H e a d n o t e s

to the Judgment of the First Senate of 5 November 2014

– 1 BvF 3/11 –

1.The Aviation Tax (*Luftverkehrsteuer*) is a miscellaneous tax on transactions related to motorised means of transport within the meaning of Article 106(1) no. 3 of the Basic Law.

2.In the event of selecting an object of taxation the legislature already complies with the principle of equality if this choice is based on substantive reasons, if it can be ruled out that inappropriate or arbitrary reasons influenced the considerations and if the specific allocation of burdens does not conflict with other constitutional provisions.

3.Due to the legislature's extensive leeway in selecting taxable objects, the principle of equality does not require the legislature, after having decided on a specific object of taxation, to also tax any similar taxable objects that are also suitable for the tax purpose.

FEDERAL CONSTITUTIONAL COURT

– 1 BvF 3/11 –

Pronounced
on 05 November 2014
Kehrwecker
Amtsinspektor
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

**In the proceedings
for**

constitutional review

of whether the Aviation Tax Act (*Luftverkehrsteuergesetz* – LuftVStG) of 9 December 2010 (Federal Law Gazette – *Bundesgesetzblatt* – BGBl I p. 1885) in the version of the Act Amending the Energy Tax Act and the Electricity Tax Act as well as the Aviation Tax Act (*Gesetz zur Änderung des Energiesteuer- und des Stromsteuergesetzes sowie zur Änderung des Luftverkehrsteuergesetzes*) of 5 December 2012 (Federal Law Gazette I p. 2436) is void,

applicant: Government of the *Land* Rhineland-Palatinate,
represented by the Minister-President,
Peter-Altmeier-Allee 1, 55116 Mainz

– authorised HÜLSEN MICHAEL HAUSCHKE
SEEWALD Rechtsanwälte,
Tauentzienstraße 11, 10789 Berlin –

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice-President Kirchhof,

Gaier,

Eichberger,

Schluckebier,

Masing,

Paulus,

Baer,

Britz

held on the basis of the oral hearing of 20 May 2014:

Judgment:

§ 1, § 2 numbers 4 and 5, § 4, § 5 nos. 2, 4c and 5, §§ 10 and 11 as well as Annexes 1 and 2 of the Aviation Tax Act of 9 December 2010 (Federal Law Gazette I p. 1885) in the version of the Act Amending the Energy Tax Act and the Electricity Tax Act as well as the Aviation Tax Act of 5 December 2012 (Federal Law Gazette I p. 2436) are compatible with the Basic Law.

R e a s o n s:

A.

The abstract judicial review proceedings concern the Act on the Imposition of an Aviation Tax on commercial passenger flights departing from Germany (*Gesetz über die Erhebung einer Luftverkehrsteuer auf in Deutschland startende gewerbliche Passagierflüge*). 1

I.

[…] 2

II.

The Aviation Tax Act (*Luftverkehrsteuergesetz* – LuftVStG) creates a tax liability for passenger flights departing from Germany as from 1 January 2011, which are conducted by a commercial airline. […] 3

Departures from a domestic departure location with respect to transit and transfer flights are exempt from taxation [...]. The tax exemption also applies [...] in particular to medical and military flights or flights for other official purposes, repeated departures following an aborted flight, flights to domestic islands for residents of these islands, flights between islands in the North Sea with no road or rail connection with the mainland that is independent of tides, or between these islands and an inshore airport located on the mainland, circular flights in light aircraft as well as to flights of persons under the age of two years not occupying their own seat, and flights of flight crews. 4

[…] 5-6

[…] 7

§ 10

Tax Base

The tax amount is determined by the location of each chosen destination and the number of passengers carried.

