**Headnotes**

**to the Order of the First Senate of 15 January 2014**

– 1 BvR 1656/09 –

1. **A degressive tax scale for secondary residences violates the fundamental right to equality under Art. 3(1) of the Basic Law in its manifestation as the requirement to tax according to economic capacity if not justified by sufficiently weighty factual reasons.**

2. **When lodging constitutional complaints, a person has regularly exercised the required level of care when the person has allowed a 20-minute safety margin in excess of the expected time needed for the transmission of the briefs including annexes to be faxed. This safety margin also applies when sending a fax after a weekend or a public holiday.**

FEDERAL CONSTITUTIONAL COURT

– 1 BvR 1656/09 –

**IN THE NAME OF THE PEOPLE**

**In the proceedings**
**on**
**the constitutional complaint**

of Mr R(…),

authorised representative: Rechtsanwalt Sören Rößner LL.M., in Sozietät MMR Müller Müller Rößner Rechtsanwälte, Mauerstraße 66, 10117 Berlin -

against a) the order of the Baden-Württemberg Higher Administrative Court (*Verwaltungsgerichtshof*) of 12 May 2009 – 2 S 3342/08 –,

b) the judgment of the Freiburg Administrative Court (*Verwaltungsgericht*) of 11 November 2008 – 3 K 1622/07 –,

c) the ruling, on an objection, of the City of Konstanz of 3 July 2007 – 5.02229.002887.1 ZwWIRöß 27K Rie/hz –,

d) the amendment decision, on the secondary residence tax assessment, of the City of Konstanz of 20 March 2007 – 5.0229.002887.1 –,

e) the amendment decision, on the secondary residence tax assessment, of the City of Konstanz of 12 February 2007 – 5.0229.002887.1 –,

f) the secondary residence tax assessment of the City of Konstanz of 18 December 2006 – 5.0229.002887.1 –,

g) the Bylaws on the Taxation of Secondary Residences in the City of Konstanz of 26 October 2006,

h) the Bylaws on the Taxation of Secondary Residences in the City of Konstanz of 22 March 1984, amended by the Bylaws of 23 February 1989 and 26 September 2002,

i) the Bylaws on the Taxation of Secondary Residences in the City of Konstanz of 22 March 1984, amended by the Bylaws of 23 February 1989

and application for reinstatement into the former procedural position,

the Federal Constitutional Court – First Senate –

with the participation of the Justices

Vice-President Kirchhof,

Gaier,

Eichberger,

Schluckebier,

Masing,

Paulus,

Baer,

Britz

held on 15 January 2014:

1. **Reinstatement of the complainant into the former procedural position is granted with regard to the failure to comply with the time limit for lodging and substantiating a constitutional complaint.**

2. **§ 4(1) of the Bylaws on the Taxation of Secondary Residences in the City of Konstanz of 22 March 1984, as amended by the Bylaws of 23 February 1989 and by the Bylaws of 23 February 1989 and 26 September 2002, as well as § 4(1) of the Bylaws on the Taxation of Secondary Residences in the City of Konstanz of 26 October 2006 violate the complainant's fundamental right under Art. 3(1) of the Basic Law (*Grundgesetz* – GG) and are void.**

3. **The order of the Baden-Württemberg Higher Administrative Court of 12 May 2009 – 2 S 3342/08 –, the judgment of the Freiburg Administrative Court of 11 November 2008 – 3 K 1622/07 –, the ruling on an objection of the City of Konstanz of 3 July 2007 - 5.02229.002887.1 ZwWIRöß 27K Rie/hz –, the amendment decision, on the secondary residence tax assessment, of the City of Konstanz of 20 March 2007 – 5.0229.002887.1 –, the amendment decision on the secondary residence tax assessment of the City of Konstanz of 12 February 2007 – 5.0229.002887.1 –, and the secondary residence tax assessment of the City of Konstanz of 18 December 2006 – 5.0229.002887.1 –, violate the complainant's fundamental right under Art. 3(1) GG. The decisions are reversed and the matter is remanded to the Baden-Württemberg Higher Administrative Court for a decision on the costs of the proceedings.**

4. **The City of Konstanz is to reimburse the complainant for two thirds of his necessary expenses; the *Land* of Baden-Württemberg is to reimburse him for one third of those expenses.**

5. **[…]**

**R e a s o n s :**

**A.**

The constitutional complaint relates to the question of the extent to which a degressive tax scale for secondary residence taxes is compatible with the Basic Law. 1

