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**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
of 4 November 1993**

Review of the petition of the President of the Republic, submitted under § 107 of the Constitution, for the declaration of unconstitutionality of the Taxation Act, passed by the Riigikogu on 28 September 1993.

The Constitutional Review Chamber, sitting in a panel presided over by the Chairman of the Chamber, Chief Justice Rait Maruste, and composed of members of the Chamber, justices Tõnu Anton, Lea Kalm, Jaano Odar and Jüri Pöld, at its session of 28 October 1993, with the representative of the President of the Republic Ivar Ranne, and the Chancellor of Justice Eerik-Juhan Truuväli appearing, and in the presence of the Secretary to the Chamber Külli Härm reviewed the petition of the President of the Republic for the declaration of unconstitutionality of the Taxation Act, passed by the Riigikogu on 28 September 1993.

From the documents submitted to the Constitutional Review Chamber it appears that:

On 25 August 1993, the Riigikogu passed the Taxation Act. On 8 September 1993 the President of the Republic, by reasoned resolution no. 177, refused to promulgate the Act and returned it to the Riigikogu for a new debate and decision, considering it necessary to bring the Act into conformity with the Constitution.

On 28 September 1993, the Riigikogu again passed the Taxation Act, unamended.

On 4 October 1993, on the basis of § 107 of the Constitution, the President of the Republic submitted a petition to the Supreme Court for the declaration of unconstitutionality of the Taxation Act, passed by the Riigikogu on 28 September 1993.

The President of the Republic was of the opinion that the Taxation Act was unconstitutional on the following grounds:

1. § 7 (2) and (5) of the Act are in conflict with § 157(2) of the Constitution, according to which a local government has the right, on the basis of law, to levy and collect taxes, and to impose duties. Therefore, it is not lawful to oblige the Ministry of Finance and the Minister of Finance to establish the nature of local taxes and to approve those taxes.

2. § 15(1) of the Constitution provides that every person whose rights or freedoms have been violated has the right of recourse to the courts. The legal provisions included in Chapter VII of the Act do not guarantee

the taxpayer's constitutional right of direct recourse to the courts without first exhausting pre-trial procedure for resolution of disputes.

3. The duty imposed on judges by § 17(2) of the Act to give permission to a tax inspector to inspect tax evasions, is unconstitutional, because § 146 of the Constitution establishes the sole duty of the courts to be the administration of justice, and not the conduct of the pre-trial proceedings referred to in § 17(2) of the Act.

4. § 19 of the Act restricts the rights granted to everyone by §§ 26, 33 and 43 of the Constitution. Special equipment (e.g. a camera) may be used only on the basis of and pursuant to procedure established by law. In response to the request of the Supreme Court of 13 October 1993, the Riigikogu submitted the shorthand notes of its sitting of 28 September 1993 where it decided to pass again the Taxation Act, unamended, and an explanation concerning § 7 (2) and (3) of the Taxation Act. The Riigikogu adopted the explanation by its resolution of 25 October 1993.

In the resolution of the Riigikogu the following was pointed out:

1. The "establishment of the nature of taxes", included in § 7(2) of the Taxation Act, passed by the Riigikogu on 28 September 1993, means that the Minister of Finance shall establish the description (characterisation) of every local tax referred to in § 7(1). These descriptions are to be established in order to facilitate the work of rural municipality and city councils in imposing local taxes. The establishment of tax rates is not within the competence of the Minister of Finance.

2. When implementing the requirement "to obtain the approval of the Ministry of Finance to local taxes", established in § 7(5) of the Taxation Act, a local government council must submit the draft of the legislation establishing a tax to the Ministry of Finance where the conformity of the local tax to the nature of the tax established by the Minister of Finance under § 7(2) of the Taxation Act shall be examined.

3. The requirement "to register local taxes", established in § 7(5) of the Taxation Act, means the duty of a local government council to inform the Ministry of Finance of all the local taxes imposed by it. When a local tax is in conformity with the nature of the tax established by the Ministry of Finance, the Ministry of Finance has no right to refuse to register the tax. The aim of the registration of local taxes is to obtain an exhaustive overview of local taxes imposed in Estonia.

It is fixed in the shorthand notes of the sitting of the Riigikogu of 28 September 1993 that the Taxation Act was passed again, unamended, by 33 votes of members of the Riigikogu in favour.

The Minister of Justice Kaido Kama submitted his written opinion concerning the petition of the President of the Republic, arguing that the Taxation Act was not in conflict with the Constitution.

Having examined the documents submitted and having heard the opinion of the Chancellor of Justice who supported the petition of the President of the Republic, the court found the following:

Pursuant to § 157(2) of the Constitution local governments have the right to levy and collect taxes on the basis of law. Since, under the Constitution, local governments conduct their activities in accordance with the laws, the Riigikogu has no authority to delegate its legislative powers to regulate the activities of local governments. The duty of the Minister of Finance to determine the nature of local taxes and to establish the rules for the approval and registration thereof by the Ministry of Finance, as set forth in § 7(2) and (5) of the Taxation Act, constitutes a delegation by the Riigikogu of its legislative powers to the executive power.

