**H e a d n o t e s**

**to the Order of the Second Senate of 10 November 1998**

– 2 BvL 42/93 –

**Art 6.1 of the Basic Law (*Grundgesetz* – GG) requires that with regard to the taxation of a family the minimum income of all family members is to be exempt from tax:**

**a) Here, the minimum income defined by the law on social assistance forms the boundary for minimum income in terms of income tax which may be exceeded, but which must indeed be reached.**

**b) The full amount of minimum income in terms of income tax is to be exempted from income tax for all taxpayers – regardless of their individual marginal tax rate.**

**c) The residential requirement is not to be calculated in accordance with the per capita method, but in accordance with the additional requirement.**

FEDERAL CONSTITUTIONAL COURT

**– 2 BvL 42/93 –**

**IN THE NAME OF THE PEOPLE**

**In the proceedings**
**for**
**constitutional review**

of whether § 32.6 of the Income Tax Act (*Einkommensteuergesetz*) in the version of the 1986/1988 Tax Reduction Act (*Steuersenkungsgesetz*) of 26 June 1985 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 1153, Federal Tax Gazette, *Bundessteuerblatt* – BStBl I p. 391) is compatible with Article 3.1 in conjunction with Article 6.1 of the Basic Law insofar as according to this provision parents with one child may only claim a (joint) child allowance of DM 2,484

– order of suspension and referral from the Federal Finance Court (*Bundesfinanzhof* – BFH) of 16 July 1993 – III R 206/90 –

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Limbach,

Kirchhof,

Winter,

Sommer,

Jentsch,

Hassemer,

Broß,

Osterloh

held on 10 November 1998:

**§ 32.6 of the Income Tax Act in the version of the 1986/1988 Tax Reduction Act of 26 June 1985 (Federal Law Gazette I p. 1153) was incompatible with Article 3.1 in conjunction with Article 6.1 of the Basic Law (*Grundgesetz* – GG) in its application to the 1987 assessment period insofar as according to this provision parents with one child could only claim a joint child allowance of 2,484 Deutsche Mark.**

**Reasons:**

**A.**

The submission concerns the question of whether support for maintenance of a child granted by virtue of child benefit and child income tax allowances in the 1987 assessment period meets the constitutional requirements, as were illustrated in particular in the orders of the Federal Constitutional Court of 29 May 1990 (Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 82, 60) and of 12 June 1990 (BVerfGE 82, 198). 1

**I.**

To compensate for the general burdens associated with the maintenance of children, parents are granted child income tax allowances and child benefit in accordance with the so-called dual system (see BVerfGE 82, 60 (78-79) referring to *Bundestag* document (*Bundestagsdrucksache* – *BTDrucks*) 9/2140, p. 66). 2

1. § 32.6 sentence 1 of the Income Tax Act in the version of the 1986/1988 Tax Reduction Act of 26 June 1985 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 1153) provided a child allowance amounting to DM 1,242 for each child of the taxpayer to be allowed for. With spouses who were assessed jointly for income tax in accordance with §§ 26 and 26b of the Income Tax Act, the joint child allowance was doubled to DM 2,484 in accordance with § 32.6 sentence 2 of the Income Tax Act. The child allowance was also granted in this amount if a parental couple unrestrictedly liable to income tax did not meet the requirements of § 26.1 sentence 1 of the Income Tax Act – joint assessment –, but a parent applied for the transfer of the child allowance of the other parent to himself or herself and the other parent consented to this application (§ 32.6 sentence 4 of the Income Tax Act). 3

§ 32.6 had the following wording in the 1987 assessment period: 4

A child allowance of 1,242 Deutsche Mark shall be deducted from income for each child of the taxpayer to be allowed for. Among spouses who are assessed for income tax jointly in accordance with §§ 26 and 26b, a child allowance of 2,484 Deutsche Mark shall be deducted if the child is the child of both spouses. A child allowance of 2,484 Deutsche Mark shall also be deducted if 5

