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Selected Procedural Issues

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I. Recusal of a judge from a case

In Germany laws provide the recusal of judges. Provisions on recusal and self-recusal are laid down in Art. 42 – 49 of the Code of Civil Procedure. According to Art. 51 I of the Code of Procedure for Fiscal Courts these rules shall apply mutatis mutandis to fiscal court proceedings. A judge may be recused from a case in those cases in which he is disqualified by law from exercising a judicial office. By law he is disqulified in all matters in which he himself is a party and in all matters concerning his spouse, his partner or persons who are or were directly related to him, either by blood or marriage. Furthermore a fiscal judge is disqualified by law in all matters in which he was appointed as attorney of record or as a person providing assistance to a party, in all matters in which he is examined as a witness or expert and in all matters in which he assisted, at a prior level of jurisdiction, in entering the contested decision.

As to fiscal judges a judge shall also be excluded from exercising the office of a judge who was involved in the previous administrative proceedings. In addition to these possibilities of recusal by law a judge may be recused from a case in those cases in which there is a fear of bias. According to Art. 42 II of the Code of Civil Procedure a judge will be recused for fear of bias if sound reasons justify a lack of confidence in

his impartiality. Concerns about partiality shall always be well-founded if the judge belongs to the representation of a body whose interests are affected by the proceedings. However, according to the jurisdiction of the Supreme Tax Court the term "representation of a body" must be interpreted as meaning a member of the executive board of a stock corporation or a managing director of a company or a representative of a municipality. The provision does not apply in cases in which a fiscal judge before his election and appointment as a judge has been active in the tax administration, e.g. as head of a departement of a tax or customs office or as head of a tax or customs office.

According to the German jurisdiction of civil and tax courts grounds for recusal can be any inappropriate behavior of a judge during an oral hearing (e.g. unobjective and offensive comments, inappropriate gestures or mockery and scorn for arguments put forward by a party of the case pending before the court).

The judge is obliged to observe the principle of equal opportunities and to give each party a reasonable opportunity to present its case and to put forward arguments. Both parties have to be treated equally in terms of procedural law. Prohibited is any preferential treatment of a party without proper reasons. Therefore grounds for recusal can be an abuse of the power to organise the process of the proceedings (e.g. refusal to allow an inspection of records or manipulation of the composition of the formation of the court).

Although the judge is free to formulate and express his own scientific opinion on legal problems and to write and publish articles and commentaries on the application and interpretation of tax law he should exercise caution when expressing his own view in the public. However, according to the German jurisdiction the mere fact of expression of own expert opinions and the publication of such opinions does not give rise to concerns about the unpartiality of a judge. This principle is expressively laid down in Art. 18 of the Federal Constitutional Court Act that states that a judge of the Federal Constitutional Court is not involved in the case pending before the court and therefore not debarred from the exercise of his function by an expression of an expert opinion on a question of law which may be of relevance to the case. It goes without saying that in writing and publishing articles judges cannot avoid that they comment

on legal questions and problems that might become subjects to consideration and discussion before the court in the near future. However, a sound reason for disqualification could be the publication of legal views or statements with respect to a certain case pending before the court, especially in cases where the judge is a member of the formation that exclusively is dealing with the case and therefore has to vote on it.

In Germany some of the elected and appointed tax judges have a background in fiscal administration. It may happen that a judge has been involved in the drafting of legislation in the Federal Ministry of Finance or in Ministries of the Länder, e.g. of Bavaria or Saxony. Under these circumstances the question arises whether the participation in legislative procedures is a solid ground for recusal. From my point of view the answer to this question depends on the kind of activities. If the judge gave only advice and in fact had no decisive influence on the result of the legislative procedure and was only subject to directives of superiors there would be no reason justifying a lack of confidence in his impartiality.

The court competent for dealing with an application for recusal is to decide on the matter also in cases of self-recusal (recusal ex officio), in which a judge notifies the court that a relationship exists that might justify his recusal, or in which other reasons give rise to concerns that a judge might be disqualified by law (Art. 48 Code of Civil Procedure). Therefore a judge should inform his collegues before the beginning of the proceedings about any circumstances that might constitute grounds for fearing a conflict of interests and that therefore could give rise to concern of partiality and bias of his person. In one case decided by a German fiscal court the court had to decide whether registered civil partners could benefit from the tax reliefs granted by the possibility of joint assessment of married couples. Since one judge of the court lived together not with a spouse but with a registered partner he notified this circumstance to his collegues. The court ruled that the affiliation or belonging to a particular social group does not constitute by itself a solid ground for recusal. Neither an interest in the outcome of the proceedings nor a possible fiscal effect on the taxation would create doubts in the impartiality of the judge. According to this ruling only a sustained and additional interest, beyond the usual expectations of the judgment could raise concerns that the judge might be disqualified by law. In any case the mere fact that a

judge is a member of a particular group, e.g. a member of a party, a trade union, a religious community or a professional organisation cannot be regarded as a solid reason for recusal.