§ 11

Tax Rate

(1) The tax per passenger amounts to

1. EUR 7.50 for destinations in a country listed in Annex 1 to this Act,

2. EUR 23.43 for destinations in a country listed in Annex 2 to this Act, and to

3. EUR 42.18 for destinations in other countries.

(2) From 2013, the Federal Ministry of Finance is authorised to reduce the tax rates stated in section 1 by a percentage determined in agreement with the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, the Federal Ministry of Transport, Building and Urban Development and the Federal Ministry for Economic Affairs and Technology, by way of regulation and without the consent of the *Bundesrat*, and taking effect at the beginning of a calendar year. The percentage of reduction is calculated on the basis of the proportion of the previous year's revenues resulting from the inclusion of aviation into the greenhouse gas emission allowance trading system to the amount of EUR 1 billion. The revenues resulting from the inclusion of aviation into the greenhouse gas emission allowance trading system is estimated based on the revenues from the first six months of the previous year. The reduced tax rate is rounded to the nearest cent.

III.

The government of the *Land* of Rhineland-Palatinate applies for the Aviation Tax Act to be declared void by way of abstract judicial review proceedings. It claims that the Federation was lacking legislative competence and violations of Art. 3(1), Art. 12(1) and Art. 20(3) of the Basic Law (*Grundgesetz* – GG) caused by § 1(1), § 2 nos. 4 and 5, § 4, § 5 nos. 2, 4c and 5 as well as § 11(1) and (2) first sentence LuftVStG. 8

1. […] 9

2. […] 10

3. […] 11-15

4. […] 16

IV.

[…] 17-26

B.

§ 1, § 2 nos. 4 and 5, § 4, § 5 nos. 2, 4c and 5 and §§ 10 and 11 LuftVStG as well as their Annexes 1 and 2 are compatible with the Basic Law. 27

I.

The aforementioned provisions of the Aviation Tax Act, to which the application is in substance limited, are formally compatible with the Basic Law. The Federation's legislative competence to pass the challenged legal provisions is provided under Art. 105(2) alt. 1 GG in conjunction with Art. 106(1) no. 3 GG. Pursuant to Art. 105(2) alt. 1 GG, the Federation has, *inter alia,* concurrent legislative powers for taxes if it is entitled to the tax revenues in whole or in part. Art. 106(1) no. 3 GG allocates the revenues from road freight tax, motor vehicle tax and other taxes related to motorised means of transport to the Federation. The legal competence for tax legislation also authorises the Federation to pursue steering objectives by imposing the aviation tax (cf. in general: Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 98, 106 <118>). 28

1. The Aviation Tax constitutes a tax as provided for in the fiscal system because, in order to generate revenues for the Federation, it imposes an official payment obligation on tax debtors while these do not receive anything specific in return. The Aviation Tax is categorised as a tax on transactions. As such it is tied to activities or events of legal transactions (cf. BVerfGE 7, 244 <260>; 16, 64 <73>). 29

§ 1(1) LuftVStG links the aviation tax to the legal act authorising the departure of an airline passenger, thereby defining the object of taxation. Generally, the conclusion of a contract of carriage (against payment) constitutes the relevant legal transaction (thus, e.g., *Bundestag* document, *Bundestagsdrucksache* – BTDrucks 17/3030, p. 36 and 37). Insofar as § 1(2) LuftVStG equates the assignment of a seat on an airplane or rotorcraft to a passenger with a legal transaction within the meaning of § 1(1) LuftVStG in cases in which there has been no other preceding legal transaction within the meaning of the Act. This legal assumption aims to avoid legal loopholes in case of departure rights whose economic outcome is essentially the same as that of legal transactions yet whose nature is not that of such transactions. No constitutional concerns arise if atypical cases, not exactly matching the tax category in each individual case, are regulated in omnibus clauses to avoid revenue losses. This does not lead to a change in the overall classification of the tax category and the related legislative competence. 30

