These disputes, without doubt, increase the costs of collecting taxes. Thus, *Niemann* recommends the use of more detailed tax law provisions.

On the other hand, it is not possible for the legislator to take all potential situations into consideration. Therefore it is necessary for the legislator to use tax concepts that describe a typical situation. But, when applied in a concrete situation it is not necessary that all elements of the tax concept are fulfilled in the same extent. Despite of the indeterminacy of such vague tax concepts, such concepts do not give the administration any discretion. The proper application of such concepts leads in each case to only one legitimate decision (cp. *Stoll*, BAO, 203 f).

2.3. Are there independent domestic Courts obliged to control the constitutionality of tax legislation?

Yes, the Constitutional Court (*Verfassungsgerichtshof; VfGH*) is obliged to test tax legislation for its constitutionality and has the competence to repeal the concerned tax legislation if otherwise.

2.4. Is legal indeterminacy considered to be unconstitutional/has a tax rule ever been declared unconstitutional due to legal indeterminacy?

The constitutional principle of legality (*Legalitätsprinzip; Art 18 B-VG*) commits the legislator to sufficiently determine legal provisions. Administrative acts should be bound to the law and predictable for all citizens. Whereas the necessity for clearly stating the essential substances and competences of administrative acts is undoubted, the degree of determination is a more complex question: On the one hand, administrative power has to be controlled. On the other hand, a certain flexibility is required. Vague formulated provisions therefore do not automatically offend against the constitutional principle of legality. The constitutionality of undetermined legal provisions does also depend on the affected field of law, for instance tax law and criminal law have to be much more detailed than economic law (VfGH 13.12.1988, G 169/88, V 120/88, VfSlg 11.938; VfGH 20.6.1994, B 473/92, VfSlg 13.785; VfGH 15.6.1998, B 2410/94, VfSlg 15.177). In the end however, the particular case has to be considered and the constitutionality is stated by the Constitutional Court on an individual basis.

Undefined legal provisions are conform with the principle of legality as far as the meaning is determinable to such degree that administrative acts can be checked on their accordance with the law. However, if there are too many contradicting opinions concerning the meaning of one provision or - even after application of all means of interpretation - a meaning could not be figured out (VfGH 13.10.1987, G 90/87 et al., VfSlg 11.499; VfGH 20.6.1994, B 473/92, VfSlg 13.785; VfGH 4.3.1999, G 470/97, VfSlg 15.447), than that is a violation of the principle of legality, which is part of the rule of law, and therefore part of the constitutionality principle (e.g. VfGH 27.6.1969, G 17/68, VfSlg 5993; VfGH 14.3.1997, G 392/96 et al., VfSlg 14.802).

Additionally, a certain comprehensibility of legal norms is demanded. In order to be constitutional, legal provisions need not only to be accessible and readable in a formal understanding, but it is also necessary that the persons subject to the law are able to understand the meaning of the norm. On basis of the rule of law and the principle of announcement and publicity, the Austrian Constitutional Court has passed the following decrees concerning the comprehensibility of legal norms:

- Diligence of an archivist (VfGH 14.12.1956, VfSlg 3130): If the tenor of a norm can only be determined because of a subtle knowledge of the Constitution, a qualified juridical qualification and experience and being almost diligent as an archivist, this norm is not in line with the principle of announcement and publicity.

- Brainteaser-ruling (VfGH 29.6.1990, G 81/90 et al., VfSlg 12.420): A norm is not in line with the principles of legal clarity and legal certainty – which are immanently part of the Constitution – if for understanding the norm at all it is necessary to have a subtle experience, extraordinary methodic abilities and, to a certain degree, a fancy to answer brainteasers.