**I.**

1. The City of Konstanz, defendant in the initial proceedings (hereinafter: defendant), imposed a secondary residence tax on the complainant for the years 2002 to 2006, based on the Bylaws on the Taxation of Secondary Residences in the City of Konstanz of 22 March 1984 as amended by the Bylaws of 23 February 1989 (hereinafter: 1989 Bylaws), and as amended by the Bylaws of 23 February 1989 and 26 September 2002, effective as of 1 January 2003 (hereinafter: 2002 Bylaws), and the Bylaws on the Taxation of Secondary Residences in the City of Konstanz of 26 October 2006, effective retrospectively from 1 January 2006 (hereinafter: 2006 Bylaws). 2

2. The relevant tax scales laid down in these bylaws are contingent on the annual rental expense, as the assessment basis for the tax, and generalise the tax amount by establishing five (1989 Bylaws) or eight (2002/2006 Bylaws) rental expense groups, respectively. § 4(1) 1989 Bylaws, applicable to the first part of the taxation period in dispute (1 January to 31 December 2002), reads as follows: 3

§ 4 Tax rate 4

(1) Per calendar year, the tax amounts to

a) EUR 409.03 for an annual rental expense of up to EUR 1,533.88

b) EUR 613.55 for an annual rental expense of more than EUR 1,533.88 but not exceeding EUR 2,351.94

c) EUR 818.07 for an annual rental expense of more than EUR 2,351.94 but not exceeding EUR 3,170.01

d) EUR 1,022.58 for an annual rental expense of more than EUR 3,170.01 but not exceeding EUR 3,988.08

e) EUR 1,227.10 for an annual rental expense exceeding EUR 3,988.08.

For the second part of the taxation period in dispute (1 January 2003 to 31 August 2006), the following tax rates are applicable pursuant to § 4(1) 2002 Bylaws and § 4(1) 2006 Bylaws, which are identical in wording: 5

§ 4 Tax rate 6

(1) Per calendar year, the tax amounts to

a) EUR 400.00 for an annual rental expense of up to EUR 1,650

b) EUR 575.00 for an annual rental expense of more than EUR 1,650 but not exceeding EUR 2,640

c) EUR 750.00 for an annual rental expense of more than EUR 2.640 but not exceeding EUR 3,630

d) EUR 925.00 for an annual rental expense of more than EUR 3,630 but not exceeding EUR 4,620

e) EUR 1,100.00 for an annual rental expense of more than EUR 4.620 but not exceeding EUR 5,610

f) EUR 1,275.00 for an annual rental expense of more than EUR 5,610 but not exceeding EUR 6,600

g) EUR 1,450.00 for an annual rental expense of more than EUR 6,600 but not exceeding EUR 7,590

h) EUR 1,625.00 for an annual rental expense exceeding EUR 7,590.

3. The specific design of the tax scales leads to an overall degressive tax scheme in relation to the rental expense. The absolute amount of the secondary residence taxes owed by the taxpayer increases from one tax bracket to the next as the annual rent increases. However, the tax rate calculated on the basis of the annual rental expense and the payable tax amount decreases as rental expenses increase, not only within the respective brackets but also across all tax brackets. 7

This is due to an increasing degression rate from bracket to bracket, both in the mid-range brackets and with regard to the minimum and maximum amount brackets. Not 8

taking into consideration the minimum and maximum amount bracket, [… the] spread between the brackets' average tax rates [thus amounts to] approximately 3 percentage points with regard to the 1989 Bylaws (decreasing from 31.58% to 28.7%) and 6.37 percentage points with regard to the 2002/2006 Bylaws (decreasing from 26.81% to 20.44%).

The continuous degression from bracket to bracket – and hence the decline of the tax rate – intensifies when considering also the minimum and maximum amount brackets. Assuming a minimum monthly net rent of EUR 100, the resulting average tax rate amounts to 29.92% in the (fictitious) minimum amount bracket for annual rental expenses between EUR 1,200 and EUR 1,533.88 under the 1989 Bylaws. Under the 2002/2006 Bylaws, the average tax rate amounts to 28.07% under the (fictitious) minimum amount bracket for annual rental expenses from EUR 1,200 to EUR 1,650. Assuming a maximum annual rent of EUR 24,000, which stills seems realistic for a secondary residence, the average tax rate amounts to 11.40% under the (fictitious) maximum amount bracket for rental expenses between EUR 3,988.08 and EUR 24,000 under the 1989 Bylaws; whilst the average tax rate amounts to 10.29% under the (fictitious) maximum amount bracket for annual rental expenses between EUR 7.590 and EUR 24.000 under the 2002/2006 Bylaws. Disregarding annual rents of less than EUR 1,200 or exceeding EUR 24,000, the spread of tax rates for the remaining range of rental expenses amounts to 18.52 percentage points (1989 Bylaws, ranging from 29.92% to 11.40%) and 17.78 percentage points (2002/2006 Bylaws, ranging from 28.07% to 10.29%). Without consideration of these maximum and minimum limits, the spread would be even more significant. 9