2. The aviation tax is a miscellaneous tax on transactions related to motorised 31

means of transport within the meaning of Art. 106(1) no. 3 GG. Beside road traffic vehicles, means of transport also comprise means of shipping, rail and aviation. Neither the wording nor the purpose of this provision indicates that the legislative competence is limited to road transport. The first two options stated in Art. 106(1) no. 3 GG, namely road freight tax and motor vehicle tax, relate exclusively to road transport – unlike the third option stated therein which is relevant in the present case. This does not lead to the conclusion that the latter also refers exclusively to road traffic. On the contrary, restricting the legal competence to road transport-related taxes would run contrary to the purpose pursued by extending the legal competence in 2009 “to miscellaneous taxes on transactions related to motorised means of transport”. According to that the Federation was to be granted comprehensive competence for the taxation of mobility in order to develop a coherent concept for the taxation of traffic (cf. BT-Drucks 16/11741, p. 1, 4).

II.

§ 11(2) LuftVStG is compatible with the Basic Law to the extent that the Federal Ministry of Finance is given authorisation to reduce the tax rates pursuant to § 11(1) LuftVStG by a percentage, in agreement with the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, the Federal Ministry of Transport, Building and Urban Development and the Federal Ministry for Economic Affairs and Technology, by way of regulation and without the consent of the *Bundesrat*, and taking effect at the beginning of a calendar year (see below under 1.). The provision meets the requirements stipulated in the Basic Law with respect to a legal authorisation of the executive branch to issue regulations in the field of tax law. Therefore, while the administrative branch may take relevant decisions regarding the tax rate itself, it is, pursuant to the Act, confined to performing arithmetic operations based on predetermined data with no discretion of its own and obliged to recalculate the rates annually (see below under 2.). 32

1. a) The requirement of a statutory provision stemming from the rule of law (Art. 20(3) GG) calls for the legislature to take all essential decisions in fundamental normative areas itself and may not leave them to other legislative authorities (cf. BVerfGE 49, 89 <146 and 147>; 84, 212 <226>). In tax law, where the decisions to impose tax burdens depend to a large extent on the intention of the legislature with respect to the object of taxation and the tax rate, the requirement of a statutory provision is applied strictly. Thus, tax law exists through the “*dictum* of the legislature” (cf. BVerfGE 13, 318 <328> with further references). 33

b) The Aviation Tax Act meets the aforementioned requirements. It determines the imposition of the aviation tax to a sufficient degree itself. The legislature sufficiently mapped out the tax burden with regard to the tax debtor, taxable event, tax base and tax rate in §§ 1, 4, 5, 6, 10 and 11(1) LuftVStG. The legal authorisation for issuing regulations set out in § 11(2) LuftVStG does not give the executive branch the permission to adopt a deviating decision as to “whether” or “how” to reduce the aviation tax 34

but only allows it to reassess the tax rates in accordance with clearly defined specifications.

This does not conflict with the fact that § 11(2) LuftVStG does not explicitly oblige the executive branch to issue the regulation for the tax rate reduction. The legislature assumed that the authorisation has to be exercised on an annual basis. […] Also, the objective to generate tax revenues in the total amount of EUR 1 billion *per annum* from both certificate trading and aviation tax can only be reached if the tax rate is reassessed accordingly on an annual basis. 35

The executive branch authorised by the legislature to issue regulations under § 11(2) LuftVStG also considers this provision to be mandatory. […] 36

2. The legal authorisation to issue regulations pursuant to § 11(2) LuftVStG meets the requirements of Art. 80(1) second sentence GG. 37

According to this Article, the content, purpose and scope of the authorisation granted must be set out in an act of parliament. If the elements of taxation – tax debtor, taxable object, tax base and tax rate – are determined in the act of parliament, the authorisation to issue regulations is generally sufficiently specific in the field of taxation. 38

The authorisation to issue regulations under § 11 LuftVStG contains all relevant specifications for imposing the aviation tax. It defines both the basis and the mode of calculation of the tax reduction. Pursuant to § 11(2) LuftVStG, the executive branch issuing the regulation is obliged to apply the tax rates defined in § 11(1) LuftVStG and to calculate the reduction in proportion of the previous year's revenues gained from the inclusion of aviation into the greenhouse gas emission allowance trading system to the amount of EUR 1 billion which, according to the explanatory memorandum of the Act, is the amount of revenues intended to be gained from the aviation tax. […] 39

III.

