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Germany Va: Simplicity vs. Complexity

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1 Status Quo

“The less people know how sausages and laws are produced the quieter they sleep“
(Bismarck“)

“The most corrupt states have the largest numbers of laws“ (Tacitus)

The ca. 200,000 paragraphs of tax and social law only formally have anything to do with justice (Jürgen Borchert)¹

Given the complexity of German tax legislation and administration, the question imposes itself whether such a complex system is not per se unfair because it overburdens the ordinary tax payer and/or can best be exploited for selfish reasons by those having a complex tax base and wealthy enough to hire tax consultants. Such a discussion can be done only if also administrative aspects are considered. This is why this chapter is a useful bridge between the chapter dealing with tax law and the one dealing with tax administration.

The German system of tax law is known for its complexity, and, interesting enough, this complexity is justified with justice reasons: A simple law, treating everybody equal, does not do justice to different different *Lebenslagen* (situations in life) of individuals and businesses. Also experts agree that if a system is too simplistic, it no longer does justice to situations particular to individuals and small groups.² This is also the view held by one of the conversation partners on the Bavarian tax administration. Pointing out to Slovenia with its flat tax approach it is argued twice: First, in their eyes it is not fair if somebody earning – e.g. – EUR 1000 has to pay EUR 300, while somebody earning EUR 1 a millionaire income earner has EUR 700,000 net of income tax. This offends against the principle of proportionality according to which the strong have to shoulder a heavier burden. Second, they have the impression that the Eastern European States should shift from flat tax systems and to more complex taxation as we have in Germany.

In order to be a “case-just” as possible, qualifications, differentiations, exemptions etc. are needed, already on the legal level.

Tax rules and regulations are not only result of legislation (laws) or statutory instruments/regulations issued by the federal or state government. Of importance for application are also the following sources their interpretation. Because of the existing complexity, the Federal Ministry of Finance issues the Ministry of Finance Letters (so-called *BMF-Schreiben*), aiming to secure a uniform application of the tax law by the federation, *Länder* and municipalities. The same may happen through circulars issued by administrative bodies on *Länder* level for their respective area of competence. Next, in case of a conflict between taxpayer and revenue authorities, there the possible of appeal to juridical bodies, e.g. at the Financial Court on the *Länder* level, and the Federal Financial Court and Constitutional court on the federal level and even the European Court of Justice – depending on the verdict, laws need to be rephrased or reformed.

There are roughly 200 laws and 100,000 (administrative) regulations. Between 1993 and 2005, the Income Law alone has been affected by changes in 97 other laws, some paragraphs of the Income Law itself were changed and revised several time, e.g. paragraph 3

¹ »Je weniger die Leute wissen, wie Würste und Gesetze gemacht werden, desto besser schlafen sie!«, wusste schon Bismarck ... Tacitus zitiert, der von 58 bis 120 n. Chr. vor ihnen lebte: »Die verfaultesten Staaten haben die meisten Gesetze!« In der Tat. Die schätzungsweise 200 000 Paragraphen des Steuer- und Sozialrechts, mit denen hierzulande die öffentliche und soziale Lasten- und Leistungsverteilung geregelt wird, haben mit Gerechtigkeit oft nur noch formal zu tun. (Borchert, 2014, p. 42+44)

² (Merten, 2012, S. 12), (Vogt, 2011)

alone 30 times. This in turn influenced paragraph 52 which regulates the application of the Income Law, which therefore needed to be changed 55 times during these 33 years.³ On May 2013, the relevant Website of the Ministry of Finance had 528 of its interpretative “Ministry of Finance” Letters online. At the same time it was emphasized that ‘the removal of one letter from this website does not mean that their validity has expired.’⁴ And: there are hundreds and thousands of open cases at the Federal Financial Court awaiting definite and binding interpretation and decision.⁵

To put it into context: In Amsterdam one finds the International Bureau of Fiscal Documentation (IBFD). Of its 2000 shelf-meters on taxation literature, German taxation literature alone makes up for 200 shelf-meters, i.e. 10%, the share among electronic resources is given with 15%.⁶

2 Impact on tax declarations and tax administration

Complicated tax laws, the frequency of reviews, changes, amendments and reforms, and some ambiguities etc. cause many challenges.

First, with any taxpayer: Not for all it is easy to understand and handle many different and complex forms. Many make mistakes in their tax declaration which then leads to problems with tax authorities. These unintentional mistakes are another reason behind the high number of rejected tax declaration by authorities. In other words: the high number of rejected declarations is not automatically an indicator of suspected cheating, but includes also simple mistakes. An evident injustice in this context is that professional advice and guidance is not affordable to all, but primarily for the wealthy and businesses. A frequently reported solution for “ordinary taxpayers” is that they try to call the tax authority for advice, which, of course, distracts civil servants from their proper job.

Complexity has – secondly – an impact on the tax administration. Experts propose that an adequate staff number to handle this flood of (fast changing) material would be 130,000 tax officials. However: Only 100-115,000 are employed and they face at the same time 94,000 tax consultants.⁷ That way, also tax authorities surrender since their employees cannot both do their work and enhance their qualification in workshops or by reading the numerous circulars and other publications (Adamek & Otto, 2010, p. 61). One conversation partner heading a unit investigating employers’ payment of social security contributions argued: ‘When I realised in the most recent circular, that changes in one paragraph, point a, were subdivided into five sub-level labelled “aaaaa” I first thought that it was a mistake – but then I realized: That’s for real! Who has time to keep up with it when he users handbook for inspections has already 300 pages and it is not permitted to print it out because it is outdated too fast due to further changes!’

³ For this and the following: (Evangelische Kirche in Deutschland, 2009, p. 7), (Adamek & Otto, 2010, pp. 59-61), (Schöbel, 2008, p. 206ff.), (Conradi, 2013)

⁴ http://www.bundesfinanzministerium.de/Web/DE/Service/Publikationen/BMF_Schreiben/bmf_schreiben.html

⁵ <http://www.bundesfinanzhof.de/anhaengige-verfahren>

⁶ Cf.: Brinkmann, B./ Brühl, J. (2013, July 22) Absetzen und abhauen. In: *Süddeutsche Zeitung*. Retrieved from (Süddeutsche Zeitung, 2013b).