1.the other parent died prior to the commencement of the calendar year or has not been unrestrictedly liable to income tax during the entire calendar year, or 6

2.the taxpayer alone has adopted the child or the child is only his or her foster child. 7

In derogation from sentence 1, in the case of a parent couple unrestrictedly liable to income tax not meeting the preconditions of § 26.1 sentence 1, on request by one parent the child allowance of the other parent shall be transferred to him or her if he or she meets his or her maintenance obligation towards the child for the calendar year, but the other parent does not do so, or only to an insignificant degree, or if the other parent consents to the application; the consent may not be withdrawn. 8

2. The child benefit for the first child was DM 50 in accordance with § 10.1 of the Federal Child Benefit Act (*Bundeskindergeldgesetz*) in the version applicable to the 1987 assessment period promulgated on 21 January 1986 (on the legal development see BVerfGE 43, 108 (109-110); 82, 60 (61-62); 91, 93 (94 et seq.)). 9

**II.**

The plaintiff in the original proceedings was individually assessed for income tax in 1987, the year under contention. The Tax Office approved a child allowance in the amount of DM 2,484 in respect of the plaintiff's son which the plaintiff had applied for with the consent of the other parent. 10

In his objection, the plaintiff requested the approval of a higher child allowance. The objection and the action addressed against its rejection were unsuccessful. 11

The plaintiff continues to pursue his action with the appeal on points of law, and complains that neither the basic allowance nor the child allowance were sufficient in order to exempt his minimum income and that of his son from tax. 12

**III.**

1. The III Senate of the Federal Finance Court suspended the proceedings in order to request a ruling of the Federal Constitutional Court on the legal validity of § 32.6 of the Income Tax Act. § 32.6 of the Income Tax Act was said to be incompatible with Article 3.1 in conjunction with Article 6.1 of the Basic Law insofar as according to this provision parents with one child could only claim a child allowance totalling DM 2,484. 13

[…] 14-33

**IV.**

The President of the Federal Finance Court has submitted a statement of the IX Senate on the submission order. The Federal Minister of Finance has made a statement for the Federal Government. 34

1. The IX Senate of the Federal Finance Court shares the view of the submitting III Senate, according to which the child allowance for 1987 does not meet the constitutional requirements. […] 35-37

2. In the view of the Federal Government, the submission is unfounded. The amount of the child allowance in 1987 is said to also be in compliance with the constitutional 38-41

principles which the Federal Constitutional Court had developed in its rulings. Children's fiscal minimum income which was to be exempted was said to be DM 353 per month, DM 4,236 per annum. […]

a) […] 42

b) […] 43

c) […] 44

d) […] 45

e) This […] was to be compared for the first child with a child allowance of DM 2,484 and child benefit of DM 600 per annum. If child benefit were to be converted to a child allowance of DM 1,764 and for fiscal reasons rounded off to the amount of DM 1728, which is divisible by 108, it would be sufficient together with the child allowance to cover the minimum income of roughly 78% of all taxpayers with one child. The minimum income for children was hence said to have been allowed for in full up to a taxable income of DM 31,645/DM 62,423 (basic/splitting tax table). The child allowance and child benefit was said to not completely cover the minimum income of roughly 22% of taxpayers with one child from a marginal fiscal burden of roughly 35.4%. Having said that, the increases in the fiscal burden in each case were said to be only small in this instance; the additional fiscal burden exceeded DM 100 with one child with regard to only roughly 11% of taxpayers, and only exceeded DM 200 per annum in roughly 5% of cases. 46

The overall provisions of the Income Tax Act were said to be ultimately constitutional within the framework of the uncertainties to be accepted in such an estimate. 47

**B.**

The submission is admissible. 48

[…] 49

**C.**

§ 32.6 of the Income Tax Act in the version of the 1986/1988 of the Tax Reduction Act was incompatible with Article 3.1 in conjunction with Article 6.1 of the Basic Law in its application to the 1987 assessment period insofar as according to this provision parents with one child were only able to claim a child allowance totalling DM 2,484. 50