The provisions submitted for constitutional review are compatible with the principle of equality under Art. 3(1) GG. The selection of the taxable object in § 1(1) LuftVStG (see below under 1.), the tax privileges granted by § 5 nos. 2, 4c and 5 LuftVStG and by § 2 nos. 4 and 5 LuftVStG (see below under 2.) as well as the design of the tax rate under § 10 in conjunction with § 11(1) LuftVStG and Annexes 1 and 2 (see below under 3.) are unobjectionable. 40

The principle of equal burdening constitutes the basis for equality considerations in tax law. According to this principle, taxpayers must, *de facto* and *de jure*, be equally burdened by a tax law (cf. BVerfGE 117, 1 <30>; 121, 108 <120>; 126, 400 <417>). The principle of equality allows the legislature to retain an extensive leeway both in choosing the taxable object and in determining the tax rate (cf. BVerfGE 123, 1 <19>; established case-law). After an object of taxation is chosen and therefore a decision on a tax burden is made deviations from such a decision must, however, be in accordance with the principle of equality (requirement of consistent design of the basic tax 41

provision, cf. BVerfGE 117, 1 <30 and 31>; 120, 1 <29>; 121, 108 <120>; 126, 400 <417>). Accordingly, deviations require a specific factual reason (cf. BVerfGE 117, 1 <31>; 120, 1 <29>; 126, 400 <417>; 132, 179 <189, para. 32>) that is capable of justifying the unequal treatment.

1. a) It is compatible with Art. 3(1) GG that § 1(1) LuftVStG defines commercial passenger flights as taxable objects. In the field of tax law, the legislature has an extensive leeway in choosing the taxable object and determining the tax rate (cf. BVerfGE 21, 12 <26 and 27>; 117, 1 <30>; 120, 1 <29>; 122, 210 <230>; 123, 1 <19>; 127, 224 <245>). The legislature's authority to define the taxable object is based on its democratic legitimation for fiscal policy. Decisions on eligibility for taxation are substantially based on political judgments. Pursuant to the Basic Law the legislature is entitled to reach such judgments and must make them by enacting legislation. Therefore, with respect to such decisions, the legislature already complies with the principle of equality if the choice of the taxable object is based on a substantive reason and if it can be ruled out that improper or arbitrary considerations influenced the decision (cf. BVerfGE 120, 1 <29>) and if the specific decision to impose a tax on a taxable object does not conflict with other constitutional provisions. 42

b) The burden of regulatory taxes for financial purposes must be aligned with the economic capacity of the taxpayers (cf. BVerfGE 61, 319 <343 and 344>; 82, 60 <86>; 89, 346 <352>; 122, 210 <231>; 126, 400 <417>; 135, 126 <144 and 145>). The legislature may generally also exercise its fiscal competence and thus differentiate in order to achieve steering effects (cf. BVerfGE 93, 121 <147>; 99, 280 <296>; 105, 73 <112>; 110, 274 <292>; 116, 164 <182>; 117, 1 <31 and 32>; established case-law). It is entitled to influence economy and society not only by enacting rules and prohibitions, but also by adopting more indirect measures to steer behaviour. Consequently, citizens are not legally obliged to adopt a certain conduct, but are rather given a financial incentive in the form of exceptional charges levied for undesirable conduct or tax benefits for desirable conduct, as a motivation to act or abstain from acting in a certain way (cf. BVerfGE 98, 106 <117>; 117, 1 <31 and 32>). If such promotion and steering objectives are based on obvious legislative decisions, they are suitable for providing reasons justifying tax burdens or tax exemptions (cf. BVerfGE 105, 73 <112 and 113>; 110, 274 <293>; 116, 164 <182>; 117, 1 <32>). It is sufficient in this respect if the legislative decisions can be identified by applying the usual methods of interpretation. Steering purposes may, for example, be found in the explanatory memorandum to an act (cf. BVerfGE 116, 164 <191 et seq.>). In addition, it is possible to deduce the purpose on the basis of an overall evaluation of all tax provisions passed by the legislature (cf. BVerfGE 110, 274 <296 and 297>). 43