⁷ Pressemeldung der Deutschen Steuergewerkschaft zum Tag der Steuergerechtigkeit am 30.9.2015 sowie Pressemitteilung der Steuerberaterkammer (2015, October 17). Retrieved from https://www.bstbk.de/de/presse/pressemitteilungen/2015/20150217_pressemitteilung_001_bstbk/index.html

One result of this situation is at times some “arbitrariness” and superficiality in the processing of tax declarations. This in turn is one of the reasons for the declining confidence of the population into the tax system, its inadequacy and justice (Bundesbeauftragter für Wirtschaftlichkeit in der Verwaltung, 2006, p. 55). Accordingly, the number of complaints remains high (cf. 6.5).

3 Complexity, mass procedures and inequality

Findings of this study and other comparable publications, e.g. (Schöbel, 2008), substantiate the discussion whether the complexity of the law, the organisation and equipment of tax authorities can handle the increasing numbers of tax declarations. Further, does the capacity of the Tax Authorities still adequately secure standards required by the constitutional principle of equal treatment of tax subjects? If not, how it could be secured in the best possible way? As will be shown in more detail in chapter G/VI:

- Tax law may be equal in principle for all Germans, but the implementation, administration and enforcement of the law varies from German state to German state.
- The increasing volume of tax declarations and cases requiring examination and assessment is at variance with resources available at the disposal of the tax authorities. Here, “practicability” considerations (i.e. that which can be done with resources available) supersede already that which is required by law (Schöbel, 2008, p. 186f.)
- The resolve by tax administrations to use computerized systems to (pre)process tax declarations, with the view to grant relief to tax inspectors of physical assessments thereby enabling tax officers to devote resources to “deserving cases” is apparently faulty than admitted and mitigates against “equal treatment”.

Another major problem for the research is that the state is about to delegate sovereign acts to computerized processing and decision making – which is rejected by this research and will be discussed in more detail in chapter VI.

4 The role of tax consultants and lawyers

Given the complexity of the German taxation system and the many challenges which both this law and international transactions pose, the services of tax experts is on demand.

4.1 Tax consultants as opponents or partner

The functional role of Tax Consultants is multifaceted. Some are indeed transparent and accountable in that they process tax declarations with due competence and diligence. Tax consultants are generally engaged when the tax workload is becoming complex and risky to the individual tax payer or corporation. It is also the tax advisors responsibility to check submitted documentation for adequacy and completeness and to take into account peculiarities which are not accepted by the tax authority, e.g. ordering material or concluding treaties including payments with handshake only and without formal transaction records, a practice still widespread in rural areas. (Lechner, 2014, p. 37).

Conversation partners from the Tax Consultants Federation agree, of course, that it is part of their job to interpret and apply the law and to act in the best interest of their clients. Doing that, they would admittedly ‘go to the limits of that which is legally possible, but never beyond.’ In justification of that they remind the author that they are bound to do this by a

decision of Superior and Federal Courts: Tax consultants are obliged to advise clients comprehensively about their options, even if they have not asked for it. If they fail to do so and if the client finds out they risk professional and institutional reputational damage. A conversation partner, being himself tax consultant, provided the following case in order to reveal how ridiculous this can be: The tax consultant forgot to indicate to the client in a liquidation proceeding that he could save massively on church taxes if he leaves the church in time. This, he finds, is rather some question of ethics, belief and certainly personal opinion and not something pertaining to legal advice.⁸

At the same time conversation partner among tax consultants admit that there are colleagues going beyond what is legally and professionally acceptable, as evidenced in the Luxemburg Leaks and ensuing inquiries. This was certainly up to recently a big business sector for the Big 4, but now, since they are at risk of losing practice licences in some countries, they are much more cautious, without abandoning the game entirely (see GER/III/6 and GER/VII/2.3). Equally, clients who can afford it do most of this kind of business outside Germany, well beyond the reach of German authorities. Conversation partners estimate that the large majority of German tax consultants have high tax morality, not the least since the risk of losing a practice licence is too grave. On the other hand they concede that others take risks and engage in unprofessional conduct. One conversation partner among tax consultants conceded that some clients did request him to engage in unprofessional and unethical conduct. However, when he declined they did not sign a contract. He also admitted that clients have multiple assets and business relations and that he probably does not know what his clients do or conceal from Tax authorities, especially in Panama. "Here we will probably discover a lot if Wikileaks and other platforms continue to publish."⁹

The task of tax consultants, one senior member of the tax consultant federation, is, to advise the tax subject to his best knowledge about what the law means and what he has to expect from the local tax administration if he hands in his tax declaration. This is called the "safe procedure". But it is up to the client to choose the way he wants to take: If he wants to take risks, even court proceeding, then it is not up to the tax consultant to prevent this.

A big problem for them is, again on the background of their liability in the event of bad advice. the problem that new laws apply in principle in the moment they are passed and published, even if local administration has not yet published their application and execution regulations. Hence they have to undertake a balance of probabilities on the outcome of certain specific tax administrative procedures The Tax Returns and submission details in the application are the premises upon which the tax auditor relies on when checking on clients

⁸ Rechtsprechung zum Beratungsumfang und Haftung des Steuerberaters gibt es sehr viel, zum Teil auch widersprüchliche, sodass es letztendlich immer auf den Einzelfall ankommt, der Berater also immer das Risiko eines Haftungsfalls hat. Folgende Urteile beispielhaft:

- Haftung eines StB bei unterlassenem Hinweis auf Anspruch auf eine steuerliche Sonderbehandlung nach dem sog. Sanierungserlass (BGH, Urt.v. 13.3.2014, IX-ZR-23/10)

- Umfang der Aufklärungspflicht eines StB i.R. eines auf den steuerlichen Jahresabschluss oder die Erklärungen zu Körperschaftsteuern und Gewerbesteuern beschränkten Dauermandats (BGH, Urt.v. 23.2.2012, IX-ZR-92/08)

- Verpflichtung des StB zum Beraten des Mandanten auch vor außerhalb seines Auftrags liegenden steuerlichen Fehlentscheidungen (BGH, Beschluss v. 18.3.2010, IX-ZR-192/08)

- Pflicht des StB zur Aufklärung über die verschiedenen Afa-Möglichkeiten nach § 7 EStG (OLG Koblenz, Urt. v. 4.6.2012, 2-U-694/11)

- Wegen der steuerlichen Folgen eines Rechtsgeschäfts muss auch hinsichtlich eines zu erwägenden Kirchenaustritts beraten werden (OLG Düsseldorf, Urt.v. 20.12.2002, 23-U-39/02).