II. Opinion process

After administrative appeals have been exhausted an action can be brought before the fiscal court that is a court of first instance. At present in Germany 19 fiscal courts charged with exercising jurisdiction in tax and customs matters are acting as separate and independent tribunals. About 70.000 cases are now pending before fiscal courts throughout the Federal Republic of Germany. In tax and customs matters there are only two instances. Against judgments of the fiscal courts an appeal may be brought before the Supreme Tax Court. In general, 4 to 5 per cent of the cases dealt with by the fiscal courts are appealed to the Supreme Tax Court. Since the establishments of facts is the task of the subordinate fiscal courts in general the facts established in the first instance are binding for the Supreme Tax Court. Therefore the Supreme Tax Court can examine the judgment only for error of law and procedure. A re-determination or a new establishment of facts is not admissable. The Supreme Tax Court has three main choices when making a decision. It can dismiss the action or set aside the judgment of the fiscal court or refer the case back to the fiscal court.

The fiscal courts adjudicate through their senates, generally sitting with three full-time and two honorary judges. The honorary judges are not involved in decisions taken outside court proceedings. The senate concerned can take the decision to give the case to a single judge for the final decision provided the case does not pose a particular factual or legal problem or the case of issue is not of fundamental legal significance. Against the order of the senate an appeal is not admissible. In these cases the decision is taken without deliberations by one judge only. However having examined the case and after having heard the parties, e.g. in an oral hearing, the judge can reffer back the case to the senate if he concludes that the case in fact is one of fundamental legal significance that creates bigger problems. In contrast to the procedure before fiscal courts a senate of the Supreme Tax Court is not in a position

to give a case to a single judge. Cases pending before the Supreme Tax Court have to be decided by the senate.

Each new case brought before the Supreme Tax Court is first registered by the office of the senate responsible and given a case number. The senate office sends each party the pleadings of the other party, requesting comments from both sides. When no further comment is to be expected from either party, according to the organisation plan of the senate the Senate President appoints a judge to report on each case and a second judge as co-reporter (in cases before the fiscal courts the President of the senate is acting as co-reporter). On the basis of the content of the files the reporting judge prepares a written report containing a statement of the facts of the case and a substantiated proposel for the decision to be taken by the senate. Taking the relevant jurisprudence and literature into account, the report gives a comprehensive overview of the case. The report can have a greater volume than the final decision. Then the report and the file are given to the co-reporter. The task of the co-reporter is to comment on the report drafted by his collegue. In the case of differences between the opinion of the co-reporter and the opinion expressed in the report, the reporter gets back the file for information. In a supplementary report he can comment on the remarks and suggestions of the co-reporter. The process of opinion writing comes to an end as soon as both judges have given their final comments. There are no further deliberations on paper between the judges of the senate. By order of the Senate President, the case is put on the agenda of the next session of the senate. In cases in which court proceedings are required this session can be a pretrial meeting without the participation of parties in order to discuss the legal problems of the case or to sort out problems of procedural law.

Only in a few cases the Supreme Tax Court comes to a decision on judgment cases on the strength of court proceedings. Most of the parties make use of the possibility to dispense with a hearing. In fact, only about 8 to 12 per cent of all appeal cases are decided on the basis of court proceedings. However, even if the parties do not dispense with a hearing the Supreme Tax Court can give its decision in a so-called summary ruling. This ruling is notified to the parties. In the case that the parties do not lodge an appeal for a hearing within a time period of one month the summary ruling will take effect as a non-appealable judgment and proceedings are concluded.