### 3. The consequences of legal indeterminacy in tax matters

In order to understand the following chapters, it is important to illustrate the different sources of (tax) law in Austria:

- Acts of parliament: Constitutional acts stand above the non-constitutional acts.
- Regulations (binding): Every administrative (tax) authority can enact legally binding regulations without any further authorisation (Art 18 [2] Constitutional Law). However, these orders are only allowed to specify Acts of Parliament and are subject to control by the Constitutional Court. Regulations are found rather rare within the tax law.
- Administrative rulings (non-binding): The rulings released by the Ministry of Finance are of great importance for applying the tax law. There is a ruling to nearly every important tax act.
- Case law
- Tax treaties: They are in line with the non-constitutional acts but usually eliminate these acts because of their speciality.
- European law eliminates all other sources of law (including constitutional acts).

- 3.1. In case of legal indeterminacy not considered to be unconstitutional, who has the final word regarding the interpretation of the rule – the tax authorities or the domestic Courts?

As long as an undefined legal provision meets the requirements stated under I.2.4 and therefore is constitutional, it gives tax authorities a certain leeway to interpret the provision and to act accordingly. In the opinion of the majority of authors and of the Austrian Administrative (High) Court himself (e.g. VwGH 28.5.1991, 91/04/0110) in this context the Administrative Court has the final word regarding the interpretation of the particular undefined provision.

Various tax provisions allow administrative discretion and entitle tax authorities to act in different ways in accordance with the law (q.v. Art 130 [2] Constitutional Law and § 20 Fiscal Code). In this scope the entitlement of Courts to control administrative acting is limited. The Administrative Court is only obliged to check, whether the administrative discretion was exercised correctly in terms of the law (VwGH 26.4.2005, 2005/03/0031; VwGH 29.9.2005, 2004/11/0043).

- 3.2. Is there a constitutional basis for either the tax authorities or the domestic Courts having the final word on interpretation of indeterminate legal rules?

Art 130 f Constitutional Law entitles the Administrative (High) Court to interpret undefined legal (tax) provisions. If the authorities however exercise their right to enact (binding) regulations, in which they substantiate undefined provisions, the Administrative (High) Court is bound to this interpretation. In this case only the Constitutional Court is able to control the regulations on their legality and constitutionality.

3.3. Is legal indeterminacy normally fulfilled by regulations, administrative rulings and/or case law?

Whereas only a few (binding) regulations substantiate indeterminate legal provisions in Austria, administrative rulings and case law take over this part. Administrative rulings do not bind the Courts. Judgements by (High) Courts are generally only applicable to the case in litigation, but such judgements can matter beyond the particular case, if the facts of other cases are similar. If the Administrative (High) Court in a new judgement wants to deviate from a previous ruling it has to form an extended senate (nine instead of five members) to do so.

3.4. Are administrative rulings binding to the taxpayer and/or the Courts?

No, they are binding neither for the taxpayer nor the Courts, but a taxpayer has to assume that the financial administration will act on basis of their own rulings. At the same time § 236 BAO guarantees a certain protection of confidence for every taxpayer. Tax debts due can be waived partly or completely, if the tax levy would be unfair in the individual case. The Minister of Finance enacted a regulation to specify § 236 BAO (BGBl II 2005/435) in which he stated circumstances causing such an inequity. According to that regulation, the levy would be unfair for instance, if the tax duty bases on an interpretation of the law that is in conflict with the interpretation given by the Ministry of Finance in a ruling which was published within the Gazette of the Tax Administration, and the taxpayer has undertaken some significant activities relying upon these rulings.

## 5. Relationship between the Tax Administration and the Domestic Tax Courts:

5.1. Do your domestic Courts control application of tax law by your Tax Administration?

Yes, the application of tax law by the Tax Administration is controlled by the Independent Financial Senate (*Unabhängiger Finanzsenat*), the Administrative (High) Court (*Verwaltungsgerichtshof*) and the Constitutional Court (*Verfassungsgerichtshof*).

The Independent Financial Senate adjudicates as second instance on tax law cases. This Senate is an administrative body but it is provided with the independency of a 'tribunal' in the meaning of Art 6 ECHR. The decision of the Senate replaces the decision of the first instance.

