

<http://doi.org/10.22364/jull.11.08>

Scope of Constitutional Review of Tax Law Provisions

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The article examines practice of the Constitutional Court of the Republic of Latvia in assessing proportionality of restriction upon fundamental rights established in the field of tax law. The article argues that the Constitutional Court exercises self-restraint: the court does not examine, whether the measure chosen by the legislator is economically the most sound, whether the tax is necessary, whether other, alternative solutions that would be less burdensome for an individual exist (insofar as they are not confiscatory).

Keywords: tax law, constitutional review, scope, self-restraint

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Introduction

The Constitutional Court of the Republic of Latvia [hereinafter – the Constitutional Court] is an independent institution of judicial power, which implements constitutional review of the legal norms with norms of higher legal force and Constitution [*Satversme* of the Republic of Latvia]. The Constitutional Court has developed rich jurisprudence in tax and budgetary law questions, examining, whether the tax law is in line with *Satversme*. This article explains

the legal doctrine of the Constitutional Court in assessing legal norms setting the obligation to pay a tax.

The article consists of three sections. The first section outlines the obligation to pay a tax as a restriction upon the right to property. In the second section, the model of assessment of a restriction applied by the Constitutional Court is proved. The third section outlines examination of proportionality of a restriction upon the right to property.

1. The Obligation to Pay a Tax – a Restriction Upon the Right to Property

The Constitutional Court has recognized that the specificity of tax law influences the scope of constitutional review.

The Court has noted that regulation, insofar it envisages a person's obligation to pay a tax, falls within the scope of the first and the third sentence of Article 105 of the *Satversme* [Constitution of the Republic of Latvia]: "Everyone has the right to own property. Property rights may be restricted only in accordance with law".

Usually, the Constitutional Court examines legal norms related to the obligation to pay a tax as a restriction upon property rights rather than expropriation of property.¹ The duty to pay a tax always means restricting the right to property, because as the result of levying a tax the amount of applicant's income decreases.²

Likewise, a finding has been enshrined in the case law of the Constitutional Court that the rights that follow from Article 105 of the *Satversme* must be interpreted in interconnection with Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms.³ It follows from the case law of the European Court of Human Rights (hereinafter – ECHR) that cases that are linked to establishment of an obligation to pay taxes are, predominantly, examined in the context of control over the use of property.⁴ It has also been recognized in the case law of ECHR that a tax, as to its nature, may not be confiscatory.⁵

2. Model of Assessment of a Restriction Upon the Right to Property

In general, the right to property may be restricted, if the restriction is justifiable. To establish, whether a restriction upon property right can be justified, the Constitutional Court applies the following model of assessment (test):

2.1. Whether the Restriction Upon the Right to Property Has Been Established by Law

In examining whether the restriction upon the right to property has been established by law, the Constitutional Court verifies:

¹ Judgment of 8 June 2007 by the Constitutional Court in case No. 2007-01-01, para. 19, and Judgment of 25 March 2015 in case No. 2014-11-0103, para. 15.

² Judgment of 8 June 2007 by the Constitutional Court in case No. 2007-01-01, para. 19, and Judgment of 25 March 2015 in case No. 2014-11-0103, para. 15.

³ Judgment of 28 May 2009 by the Constitutional Court in case No. 2008-47-01, para. 7.1.

⁴ *Sermet, L.* The European Convention on Human Rights and property rights. Human rights files, No. 11 rev. Strasbourg: Council of Europe Publishing, 1999, p. 25.

⁵ ECHR Judgment of 25 July 2013 in case *Khodorkovskiy and Lebedev v. Russia*, Applications No. 11082/06 and 13772/05, para. 870.

- 1) whether the law has been adopted in accordance with procedure set out in regulatory enactments;

Before assessing whether the restriction upon fundamental rights has been established by law, the subject, which in the area of taxes is to be regarded as the legislator, is specified. Pursuant to Article 64 of the *Satversme*, the right to legislate is vested in two subjects – the *Saeima* and the people, in the procedure and scope defined by the *Satversme*. Article 73 of the *Satversme*, in turn, defines the issues that cannot be put for a national referendum. It follows from the above that the *Satversme* restricts activities of the people as the legislator in the field of taxes, and insofar as the actions by the State with respect to taxes fall within the scope of Article 73 of the *Satversme*, only the *Saeima* is to be recognized as being the legislator in this field.

Stakeholders' involvement in preparing a draft regulatory enactment may facilitate adoption of an objective decision and balancing of various interests; however, an opinion held by a particular group of persons is not binding upon the *Saeima*.⁶ Therefore the Constitutional Court has recognized that, although it would be advisable to hear the opinion of the addressees of norms, neither the *Satversme*, nor the *Saeima* Rules of Procedure define such hearing as a mandatory pre-requisite for adoption of legal norms. An opinion held by the addressees of legal norms regarding the draft of these norms may not prohibit the *Saeima* from adopting a decision.

