Headnote

to the order of the First Senate of 5 March 2013

– 1 BvR 2457/08 –

The principle of the rule of law, in its manifestation as the principle of clarity and predictability of burdens, which serves legal certainty, requires provisions of law that ensure that contributions to compensate for a benefit cannot be assessed for an unlimited period of time after the benefit is received. It is the legislature's responsibility to establish a fair balance between, on the one hand, the public's interest in receiving contributions for such benefits and, on the other hand, the contribution-payers' interest in having certainty at some point as to whether and to what extent contributions will be assessed.

FEDERAL CONSTITUTIONAL COURT

– 1 BvR 2457/08 –

IN THE NAME OF THE PEOPLE

in the proceedings
on
the constitutional complaint

of Dr. J…

– authorised representatives: Rechtsanwälte […] -

1. directly against

a) the order of the Bavarian Higher Administrative Court (*Bayerischer Verwaltungsgerichtshof* of 16 May 2008 – 20 ZB 08.903 –,

b) the judgment of the Bavarian Administrative Court (*Bayerisches Verwaltungsgericht*) Munich of 28 February 2008 – M 10 K 06.2850 –,

2. indirectly against

Art. 13 sec. 1 no. 4 letter b double letter cc indent 2 of the Bavarian Municipal Charges Act (*Bayerisches Kommunalabgabengesetz* – BayKAG) in the version of the Act Amending the Municipal Charges Act (*Gesetz zur Änderung des Kommunalabgabengesetzes*) of 28 December 1992 (Law and Ordinance Gazette, *Gesetz- und Verordnungsblatt* – GVBl p. 775)

the Federal Constitutional Court – First Senate –

with the participation of

Justices Kirchhof (Vice-President),

Gaier,

Eichberger,

Schluckebier,

Masing,

Paulus,

Baer, and

Britz

decided on 5 March 2013 as follows:

1. Article 13 section 1 number 4 letter b double letter cc, indent 2, of the Bavarian Municipal Charges Act in the version of the Act Amending the Municipal Charges Act of 28 December 1992 is incompatible with Article 2 section 1 of the Basic Law (*Grundgesetz* – GG) in conjunction with the constitutional principle of legal certainty (Article 20 section 3 of the Basic Law). If the legislature does not replace Article 13 section 1 number 4 letter b double letter cc, indent 2, of the Bavarian Municipal Charges Act with a new, constitutionally acceptable provision by 1 April 2014, the provision will be void.

2. The order of the Bavarian Higher Administrative Court of 16 May 2008 – 20 ZB 08.903 – and the judgment of the Munich Administrative Court of 28 February 2008 –M 10 K 06.2850 – violate the complainant's fundamental right under Article 2 sec. 1 of the Basic Law in conjunction with the constitutional principle of legal certainty (Article 20 sec. 3 of the Basic Law). The order of the Bavarian Higher Administrative Court is reversed and the matter is remitted to that court.

3. […]

Reasons:

A.

The constitutional complaint concerns the question whether the provision for the beginning of the assessment period under Art. 13 sec. 1 no. 4 letter b double letter cc indent 2 of the Bavarian Municipal Charges Act (BayKAG) in the version of the Act Amending the Municipal Charges Act of 28 December 1992 (GVBl p. 775) is compatible with the constitutional principles of legal certainty and protection of legitimate expectations enshrined in Art. 20 sec. 3 GG. 1

I.

[Excerpt from the Court's press release of 3 April 2013]

According to Bavarian law, the time-limit for the assessment of municipal contributions is four years. As a general rule, the time-limit starts to run at the end of the year in which the duty to pay the contribution has arisen. In this regard, the Bavarian Municipal Charges Act makes reference to the Federal Fiscal Code (*Abgabenordnung*). Art. 13 sec. 1 no. 4 letter b double letter cc indent 2 of the Bavarian Municipal Charges Act, however, makes special provision for the case of invalidity of the rules on contribution: in this case, the time-limit starts to run only at the end of the calendar

year in which valid rules have been published.

From 1992 to 1996, the complainant was the owner of built-up property which was connected to the local drainage system. During an inspection of the property in 1992, the local authorities found out that the top floor of the building had been converted. However, they levied a drainage construction contribution for the converted surface of the top floor from the complainant only in a subsequent assessment order of 5 April 2004. The order was based on Rules Governing Contributions and Fees of 5 May 2000. To remedy the voidness of the previous Rules, the local authorities had enacted the Rules with retroactive effect as from 1 April 1995. During the complainant's objection proceedings, these Rules proved void as well. The local authorities thereupon adopted new Rules and put them into force retroactively as from 1 April 1995. The new Rules were published in the Municipal Gazette on 26 April 2005.