§ 7(2) of the Taxation Act uses the expression "the nature of taxes". In § 7(5) the expression "approval and registration of taxes" is used. The content of these expressions has not been legally defined by the Taxation Act. According to the explanation of the Riigikogu of 25 October 1993 "the establishment of the nature of local taxes" means the establishment of a description (characterisation) of a local tax by the Minister of Finance. The explanation establishes a link between the approval and registration of a local tax by the Ministry of Finance and the nature of a local tax. According to the explanation, what is controlled in the

approval process is the conformity of the draft legislation of a local government council with the nature of a tax; upon registration, however, what is controlled is the conformity of the local tax imposed by a council with the nature of such tax. From this the Court concludes that the Ministry of Finance has been given the opportunity to directly interfere with the imposition and establishment of the procedure and conditions for collecting local taxes.

According to § 154 of the Constitution all local issues shall be resolved and managed by local governments, which shall operate independently pursuant to law. § 7(2) and (5) of the Taxation Act are in conflict with §§ 154 and 157(2) of the Constitution because the establishment of the nature of local taxes, the approval and registration thereof by the Minister of Finance, or pursuant to the procedure established by the Minister, excludes the independent operation of local governments upon establishing local taxes pursuant to law.

§§ 33 and 43 of the Constitution provide for every person's fundamental rights to the inviolability of home, dwelling, real or personal property under a person's control and place of employment, as well as to the confidentiality of messages sent or received by post, telegraph, telephone or by other commonly used means. Pursuant to § 9(2) of the Constitution, these rights shall also extend to legal persons. Restrictions and exceptions to these constitutional rights may be imposed by law only for the purposes set forth by the Constitution for the protection of health, morals, public order, or the rights and freedoms of others, to prevent a criminal offence, to apprehend a criminal offender or to ascertain the truth in a criminal proceeding.

According to § 17(1) and (2) of the Taxation Act, an official of a tax authority has the right to inspect the territory, buildings, structures and premises of businesses, agencies and other organisations without a prior warning or special permission. § 19 of the same Act gives a tax inspector the right to mount meters on containers, storage facilities and equipment, to seal containers, storage facilities and equipment, and to install cameras. All this presumes access to personal property under the control of some other person. The referred provisions do not require the owner's or possessor's consent. The constitutional principle of inviolability of ownership, however, requires the consent of the owner or possessor for entry onto his or her property.

Subsection 17(2) of the Taxation Act gives a tax inspector the right to conduct necessary inspection with a court permission, if he has reason to believe that a delay with the inspection would lead to tax evasion. The existence of a court permission does not render such an inspection constitutional because the belief of a tax inspector that a delay with the inspection would result in tax evasion does not constitute a ground on the basis of which it would be possible to restrict the inviolability of dwelling, real or personal property under person's control, or place of employment, referred to in § 33 of the Constitution.

Entitling a tax inspector to enter real or personal property under a person's control simply on the basis of his or her opinion, without requiring the existence of reasonable grounds or documentary evidence or factual basis, creates conditions for uncontrolled restriction of constitutional rights at the discretion of an official. The fact that the law does not stipulate a requirement to give justifications renders a request for a court's permission a mere formality, because a judge has no basis for evaluating the matter on its merits.

§ 19 of the Taxation Act provides for the installation of cameras in order to check the correctness of taxes paid or to determine the tax amounts to be paid. From the text of the Act it does not appear whether these cameras constitute equipment installed for covert (discreet) surveillance or for public surveillance with the consent of the owner or possessor. If cameras intended for covert surveillance are used, this amounts to the use of so-called special equipment, which may violate the constitutional principle of privacy of personal life and business, and therefore it is necessary to have as a basis for the use such equipment – a relevant Act which determines the grounds for the use of special equipment, the subjects entitled to use this equipment, relevant procedure, etc. According to the valid regulatory framework tax inspectors do not belong to this group of subjects. For this reason, the installation of cameras on the basis of § 19 of the Taxation Act is in conflict with §§ 26, 33 and 43 of the Constitution.

According to § 15(1) of the Constitution every person whose rights have been violated has the right of

recourse to the courts. Chapter VII of the Taxation Act provides for pre-trial resolution of disputes. This is a pre-trial resolution of disputes pursuant to administrative procedure, which must be exhausted before one can have access to administrative courts. § 46 of the Constitution does not preclude pre-trial administrative procedures for the resolution of disputes as it gives everyone the right to address state agencies, local governments, and their officials with petitions. According to § 13(2) the Constitution the law shall protect everyone from the arbitrary exercise of state authority. The pre-trial procedure for the resolution of disputes provided for in Chapter VII of the Taxation Act does not meet this requirement since the competence to resolve disputes has been given to the administrative agency against whose activity the complaint is lodged. Also, the procedure for solving disputes and the guarantees of the taxpayer have been established in an incomplete manner.

Many provisions of the Taxation Act require amendments to the Code of Administrative Offences, the Code of Civil Procedure, the Code of Enforcement Procedure, the Code of Administrative Court Procedure and the Eesti Pank Act, passed earlier by the Riigikogu. According to § 104(2) 12) and 14) of the Constitution these Acts may be amended only by a majority of the membership of the Riigikogu. From the shorthand notes of the 28 September 1993 sitting of the Riigikogu it appears that the Taxation Act was passed by a simple majority of votes which, on that occasion did not constitute a majority of the membership. Thus, the procedure for adoption of Acts established by the Constitution has been violated.

On the basis of the foregoing and pursuant to § 19(1)4 of the Constitutional Review Court Procedure Act, the Constitutional Review Chamber has decided:

To declare the Taxation Act, passed by the Riigikogu on 28 September 1993, unconstitutional.

The judgment is effective as of pronouncement and is not subject to further appeal.

Rait Maruste

Chief Justice of the Supreme Court

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