After oral hearings or in other cases where a hearing is dispensable the judges gather in a conference room to deliberate and vote on the cases on the basis of the report and the co-reporters' comments. The deliberations are chaired by the Senate President who leads the discussion and moves the deliberation along from one judge to the other. Each judge has to be given the opportunity to present his perspective. In the voting the reporter votes first, followed by the co-reporter. The younger judges votes before the elder one. The last senate member to vote is the Senate President himself. Of course the reporter can change his previous vote he has already given in writing. A majority vote decides the case. Deliberation and voting are secret and thus may not be subsequently reported. The judges outvoted on any one decision are obliged to sign that decision as well as the judges who voted in vavour of it. It is not possible for a dissenting opinion to be appended to a decision.

III. Expert evidence

As a general principle it is solely within the discretion of the fiscal court to appoint experts. Provisions on taking of evidence by hearing experts are laid down in Art. 402 – 414 of the Code of Civil Procedure. According to Art. 82 of the Code of Procedure for Fiscal Courts these rules apply mutatis mutandis to fiscal court proceedings. In Germany court-appointed experts or private experts do not play an important role in assisting the judges to decide on tax cases. In most of the cases a decision is taken without hearing witnesses or experts. In this respect attention must be paid to the fact that experts are expensive and that the party that has not prevailed in the dispute is to bear the costs of the legal dispute including the costs for experts. In practice examples for the most frequent cases in which fiscal courts require expert opinions are cases where particular values, e.g. values of immobile property or trade receivables are disputed, or in cases where the court has to decide whether the taxpayer received business income or income from freelance professional activities by working e.g. as an artist, architect or computer programmer.

According to German procedural law the court hearing the case shall select a single expert or a certain number of experts to be involved. However, the court may also ask the parties to designate persons who are suited to be examined as experts. In

cases where the parties agree on certain persons to be appointed as experts, the court is to comply with what they have agreed. Prior to hearing the expert the court has to frame the questions regarding which evidence is to be taken. In Germany it is uncommon that fiscal courts organise pretrial meetings to require the experts to meet in person prior to trial in order to identify the relevant questions and to discuss problems as to the content and scope of the task allocated to the expert by the court. In cases of disputed facts, the court shall determine the facts on which the expert is to base his report. If it is ordered that the report be submitted in writing the court may order the expert to appear before it for the purpose of explaining the written report to judges and parties in an oral hearing. According to Art. 83 of the Code of Procedure for fiscal courts the parties should be informed about the evidence-taking trial date. Each party may address any pertinent question to the expert. A permission of the court is not necessary. In case of doubt whether a question posed by a party is of relevance for the case and therefore admissable the court shall take a decision. In German procedural law there are no provisions laid down on the use of concurrent evidence and joint expert reports. Although codified expert concurrent evidence procedures do not exist the parties are free to address questions to the expert appointed by the court. Furthermore a party may offer a private expert in order to support the evaluation process and to explain on a professional basis why the opinion of the other expert may be right or wrong or at least unconvincing. Furthermore there is no provision that prohibits a dispute between both experts before the court. However, the court is to direct the experts in terms of their activities and may issue instructions. Having heard the experts it is the role of fiscal judges to decide on the case according to their own independent conviction. Because the fiscal judge is not in a position to challenge the expert in the field of expertise, in Germany the acceptance rate of expert opinion by the judges is very high, especially in cases where the expert has been appointed by the court itself. In other cases where the parties present reports written by private experts the courts are more restrained and cautious to adopt the expert's opinion.

IV. Sanctions (refusal to admit comments and evidence)

According to Art. 79b of the Code of Procedure for Fiscal Courts the President of a senate or the reporter may set a period by court order within which the applicant is

obliged to present facts or within which a party is obliged to present facts or evidence or records and documents. The court may refuse to admit comments or evidence that are not submitted in due time, if it finds at its free conviction that admitting them to the proceedings would delay the process of dealing with and terminating the legal dispute, and that the delay was not sufficiently excused. When requested by the court the party has to substantiate the reason for the delay.

V. Compulsory representation before the Supreme Tax Court

A special rule of procedure to follow before the Supreme Tax Court is the compulsory representation. As a general rule, appeals to the Supreme Tax Court must be lodged and substantiated by a lawyer, a tax consultant or a certified public accountant, authorized representative in tax matters, European lawyer in practice or a sworn auditor or a company acting accordingly. An exception is made for public authorities, which may opt to be represented by a public service official or employee qualified to hold judicial office. In cases where actions for review or appeals against denial of leave to appeal are lodged by private persons without a professional representation these remedies have to be rejected by order as not admissable.