The action brought by the complainant against the assessment order and against the ruling by the local authorities on the complainant's objection was unsuccessful both before the Administrative Court and the Higher Administrative Court.

[End of excerpt from press release.]

[…] 2-9

II.

1. In his constitutional complaint, the complainant objects to a violation of his rights under Art. 20 sec. 3 and Art. 103 sec. 1 GG. […] 10

[…] 11-12

2. […] 13-14

3. […] 15

III.

[…] 16-18

IV.

[…] 19-29

B.

The challenges lodged in the constitutional complaint are admissible only in part. 30

I.

Insofar as the complainant claims a violation of his right to a fair hearing, equivalent to a fundamental right, under Art. 103 sec. 1 GG, the constitutional complaint is inadmissible, as it is insufficiently substantiated (§ 23 sec. 1 sentence 2, § 92 Federal Constitutional Court Act, *Bundesverfassungsgerichtsgesetz* – BVerfGG). The com- 31

plainant has not provided a substantiated demonstration of the possibility of a violation of Art. 103 sec. 1 GG (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 7, 95 <99>; 60, 313 <318>; 86, 133 <147>).

II.

The constitutional complaint is admissible insofar as it concerns a violation of the rule of law principles of legal certainty and the protection of legitimate expectations that proceed from Art. 2 sec. 1 in conjunction with Art. 20 sec. 3 GG. 32

Despite his complaint of a violation of his right to a fair hearing under Art. 103 sec. 1 GG, the complainant was not required to raise a challenge claiming denial of his right to a hearing under § 152a of the Administrative Courts Act (*Verwaltungsgerichtsordnung* – VwGO) in order to exhaust all his avenues of appeal under § 90 sec. 2 sentence 1 BVerfGG. If a violation of the right to a fair hearing is claimed in the appeal proceedings before a non-constitutional court, and if the appellate court upholds the challenged decision, the decision of the appellate court – unless some independent new violation of the right to a fair hearing by the appellate court is claimed – does not need to be challenged with a complaint claiming denial of a fair hearing, in order to conform to the requirement that all avenues of appeal need to be exhausted (§ 90 sec. 2 sentence 1 BVerfGG) (cf. BVerfGE 107, 395 <410 and 411>). 33

C.

To the extent that the constitutional complaint is admissible, it is also well-founded. The indirectly challenged provision of Art. 13 sec. 1 no. 4 letter b double letter cc indent 2 BayKAG in the version of the Act Amending the Municipal Contributions Act of 28 December 1992 (GVBl p. 775), together with the directly challenged court decisions based on that provision, violate the constitutional principle of legal certainty as established in Art. 2 sec. 1 in conjunction with Art. 20 sec. 3 GG, in its manifestation as the principle of clarity and predictability of burdens. 34

I.

1. In the case at hand, Art. 13 sec. 1 no. 4 letter b double letter cc indent 2 BayKAG does not violate the constitutional standards for the permissibility of retroactive legislation. 35

Protection of legitimate expectations under the rule of law limits the legislature's authority to make changes to the law that affect a matter that began in the past but has not yet been completed (cf. BVerfGE 95, 64 <86 and 87>; 101, 239 <263>; 126, 369 <393>). 36

Art. 13 sec. 1 no. 4 letter b double letter cc indent 2 BayKAG itself has no retroactive effect on the complainant. The provision governs the beginning of the limitation period for assessing contributions based on Rules Governing Contributions and Fees, 37

which remedied earlier Rules that turned out to be void. At the time when the provision entered into force on 1 January 1993, no such valid remediating Rules existed as yet in the complainant's case, nor were any enacted later, retroactively to or before 1 January 1993, so that irrespective of the new legislative provisions, the limitation period had not yet begun to run. As long as the limitation period has not begun to run because of the absence of valid Rules, the new legislative provision on the beginning of the limitation period, with the effect of extending that period, does not even affect a matter that has started in the past and has not yet been completed.

The beneficial situation that existed before the new provision took effect also does not constitute a situation that had already begun for the complainant, and into which the new provision of Art. 13 sec. 1 no. 4 letter b double letter cc indent 2 BayKAG could interfere retroactively. The new provision is limited to the postponement of the beginning of the limitation period. But such a period could not begin to run without a valid set of Rules. 38

2. […] 39

II.