c) Furthermore, equality of taxation also depends on the respective nature of the tax. In the case of indirect taxes, the notion that tax debtors are burdened as equally as possible should not only be reflected by a design of the tax purpose which is in line with equality requirements (see BVerfGE 21, 12 <27>; 110, 277 <292>). But rather, also final or end consumers who are meant to bear the indirect tax burden (tax bear- 44

er) – via one or several levels of trade – must be taken into account (cf. BVerfGE 110, 274 <292>).

d) Applying these principles, choosing commercial passenger flights as taxable objects is in accordance with Art. 3(1) GG. The aviation tax constitutes a financial burden that combines the aim of public financing with an environmental protection objective (aa). This justifies levying a tax on aviation (bb). Limiting this tax to commercial passenger flights without including non-commercial and cargo flights is justified by factual reasons (cc). 45

aa) The objective of limiting air kilometres for the purpose of environmental protection, in particular climate protection, in addition to generating state revenues, is made sufficiently clear by linking in §§ 10, 11 LuftVStG the tax rate to the distance the taxed flight covered. The explanatory memorandum to the draft bill also reflects the legislature's decision to influence the – in the legislature's opinion – adverse environmental effects of commercial passenger flights. According to the explanatory memorandum the purpose of the Act is to integrate aviation into the system of mobility taxation. In order to create incentives encouraging environmentally responsible behaviour other modes of transport have already been burdened with consumption-oriented energy taxes. Furthermore, the explanatory memorandum stresses that environmental concerns must be taken into consideration when levying taxes (BTDrucks 17/3030, p. 36). 46

The objective of environmental protection pursued by the legislature constitutes a factual reason. Its legitimacy results, *inter alia*, from the mandate to preserve natural resources, as a responsibility to future generations, as stated in Art. 20a GG (cf. BVerfGE 118, 79 <110>; 128, 1 <37>). This mandate may require taking measures for the protection against threats, and legitimise risk provisioning. Climate protection, as one aim of the tax, also belongs to the environmental goods protected under Art. 20a GG. 47

bb) By burdening commercial passenger flights, the legislature chose the object of taxation in accordance with the Constitution. Meanwhile, the aviation tax has even been recognised under constitutional law, namely in Art. 106(1) no. 3 GG. Such flights have an adverse effect on the environment and fiscal steering in this respect serves climate protection. 48

Moreover, even compared with other types of transportation, taxation of commercial passenger flights does not lead to double taxation, violating the principle of equality, with regard to the burdening of aviation as of 2012 due to the emissions trading system. With the arrangement set out in § 11(2) LuftVStG, the legislature has already ensured that the cumulative burden resulting from these two factors does not exceed the annual amount of EUR 1 billion, which is the amount of revenues that is expected to be gained from the aviation tax alone and to be actually generated in practice. In addition, commercial aviation in Germany is currently not taxed with an energy tax ("kerosene tax"). According to estimates, that leads to annual tax savings for the com- 49

panies amounting to EUR 680 million only considering domestic aviation.

cc) The legislature was not obliged to impose, for reasons of equality, the aviation tax also on non-commercial and cargo flights. 50

The choice of commercial passenger flights constitutes the determination of a taxable object – a decision which must merely be based on comprehensible factual reasons. The legislature framed the taxable object narrowly in § 1(1) LuftVStG, which is the key provision of the Act. This indicates that commercial passenger flights are considered a separable item, which can be treated differently from other forms of aviation. The legislative decision to exempt non-commercial aviation and cargo flights as opposed to commercial passenger flights from the aviation tax must therefore only be reviewed with respect to whether there is a factual reason which will not be considered arbitrary when assessed with due regard for equity considerations (cf. BVerfGE 26, 1 <8>; 46, 224 <233, 239 and 240>; 120, 1 <31>). However, by virtue of its extensive leeway in selecting taxable objects, the legislature is not required under the principle of equality to also tax all similar taxable objects suitable for the tax purpose, once a specific object of taxation is chosen. 51