**I.**

In accordance with now established case-law of the Federal Constitutional Court, the Basic Law demands that a suitable, realistic amount of expenditure necessary to maintain a minimum standard of living is to be exempted from income tax. Social assistance law offers a comparative level quantifying the minimum income: The minimum income to be exempted from income tax may at any rate not go below the amount granted by the state to a needy person in the context of state welfare. 51

1. The constitutional examination standard is the principle emerging from Article 1 in conjunction with Article 20.1 of the Basic Law, namely that the state must exempt the taxpayer's income from tax insofar as it is needed to provide the minimum preconditions for a dignified existence (see BVerfGE 82, 60 (85)). The requirement necessary to maintain a minimum standard of living forms constitutionally the lower limit for encroachment by income tax (see BVerfGE 87, 153 (169)). Article 6.1 of the Basic Law requires over and above this that in the case of taxation of a family the minimum income of all family members must remain tax-free (see BVerfGE 82, 198 (207)). 52

2. The principle of equality (Article 3.1 GG) establishes further constitutional requirements in its character as "horizontal fiscal equality" (see BVerfGE 82, 60 (89-90)). It requires that taxpayers with equal ability to pay should be taxed in the same amounts. Also, recipients of higher incomes must be equally taxed depending on their ability to pay in comparison to recipients of equally high income; reduced ability to pay by virtue of a maintenance obligation towards a child, accordingly, must also be appropriately allowed for in their case in this comparison. 53

3. The expenditure necessary to maintain a minimum standard of living to be accommodated constitutionally must be measured – realistically – by the actual requirement (see BVerfGE 66, 214 (223); 68, 143 (153); 82, 60 (88)). Its lower limit is lent concrete shape by the social assistance benefits which are to guarantee the minimum income recognised in the social welfare state, calculated in terms of consumption and also regularly adjusted to the changed circumstances. The legislature must as a minimum leave to the income recipient the amount from his or her remuneration that it provides from public funds to a needy party in order to meet a requirement necessary to maintain a minimum standard of living (see BVerfGE 87, 153 (171); 91, 93 (111)). 54

a) The constitutionally specified standard of the minimum requirement necessary to maintain a minimum standard of living recognised under the law on social assistance is calculated on the basis of the Federal Social Assistance Act (*Bundessozialhilfegesetz*) in the following items: 55

1. standard rate in accordance with § 22.3 of the Federal Social Assistance Act 56

2. benefits for housing and heating in accordance with § 3.1 and 3.2 of the Standard Rate Ordinance (*Regelsatzverordnung*) 57

3. one-off assistance for additional fundamental requirements not covered by ongoing benefits 58

4. additional requirement in accordance with § 23.4 no. 1 of the Federal Social Assistance Act to account for the increased private needs caused by gainful employment. 59

b) These items to be accommodated on the basis of constitutional considerations (see BVerfGE 87, 153 (171)) may be typified in a generalising manner making it easi- 60

er to process high-quantity procedures, but in so doing are to be measured such that the deduction amounts in all cases cover the requirement necessary to maintain a minimum standard of living; no taxpayer is hence required as a result of income taxation to ensure his or her requirement necessary to maintain a minimum standard of living by claiming state benefits (see BVerfGE 87, 153 (172)).