⁹ This conversation was before the Panama Paper Leaks...

and businesses. If there is a minor divergence, the anomaly could be resolved through a gentlemen's agreement by making requisite adjustments. This is furthered by the fact that in most cases tax subject and his tax consultant know the tax inspector in charge of the case so that they can assess the others honesty and thinking. More problems emerge over the past years, especially in Bavaria, due to the fact that the tax inspectors in charge change more frequently and no longer a familiar and trusted relationship is possible. If therefore a gentlemen's agreement cannot be reached, the only recourse is the Court of law.

4.2 Tax consultants and tax administration

Also members of the tax administration commend their cooperation with the vast majority of tax consultants which would, in their opinion, make their life much easier: Their professional preparation of tax declarations would avoid many mistakes otherwise committed by tax subjects and therefore serve the common good. In one case a tax inspector even confided that he once, when his computerized risk management did not work, went to tax consultant friends whose software he knew would answer his problem easily and he used his facilities to complete his case and problem (by preserving, of course, all necessary requirements of tax secrecy!!) Overall, it was found out by this research after several interviews that the relationship between tax consultants and tax administration is much better than public exchanges of diverging positions would suggest.

In cases where there is interest in a long-time well-working cooperation, amicable settlements are reached rather than decisions taken, e.g., if the case is so complex that no simple or clear solution can be found (Schöbel, 2008, p. 213).

Fact is: There is an increasing mismatch between tax lawyers and tax consultants on the one hand, and tax inspectors on the other. Since 2003, the number of tax lawyers increased by 60%, of tax consultants by 30%, while the number of tax inspectors decreased by 5% and will further decrease until 2020 (the exact number depending on the *Land* where the statistic was generated and applies) by 10-20%. (Wüllenweber, 2013). Today, ca. 110,000 tax officials as matched against 94,000 tax consultants.¹⁰

4.3 The more ambiguous role

But at the latest since Luxemburg Leaks there is also growing awareness of the more ambiguous role of tax consultants and tax lawyers when it comes to tax planning and tax avoidance. The point in question is illustrated by a noticeable variation of the above-mentioned phrase of a local tax consultant from PriceWaterhouseCoopers, who conceded at a hearing in the British Parliament that tax saving models proposed by them are considered to be legit even if there is only a 50:50 chance that the proposed construction is legal!¹¹

The more documents of Luxembourg-Leaks were assessed (Süddeutsche Zeitung, 2014), the more light was shed into the doings of the other "Big 4" companies, namely Ernst & Young, Deloitte or KPMG. By then, even Jean-Claude Juncker, formerly Prime Minister of Luxembourg and current President of the European Commission, grudgingly admitted 'that

¹⁰ Pressemeldung der Deutschen Steuergewerkschaft zum Tag der Steuergerechtigkeit am 30.9.2015 sowie Pressemitteilung der Steuerberaterkammer (2015, October 17). Retrieved from https://www.bstbk.de/de/presse/pressemitteilungen/2015/20150217_pressemitteilung_001_bstbk/index.html

¹¹ Obermayer, B./Riedl, K./Risel, M. (2014, November 6) Steuertrickser vom Dienst. In: Süddeutsche Zeitung. Retrieved from <http://sz.de/1.2208497>

the system was “not always in line with fiscal fairness” and may have breached “ethical and moral standards”.¹²

The analysis “Legal Enemies of the State” (Wüllenweber, 2013) summarizes some facts. Worldwide the Big 4 employ about 700,000 specialists and have a multibillion turnover in about 150 countries. Not surprisingly, there are many of them in small countries such as Luxembourg, Cyprus and wherever else taxes can be “downsized”. They are specialized in analysing national laws in order to find loopholes which then can be marketed to solvent customers for lowering their tax-bills. It is them who invented the Double Irish, Dutch Sandwich, Soap Picante and PITA (Pain In The Ass) constructions, enabling private and corporate holder of wealth to avoid the payment of taxes. Conversation partners from the tax administration and others admit that those highly paid experts who earn up to EUR 1000 an hour are no match for the tax inspector and tax auditor whose task is to understand and check the books.

5 Taxation and business environment

‘It’s the economy, stupid’, was the famous saying of Bill Clinton at a time when the US Economy was in recession and with which he run a successful campaign to unseat George H. Bush in 1992.¹³ The message coming across was that elections are being won with jobs, jobs and jobs again. In this context, taxes are often presented to be the ultimate job killer since they pose a heavy burden on business and therefore hamper investment. Germany’s reputation here is particularly bad.

The field of business taxation is also a very suitable area to illustrate the tension between simplicity and complexity in tax law. Looking more closely, however, the situation is not that bad from businesses’ point of view:

5.1 *Competing for businesses and jobs*

As stated by OECD and others, states and governments have problems to keep track with the development of global businesses and their productions and “value chains” – a fact which businesses can instrumentalize for their favour.

OECD experts state that the very possibilities offered by globalisation processes to create Global Value Chains from R&D to production to sale, including insurance options, enable TNCs to develop new models to maximize profits and minimize expenses and costs, taxation being among the latter (OECD, 2013a, p. 27). This is also seen by national politicians: The problem starts with the fact that TNCs can “compose” themselves from different entities residing in different countries subject to different legislations and administrations and yet act as a unitarian, yet complex, entity (Kekeritz & Schick, 2013, p. 7). Accordingly, they can legally pick for taxation planning purposes a country domicile /subsidiary which is most attractive for a particular business.