In determining the object of taxation, the legislature has not exceeded the permissible scope of its leeway. With respect to non-commercial flights the explanatory memorandum to the draft bill justifies the approach by the fact that such flights are already taxed with an energy tax. Whereas regarding cargo flights, it justifies the approach by emphasising the different conditions of competition on separate markets for passenger and for cargo flights, respectively (BTDrucks 17/3030, p. 36). These aforementioned distinctions are based on the financial capacity of the groups concerned and are thus compatible with the principle of equal burdening. The assessment that non-commercial flights cannot be burdened to the same extent because they are already subject to a different tax, and that the financial capacity of cargo flights with their entirely different market conditions is limited, does not exceed the legislature's leeway to decide what source of taxation it generally wants to tap into. 52

2. The derogations provided in § 5 numbers 2, 4c and 5 LuftVStG and in § 2 numbers 4 and 5 LuftVStG are also compatible with Art. 3(1) GG. After the taxable object has been chosen, the legislature is bound by the stricter rules of Art. 3(1) GG. The deviation from the decision on the tax burden, once taken by determining the taxable object, is based on specific factual reasons capable of justifying the unequal treatment. 53

a) The tax exemption for island supply flights specified in § 5 no. 5 LuftVStG constitutes an unequal burden. The tax privilege is granted irrespective of the distance covered by the flight, which is merely determined in a standardised manner. […] 54

However, the benefit determined in a tax exemption satisfies the principle of equality, because it is based upon a factual reason justifying a deviation from the financing and steering purpose of the tax. If the legislature intends to promote a specific behav- 55

iour of the citizens it deems desirable for economic, social, environmental or socio-political reasons, it has an extensive leeway to do so. In its decision as to which natural or legal persons are to be supported by way of financial benefits granted by the state the legislature is largely independent (cf. BVerfGE 17, 210 <216>; 93, 319 <350>). While the legislature remains bound by the principle of equality, it may take into account a wide range of factual considerations, especially if the group of beneficiaries of the regulation is appropriately defined, and provided that the assessment of the relevant life circumstances, on which the regulation is based, is not contrary to every life experience (cf. BVerfGE 17, 210 <216>). These considerations also apply if the legislature grants a subsidy under tax law rather than providing it in form of an immediate financial contribution (cf. BVerfGE 110, 274 <293>).

Reducing the aviation tax for flights to and from domestic, Danish and Dutch North Sea islands without any traffic connection to the mainland that is not dependant on tides […] is based on the purpose of securing the traffic connections of the affected islands (BTDrucks 17/3030, p. 38). This also justifies the exemption of tourist traffic from the tax. […] 56

b) The exemption of military and other official flights (§ 5 numbers 2 and 4c LuftVStG) is already justified by the type of object chosen for taxation. The legislature was entitled to exclude military and other official flights given that they are not covered by the category of commercial passenger flights. The exemption is furthermore justified by the fact that due to the intended passing-on to the passenger the tax collection would, in this case, ultimately defeat its revenue purpose. The burden resulting from a taxation of official aviation flights would ultimately be borne by the state budget. Thus, the tax burden would have the result that merely financial resources are in fact only shifted between various public budgets or within the same public budget. Revenues for the state would in fact not be generated. […] 57

c) The tax privilege for connecting passengers (§ 2 numbers 4 and 5 LuftVStG in conjunction with § 1(1) LuftVStG) is compatible with the principle of equality laid down in Art. 3(1) GG. 58