4. a) The fundamental constitutional questions on the reason and amount of the constitutionally required allowance of child maintenance expenditure are largely clarified by the rulings of the Federal Constitutional Court (BVerfGE 82, 60; 87, 153). However, the method of calculating the tax-free maintenance expenditure for the minimum income of children to be exempted from tax by the legislature is a matter for clarification. 61

The Federal Constitutional Court also previously included in its calculations the residential requirement value which is material to the minimum income, but did not yet consider an occasion to have arisen to explicitly set out the calculation method (left open in the Order of the First Senate, BVerfGE 91, 93 (113 et seq.), see also Order of the Third Chamber of the First Senate of 13 December 1996 – 1 BvR 1474/88 – *Höchstrichterliche Finanzrechtsprechun*g – HFR 1997, p. 251). The Federal Constitutional Court furthermore did not state precise figures as to the tax rate with which the child benefit actually paid is to be converted into a fictitious child allowance. In the Order of the First Senate, it merely ruled when unconstitutionality certainly did not arise. In the same ruling, with regard to the scope for assessment and prognosis it specifies a maximum guideline value of 15 % by which fiscal law may fall below the average social assistance requirement (see BVerfGE 91, 93 (115-116)). In particular the Federal Finance Court (BFH, *Deutsches Steuerrecht* – DStR 1998, p. 448 (449)) considers that there is still a need for further clarification here. 62

b) These three sub-values – the assessment technique for the residential requirement, the 15 % tolerance limit and the marginal tax rate which is material to the comparison – influence the amount of the minimum child income: The amount of the residential requirement determines the requirement figures as a whole; with the conversion of the child benefit into a child allowance, the applicable marginal tax rate directly determines the amount of the requirement to be accommodated by law; the tolerance limit opens an evaluation framework for the question of constitutionality. 63

5. a) The residential requirement is not to be calculated in accordance with the per capita method, but in accordance with the additional requirement. This per capita method, as used as a basis with the social assistance values, in principle presumes a proportional expansion of the residential requirement with each further individual; an equal share of the total residential premises is estimated for each person. By contrast, it should however be taken into account that an additional person in an existing household certainly does not give rise to a proportional additional requirement for shared rooms such as kitchen, bathroom or hall. For this reason, the calculation of the residential requirement is to be taken as a basis, using the technique of the addi- 64

tional requirement calculation, in accordance with which the legislature also currently assesses the child income tax allowance (see 1996 Report on the Amount of the Minimum Income of Children and Families (*Bericht über die Höhe des Existenzminimums von Kindern und Familien*), BTDrucks 13/381, p. 4 as well as Report on the Amount of the Minimum Income of Children and Families for 1999, BTDrucks 13/9561, p. 4). This method covers typical cases of the actual additional expenditure for the residential requirement.

b) The minimum income defined by the law on social assistance forms the boundary for minimum income in terms of income tax which may be exceeded, but which must indeed be reached. The First Senate of the Federal Constitutional Court has put forward, as one of the reasons for a tolerance value of 15%, the circumstance that the residential requirement is alleged to have been calculated with the *guideline values* used there in accordance with the per capita method, and not in accordance with the lower values which merely accommodate the necessary additional requirement of residential premises (BVerfGE 91, 93 (113 et seq.), referring to the statements of the Federal Ministry for Family Affairs and Senior Citizens, the case-law of the Federal Administrative Court (*Entscheidungen des Bundesverwaltungsgerichts* – BVerwGE 79, 17, 20) and the case-law of the Federal Finance Court (Collected Decisions of the Federal Finance Court (*Sammlung der Entscheidungen des Bundesfinanzhofs* – BFHE) 171, 534, 539 et seq.)). The requirement calculation in accordance with the per capita method reaches values which tend to be higher, which can justify a 15% tolerance. In principle, however, also the First Senate requires accommodation of the minimum income “where possible in all cases” within precise, realistic limits (BVerfGE 91, 93 (115)). 65

aa) In the case at hand, the calculation of the requirement values of 1987 is however based not on the per capita method, but on the additional requirement method. The requirement figures are based not on average guideline values (see BVerfGE 91, 93 (112)), but only on the minimum requirement necessary to maintain a minimum standard of living. These requirement values to determine the minimum standards of living are in each case only statistically documented *minimum* amounts which for this reason may be exceeded, but which must indeed be reached (see Report on the Amount of the Minimum Income of Children and Families of 1996, BTDrucks 13/381, p. 4). 66