This view is confirmed by the European Court of Justice, which interprets the four basic freedoms enshrined in EU Law that Corporations are permitted to pay their tax in those countries of the EU which have the lowest taxation rate as opposed to where wealth and profit

¹² Luxembourg tax deals for Disney, Koch brothers empires revealed - Latest “Lux Leaks” files obtained by ICIJ disclose secret tax structures sought by “Big 4” accounting giants for brand name international companies (2014, December 10). Retrieved from <http://www.publicintegrity.org/2014/12/09/16382/luxembourg-tax-deals-disney-koch-brothers-empires-revealed>

¹³ http://en.wikipedia.org/wiki/It%27s_the_economy,_stupid

has been generated. And it is seen by NGOs who describe the international context and the options opened by it as being complex and complicated:

While it is clearly reasonable to tax a share of a company's profit, it is less clear exactly what should ... be taxed; this includes, for instance, the question of which costs are deductible from the taxable profit. The problem is worsened by the fact that wealth is not longer strictly tied to tangible assets, such as factories, but also to intangibles, like intellectual property rights... The difficulties of taxation are multiplied by any transnational business activity (i)f ... a company is active in two different countries. (Henn, 2013, p. 1)

Most of that which is going on in the field of corporate tax dodging does not offend legal regulations. Preferential tax regimes, tax expenditures, gaps and loopholes in domestic and international law underlie these developments. However, even the OECD states that there is 'circumstantial evidence' of an 'increased segregation between the location where actual business activities and investment take place and the location where profits are reported for tax purposes', preferably places 'where they profit from a favourable tax treatment' (OECD, 2013a, p. 20).

This is also, where Tax Havens enter the picture: In the case of TNCs tax optimizing strategies do not involve a transfer of real economic activity, but rather the setting up of shell-entities which facilitate the conduit or deposition of money with the goal of saving tax payments. However, the problem is not limited to exotic states such as Mauritius or Bermuda. Even within OECD states cheap tax rates or tax saving models available such as the "Double Irish" or the "Dutch Sandwich" (which can also be combined!), trying to attract businesses and TNCs.¹⁴

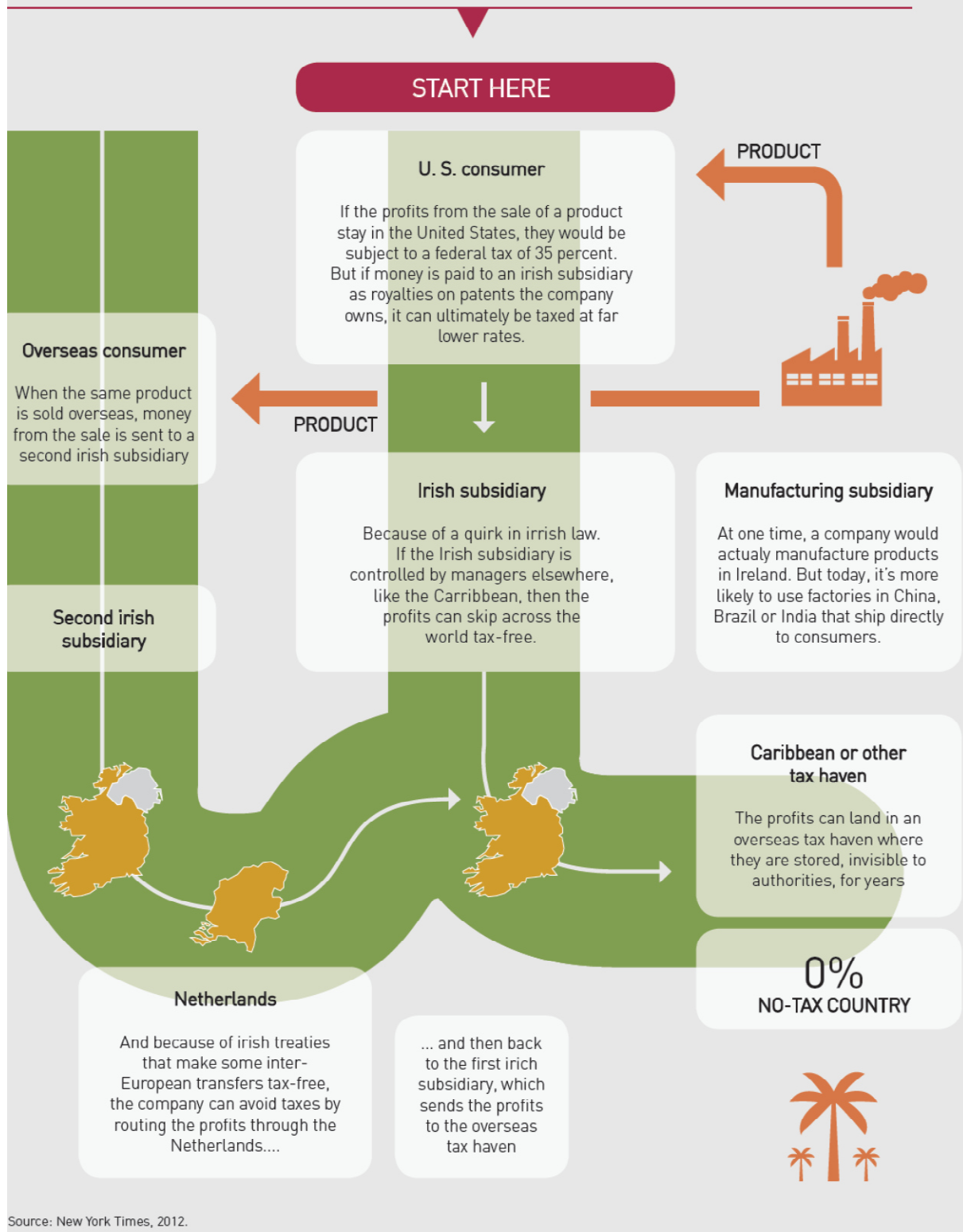
¹⁴ The graphic is taken from (High Level Panel, 2015a, p. 26) On 14 October 2014 Ireland announced the definitive closure of the "Double Irish Loophole" but a definitive date is not yet known. See Death of the Double Irish. In: *The Economist*. Retrieved from <http://www.economist.com/news/business-and-finance/21625444-irish-government-has-announced-plans-alter-one-its-more-controversial-tax-policies>

Graphic 1 Double Irish with a Dutch Sandwich

The "Double Irish" system of tax evasion

'DOUBLE IRISH WITH A DUTCH SANDWICH'

Numerous companies take advantage of loopholes in international laws to move profits around the world, avoiding taxes. Many of these techniques rely on transferring profits on patent royalties to places like Ireland. Here is one technique typical of what Apple and others pioneered.