aa) If a single legal transaction – generally a single ticket purchase – forms the basis of an air journey beginning abroad, leading to a stop-over in Germany and continuing, with or without having to change airplanes, to a destination in Germany or abroad, the right for the departure following the stop-over in Germany is exempt from tax. The departure abroad is not taxed according to the underlying definition in § 1(1) LuftVStG, because there is no “domestic departure airport”. As a result, such flights are not taxed at all. In the case of feeder flights departing from a domestic airport, aviation tax is charged only for the feeder flight, not for the repeated departure, meaning the tax is charged only once. However, the tax-exempted repeated departures from German airports and airfields following stop-overs within the meaning of § 2 no. 5 LuftVStG do not noticeably differ from flights charged with the aviation tax with respect to the economic capacity of the exempt passengers or the environmental pollution they cause. 59

[…]

bb) If a tax law leads to an exemption causing unequal taxation of the relevant taxable objects within a certain tax type, such an exemption can be justified with regard to the principle of equality. The legislature's intention has to be the promotion or steering of the taxpayers' behaviour for reasons of the common good (cf. BVerfGE 93, 121 <147>). If there are sufficient reasons for the common good, it is constitutionally unobjectionable that a tax relief can even lead to the total tax exemption of specific taxable objects (cf. BVerfGE 117, 1 <32>). 60

cc) By these measures, the tax exemption privileging connecting passengers stands up to constitutional review because it is based on legitimate economic policy purposes. The tax privilege is intended to protect German airports as international hubs by imposing a lower aviation tax burden on them in this capacity (cf. BTDrucks 17/3030, p. 4). […] 61

3. The challenged design of the tax scale in § 10, § 11(1) LuftVStG does not violate the general principle of equality. By linking the taxation to the distance covered by the flight, the legislature has chosen a suitable and sufficiently realistic standard of taxation. For the sake of simplification, distortions caused by the Act are still tolerable. 62

a) In § 10 LuftVStG, the legislature determined that the location of each chosen destination is the standard for taxation. Read in conjunction with § 11 LuftVStG and its two annexes, one can conclude the burdening decision of the Act: The amount of aviation tax to be paid by the airline for each passenger and to be borne by each passenger when passed on to him generally increases as the travel distance extends. This design is consistent with the Aviation Tax Act's purpose of contributing to environmental protection. 63

b) aa) However, the fact that § 11(1) LuftVStG links the tax amount to the largest commercial airport in the destination country rather than the actual destination airport results in a constellation in which those countries that are specified in annex 1 to § 11 (1) LuftVStG and that are very large or have overseas territories benefit from tax privileges in deviation from the principle of the Act to burden aviation depending on the travel distance. In such countries, the largest commercial airports determining the tax rate are indeed less than 2500 kilometres away from Frankfurt Airport; however, this is not true for all the other airports. […] 64

bb) The resulting unequal burden does not result in the finding that the tax standard determined by the legislature is incompatible with Art. 3(1) GG. The destination country's airport with the largest volume of commercial flights and thus determining the tax rate is actually the destination airport of a considerable part of the taxed flights and thus correctly reflects the measure established with respect to the distance. As far as the destination is not identical with the largest commercial airport, it is still within a 2500 km radius of Frankfurt am Main in most cases. Distortions only arise in the cases of a few very large countries or in the case of flights to some countries' overseas 65

territories.

For the sake of simplification, such distortions are still tolerable under equality principles. If the resulting advantages are in due proportion to the inequality of the taxation inevitably resulting from the standardisation (cf. BVerfGE 110, 274 <292>; 117, 1 <31>; 120, 1 <30>; 123, 1 <19>), and if it is realistically orientated towards the standard case (cf. BVerfGE 117, 1 <31>; 120, 1 <30>; 123, 1 <19>; 132, 39 <49, para. 29>) and if there is a reasonable and comprehensive reason (cf. BVerfGE 123, 1 <19>), the tax legislature may determine tax rates in a standardised way in the interest of simplifying administrative procedures, thereby disregarding the particularities of the individual case. In the case at hand, the Aviation Tax Act is realistically oriented towards the airport with the highest traffic volume in the relevant country and where most flights arrive. This simplified statutory standardisation in favour of a rather general catalogue of destination countries avoids having to exactly calculate the actual distance between two airports for each flight. Also in the interest of the affected airlines, being the tax debtors, the classification of flights in terms of the tax rate is thereby simplified in those mass operations of tax law. Above all, the resulting inequalities of the stipulated rate with three distance zones are very small in number. […] 66

cc) […] 67

IV.