bb) Falling below statistically-calculated minimum amounts can also not be justified by the task of setting requirement figures for the future without being able to forecast future developments with certainty. The requirement necessary to maintain a minimum standard of living has thus not fallen in the Federal Republic in the past 50 years, but has regularly increased (Statistical Yearbook (*Statistisches Jahrbuch*) 1994, p. 662). The adjustment of the minimum income under income tax law has as a rule not kept pace with these increases. For this reason, at best it would be necessary to exceed the minimum values – by way of prevention or compensation. 67

c) Horizontal equality requires the full tax exemption of the minimum requirement necessary to maintain a minimum standard of living for the children of all taxpayers, regardless of their individual marginal tax rate. 68

aa) The conversion of child benefit into a tax allowance must accommodate the constitutional principle of horizontal fiscal justice, in accordance with which taxpayers whose ability to pay is equal are also to be taxed equally (see BVerfGE 82, 60 (89-90)). An additional fiscal burden on taxpayers with children in need of maintenance, in comparison with childless taxpayers with the same income, cannot be justified by taxpayers with a higher income being able to more easily endure lesser tax relief. This reasoning would permit in circumstances in which only the income of the taxpayer in question is sufficiently high any unequal fiscal treatment as against other recipients of the same amount of income, and would undermine – ultimately to the detriment of the children – the principle of taxation in accordance with ability to pay. 69

bb) Allowance for the minimum expenditure necessary to maintain a minimum standard of living for child maintenance which is not sufficient in all cases in income tax law is not justifiable with the necessity of a statutory generalisation. Each statutory provision must generalise (see BVerfGE 82, 126 (151); 96, 1 (6)), may in principle be orientated to the standard case, and in particular need not accommodate all possible variants of the respective individual case by means of special regulations. With constitutionally required (see C.I.1.-3. above) allowance for the minimum expenditure necessary to maintain a minimum standard of living for child maintenance, however, no individual case-related specialities are to be taken up in the elements and where appropriate to be typified; rather, a requirement that is equal for all is to be included in the requirements under the law on income tax. 70

If the legislature structures the compensation for children in accordance with the dual system by combining child allowance and child benefit, it must include on converting child benefit into a child allowance, which then becomes necessary, its own requirements of income tax law. The progressive income tax rate as defined by law applies only to taxable income (§ 2.5 sentence 1 of the Income Tax Act). This assessment base must be reduced by the fiscal minimum income, and is thus not open to imposition of income tax in the respective amount determined by law – be it at the starting or top rate. 71

cc) The principle of allowing in the assessment base for the minimum expenditure necessary to maintain a minimum standard of living for child maintenance with regard to all taxpayers, regardless of their individual marginal tax rate, also follows from the principle of consistency (see BVerfGE 84, 239 (271); 87, 153 (170); 93, 121 (136)). The legislature may in principle allow for the child-related reduction in ability to pay either in fiscal law, or instead of this in social law by granting sufficient child benefit, or may indeed combine provision of support in fiscal law and in the law on child benefit (see BVerfGE 82, 60 (84) referring to BVerfGE 43, 108 (123-124); 61, 319 (354)). The impact of the respective results from the various methods must however be equiva- 72

lent. This would be contradicted if in the conversion of child benefit into a fiscal child allowance the child-related reduction in the ability to pay was not equally fully accommodated for each income taxpayer as would be the case if this reduction in ability to pay were to be accommodated solely by a tax allowance (BVerfGE 82, 60 (97)).