Source: New York Times, 2012.

Germany, too, plays its role in the global competitive business and offers incentives to private and corporate assets in order to attract them to Germany (cf. GER/VII/2+4)

It would be surprising if businesses would not exploit their powerful and privileged role. Hence it is increasingly felt that TNCs are becoming more aggressive in their tax planning, which is why the OECD devotes increasingly time to tackle it (OECD, 2011c)

5.2 Constant lobbyism (1)

In spite of all facts there is staunch opposition from German business groups and federations against all plans to increase taxes. For example: Ahead of the 2013 General Elections, when the Social Democrats and Green Party (among other things) campaigned with calls to increase taxation for the wealthy and to curb tax avoidance and tax evasion. Some of the responses were:

- “Federations of Business warn: Tax on financial transaction weakens the German economy” (Bankenverband, 14 February 2013)
- “SPD Tax plans drag down economy” (Handelsverband Deutschland, 13.3.2013)
- “Tax attack on medium size enterprises: How the red-green tax plans burden the pillars of society” (Wirtschaftsrat Deutschland, May 2013)
- “Fear of bankruptcy: Tax plans burden travel-industry” (Travel Federation, 20 October 2013)

But for obvious reasons, business interest groups present a situation far more negative and alarmist than governments and of course everybody has their own interests to do so – even more during election time. Also German businesses are aware, of course, that there are many other factors which make Germany attractive and an FDI country of choice.

5.3 Global Competitiveness Report

The German taxation system is presented to be a major obstacle to business investment in Germany. In the Global Competitiveness Report 2013/2014 of its ranking of 148 states, the highest share of respondents answered the question “The most problematic factors for doing business?” with: “Complexity of tax regulations” – 19% (up from 2012/2013: 18.1 %), followed on third place with “Tax Rates” – 12.7%. The Labour Market Criteria “Effect of taxation on incentives to work” put Germany on rank 64 (up from 2012/2013: 74)¹⁵, the Goods Market Efficiency criterion “Total tax rate, % profits” on rank108 (down from 2012/2013: 103).¹⁶

Three years later, the Global Competitiveness Report 2015/2016 with its ranking of 140 states reads as follows: The most problematic factor for doing business in Germany remains “Tax Regulations” with 16.8%, “Tax Rates” still being on third place with 15.1%. Regarding the Labour Market Criterion “Effect of taxation on incentives to work” Germany is on rank 95, the indicator “Effect of taxation on incentives to invest” finds Germany on place

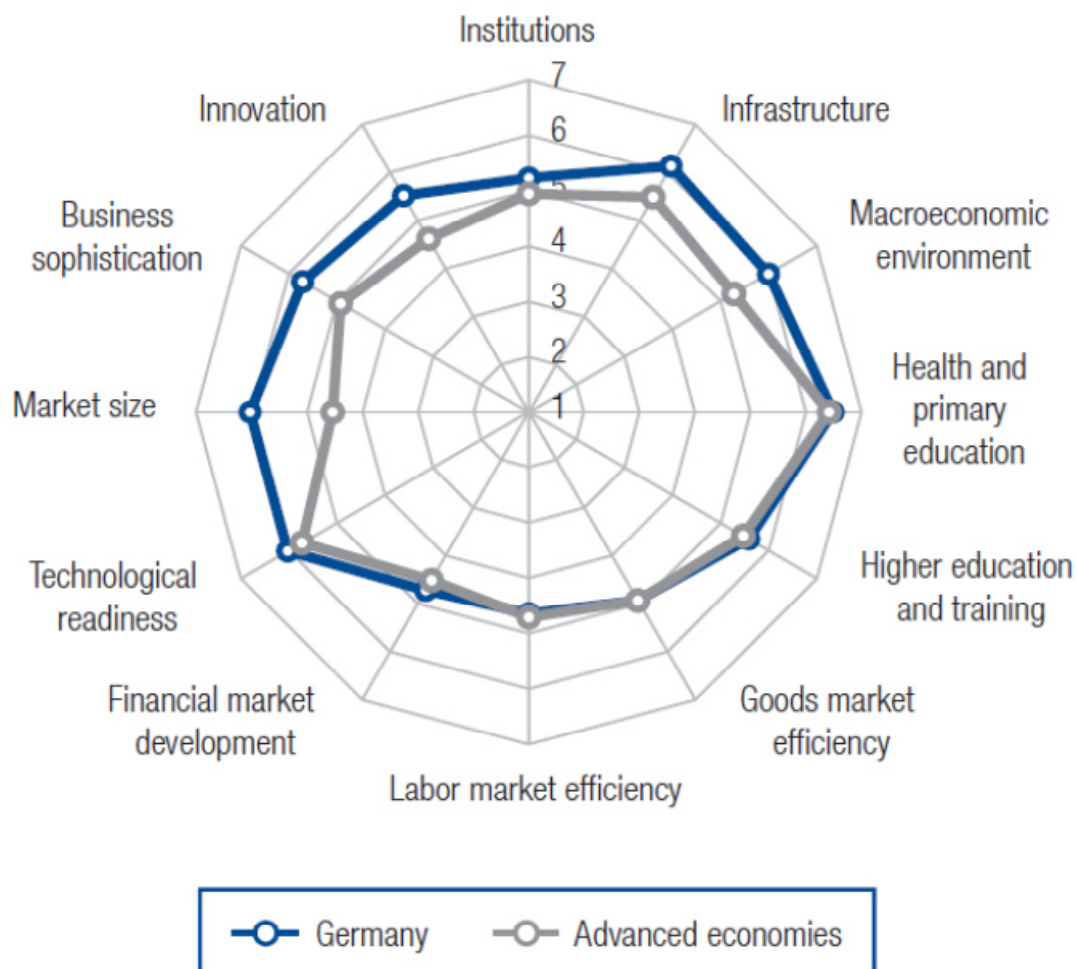
¹⁵ NB: The defined criteria was changed in the 2013/2014 report! 2012/2013 it was “Extent and effect of taxation”