The taxation of commercial passenger flights pursuant to § 1(1) in conjunction with § 11(1) LuftVStG neither violates the freedom of occupation of the airlines, being the tax debtors, nor the passengers' freedom of occupation, who are affected as taxpayers following the actual passing-on of the tax. 68

1. The aviation tax does not constitute an interference with the passenger's freedom of occupation because it lacks any occupation-regulating component. Imposing taxes and other charges interferes with the scope of protection of Art. 12(1) GG if it is closely linked to practicing an occupation and clearly shows an objective tendency to regulate an occupation (cf. BVerfGE 37, 1 <17>; 98, 106 <117>; 110, 274 <288>). Such an occupation-regulating tendency does not exist if the tax affects all consumers, irrespective of their professional activities (cf. BVerfGE 110, 274 <288 and 289>). This generally holds true for the passengers; tourists, professionals, persons undergoing work-related training, passengers on their way to visit family and others are equally affected. Even if a passenger's professional activity involves a large number of flights, the tax does not have an occupation-regulating effect due to its low amount compared to the remaining airfare costs. 69

2. However, there is an objective tendency of the aviation tax to regulate the occupation with respect to the airlines, due to the tax's steering purpose. The resulting interference with the freedom of occupation (a) is nonetheless unobjectionable under constitutional law (b). 70

a) The objective of the Act is to set incentives to adopt a more environmentally responsible behaviour. To reach this objective, the legislature increases the costs for the services rendered by the airlines in varying degrees in order to reduce the total amount of aircraft movements. Thereby, it also controls the occupational behaviour of the airlines. Offers a business makes on the market are protected under the freedom of occupation pursuant to Art. 12(1) GG. According to the explanatory memorandum to the Act, the commercial aviation sector, which is exempt from the consumption-oriented energy tax, is given an incentive to use fuels in an energy-efficient way. That shows that the legislature intends to control the occupational behaviour of the airlines by, for example, prompting the airlines to offer fuel-efficient services. 71

b) The impairment of the airlines' freedom of occupation is justified by the legislature's intention to protect the environment. 72

Due to the resulting cost pressure, the burden of the aviation tax is suitable in terms of motivating airlines to improve the utilisation of flights or reduce inefficient flights. When it comes to steering purposes pursued by means of taxes, the legislature may accept that the steering objective is not reached in all instances (cf. BVerfGE 98, 106 <121>). Compared with prohibitions having a direct legal effect with no possibility of avoidance, taxation is the less restrictive measure because the taxed person can choose between adopting the behaviour intended by the legislature and making a payment. The impairment of the freedom of occupation is not disproportionate to the intended purpose of steering potential taxpayers in their behaviour. In this respect, it should be considered that the impairment of the airlines' occupational activity resulting from the steering purpose pursued by means of the tax is relatively small. It affects legal entities, for whom the right to free personal development as protected by Art. 12(1) GG has rather little weight, while the climate policy objectives pursuant to Art. 20a GG may be given high priority. The purpose and intensity of the interference are thus in due proportion to each other. 73

Kirchhof Gaier Eichberger

Schluckebier Masing Paulus

Baer Britz

Bundesverfassungsgericht, Urteil des Ersten Senats vom 5. November 2014 - 1 BvF 3/11

Zitiervorschlag BVerfG, Urteil des Ersten Senats vom 5. November 2014 - 1 BvF 3/11 - Rn. (1 - 73), http://www.bverfg.de/e/fs20141105_1bvf000311en.html

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