Against the decision of the Independent Financial Senate the tax payer can file a remonstrance with the Administrative (High) Court due to illegality of the decision or with the Constitutional Court due to the violation of guaranteed rights by the constitution or due to the application of unconstitutional law. The coexistence of these two high courts is a specific characteristic of the Austrian legal protection system. Additionally, the Constitutional Court is also called to adjudicate on the constitutionality and legality of regulations enacted by the Tax Administration. The Administrative (High) Court and the Constitutional Court do not decide in the case per se, they only revoke the decision of the Independent Financial Senate.

- 5.2. Do your domestic Courts, in their case law, take into account rulings and binding information emerging from your Tax Administration?

Basically the domestic Courts are independent and do not have to consider any administrative rulings or binding information. The Administrative (High) Court however has to take into account the (binding) regulations enacted by the Tax Administration, because he has no competence to control them. It is the duty of the Constitutional Law to check binding regulations on their conformity with the law.

- 5.3. Does your Tax Administration take into account the domestic Courts case law and/or the ECJ case law when applying the law?

Yes, the Tax Administration considers case law of Austrian Courts. The administration (first instance) usually does not take ECJ judgements into consideration except they are told to do so by an administrative ruling from the Minister of Finance.

- 5.4. Is there a principle of reciprocal observation of the interpretation of tax law by the Tax Administration and domestic Courts?

No, basically just in one direction – the Tax Administration observes the interpretation of tax law by Courts, but not vice versa. An exception is the obligatory observation of (binding administrative) regulations by the Administrative (High) Court. For example, according to Regulation, BGBl II 2003/528 the term “domicile” do not include secondary residences which are used for less than 70 days a year by persons which have been residents of a foreign country for more than five years. As mentioned above, only the Constitutional Court is legitimated to check regulations on their conformity with the law.

- 5.5. Is your Tax Administration legally bound to the decisions of supreme courts and/or the ECJ?

In the particular case in litigation the Tax Administration (it is the Independent Financial Senate which has to decide on the case once again) is always bound to the supreme courts decision. This decision however does not apply automatically for other cases. Practically, however, the Tax Administration will make their decisions taking the supreme courts findings into account, whenever the facts of another case are similar to the case which has been decided by one of the supreme courts. .

Within the preliminary ruling procedure the ECJ does not decide in the particular case, but decides on the compatibility of a provision of a national legal system with European law or on the interpretation of European law. The presenting Courts (including the Independent Financial Senate) are legally bound to the ECJ’s findings.

5.6. Does your Tax Administration circumvent your domestic Courts' case law?

Sometimes the Austrian Ministry of Finance comments a judgement by stating that it only has relevance for the case in litigation, but in general the administration accepts the Courts' case law.

## II

### PLEASE ANSWER THE FOLLOWING QUESTIONNAIRE, WHICH AIMS AT CONFIRMING YOUR ANSWERS IN I

**1. Relationship between the Parliament and the tax authorities: The influence of the tax authorities on tax legislation**

1.1. Does your Parliament control tax authorities in an efficient way?

Yes. The Parliament by means of the Public Audit Office (*Rechnungshof*), which is directly subordinate to the National Council, controls all activities of the Federal State (and the provinces) including the Tax Administration. Examination by the Public Audit Office shall extend to arithmetical correctness, compliance with existing regulations, and the employment of thrift, efficiency and expediency.

1.2. Do tax authorities influence tax legislation to a major degree?

Yes. The Ministry of Finance is the supreme administrative body and at the same time prepares draft bills to be presented to Parliament by the Government.

1.3. Does your Parliament

a) usually accept the bills provided by tax authorities?

The Tax Administration, respectively the Ministry of Finance, is not legitimated to submit bills to Parliament at all. Only the Government can do this via 'government bills' (q.v. chapter I.1.2.). Due to the fact that the Ministry prepares the drafts and therefore has great influence on the government bills, the answer is 'yes'.

b) refuse the bills provided by tax authorities? Sometimes.

c) improve the bills provided by tax authorities? Sometimes. → During the discussion of a draft bill within the Financial Committee of the Parliament, in the majority of cases, marginal changes are made.