¹⁶ World Economic Forum, Global Competitiveness Report 2013/2014 pp. 193f., retrieved from http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf; World Economic Forum, Global Competitiveness Report 2012/2013, pp. 176f., retrieved from http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf. More generous in its ranking is the report "Paying Taxes 2013" of Price Waterhouse Cooper, where Germany ranks 72 out of 178, solidly middle field, cf. <http://www.pwc.com/gx/en/paying-taxes/assets/pwc-paying-taxes-2013-full-report.pdf>

54, the indicator “Total tax rate, % profit” puts Germany on rank 107 – hence improvements and deteriorations, but nothing of an alarming size.¹⁷

However: As shown in GER/V/4.1, Germany is not worse off when tax and contribution ratio is compared with other states. And: The Global Competitiveness Reports are a marvellous proof of how little tax issues in the end count when it comes to the attractiveness of a country for doing business and making investments: On the whole, Germany ranks Nr. 4 among 148 competing states (unchanged in the 2012/2013, the 2013/2014 and the 2015/2016 ranking). Although taxation rates among other key business investment considerations, it is nevertheless one among others:

Graphic 2 Germany: Global Competitiveness Index¹⁸



5.4 Deloitte's research among corporate tax departments

A survey among the heads of tax departments of businesses gives some insights about current priorities in their work (Deloitte, 2014). Interestingly enough, the four top areas of activities of business' tax departments is related to internal business affairs, i.e. organisation and cooperation with other departments and personnel. Only in place 5 follows questions

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¹⁸ <http://www3.weforum.org/docs/gcr/2015-2016/DEU.pdf>

related to tax law, eventually questions related to transfer pricing, communication with tax authorities and lobbying to tax relevant issues (p.1). When asked, which country has the most difficult taxation system, German respondents put their own country ahead of all others, even Russia, which was heading the international hit list. Not surprisingly, the question aiming to identify the country with most favourable tax conditions was lead by the Netherlands and the UK (p. 3). The top desire of the German heads of tax departments is a simplification of German tax law, followed by more predictive reliability, while the top desire internationally is reliability. A major problem seen by the Germans is the increasing control of their operations by tax departments, (p.2) and duration of tax proceedings (including legal suits) and changes in tax law (p.3). Main issues of contention in Germany are corporation tax, followed by Transfer Pricing and Turnover Tax, which is slightly different from the rest of Europe where the list is headed by Corporation Tax, followed by Turnover Tax and Transfer Pricing is somewhere further down the list (p.4). This indicates that transfer pricing has a special importance for Germany, not surprisingly given its role as exporting nation.

On the whole, it seems the relationship between tax departments and tax administration is not too bad in Germany and on the whole the survey reflects a positive light regarding their cooperation. It is also interesting that in Germany the success of tax departments is no longer measured in their success to lower the effective tax rate, but their ability to submit tax relevant documents in time (p.2). This is different from other countries, e.g. Austria, where heads of tax departments admit that tax planning is still part of their job.¹⁹

5.5 Conclusion

Indications are that, on a balance of probability and in the end, other factors are much more important for businesses and investment decisions, e.g. infrastructure, training and education of the workforce, politically and socially stable environment, and quality-of-life-enhancing facilities for the CEOs and their families and other elites....

Often business owners and CEOs of TNCs complain about Germany being a country of high taxation, hence being business unfriendly. This is neither true in absolute nor relative terms: The combined nominal taxation rate of corporation and business tax dropped from 56.8% in 1995 to 29.8% in 2009. At the same time, however, does this nominal rate not really reveal the tax burden of corporations and that this tax is being paid. German law offers a lot of loopholes to shift around profits or lower the tax base (*Bemessungsgrundlage*).

Research found out that also the complaint about complex legislation do not apply: German paragraphs and its application relating to the taxation of corporations fit on 1,700 pages, in the US one needs 5,100 pages, in Japan 7,200 pages. Likewise it was found out that in Germany business leader find it easier and faster to comply with business taxation than in other states of Europe.²⁰ It depends, perhaps, how you ask and whom you ask.

¹⁹ In Austria, tax planning is with 51% the second most important part of the job, while at the same time 65% admit that tax planning is not essential for the success of business. Cf. http://www2.deloitte.com/at/de/seiten/ueber-deloitte/artikel/european-tax-survey-2014.html?utm_source=dlvr.it&utm_medium=twitter

²⁰ Pennekamp, J. ((2011, October 24) Die Mär vom Steuerdschungel. In: *Handelsblatt*. Retrieved from: <http://www.handelsblatt.com/politik/oekonomie/nachrichten/urban-legends-warum-die-maer-nicht-totzukriegen-ist/5664240-2.html>

6 Is simplification a solution?

6.1 *Calls for simplification and status quo*

But, of course, the call for simplification of the German tax law is a frequent one: In the course of interviews, many conversation partners among tax inspectors, tax consultants, business people and ordinary citizens call for simplifications in tax law. For example:

- ‘Simplification is very necessary. Just tax the income, not the net difference between income and expenses’. Or:
- ‘Reduce exemptions since every exemption costs labour, time and effort. Keep it as simple as possible. This increases compliance, transparency and detection of fraud.’
- ‘Just consider this: Labour Law, Fiscal Code and Social Law are independent legal codes. There are cases where they treat one and the same issue, but differently. How on earth can you now decide which legal obligation you accept to be the most important one!’
- A lot of tax avoidance is only possible because of the many grey areas and ambiguities within the law. Tax compliance and enforcement would be easier if the legislator would clarify these issues.

Simplification of tax law and tax procedures was also among the most frequently mentioned desires of “ordinary taxpayers” in Germany who took part in the Mini-Surveys of this research.²¹

Even though calls for a comprehensive tax reform recur regularly and ministers and experts are working on it,²² nothing in substance has been achieved so far. The failure to work on a functional comprehensive tax system has been attributed largely to the German federal system and the competition between states and federation or between different states. When a coalition of four federal states introduced a modest reform of the German taxation system in 2012 via the Chamber of States it came to nothing because there was neither adequate support by the other 12 states and no openness on part of the federal government. The reason behind this, so the leading Senator for Finance of Bremen, Karoline Linnert, suspected is ‘because there are always interest groups losing out’, which is why they try to prevent those changes.²³

But there are quite a number of reasons why a substantial simplification is unlikely to happen:

6.2 *Complexity due to justice requirements*

A first area of contention is the question whether the present complexity of tax law and tax procedures is one consequence of the desire to create laws and procedures which are indeed able to “do justice” to individual persons and businesses. And: This seems to work, as surveys of taxpayers indicate:

²¹ For the German survey cf. <http://www.taxjustice-and-poverty.org/results/germany/resources/umfrage.html>.