The differences in the relative tax burden resulting from the creation of brackets leads to a further degression. The tax rate within each bracket is degressive, as the relative tax rates decrease as rental expenses increase. In the mid-range brackets (i.e. disregarding the maximum and minimum amount bracket) the difference in the tax burden is found to be most pronounced when comparing taxpayers subject to taxation at the bottom end of the second bracket with taxpayers subject to taxation at the upper end of the second highest bracket. […] 10

**II.**

1. From 1 January 2002 to 31 August 2006, the complainant occupied an apartment his parents had provided for him within the defendant's municipal area; the complainant had registered the apartment as his secondary residence. With tax assessment of 18 December 2006, the defendant imposed secondary residence taxes in the total amount of EUR 7,320.85 on the complainant for this time period. After the complainant had lodged an objection (*Widerspruch*), the defendant reduced the tax amount to EUR 3,835.08 with the amending notice of 12 February 2007 and further to EUR 2,974.32 with the amending notice of 20 March 2007. As agreed by the parties, the latter amending notice was based on a fictitious rent of 4.11 EUR/m², which had been set at half of the rental value according to the local rent index. For the year 11

2002, the resulting fictitious rent of EUR 201.39 per month (EUR 2,416.68 per year) led to a secondary residence tax of EUR 818.07, based on the third tax bracket in § 4(1) 1989 Bylaws. For the years 2003 to 2005, the annual secondary residence tax amounted to EUR 575, and to EUR 431.25 for the year 2006, based on the second tax bracket in § 4(1) 2002/2006 Bylaws. The defendant rejected the complainant's objection against the tax assessments, which he had upheld nonetheless.

2. The Administrative Court dismissed the complainant's action against the tax assessments and against the ruling on the objection. […] 12

[…] 13

3. The Higher Administrative Court dismissed the complainant's application for admission of appeal on points of fact and law. The complainant received the Court's decision on 27 May 2009. […] 14

[…] 15

**III.**

1. On 13 July 2009, the complainant filed a constitutional complaint. Simultaneously, he applied for reinstatement into the former procedural position with regard to the failure to comply with the time limit for lodging and substantiating the constitutional complaint. According to the complainant's affidavit and the fax logs presented to the Court, the complainant first attempted to send the constitutional complaint brief to the Federal Constitutional Court by fax on Monday, 29 June 2009 at 10:57 p.m. However, the transmission failed and so did further attempts at 11:07 p.m. and 11:19 p.m. of the same day. The Federal Constitutional Court's fax book and fax log show that, on this day, the Court's fax line was busy for approximately four hours from about 8:00 p.m. onwards. 16

2. With his constitutional complaint, the complainant claims a violation of his fundamental rights under Art. 2(1) in conjunction with Art. 20(1) and (3), Art. 14(1), and Art. 3(1) GG. 17

[…] 18-19

**IV.**

The defendant, the Federal Administrative Court, the Federal Finance Court and numerous higher administrative courts and finance courts have submitted statements on the constitutional complaint. 20

[…] 21-31

**B.**

The constitutional complaint is admissible. 32

The complainant failed to comply with the time limit for constitutional complaints un- 33

der § 93(1) first sentence of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG). However, he is to be granted reinstatement into the former procedural position pursuant to § 93(2) first sentence BVerfGG on the basis of his timely application to that end.

**I.**

The complainant was unable to observe the time limit as the Federal Constitutional Court's fax line was busy from 10:57 p.m. until midnight on 29 June 2009. This failure to meet the time limit was not the complainant's fault. 34

1. With regard to failure to meet a time limit, a complainant is responsible for such failure in case of intent or negligence. The level of care imposed on the individual, however, may not be overly strict; this follows from the connection to the constitutional guarantees in Art. 103(1) GG and Art. 19(4) GG (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 25, 158 <166>). A person acts negligently if the transmission of a complaint brief together with the required annexes is not initiated in a timely manner such that, under normal circumstances, it may be expected that the transmission will still be completed on the day the time limit expires. 35

In this regard, persons seeking legal protection must allow a safety margin in excess of the expected time needed for actual transmission of the fax (cf. also Federal Constitutional Court, *Bundesverfassungsgericht* – BVerfG, Order of the Third Chamber of the Second Senate of 19 November 1999 – 2 BvR 565/98 –, Neue Juristische Wochenschrift – NJW 2000, p. 574; Order of the Third Chamber of the First Senate of 19 May 2010 – 1 BvR 1070/10 –, juris para. 3; Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 7, 215 <216>). A person has exercised the level of care that can reasonably be expected if that person caters for the possibility that the receiving device is busy. Particularly during evening and night-time hours it is to be expected that other complainants will also be attempting to transmit documents by fax to ensure a timely transmission, due to the impending expiry of a time limit (cf. BVerfG, Order of the Third Chamber of the Second Senate of 19 November 1999 - 2 BvR 565/98 -, NJW 2000, p. 574). 36