- 2) whether a law has been promulgated and is publicly accessible in accordance with requirements of regulatory enactments;
- 3) whether the law has been worded with sufficient clarity, so that a person would be able to understand the content of rights and obligations derived from it and predict consequences of application thereof, as well as whether the law ensures protection against arbitrary application of it.⁷

2.2. Whether the Restriction has a Legitimate Aim

It has been recognized in the case law of the Constitutional Court that a regulation that envisages paying of a tax should be assessed as a restriction, which is established in legal tax relations to ensure formation of the state budget and budgets of local governments.⁸ Taxes are introduced to ensure public welfare.⁹ Any tax, which ensures state budget revenue, may be further used for the protection of public welfare. The legislator's obligation to cover expenses only in particular fields by revenue from a particular tax does not follow from the *Satversme*.¹⁰ Consequently – the obligation to pay a tax has a legitimate aim – to ensure public welfare.

2.3. Whether the Restriction is Proportionate to Its Legitimate Aim

In examining proportionality of a restriction established in the field of tax law, the Constitutional Court exercises self-restraint. The Court has noted that in the field of tax law the same requirements cannot be set for the legislator as, for example, in the field of protecting and ensuring civic or political rights.¹¹ In defining

⁶ Judgment of 26 November 2009 by the Constitutional Court in case No. 2009-08-01, para. 17.2.

⁷ Judgment of 8 April 2015 by the Constitutional Court in case No. 2014-34-01, para. 14.

⁸ Judgment of 8 June 2007 by the Constitutional Court in case No. 2007-01-01, para. 22.

⁹ Judgment of 6 December 2010 by the Constitutional Court in case No. 2010-25-01, para. 9.

¹⁰ Judgment of 3 February 2012 by the Constitutional Court in case No. 2011-11-01, para. 13.

¹¹ Judgment of 13 April 2011 by the Constitutional Court in case No. 2010-59-01, para. 9.

and implementing its taxation policy, the State enjoys broad discretion.¹² It includes the right to choose tax rates and categories of persons to whom these are applied, as well as the right to define the details of particular regulation.

In examining the limits of the legislator's discretion with respect to establishing a tax for a particular object, the Constitutional Court has noted that it should be taken into account that the *Satversme* authorizes *expressis verbis* the legislator to adopt the state budget, thus, to determine the state revenue and expenditure. The *Satversme* has authorized the legislator to implement such fiscal policy that would ensure the necessary income to the State.¹³

The State must take care of its sustainable development, *inter alia*, by ensuring that the resources that are necessary for performing the State's functions always are in the state budget. Moreover, the Constitutional Court already has noted that a person's right to property cannot be examined in isolation from the person's constitutional obligation to pay taxes established in due procedure.¹⁴

Due to the reasons referred to above, the Constitutional Court has recognized that the legislator's decisions on what kind of tax would be proportionate and necessary is an issue of policy and expedience. Therefore, with respect to implementation of tax policy, the scope of constitutional review is narrower,¹⁵ and in this regard the Constitutional Court has exercised self-restraint.

The Constitutional Court has recognized that in reviewing legality of a restriction, it mainly examines, whether the tax payment is not an incommensurate burden for the addressee and whether the legal tax regulation complies with general principles of law.¹⁶ Thus, in assessing whether the tax payment is not an incommensurate burden for the addressee, the Court considers only, whether the applied tax is not confiscatory by nature.

3. Examination of Proportionality of a Restriction Upon the Right to Property

In examining proportionality of a restriction upon fundamental rights, the Constitutional Court verifies:

- 1) whether the chosen measures are appropriate for reaching the legitimate aim, or whether the legitimate aim can be attained by the chosen measure;

The Constitutional Court has found that the legislator has the right, insofar the *Satversme* and the State's international commitments do not provide otherwise, to decide on establishing priority expenditure for the State and society and channel resources obtained from tax payments for this expenditure. The legislator's obligation to cover expenditure only in particular fields from the particular tax revenue does not follow from the *Satversme*.¹⁷ Thus, the legislator does not have the obligation to channel revenue from particular taxes for reaching particular aims.

Although the Constitutional Court recognizes that norms of tax law should be not only legally impeccable, but also economically sound¹⁸, and that tax regulation

¹² Judgment of 20 May 2011 by the Constitutional Court in case No. 2010-70-01, para. 9.

¹³ Judgment of 6 December 2010 by the Constitutional court in case No. 2010-25-01, para. 10.

¹⁴ Judgment of 13 April 2011 by the Constitutional Court in case No. 2010-59-01, para. 9.

¹⁵ Judgment of 30 April 2008 by the Constitutional Court in case No. 2007-23-01, paras. 7 and 11.

¹⁶ Judgment of 8 June 2007 by the Constitutional Court in case No. 2007-01-01, para. 24.