1.4. Is your Parliament able to discuss the bills thoroughly?

It has to be distinguished between the discussions in the plenum of the Parliament and the discussions within the Financial Committee. The Parliament itself is rather not able to discuss the bills thoroughly, the Financial Committee (consisting of a couple of Members of Parliament) rather is. The Committee, which can also consult exterior experts, discusses the bills, makes suggestions for modifications and submits a report to Parliament.

1.5. Is there sufficient knowledge of tax law in Parliament?

Rather no. Although the Members of Parliament are able to understand the effects which come along with a certain tax bill, they do not have the ability to draft complex tax bills by themselves.

1.6. Are tax rules often so vague, that tax authorities have to fill the gaps themselves by administrative regulations?

Often. Tax authorities often enact (non-binding) rulings to fill the gaps of indeterminacy; (binding) regulations are passed not so often.

1.7. Have tax authorities the competence to typify and fill out the legal gaps without control by the Parliament?

Yes. Tax authorities can enact (binding) regulations, which are only controlled by the Constitutional Court on their constitutionality and legality.

## **2. Relationship between the Parliament and the Domestic Tax Courts**

2.1. Are there independent (Tax) Courts in your country entitled to control legislation?

Yes, the Constitutional Court is called to adjudicate on the constitutionality and legality of legislation.

2.2. If “yes”, do they control tax legislation:

Yes, ex post.

- 2.3. Are Courts competent to clarify whether a specific written tax rule is compatible with constitutional standards?

Not in general. This competence is reserved the Constitutional Court (q.v. chapter II.2.1.).

- 2.4. If a high Court is convinced that a specific tax law violates constitutional standards, is the court in this case allowed to ignore the law?

No. Also a High Court (like the Administrative Court) has to suspend proceedings and file for a constitutional review by the Constitutional Court (Art 140 B-VG). There is one exception: If a certain provision can be interpreted in several ways, the principle of constitutional interpretation requires the interpretation of (non-constitutional) law in accordance with the constitutional law to avoid unconstitutionality. Not only the legislator but also the (Tax) Administration and the Courts have to take into account this principle.

### **3. Relationship between the Tax Administration and the Domestic Tax Courts**

- 3.1. Are there independent (Tax) Courts in your country, obliged to control your Tax Administration?

Yes (q.v. chapter I.4.1.).

- 3.2. Are your domestic Courts bound to administrative regulations/orders/rulings, which are issued by tax authorities?

(Binding) regulations: Yes. (Non-binding) orders and rulings: No.

If "no", do the Courts follow them in fact? No.

- 3.3. Are first instance Court decisions on a tax case, normally accepted by the Tax Administration (i.e. do they not try to appeal against the decision)? Please report statistics if available!

The Tax Administration usually accepts decisions of the Independent Financial Senate. In 2007 tax payers "won" 1.759 cases in front of the Independent Financial Senate. Only against 51 cases an appeal to the Administrative (High) Court were made by the Tax Administration (first instance), this is only 2,9 % of all cases "lost" by the Tax Administration (see annual report of the UFS; <http://ufs.bmf.gv.at/Aktuelles/UFStigkeitsbericht/TB2007.pdf> (11.12.2008)).

3.4. Is a final judicial decision on a single tax case, followed by the Tax Administration not only in this case but also in all other similar cases?

Very often.

3.5. How does the Tax Administration react when it is convinced that the final judicial decision is wrong or not "acceptable" because, e.g., it is too expensive for the public? If possible, please add statistics to the answers!

- a) Does it accept the (from their point of view) wrong decision? Often.
- b) Does it try in another similar case to convince the Court to decide in a different way? Sometimes.
- c) Does it try to influence the Parliament to change the law? Often.
- d) Does it make sure that the Internal Revenue Service will not follow this decision in similar cases? Sometimes.
- e) Does it try "to hide" such a decision, e.g., not publishing the decision with the result that the Internal Revenue Service does not know this decision? Never.