The stipulation of a safety margin is not in conflict with the principle that time limits may be exploited to the fullest. In the same way as the usual postal delivery time frames or traffic conditions on the way to the Court ought to be considered, the complainant must make provisions for the time that is usually necessary for sending a fax. The safety margin does not shorten the time limit, but rather specifies the individual level of care the complainant is required to meet. The length of the required safety margin is kept to a minimum, as the fact that document transmission via fax is permitted obliges the Court to ensure sufficient reception capacities. 37

2. In proceedings before the Federal Constitutional Court, a person has exercised 38

the level of care that can reasonably be expected that person has allowed a safety margin of 20 minutes in excess of the time expectedly needed to fax the briefs, including annexes. This takes sufficient account of current technical conditions, and is in line with the case-law of the regular courts (cf. Federal Finance Court, *Bundesfinanzhof* – BFH, Order of 25 November 2003 – VII R 9/03 –, Bundesfinanzhof/nicht veröffentlicht – BFH/NV 2004, p. 519 <520>; Order of 28 January 2010 – VIII B 88/09 –, BFH/NV 2010, p. 919; Federal Court of Justice, *Bundesgerichtshof* – BGH, Order of 3 May 2011 – XI ZB 24/10 –, juris para. 10; Federal Administrative Court, *Bundesverwaltungsgericht* – BVerwG, Order of 25 May 2010 – BVerwG 7 B 18/10 –, juris). For reasons of legal certainty and legal clarity this safety margin is applied uniformly to all transmissions by fax, including after weekends or public holidays (still different in: BVerfG, Order of the Third Chamber of the First Senate of 19 May 2010 – 1 BvR 1070/10 –, juris para. 3).

The decisive moment for the calculation of the time limit, and thus also for observing the safety margin, is the moment in which the transmission has been fully received and saved on the Court's device; conversely, it is not relevant whether the printout has been completed (cf. Decisions of the Federal Court of Justice in Civil Matters, *Entscheidungen des Bundesgerichtshofes in Zivilsachen* – BGHZ 167, 214 <220>). 39

3. Finally, the requirements of care are only fulfilled if repeated transmission attempts are undertaken within the relevant time frame. 40

**II.**

In the case at hand, the complainant allowed for a sufficient safety margin. The actual fax transmission only took eleven minutes. On the day the time limit expired, the complainant first attempted to transmit his constitutional complaint brief together with the annexes to the Federal Constitutional Court at 10:57 p.m. He thus allowed for a safety margin of approximately 50 minutes. Furthermore, he repeated his transmission attempts numerous times before the time limit expired. 41

**C.**

The constitutional complaint is for the most part well-founded. The degressive design of the secondary residence tax scheme laid out in the taxation bylaws as well as the decisions of the defendant and of the courts in the initial proceedings violate Art. 3(1) GG. 42

**I.**

The secondary residence taxes imposed on the complainant do not violate his freedoms. 43

[…] 44-51

**II.**

The degressive tax scale in § 4(1) of the Bylaws on the Taxation of Secondary Residences violates the fundamental right to equality under Art. 3(1) GG in its manifestation as a requirement to tax according to economic capacity. 52

1. a) The general principle of equality in Art. 3(1) GG requires that the law accords equal treatment to matters that are essentially alike, and unequal treatment to such matters that are essentially different (cf. BVerfGE 98, 365 <385>; 130, 240 <252>; established case-law). The principle applies to both unequal burdens and unequal benefits (cf. BVerfGE 79, 1 <17>; 126, 400 <416>; 130, 240 <252 and 253>). 53

In this regard, Art. 3(1) GG does not subject the legislative authority to an absolute prohibition of differentiation. However, differences in treatment always have to be justified by factual reasons that are appropriate to the aim and the extent of the unequal treatment (cf. BVerfGE 124, 199 <220>; 129, 49 <68>; 130, 240 <253>). Depending on the subject matter regulated and on the criteria of differentiation, the limits imposed on the legislative authority vary; they range from a relaxed standard of compliance limited to a mere prohibition of arbitrariness to strict adherence to proportionality requirements (cf. BVerfGE 117, 1 <30>; 126, 400 <416>; 130, 240 <254>; established case-law). 54

b) In view of their impact on the tax burden, tax scales must be measured against the general principle of equality. 55