²² E.g. the proposals submitted by Finance Minister Fritz Schäffer (1953), former Constitutional Judge Paul Kirchhof (2001) or expert on economics and head of the conservative fraction in the federal parliament, Friedrich Merz (2003).

²³ (ZEIT-Dossier, 2014) and Bohsem, G. (2013, February 4) Regierung lehnt Steuervereinfachung ab. In: Süddeutsche Zeitung. Retrieved from <http://sz.de/1.1590604>. Text of the legal initiative cf. <http://dipbt.bundestag.de/extrakt/ba/WP17/486/48609.html>

- A relatively large survey by the newspaper *Süddeutsche Zeitung* puts the question to its reader, how people feel about their taxation, there was a surprising result: Most of the 9,000 people taking part in the quantitative survey perceive both the system as such and their personal situation in it as (fairly) just.²⁴
- The own survey taken among 150 citizens brought a different view: While a large part of those being asked thinks that the German tax system as such is rather unfair and privileges private and corporate wealth, they are, regarding their own personal situation, relatively content and feel themselves being treated just and fair.

Some conversation partners, one of the Tax Auditors, from the Germany Tax Administration, questions the link between complexity and justice and argues that simplification is the better approach:

‘Doing justice to the individual case increasingly creates so many problems, adjustments and complexity that a thorough simplification is justified even if it no longer permits comprehensive individual justice.’ After all, there is a direct and indirect cost to pay: The direct price is the one for tax officials who have to check whether the individual applied the options of the law legally and in accordance to the intention of the legislator. The indirect costs are lack of revenue lost by the state due to tax avoidance and tax evasion which are possible due to the complexity of law. If one compares the balance between the benefits in doing justice to the interests of the individual and the costs and efforts which this requires on part of administration and jurisdiction, this exaggerated individualism seems no longer to be justified.

Other tax practitioners, also tax auditors, agree to the principle that complexity serves the purpose of doing justice. But they have demands which should assist them coping with this complexity and fight injustices arising necessarily in complex systems which are open exploitative. Most importantly, they complain that they do not have enough staff and other resources to apply this and process tax declarations accordingly.

It appears that having requisite staff levels seems is an essential pre-requisite to guaranteeing tax justice. We argue therefore that all too often, tax laws designed to promote tax justice are often merely popular window dressing. Perhaps regulations are there, but what has been forgotten are the means and resources for the tax administration to enforce those laws. This does not only apply to staff, but also to entitlements which staff would have during checks, e.g. of businesses, when those being checked refuse information, an issue which arises even in standardized areas such as computerized checks (cf. GER/VI/4.3.3.4).

Against this argument, an conversation partner at tax administrations argued that because of increased computerization and improved software they can handle complexity by using programs which merge individual cases into types or – vice versa – allot individual tax

²⁴ The quantitative vote was visualized in a *Mood Map*. This tool visualizes votes insofar that people taking part can insert themselves in a coordinate system whose one axis concerns the question whether (or not) people pay too little, too much or adequate tax, and the other axis asks whether the extent in which this assessment is given regarding the own personal income and tax situation. The map is darker in spots where many people place themselves and light where few people place themselves. Cf.: So fair finden unsere Leser ihre Steuerlast (2013, July 25). *Süddeutsche Zeitung*. Retrieved from www.sueddeutsche.de/1.1726151. As to the personal assessment: Ebtsch, S. (2013, July 22). Was wir verdienen, was wir versteuern. *Süddeutsche Zeitung*. Retrieved from (Süddeutsche Zeitung, 2013b)

declarations to typologies which then safeguards speedy treatment. The problem seems to be that computerization makes life easy and complicated at the same time.

A final opinion on this topic is the following: An important avenue towards simplification is, for example, to establish general tax exemptions, blanket allowances or lump sums instead of individual treatment. According to the Income Tax Law, 70 categories of income are tax exempt.²⁵ The research argues that such an approach always profits some more than others and disadvantages others. If one wants to avoid even more court tax related cases these regulations need to be done, communicated and introduced in a way that the public supports them – which in any case is not an easy endeavour.

6.3 Tax law and administration as a business weapon

But there are more forces against simplification. First of all, tax law is a business and it is used for business. One should consider, for example, how many tax consultants and lawyers and companies practice tax law for a living. The former German Finance Minister, Peer Steinbrück, is convinced that calls for a simplified tax law are merely window dressing. In his words: ‘Calls for tax law simplification I can hear in speeches held over the weekend all over the country. But when I enter my office on a Monday, lobbyists crowd in front of it, asking for exceptions and exemptions.’

Next, complex tax law is used for business and business profits. If the law were simple, aggressive tax avoidance would not be possible. Similarly, business lobbyists would be unemployed because their services would no longer be required or necessary. Just imagine business and expert reaction to the following proposal done by a tax inspector:

One problem we have in Germany with the taxation of businesses is the net-principle, meaning that one first deducts losses from gains and then taxes the net-amount. Naturally everybody tries to calculate this taxable amount as small as possible. It would be much simpler to just tax income. Balancing losses could be done via allowances or lower rates.

6.3.1 Constant lobbyism (2)

In general businesses wield a higher leverage over politicians, legislators and administrations. They can always threaten to shed jobs, either by relocating to cheaper countries or just dismissing them as “unprofitable” without any replacement. Business reasons and increasing job creation are often the primary reasons why politicians justify tax related business privileges to corporations (e.g. cf. GW/VIinheritance and gift tax!#).