Art. 13 sec. 1 no. 4 letter b double letter cc indent 2 BayKAG does, however, violate Art. 2 sec. 1 GG in conjunction with the principle of legal certainty as an integral part of the principle of the rule of law enshrined in Art. 20 sec. 3 GG (cf. BVerfGE 30, 392 <403>; 43, 242 <286>; 60, 253 <267>). It makes it possible to set contributions with no time limit after a benefit arises. The legislature has therefore failed to balance the contribution-payer's expectation that the assessment will, at some point, be time-barred, and the justified public interest in a financial contribution for the receipt of individual benefits from a connection to the drainage system. Instead, the legislature made a decision that only disadvantaged the contribution-payer, and that is not constitutionally acceptable. 40

1. Legal certainty and protection of legitimate expectations, in interaction with the fundamental rights, guarantee the reliability of the legal order, which is an essential prerequisite for self-determination regarding one's life choices and their implementation (cf. BVerfGE 60, 253 <267 and 268>; 63, 343 <357>; BVerfG, order of 10 October 2012 – 1 BvL 6/07 –, *Deutsches Steuerrecht* – DStR 2012, p. 2322 <2325>). Citizens must be able to foresee the potential demands that the State may make on them, and to plan accordingly (cf. BVerfGE 13, 261 <271>; 63, 215 <223>). The principle of the protection of legitimate expectations is in this context linked to the citizens' justified confidence in certain legal provisions. It provides that they must be able to rely to a certain extent on the continuance of certain provisions. Furthermore, the principle of the rule of law guarantees legal certainty under certain circumstances even if no legal provisions exist that give rise to specific legitimate expectations, or if circumstances exist that are even contrary to such legitimate expectations. In its manifestation as the principle of clarity and predictability of burdens, it protects against the use 41

of events that occurred a long time ago and that have de facto ended, as a link for imposing new burdens. As elements of the principle of the rule of law, legal certainty and the protection of legitimate expectations are intimately related to one another, because they equally ensure the reliability of the legal order.

2. If obligations to pay contributions as compensation for benefits are imposed and linked to facts lying in the past, constitutional law requires that a period of limitation be set, establishing a final time-limit until which contributions may be assessed. It is the legislature's responsibility to establish a fair balance between, on the one hand, the public's interest in receiving contributions for such benefits, and, on the other hand, the interest of contribution-payers in having certainty at some point as to whether and to what extent they need to pay. 42

a) Statutes of limitations are also an expression of the guarantee of the certainty of law. They are intended to ensure that individuals will no longer be subject to payment demands after a certain time period expires. The aim of placing a time limit on payment claims by the authorities is to achieve a fair balance between the public's justified interest in the comprehensive and complete realisation of these claims, on the one hand, and on the other hand, the citizens' interest, which is worthy of protection, in, at some point, no longer having to expect to be liable to make a contribution, and in being able to plan accordingly. While the state's interest in fully enforcing payment obligations is supported primarily by the principles of the correct application of the law and substantive justice (equality of burdens) and by fiscal considerations, these are counterbalanced, on the citizens' side, by the principle of legal certainty. 43

It is a distinctive characteristic of statutes of limitation that they apply without it being necessary to prove that the individual had, or can be assumed to have had, certain legitimate expectations, or that the individual had acted on them. Instead, they derive their justification and their necessity from the principle of legal certainty, under which individuals are entitled to expect, even with regard to the state, that they will at some point no longer be required to pay, if the entitled authority has not exercised its power for an extended time period. 44

b) Also when levying contributions as non-recurring compensation for a benefit received through the connection to a facility, the legislature is obliged to enact statutes of limitation or at least to ensure that such contributions cannot be assessed for an unlimited period of time after the benefit has been received. Irrespective of the legislative form in which they take effect, contributions derive their legitimation from being a compensation for a benefit that the persons concerned received at a certain point in time (cf. BVerfGE 49, 343 <352 and 353.>; 93, 319 <344>). The farther in the past this point in time lies when the contribution is assessed, the more the legitimation to assess such contributions diminishes. It is true that the advantages may continue to have effects in the future, which is one reason why contributions can even be assessed after the connection to the relevant facility has been made for a relatively long time. Nevertheless, the date of the connection which provided the benefit to the 45

contribution-payer, and the one-time compensation of which is at issue here, is not without significance. Otherwise, a citizen would permanently be left uncertain as to whether to still expect an assessment for an event that continues to recede farther and farther into the past. As time passes, this becomes less and less reasonable. Instead, the principle of legal certainty demands that the recipient of a benefit must be able to know with clarity and within a reasonable time, whether and to what extent contributions must be paid in return for the benefits received.