With regard to taxes primarily aimed at raising revenues, variations in the tax burdens for different taxpayers must comply with the requirement to tax according to economic capacity as derived from the general principle of equality (cf. on the law on income and corporation taxes BVerfGE 6, 55 <67>; 127, 224 <247 and 248>). As regards taxes on earning, for instance, it violates the requirement of equal burdens in taxation if persons with greater economic capacity were to pay a lower percentage of their income in taxes than persons with less economic capacity (cf. BVerfGE 127, 224 <247>; cf. also Federal Supreme Court of Switzerland, Judgment of the Second Public Law Division of 1 June 2007 - 2P.43/2006 -, BGE 133 I, 206 <220>; […]), unless this is justified by distinct factual reasons. 56

Reliance on economic capacity as the guiding criterion is supported by the welfare state principle (*Sozialstaatsprinzip*) pursuant to Art. 20(1), Art. 28(1) first sentence GG. Where the object of taxation is linked to the taxpayer's economic capacity, the consideration of social aspects is not only permissible, but in fact necessary (cf. BVerfGE 29, 402 <412>; 32, 333 <339>; 36, 66 <72>; 43, 108 <125>). The welfare state principle requires fiscal policy to show consideration for the needs of economically weaker groups in society (cf. BVerfGE 13, 331 <346 and 347>; 29, 402 <412>; 43, 108 <119>; 61, 319 <343 and 344>). 57

c) The requirement to tax according to economic capacity mandates that "tax burdens be imposed on each citizen on the basis of his or her individual financial and 58

economic capacity" (BVerfGE 61, 319 <344>; 66, 214 <223>; both with reference to the *Bundestag* document, *Bundestagsdrucksache* – BTDrucks 7/1470, p. 211 and 212). In a horizontal dimension, the constitutionally required equal distribution of tax burdens stipulates that taxpayers with equal economic capacity be subjected to an equal tax burden (cf. BVerfGE 82, 60 <89>; 116, 164 <180>; 120, 1 <44>; 122, 210 <231>; 127, 224 <245>). In a vertical dimension, the tax burden of persons who are economically more capable must be appropriate in comparison with the tax burden of those who are less economically capable (cf. BVerfGE 107, 27 <47>; 115, 97 <116 and 117>). However, the legislature's discretion in selecting objects for taxation and determining the tax rate remains broad (cf. BVerfGE 117, 1 <30>; 120, 1 <29>; 122, 210 <230>; 123, 1 <19>; 127, 224 <245>).

Higher taxation of economically less capable taxpayers, in comparison to taxpayers with greater economic capacity, constitutes an unequal treatment within the meaning of Art. 3(1) GG and requires justification – irrespective of whether taxpayers with greater economic capacity essentially pay a higher tax amount, in absolute figures, than economically less capable taxpayers. This is due to the fact that economically less capable persons are, ultimately, levied a larger share of their income or assets in taxes than persons with greater economic capacity. 59

2. The requirement of taxation according to economic capacity is applicable to the secondary residence tax scales used by the defendant (a). The unequal treatment resulting from the degressive nature of the tax scales (b), when reviewed on the basis of the strict standard applicable (c), is not justified in the present case (d). 60

a) Similar to taxes on earnings, secondary residence taxes [*translator's note*: as expenditure taxes] have to conform to the capacity principle. The essential characteristic of expenditure taxes is to target economic capacity as reflected in the way the income is used (cf. BVerfGE 65, 325 <346>; 123, 1 <15> with further references). The respective expense for the rent which is used as the basis of assessment for the secondary residence tax, serves as an indication for the residents' respective economic capacity. 61

b) By imposing a higher tax rate on the complainant, the tax scale laid down in the Bylaws on the Taxation of Secondary Residences places him in a less favourable position than taxpayers who have rented a more expensive residence. Despite the fact that the latter can be assumed to have greater economic capacity, they are taxed at a lower rate. In light of the principle of vertical fiscal equity, the degressive tax scale laid down in § 4(1) of the Bylaws on the Taxation of Secondary Residences leads to an unequal treatment of taxpayers. Economically less capable taxpayers are subjected to a higher tax burden, in percentage terms, than taxpayers with greater economic capacity. For the bracket model results largely in a decreasing tax rate as rental expenses increase. This unequal treatment is already discernible when comparing the respective average tax rates in each bracket (aa); this finding is reinforced by the effects of the categorising brackets (bb), and especially the minimum and maximum 62

amounts brackets (cc).

