JUDGE OF THE CONSTITUTIONAL COURT

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SEPARATE OPINION

of the Justice of the Constitutional Court

Gunārs Kusiņš

in Riga, 2 November 2017

in Case No. 2016-14-01

"On Compliance of Section 3, 5, 6, 7 and 9 of the law "On Solidarity Tax" with the First Sentence of Article 91 and Article 109 of the *Satversme* of the Republic of Latvia"

1. On 19 October 2017, the Constitutional Court passed the judgement in Case No.2016-14-01 "On Compliance of Section 3, 5, 6, 7 and 9 of the law "On Solidarity Tax" with the First Sentence of Article 91 and Article 109 of the *Satversme* of the Republic of Latvia" (hereinafter – the Judgement).

I uphold the finding made in the Judgement that Section 6 of the law "On Solidarity Tax" is incompatible with the first sentence of Article 91 of the *Satversme*. However, I cannot uphold some conclusions included in the Judgement and upon which this ruling was based.

In providing reasoning for my opinion, I shall use the abbreviations used in the Judgement.

2. The Constitutional Court has repeatedly examined the constitutionality of the norms of various laws on taxes.

It has been recognised in the rulings of the Constitutional Court that in the field of tax law the legislator cannot be set the same requirements as, for example, in the

field of protecting and ensuring civic or political rights (*see, for example, Judgement of 13 April 2011 by the Constitutional Court in Case No. 2010-59-01, Para 9).* In defining and implementing its taxation policy, the State enjoys broad discretion. It comprises the right to choose, what tax rates and for which groups of persons should be envisaged, as well as the right to define the details of the respective regulation. Therefore the specificity of the tax law impacts the scope of the constitutional review (*see, for example, Judgement of 30 April 2008 by the Constitutional Court in Case No. 2007-23-01, Para 7 and Para 11, Judgement of 20 May 2011 in Case No. 2010-70-01, Para 9, as well as Judgement of 25 March 2015 in Case No. 2014-11-0103, Para 20*).

Hence, in reviewing the constitutionality of the norms included in tax laws, the Constitutional Court has consistently taken into account the specificity of the tax law.

3. Depending upon the claim formulated in the application, usually, the norms of tax laws have been examined at the Constitutional Court as a restriction on a person's fundamental rights or as a possible violation of the equality principle, applying the respective methodology. Also in the case under review, the Constitutional Court examined, whether Section 6 of the law "On Solidarity Tax" did not violate the equality principle, by establishing: 1) which persons or groups of persons were in similar and comparable circumstances; 2) whether the contested norms envisaged differential treatment; 3) whether the differential treatment had objective and reasonable grounds; i.e., whether it had a legitimate aim and whether the principle of proportionality had been complied with (*see, for example, Para 22 of the Judgement*).

I hold that the Judgement reveals problems in applying the methodology used by the Constitutional Court in reviewing a possible violation of the equality principle in tax cases. Namely, using the criterion of a legitimate aim to assess taxes with a pronouncedly fiscal function.

4. Essentially, any tax should be considered as being a measure for ensuring revenue into the state budget. However, in examining cases regarding the constitutionality of tax laws, the differences that exist between taxes with a regulatory function and taxes with a fiscal function should be taken into consideration.

The taxes with a regulatory function encourage taxpayers to take certain actions or influence their actions in a certain way, and, in additional, ensure revenue into the state budget (*see also Judgement of 3 April 2008 by the Constitutional Court in Case No. 2007-23-01, Para 15*). For example, some taxes in the environmental field have a regulatory function. Whereas the aim of taxes with a fiscal function is linked only to ensuring resources for covering the State's expenditure. The case law of the Constitutional Court comprises both cases regarding the so-called "fiscal taxes" (*see, for example, Judgement of 13 April 2011 by the Constitutional Court in Case No. 2010-59-01*) and the so-called "regulatory taxes" (*see, for example, Judgement of 25 March 2015 by the Constitutional Court in Case No. 2014-11-0103*).

The Constitutional Court, in reviewing the norms of the law on the personal income tax or "fiscal tax" law, has consistently recognised: the personal income tax is established to ensure public welfare, therefore the legitimate aim of the contested restriction is protection of public welfare (*see, for example, Judgement of 6 December 2010 by the Constitutional Court in Case No. 2010-25-01, Para 9*). It follows from the nature of "fiscal taxes" that the restrictions linked to these taxes almost always will be imposed for a legitimate aim – protection of public welfare since they ensure revenue into the state budget.