¹⁷ Judgment of 3 February 2012 by the Constitutional Court in case No. 2011-11-01, para. 13.

¹⁸ *Lazdiņš, J. Ievads nodokļu tiesībās* [Introduction to Tax Law]. *Jurista Vārds*, 40(443), 2006, p. 2.

should be based upon objective and rational considerations¹⁹, the Court exercises self-restraint and points out that it cannot verify, whether the measures used by the legislator conform with the findings of economics, i.e., whether the measures chosen by the legislator are economically sound.

However, to establish, whether the restriction upon fundamental rights caused by the obligation to pay a tax is appropriate for reaching its legitimate aim, the Court verifies, whether objective and rational considerations are used to substantiate the measures chosen for reaching the legitimate aim of the restriction. Therefore, to conclude, whether the restriction upon fundamental rights caused by the obligation to pay the tax is appropriate for reaching its legitimate aim, the Constitutional Court verifies, whether the tax payers, the taxable object and the principle for calculating the tax have not been set arbitrarily, and whether the procedure for calculating the tax is such that allows calculating the tax mathematically.²⁰

2) is this action necessary, or whether the legitimate aim cannot be reached by other measures, less restrictive upon a person's rights;

Also in this respect the Court has noted that it cannot replace the legislator's discretion by its own opinion on the most rational solution.²¹ In particular, when analysing, whether more lenient measures for reaching the legitimate aim do not exist, the Constitutional Court must abide by the limits of review that are set by the nature of tax law.²² In view of the legislator's broad discretion in developing taxation policy, the Court has recognized that the choice between alternative solutions is the legislator's political decision, which cannot be assessed by methods of constitutional review.

If the Constitutional Court has established that the principle for tax calculation, chosen by the legislator, has a rational explanation, based upon objective and rational considerations, and that the legislator has examined alternatives to the contested norms, then the Constitutional Court has no right to provide that the legislator should choose another tax rate, another principle for calculating the tax or should include other elements in the formula for calculating the tax. Likewise, ECHR, in examining cases with regard to restrictions upon human rights that are linked to the obligation to pay a tax, does not assess the States' choices in the field of taxes, unless this choice lacks reasonable grounds.²³

3) whether the restriction is appropriate, or whether the benefit gained by society outweighs the damage inflicted upon a person's rights.

A tax performs a fiscal function, because it ensures revenue in the state budget. Therefore the society's benefit may be described as the state budget revenue, which further can be used to protect public welfare. I.e., the *Satversme* authorizes *expressis verbis* the legislator to adopt the state budget, thus, also to determine the state budget revenue. Consequently, the legislator must implement such fiscal policy that would ensure the necessary revenue into the state budget.

¹⁹ Judgment of 20 May 2011 by the Constitutional Court in case No. 2010-70-01, para. 9.

²⁰ Judgment of 20 May 2011 by the Constitutional Court in case No. 2010-70-01, para. 9, and Judgment of 25 March 2015 in case No. 2014-11-0103, para. 24.1.

²¹ Judgment of 19 December 2011 in case No. 2011-03-01, para. 20.

²² Judgment of 20 May 2011 by the Constitutional Court in case No. 2010-70-01, para. 16, and Judgment of 25 March 2015 in case No. 2014-11-0103, para. 25.2.

²³ ECHR Judgment of 4 July 2013 in case *R. Sz. v. Hungary*, application No. 41838/11, para. 48.

For the purpose of ensuring public welfare, a person has a constitutional obligation to pay taxes established in due procedure.²⁴

In examining, whether the tax payment is not an incommensurate burden for the addressee, the Constitutional Court has found that it should be taken into consideration that every tax is an element of the taxation policy implemented by the legislator and that usually every person has the obligation to pay a number of taxes. Each tax has different objectives, objects, and procedure for calculating and applying it. Therefore, the Constitutional Court predominantly examines, whether the applied tax is not confiscatory by its nature.²⁵

Conclusions

1. The Constitutional Court usually examines legal norms related to the obligation to pay a tax as a restriction upon the right to property.
2. The specificity of tax law influences the scope of constitutional review.
3. In adoption of a legal norm, the *Saeima* is not required to follow the proposals made by a particular social group.
4. The obligation to pay a tax has a legitimate aim – ensuring public welfare.
5. In assessing proportionality of a restriction upon fundamental rights established in the field of tax law, the Constitutional Court exercises self-restraint: the Court does not examine, whether the measure chosen by the legislator is economically the most sound, whether the tax is necessary, whether other, alternative solutions that would be less burdensome for an individual exist (insofar as they are not confiscatory).

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²⁴ Judgment of 13 April 2011 by the Constitutional Court in case No. 2010-59-01, paras. 9 and 10.

²⁵ Judgment of 25 March 2015 by the Constitutional Court in case No. 2014-11-0103, para. 20.

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