aa) When comparing the average tax rates in each bracket, it is discernible that the treatment of economically less capable taxpayers is different compared to the treatment of taxpayers with greater economic capacity, as the former are subjected to a higher tax rate in relation to their annual rental expenses. Leaving out of consideration, due to their limiting function, the minimum and the (open-end) maximum amount brackets, each of the remaining three (1989 Bylaws) or five (2002/2006 Bylaws) brackets is continuously degressive in nature. 63

bb) The differences in tax burden resulting from the categorising brackets lead to further unequal treatment. This also intensifies the unequal treatment of taxpayers who are less economically capable than those with greater economic capacity, as the effects of the degressive tax scale on the one hand and of the brackets on the other hand accumulate to some extent. 64

(1) Unequal treatment due to the brackets is caused, firstly, by the threshold between one bracket and the next; this concerns those taxpayers whose net rent lies just above or below the threshold between two brackets. 65

Furthermore, the brackets as such treat taxpayers with different economic capacities equally, subjecting all taxpayers within one bracket to the same absolute tax amount, although higher rental expenses typically correlate with greater economic capacity. The resulting degression within each individual bracket leads to an unequal treatment contrary to economic capacity. This follows from the fact that the tax rate decreases within the individual bracket as the assessment basis increases, and thereby develops contrary to the capacity principle. For example, the tax burden within the second bracket decreases from nearly 40% to approximately 26% under the 1989 Bylaws (with the second bracket ranging from EUR 1,533.88 to EUR 2,351.94), and decreases from 34.8% to 21.8% under the 2002/2006 Bylaws (with the second bracket ranging from EUR 1,650 to EUR 2,640). 66

(2) The degression within the individual bracket adds to the degressive effects demonstrated by the comparison of the average tax rates, and constitutes an unequal treatment of its own. Taxpayers with annual rents in the lower range of the respective bracket are, overall, most heavily burdened. 67

cc) The equal and unequal treatment within the respective brackets highlighted so far also exists in the minimum and maximum amount bracket of the different bylaws. However, compared to the other brackets certain particularities are noticeable. Within the maximum and minimum amount brackets, the tax rate decreases as the assessment basis increases in a similar way as within the other brackets, and thus it develops contrary to economic capacity. Due to the position at the top, respectively at the bottom, of the tax scales, however, the degression within these two brackets is particularly pronounced. Within the minimum amount bracket, the tax rate increases as rental expenses decrease. Conversely, the relative tax burden for secondary resi- 68

dences with annual net rents subject to the maximum amount bracket decreases as rental expenses increase. The use of minimum and maximum amount brackets thus intensifies the degressive effect of the secondary residence tax.

c) Degressive tax scales are not generally prohibited. The resulting unequal treatment can be constitutionally justified (cf. BVerfGE 127, 224 <248>), because the legislative authority is not obliged to implement the capacity principle in a pure manner and without exception (cf. BVerfGE 27, 58 <68>; 43, 108 <120 and 121>). However, in terms of such justifications, the legislative authority is subject to limits which go beyond the prohibition of arbitrariness. 69

With regard to degressive tax scales, this stricter standard imposed on the legislative authority results from the deviation from the capacity principle. The capacity principle specifies the general principle of equality of treatment for the area of tax law, subjecting the legislature to a requirement to differentiate based on capacity as a substantive measure of equality. The capacity principle, however, does not prescribe a specific tax scale. The Federal Constitutional Court is merely called upon to examine whether the legislature has exceeded the constitutional limits of its leeway to design, not whether it has found the most appropriate or most equitable solution (cf. BVerfGE 52, 277 <280 and 281>; 68, 287 <301>; 81, 108 <117 and 118>; 84, 348 <359>). 70

d) Measured against these standards, the unequal treatment caused by the degressive tax scale of the challenged taxation bylaws is no longer justified. Ultimately, it cannot be based on simplification requirements (aa). Neither the aim of raising tax revenues (bb) nor the pursuit of a legitimate steering purpose (cc) can justify the unequal treatment. The same applies with regard to the proportionality of costs and benefits, as a manifestation of the principle of equivalence (dd). 71

aa) The aim of administrative simplification does not cover the unequal treatment stemming from the specific design of the tax scales in the case at issue. Whilst unequal treatment may generally be justified by the necessity of administrative simplification (1), the provisions at hand are only partially suitable in terms of achieving this goal (2), and the specific design of the tax scales leads to an overall degression that is disproportionate to the benefits of simplification (3). 72

(1) Categorisation and simplification requirements may generally constitute objective reasons for a limitation of the principle of taxation according to capacity (cf. BVerfGE 127, 224 <245> with further references). 73

(2) The provisions to be examined in the case at hand are, however, only partially suitable for simplifying the administration. 74

(a) Determining the tax scale on the basis of five (1989 Bylaws) or eight (2002/2006 Bylaws) generalising brackets is as such a suitable means. In this case, the grouping of taxpayers into brackets leads to a certain administrative simplification, because the authorities do not need to determine the exact annual net rent for each individual case nor do they have to verify the rent in cases of doubt. 75