c) It is the legislature's task to establish a fair balance between the public's justified interest in receiving compensation for benefits, and the individual's justified interest in the certainty of law, by duly drafting statutes of limitation. In so doing, the legislature has broad freedom of discretion. However, the principle of legal certainty does not permit the legislature to entirely disregard the citizens' justified interests and to entirely omit any provision that sets a specific time limit for the assessment of the contribution. 46

3. In Art. 13 sec. 1 no. 4 letter b double letter cc indent 2 BayKAG, the legislature failed to achieve the necessary balance between legal certainty on the one hand, and the validity of law and the fiscal interest, on the other. When remedying invalid Rules, Art. 13 sec. 1 no. 4 letter b double letter cc indent 2 BayKAG sets the beginning of the limitation period at the end of the calendar year in which the valid Rules are announced – with no upper time limit. The legislature thus resolves the conflict of interests unilaterally to the citizen's detriment. It is true that this does not completely rule out a time-bar on demands for contributions. However, by postponing the beginning of the limitation period without setting any time limit, the legislature entirely disregards the citizen's justified interest in not having to expect an assessment of the contribution if a considerable length of time has passed since the benefit arose. In some cases, the limitation period might therefore not begin until decades after a benefit that is subject to contributions has occurred. 47

As a general rule, citizens cannot avoid their duty to pay contributions by invoking the defence of forfeiture. According to the established case law of the Federal Administrative Court (*Bundesverwaltungsgericht*) (cf. BVerwG – Federal Administrative Court, order of 17 August 2011 – BVerwG 3 B 36.11 –, *Beck-Rechtsprechung* – BeckRS 2011, 53777; order of 12 January 2004 – BVerwG 3 B 101.03 –, *Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungs-Report* – NVwZ-RR 2004, p. 314) and of the Federal Finance Court (*Bundesfinanzhof*) (cf. BFH – Federal Finance Court, judgment of 8 October 1986 – II R 167/84 –, Decisions of the Federal Finance Court, *Entscheidungen des Bundesfinanzhofs* – BFHE 147, 409 <412>), it is not only necessary for forfeiture that a rather long time has passed since it became possible to assert a right. In addition to this, certain circumstances must arise that make a delayed assertion appear contrary to good faith. Even in cases where contributions are assessed after the assessment deadline has apparently passed, this requirement is generally unlikely to be met. 48

D.

I.

As a rule, the unconstitutionality of a provision of law renders it void (§ 95 sec. 3 sentence 2 BVerfGG). In the case at hand, however, the legislature has several possibilities at its disposal for remedying the unconstitutional situation. Thus, at present, the only option is a declaration that the provision in question is incompatible with the Constitution (cf. BVerfGE 130, 240 <260 and 261>; established case-law). 49

It is left up to the legislature how it will ensure a definitive time-limit for assessing citizens for contributions that meets the standard of legal certainty according to the principles contained in this order. […] 50

II.

In accordance with § 95 sec. 2 BVerfGG, the challenged order of the Bavarian Higher Administrative Court has to be reversed. The matter must be remitted to the Bavarian Higher Administrative Court. The declaration of incompatibility with the Constitution has the consequence that Art. 13 sec. 1 no. 4 letter b double letter cc indent 2 BayKAG may no longer be applied by courts and administrative authorities (cf. BVerfGE 111, 115 <146>). Pending court and administrative proceedings in which the decision depends on Art. 13 sec. 1 no. 4 letter b double letter cc indent 2 BayKAG remain suspended or are to be suspended until a new legislation is enacted, but not beyond 1 April 2014. 51

This stay gives the legislature an opportunity to enact new legislation that complies with the Constitution. If the legislature declines to enact specific new legislation on the beginning of the assessment period, the unconstitutional provision will be void as from 1 April 2014. In that case it would be the task of the administrative courts to interpret the laws of the *Land* (state of) Bavaria accordingly, in conformity with the Constitution (cf., for example for the case of the retroactive taking effect of provisions enacted to remedy nullity, BayVGH – Bavarian Higher Administrative Court, 6th Senate, judgment of 26 March 1984 – 6 B 82 A.1075 –, Bavarian Council of Municipalities, *Bayerischer Gemeindetag* – BayGT 1985, p. 60). 52

III.

[…] 53

Kirchhof Gaier Eichberger

Schluckebier Masing Paulus

Baer Britz

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 5. März 2013 - 1 BvR 2457/08

Zitiervorschlag BVerfG, Beschluss des Ersten Senats vom 5. März 2013 - 1 BvR 2457/08 - Rn. (1 - 53), http://www.bverfg.de/e/rs20130305_1bvr245708en.html

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