6. a) If the amount of the minimum requirement necessary to maintain a minimum standard of living is calculated in accordance with the data transmitted by the Federal Government […] and with the calculation method recently used as a basis – housing costs calculated in accordance with the additional requirement method on the basis of a special survey of the Federal Statistical Office (see statement in the proceedings 2 BvR 1852/97 referring to BTDrucks 13/9561 p. 4) – but in doing so the minimum requirement for all taxpayers – regardless of their marginal tax rate – is fully allowed for on the basis of constitutional considerations, and also no margin of tolerance is granted, the minimum requirement necessary to maintain a minimum standard of living of a child in the 1987 assessment period is DM 4,416 per child per year. This minimum requirement is calculated from the standard social assistance rate for children amounting to DM 253, one-off benefits of DM 40, an additional rent requirement amounting to DM 62 and heating costs amounting to DM 13 for each child per month. This gives rise to a monthly requirement of DM 368, and an annual requirement of DM 4,416. 73

b) This minimum income to be allowed for on the basis of constitutional considerations, amounting to DM 4,416, is opposed in accordance with the legislation submitted for a constitutional examination by a minimum requirement of between DM 3,555 and 4,484 recognised by § 32.6 of the 1986/1988 Income Tax Act and the social law. The plaintiff in the original proceedings has a marginal tax rate of 44%; this gives rise for him to a statutory accommodation of the minimum child income amounting to DM 3,847; it is hence DM 569 below the minimum income to be allowed for on the basis of constitutional considerations, amounting to DM 4,416. 74

7. The derogations from the minimum income recognised by law and required by the constitution are summarised in the table below: 75

[…] 78

**II.**

The Federal Finance Court seeks an examination of the provision contained in § 32.6 of the Income Tax Act, but not also of the provisions of child benefit law included in the requirement calculation (see on this BVerfGE 82, 198 (206)). 79

The constitutional examination of the provisions of income tax law and child benefit law leads to the result that these provisions do not meet the constitutional requirements in their combination and in the overall allowance for the minimum child income reached thereby. The shortcoming which is material in constitutional terms can hence be caused by too low a child allowance or by child benefit being assessed in an inadequate amount. 80

Nonetheless, the object of examination is not to be expanded in the sense that both the child benefit law and the individual regulation of income tax law must be examined. In the combination of the child income tax allowance and child benefit under social law, both provisions are per se amenable to an expedient examination. The interrelations to the law on child benefit however also enable the legislature to remedy the constitutional shortcomings such that the provisions of the law on child benefit are adjusted to the constitutional requirements and the impugned income tax law provision of § 32.6 of the Income Tax Act can then ultimately remain unaffected (for instance also BVerfGE 82, 60 (84, 97)). 81

**III.**

The Federal Finance Court will have to examine whether, without an amendment of § 32.6 of the 1986/1988 Income Tax Act, it can also remit the income tax for the plaintiff in the original proceedings in accordance with the fundamental concept of §§ 163 and 227 of the Tax Code (*Abgabenordnung – AO*) in the amount which would emerge if the minimum child income to be allowed for on the basis of constitutional considerations in the shape of a child allowance were to be increased by DM 569. Similarly, the Federal Finance Court could find itself required to examine in the original proceedings, and in all sets of parallel proceedings pending before it, a constitutionally required reduction of the tax owed which also without implementing a separate [tax remission] procedure for reasons of equity [§§ 163 and 227 of the Tax Code] would grant to parents pursuing appeal on points of law proceedings their minimum child income as required by the constitution, and hence would eliminate the need for a new statutory regulation with effect for past assessment years and for a small number of cases. Otherwise, the legislature would be obliged in the cases not yet in effect to remedy the discrimination of the affected taxpayers. In any case, it is free to carry out the constitutionally required amendment by increasing the child income tax allowance, by increasing child benefit or by other compensatory regulations (see BVerfGE 82, 60 (97); 82, 198 (208)). 82

**D.**

This decision has been passed unanimously. 83

Limbach Kirchhof Winter

Sommer Jentsch Hassemer

Broß Osterloh

**Bundesverfassungsgericht, Beschluss des Zweiten Senats vom 10. November 1998 - 2 BvL 42/93**

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