(b) The overall degressive development of the tax scale, i.e. the degression across different brackets, is, however, not suitable for simplifying the administration. While the use of brackets does lead to an administrative simplification, it is not easier for the fiscal authorities to administer a degressive tax rate characterised by scales that continuously become smaller from bracket to bracket than administering a linear or progressive tax scale. 76

(3) Even to the extent that the specific design is suitable for the simplification of administration, the unequal treatment resulting from the degressive effects is disproportionate to the administrative simplification achieved. 77

A justification of the unequal treatment resulting from the use of tax brackets requires that the economic effects on taxpayers do not exceed a certain level of inequality and that they are proportionate to the advantages of administrative simplification (cf. BVerfGE 110, 274 <292>; 116, 164 <182 and 183>; 117, 1 <31>; 120, 1 <30>). These prerequisites are not met in the case at hand. The difference between the highest and the lowest tax burden within a bracket already reaches a substantial level which is unacceptable in light of the overall degressive nature of the tax scheme. There is a significant spread, for instance, between the highest and the lowest tax burden in the second bracket, of approximately 13 percentage points (2002/2006 Bylaws) and approximately 14 percentage points (1989 Bylaws). This applies all the more to the maximum amount bracket: assuming an absolute limit for monthly rents at EUR 2,000, the spread in the maximum amount bracket reaches 25 percentage points (1989 Bylaws) or 15 percentage points (2002/2006 Bylaws), respectively; an even higher monthly rent would increase the spread even further. Another factor concerns the effects of the degression between the individual brackets: according to the 1989 Bylaws, a difference of 29 percentage points results between the tax on secondary residences in the case of rental expenses of EUR 1,200 (tax burden of 34%) and in the case of rental expenses of EUR 24,000 (tax burden of 5%); according to the 2002/2006 Bylaws, a difference of 27 percentage points results between the tax on secondary residences in the case of rental expenses of EUR 1,200 (tax burden of 33%) and rental expenses of EUR 24,000 (tax burden of 6%). This finding is indeed to be contrasted with the effects of simplification which is achieved through the bracket-structure of the tax scale, with fewer brackets generally leading to a higher level of simplification. However, this effect is not sufficiently weighty in the case at hand. The administrative simplification achieved by the different brackets for secondary residence taxes is limited to a simplification resulting from the fact of merely not having to determine the exact annual net rent in each individual case and of not having to verify the rent in cases of doubt. 78

bb) The aim of generating higher tax revenues cannot justify the unequal treatment stemming from the degressive tax scale either. From the outset, the degressive tax scale does not serve the purpose of increasing revenues. Unequal burdens resulting from the specific design of fundamental decisions in tax law require a justification that goes beyond the aim of merely covering the financial needs of the state or overcom- 79

ing a strained budget situation (BVerfGE 116, 164 <182> with further references).

cc) If the legislature pursues legitimate steering purposes with a degressive scale, this may, under certain conditions, justify deviations from the capacity principle (1). These conditions are, however, not fulfilled at hand (2). 80

(1) In tax law, the legislature is not restricted to stipulating binding requirements or prohibitions in order to influence the shaping of the economy and society; it may also resort to indirect means of encouraging or discouraging certain behaviour. In this case, the citizen is not legally obliged to adopt a certain conduct, but is 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 a tax benefit provided under a specific tax law contradicts the equal distribution of burdens on all taxable objects within a given tax type, such a tax relief may be justified under the principle of equality if the legislature wants to promote or steer the taxpayers' conduct for reasons of public interest (BVerfGE 117, 1 <32> with further references). 81

The legislature has considerable leeway to design if it wishes to promote a certain conduct amongst citizens that is deemed desirable for economic, social, environmental or socio-political reasons. It is granted a far-reaching latitude in deciding which persons or companies to support in this manner (BVerfGE 117, 1 <32> with further references). 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>; 110, 274 <293>; 117, 1 <32>). 82

The steering purpose must be based on a clear legislative decision (cf. BVerfGE 99, 280 <296>; 105, 73 <112 and 113>; 117, 1 <31 et seq.>; established case-law). It is sufficient that this can be determined by applying conventional methods of interpretation (cf. BVerfGE 99, 280 <296 and 297>). Steering purposes can, for example, be set out in the legislative materials (cf. BVerfGE 116, 164 <191 et seq.>; cf. however, BVerfGE 130, 131 <144>). It is further possible to deduce the purpose from an overall assessment of the relevant tax provisions adopted by the legislature (cf. BVerfGE 110, 274 <296 and 297>). Aims pursued by the legislature may further be determined by the link between the law and the matters regulated (cf. BVerfGE 62, 169 <183 and 184>). In any case, however, the established steering purposes must be attributable to a legislative decision. 83

