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Separation of Powers -- Questionnaire EATPL 2009--

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?

To answer this question, it is necessary to differentiate between several kinds of tax law provisions. The German tax law system contains different types of tax rules. First there are legal tax rules announced by the (in most of all cases Federal) Parliament. Second there are legal regulations adopted by the Government on behalf of the Parliament. And third there are administrative regulations that are aimed at structuring and standardizing the application of tax law by the Tax Administration in practice. Although the German Government has no competence on legal tax rules in a narrow sense, the Government has great influence on tax matters due to the power of announcing legal regulations and administrative regulations supplementing the tax rules given by the Parliament.

1.2. Does your Government draft tax bills proposals and present them to Parliament? Yes, it does.

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, it does.

- 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?

The draft bills provided by Tax Authorities are discussed by the German Parliament in detail and often they are changed substantially.

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

In literature there is a lot of criticism regarding this situation. The influence of the Government announcing legal regulations and administrative regulations seems to be stronger than the power of the Parliament ruling on tax matters.

The domestic Courts take the opportunity provided by the German constitutional system to limit the power of the Government and the Tax Authorities. Many rulings – especially of the Federal Tax Court – aim at reducing the influence of the Government on tax law. The fact that the Government normally is formed by the same political party dominating the Parliament often creates a special kind of competition: The Government will draft a tax bill to reach the goal, which was obstructed by the courts.

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?

Our tax legislation normally is very detailed – but unfortunately there is a wide range of legal indeterminacy as well.

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

In my view it is necessary to find a balance between both approaches. Law should be detailed enough to rule strictly what has to be done in a special case. At the same time it should be flexible enough to allow dealing with new and unexpected situations in a proper way. Flexibility of law is often accompanied by indeterminacy. And unfortunately flexibility of law bears the risk of abuse and tax avoidance. So it seems to be a great challenge developing a suitable tax law system somewhere in-between flexibility and legal certainty.

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

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

Basically legal indeterminacy is considered to be unconstitutional. Nevertheless no tax rule has ever been declared unconstitutional due to legal indeterminacy in Germany until now.

3. The consequences of legal indeterminacy in tax matters

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?

The domestic Courts are entitled and obliged to control the interpretation of vague tax provisions by the tax authorities. So the domestic Courts are responsible for the final word.

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?

Yes, there is. The constitution of the Federal Republic of Germany is dominated by several general principles: Most important are: democracy, federalism, welfare and last but not least the rule of law. The rule of law contains a couple of sub-principles. One of them is the overall binding and subjection of the administration to law and order. This sub-principle is not affected by vague terms used by legal provisions. The administration has to interpret these vague terms and the Courts are entitled to control the process of interpreting and its results.

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

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

Basically administrative rulings are binding neither to the taxpayer nor to Courts. But in some particular situations exceptions are recognized. For example, a binding occurs if an administrative ruling becomes typical by repetition and in conviction that everybody agrees on it. Such a general practice is binding because everybody else may expect to be treated in the same way for reasons of equality.

4. Relationship between the Tax Administration and the Domestic Tax Courts:

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

Yes, they do.

- 4.2. Do your domestic Courts, in their case law, take into account rulings and binding information emerging from your Tax Administration?
Yes, they do. But they do not follow them necessarily.
- 4.3. Does your Tax Administration take into account the domestic courts case law and/or the ECJ case law when applying the law?
Yes, they do. But they do not follow them necessarily.
- 4.4. Is there a principle of reciprocal observation of the interpretation of tax law by the Tax Administration and domestic Courts?
Yes, I think so.
- 4.5. Is your Tax Administration legally bound to the decisions of supreme courts and/or the ECJ?
Yes, but normally only as far as the decision reaches, that means: The Tax Administration is bound only concerning the ruled single tax case and not in general. In addition an overall binding of court decisions can be set by the Government.
- 4.6. Does your Tax Administration circumvent your domestic courts' case law?
Sometimes it does.

5. Relationship between different legal sources (legal pluralism):

- 5.1. How do your Parliament, Tax Administration and Courts react before the different legal sources in tax matters (tax treaties and other treaties, EC Treaty, secondary law and soft law)?
Carefully in some extend. Basically they try to find their way in accordance with all the different legal sources in tax matters. But sometimes they dare to set aside some rules.
- 5.2. How is the hierarchy of different tax legal sources recognized by the constitution and the different domestic powers (Parliament, Tax Administration and Courts)?
The Constitution recognizes a priority in application of EC Treaty and secondary EC law. Tax treaties and other treaties range somewhere in-between constitutional law and rules given by the Parliament as far as they contain general rules of international law. All different domestic powers are obliged to observe this hierarchy.
- 5.3. Does the taxpayer have access to different legal remedies that assure him/her effective protection of his/her rights granted by tax treaties, EC law and domestic law, or are those legal remedies in fact limited to protection of rights granted by domestic law?

The domestic legal remedies focus on rights granted by domestic law. Nevertheless taxpayers are allowed and asked to claim their rights granted by tax treaties or EC law as well.

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 - **no**
- 1.2. Do tax authorities influence tax legislation to a major degree? **yes** - no
- 1.3. Does your Parliament
 - a) usually accept the bills provided by tax authorities? yes - **no**
 - b) refuse the bills provided by tax authorities? never - **sometimes** - often
 - c) improve the bills provided by tax authorities? never - **sometimes** - often
- 1.4. Is your Parliament able to discuss the bills thoroughly? yes - **no**
- 1.5. Is there sufficient knowledge of tax law in Parliament? yes - **no**
- 1.6. Are tax rules often so vague, that tax authorities have to fill the gaps themselves by administrative regulations? never - sometimes - **often**
- 1.7. Have tax authorities the competence to typify and fill out the legal gaps without control by the Parliament? never - sometimes - **often**

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
- 2.2. If "yes", do they control tax legislation: 0 ex ante or **0 ex post?**
- 2.3. Are Courts competent to clarify whether a specific written tax rule is compatible with constitutional standards? **yes** – no
But only the Federal Constitutional Court.
- 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? yes - **no**

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, there are.

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

yes – **basically no**

If "no", do the courts follow them in fact?

never - sometimes – **often** - very often

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)?

never - **sometimes** - often - very often

Please report statistics if available!

round about 20 % of the first instance Court decisions are followed by an appeal of the Tax Administration (source Statistisches Bundesamt)

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?

never - **sometimes** - often - 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?

a) Does it accept the (from their point of view) wrong decision?

never - sometimes - often - very often

b) Does it try in another similar case to convince the Court to decide in a different way?

never - sometimes - **often** - very often - maybe

c) Does it try to influence the Parliament to change the law?

never - sometimes - often - **very often**

d) Does it make sure that the Internal Revenue Service will not follow this decision in similar cases?

never - **sometimes** - often - very often

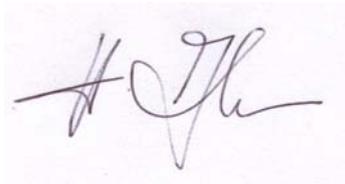
e) Does it try "to hide" such a decision, e.g., not publishing the decision with the result that the Internal Revenue Service does not know this deci-

sion?

never - sometimes - often - very often - maybe

If possible, please add statistics to the answers!

Osnabrück, 24.11.2008

A handwritten signature in black ink, appearing to read 'H. Jochum', written on a light-colored rectangular background.

Univ.-Prof. Dr. Heike Jochum, Mag. rer. publ.