Consequently, the use of the methodology for assessing a violation of the equality principle, which comprises the identification of the legitimate aim and also the proportionality test, does ensure that the peculiarities that are typical of "fiscal taxes" are fully taken into account. It has been noted also in foreign legal literature that, predominantly, identification of the legitimate aim and the proportionality test will not be appropriate for reviewing the constitutionality of "fiscal taxes"; however, it can be used in assessing "regulatory taxes" [*see, for example, Lepsius O. Constitutional Review of Tax Laws and the Unconstitutionality of the German Inheritance Tax. German Law Journal. Vol. 16, No. 5* (*2015*), *p. 1216*].

The Constitutional Court has repeatedly recognised that the regulation on taxes should be based on objective and rational considerations (*see, for example, Judgement of 20 May 2011 by the Constitutional Court in Case No. 2010-70-01, Para 9)* I am of the opinion that the use of such a criterion would allow taking into account the peculiarities of "fiscal taxes" to full extent.

5. I support the statement made in the Judgement that, essentially, the solidarity tax is a new type of income tax (*see Para 19.3. of the Judgement*). This obligation to pay the tax has been imposed on a certain circle of payers of the solidarity tax, and the solidarity tax rates for persons differ, depending upon the rate of insurance contributions applied to the respective person (*see Para 21 of the Judgement*). I.e., the solidarity tax rate complies with the rate of insurance contributions set in accordance with Section 18 of the law "On State Social Insurance" (*see Para. 24 of the Judgement*). Thus, the Constitutional Court validly found that, in the particular case, the differential treatment of comparable groups of persons followed from the established solidarity tax rates (*see Para 23 and Para 24 of the Judgement*).

At the same time, the Court recognised that the differential treatment of the payers of solidarity tax, established by Section 6 of the law "On Solidarity Tax", lacked a legitimate aim (*see Para 27 of the Judgement*). I cannot uphold this finding.

6. It is validly noted in the Judgement that the costs of administering the tax are one of the issues that the legislator has to consider to establish, whether the respective tax will be effective (*see Para 27.2. of the Judgement*). The Constitutional Court has underscored previously that the State, in the interests of public welfare, should establish an effective system of tax collection (*see Judgement of 15 April 2013 by the Constitutional Court in Case No. 2012-18-01, Para 17*).

6.1. I believe that the costs that are required to collect a certain tax or the costs of its administration should be as low as possible because the taxes are not established with the aim of financing disproportionate administration costs. Therefore the legislator enjoys broad discretion to establish such tax regulation that is effective or is such that is able to ensure the necessary tax revenue with minimal costs. However, if the revenue from a certain tax is lower than the resources required to administer it, this tax does not reach its aim.

It follows from the case materials, explanations provided by the participants of the case and the summoned persons at the court hearing that the setting of different solidarity tax rates ensures larger revenue into the state budget since it does not require

developing a new system for administering the tax and also does not create an additional administrative burden and high administration costs. The Constitutional Court also received confirmation of this statement (*see Para 27.2. of the Judgement*).

Thus, the setting of different solidarity tax rates ensures that the resources obtained from this tax supplement the state budget and can be used for public needs, not to administer the tax. In this meaning, the different solidarity tax rates and the differential treatment caused by it have been established to protect public welfare. Thus, it cannot be asserted that the differential treatment, which has been established by Section 6 of the law "On Solidarity Tax", lacks a legitimate aim.

6.2. I uphold the statement made in the Judgement that the different solidarity tax rates must be based on objective reasoning and criteria (*see Para 27.2. and Para 27.3 of the Judgement*). I.e., on such objective and rational considerations that substantiate the choice of the particular rates exactly for the solidarity tax and for reaching the effect envisaged for its introduction – so that the tax would be paid by persons with high income.

The chosen different solidarity tax rates ensure the necessary revenue into the state budget and, in this aspect, they have rational grounds. However, they are not based on the consideration, due to which the solidarity tax as a new "fiscal tax" was created. In the particular case, for example, there is no objective and rational grounds for the solidarity tax rates to change (increase or decrease) over the years, comparing 2016 and 2017, and why exactly they change in this amount.

Therefore I believe that in the case under review using the criterion of the legitimate aim, in examining the constitutionality of the differential treatment, did not reflect the peculiarities of the solidarity tax. The finding that the contested regulation even in one aspect of it is not based on objective and rational considerations is sufficient grounds for recognising that it is incompatible with the first sentence of Article 91 of the *Satversme*.

Justice of the Constitutional Court G. Kusiņš