(2) The unequal treatment caused by the degressive tax scales is not justified by the steering purposes pursued. While the steering purposes are generally legitimate (a), and are partially based on a clear legislative decision (b), they cannot justify the unequal treatment caused by the degressive tax scales (c). 84

(a) The incentive to change the registration of a secondary residence to a principal residence in accordance with the respective legislative requirements constitutes a legitimate aim of a secondary residence tax (cf. BVerfG, Order of the First Senate of 8 May 2013 – 1 BvL 1/08 –, juris para. 65, NJW 2013, p. 2498 <2502>, para. 66). Another legitimate steering purpose is to increase the housing supply for the local population, and in particular for students of local universities. 85

(b) The aim of encouraging persons registered with a secondary residence to change the registration to a principal residence is clearly endorsed by a decision of the legislative authority. This can be deduced from an objective interpretation of the Bylaws. Neither the provisions of the Bylaws as such nor the corresponding legislative materials on their development contain any specific reference in this regard. Nonetheless, the steering purpose can be deduced from an overall assessment of the Bylaws' provisions in consideration of the link between the Bylaws and the regulated life circumstances. It is apparent that this is a key consideration for the authority responsible for adopting the Bylaws, as the financial contributions under the fiscal equalisation among municipalities are dependent on the number of inhabitants and thus on the number of registered principal residences (cf. § 4, § 6(4), § 7(1) and 2, § 11(1) No. 3, § 30 of the Baden-Württemberg Law on fiscal equalisation among municipalities, *baden-württembergisches Gesetz über den kommunalen Finanzausgleich* – FAG). 86

It need not be decided whether the authority responsible for adopting the Bylaws made a clear decision endorsing the further steering purpose to reduce the number of secondary residences – in particular smaller and less costly residences – by imposing secondary residence taxes, thereby improving the housing supply for the local population, and students in particular (in this context, cf. Baden-Württemberg Higher Administrative Court, Order of 28 December 1992 – 2 S 1557/90 –, Neue Zeitschrift für Verwaltungsrecht Rechtsprechungs-Report – NVwZ-RR 1993, p. 509 <510>). 87

(c) Even in light of the legislative authority's margin of appreciation and prerogative of evaluation (cf. BVerfGE 103, 293 <307>; 115, 276 <308 and 309>), the tax differentiation caused by a degressive tax scheme appears neither suitable nor necessary to achieve these steering purposes. 88

While imposing a tax on secondary residences may be suitable overall to encourage holders of secondary residences to register it as a principal residence, the degressive tax scale itself does not promote this purpose. This objective would be achieved in the same way by a linear or even a progressive tax scale, which would avoid the unequal treatment established in the present case. The same applies to the purpose of limiting secondary residences. 89

The degression is further unsuitable because the additional tax burden specifically attributable to the degressive design is so insignificant compared to the other expenses incurred from maintaining a secondary residence that, even supposing taxpayers have knowledge thereof, its steering effect is doubtful. 90

dd) The proportionality of costs and benefits, as a manifestation of the principle of equivalence, does not justify the unequal treatment caused by a degressive tax scale for expenditure taxes at the level of the municipality in the form of secondary residence taxes. 91

With regard to certain types of taxes, in exceptional circumstances, a justification can be derived from the principle of equivalence (cf. BVerfGE 120, 1 <37 et seq.>); however, this does not apply to secondary residence taxes. The latter do not constitute any form of compensation for special expenditures of the state, because they are not based on services rendered by the state that are attributable to a specific cost-generating behaviour of the taxpayer. The annual rental expenses, as the assessment basis for the tax, are in no way related to the use of municipal services which are otherwise free of charge. 92

**D.**

The Bylaws are unconstitutional and hence void (§ 95(3) second sentence BVerfGG). 93

The challenged tax assessments issued by the defendant and the decisions of the courts in the initial proceedings are to be reversed pursuant to § 95(2) BVerfGG. […] 94

The decision on the costs is based on § 34a(2) BVerfGG. 95

[…] 96

Kirchhof Gaier Eichberger

Schluckebier Masing Paulus

Baer Britz

**Bundesverfassungsgericht, Beschluss des Ersten Senats vom 15. Januar 2014 - 1 BvR 1656/09**

**Zitiervorschlag** BVerfG, Beschluss des Ersten Senats vom 15. Januar 2014 - 1 BvR 1656/09 - Rn. (1 - 96), http://www.bverfg.de/e/rs20140115_1bvr165609en.html

**ECLI** ECLI:DE:BVerfG:2014:rs20140115.1bvr165609