This research indicates that business interests are among, perhaps the, most important influences on tax policy, tax legislation and tax administration, e.g. regarding the frequency and intensity of controls at businesses and wealthy individuals (cf. GER/VI/4.3.3.6+7)

This brings active lobbyism by private and corporate interest groups. This is done both openly, via professional lobbyism, and informally via personal acquaintances among the elites of any given country. Lobbyism of all kinds nowadays is so pervasive in the capitalist system that one not even protest if lobbyists and interest groups work in government administrations,

²⁵Aus Bundeszentrale f. Politische Bildung „Steuer und Abgaben“, Heft 288/2012 S. 28: Bestimmte Einnahmen sind gänzlich von der Einkommensteuer befreit. Dazu zählen laut Einkommensteuergesetz rund 70 verschiedene Einnahmen, unter anderem das Arbeitslosengeld, BAföG-Leistungen, Stipendien oder auch das Elterngeld.

go for private businesses once leaving their public office, or even draft legislation (cf. GER VIaTechnical)

6.3.2 Examples for successful lobbyism

Summarizing simply the discussion of 2015, a major newspaper listed the following tax presents to business, some of which are also dealt with elsewhere in the research report:²⁶

Ausnahme 1: Kfz-Steuer

Schon jetzt, bestätigt das Bundesfinanzministerium, seien Fahrzeuge steuerbefreit, "die ausschließlich in oder für land- und forstwirtschaftliche Betriebe im Sinne des Steuerrechts zweckbestimmt verwendet werden". Damit diese Traktoren, Mähdrescher und sonstigen bäuerlichen Geräte fahren, verzichtet der Bund jährlich auf 260 Millionen Euro. Und die Landwirte wollen mehr. Weshalb Baden-Württemberg am 27. November beantragt hat, Schäuble möge das Deutsche Kraftfahrzeugsteuergesetz ändern lassen, um Fahrzeuge, die "zur Pflege von Streuobstwiesen und für andere landschaftspflegerische Maßnahmen" eingesetzt werden, von der Kfz-Steuer zu befreien. Zur Begründung führt der zuständige Minister Peter Friedrich an, dass die Steuerbefreiung "einen wertvollen Beitrag zur Sicherstellung einer nachhaltigen Pflege (. . .) wertvoller Landschaftsbestandteile" leiste. Der Antrag wird inzwischen in Ausschüssen beraten. "Wird er beschlossen, werden bald alle Fahrzeuge in irgendeiner Weise Streuobstwiesen pflegen und steuerbefreit sein", warnt Binding.

Ausnahme 2: Einkommensteuer

Nicht erst seit der Griechenlandkrise stehen griechische Reeder in der Kritik, gesetzlich protegiert kaum Steuern zu zahlen. Weniger bekannt ist, dass auch die deutsche maritime Wirtschaft kaum Steuern zahlt. In diesem Jahr beschloss der Bundesrat, dass Reeder praktisch die gesamte von den Seeleuten gezahlte Lohnsteuer behalten dürfen. Arbeitgeber von Seeleuten auf deutsch geflaggt Schiffe dürfen bisher schon 40 Prozent der entstandenen Lohnsteuer behalten, wenn die Besatzung mehr als 183 Tage zusammenhängend angeheuert ist. Bis 2020 dürfen sie nun die gesamte Lohnsteuer einbehalten. Das Steuergeschenk an die deutschen Reeder begründet die Bundesregierung damit, Jobs für europäische Seeleute und deren Know-how zu erhalten. Tatsache ist allerdings, dass die Vergünstigungen schon bisher nicht verhindert haben, dass deutsche Schiffseigentümer lieber unter anderer Flagge fahren. Entgegen früheren Versprechungen fahren heute nur noch rund 200 der 4000 Schiffe unter deutscher Flagge.

Ausnahme 3: Gewerbesteuer

Der Deutsche Reiseverband fordert steuerliche Vergünstigungen für seine Groß-Klientel. Er will Aufwendungen der Reiseveranstalter zur Anmietung von Hotelzimmern von der Hinzurechnung zur Gewerbesteuer ausnehmen. Die wirtschaftliche Belastung könne von der Branche nicht mehr getragen werden, so die überraschende Begründung - denn die Steuervergünstigung käme vor allem großen Reiseveranstaltern zugute, die wie TUI als Kapitalgesellschaften organisiert sind. Finanzverwaltungen von Bund und Ländern argumentieren, dass die Anmietung als Anlagevermögen zu versteuern ist und im Zuge dieser Regelung die Körperschaftsteuer drastisch gesenkt wurde. Das Bundeswirtschaftsministerium schlug als Kompromiss vor, kurzfristige Anmietungen von der Hinzurechnung auszunehmen. Was wiederum durch Kettenmietverträge leicht zu umgehen ist.

Ausnahme 4: Gewinnbesteuerung

Die Wirtschaftslobby kritisiert die aus ihrer Sicht unzureichende Förderung von Wagniskapitalgebern. Sie fordert Steuervergünstigungen, damit innovative Kleinunternehmen leichter an Kapital kommen, und will deshalb Gewinne, die Unternehmen aus dem Verkauf

²⁶ Gammelin, C. (2015, December 27) Schäuble macht wieder Steuergeschenke. In: Süddeutsche Zeitung. Retrieved from <http://www.sueddeutsche.de/wirtschaft/verguenstigungen-vom-finanztministerium-schaeuble-macht-wieder-steuergeschenke-1.2796825>

von Anteilen an Start-ups erzielen, steuerfrei stellen. Die Lobby argumentiert, dass un versteuerte Gewinne in voller Höhe wieder als Wagniskapital eingesetzt werden könnten. Gegen die Forderung spricht, dass auch die steuerliche Freistellung von Veräußerungsgewinnen bei Start-ups ein breites Tor öffnen würde, weil plötzlich jedes beliebige Unternehmen als ein solcher Kapitalgeber auftreten könnte.

Ausnahme 5: Entstrickungsbesteuerung

Das ungewöhnliche Wort steht für die gängige Praxis von Steuerpflichtigen, abgeschriebene Wirtschaftsgüter ins Ausland zu verbringen und dort zu verkaufen, ohne den erzielten Erlös zu versteuern. Der Fiskus hat inzwischen die deutschen Besteuerungsrechte bei der Verlagerung von Wirtschaftsgütern ins Ausland gesichert. Die deutsche Wirtschaft fordert allerdings wieder Ausnahmeregelungen, was von Steuerexperten wie Binding nicht zuletzt wegen der Gefahr europarechtlich unzulässiger Diskriminierung abgelehnt wird.

Ausnahme 6: Pensionsrückstellungen

Angesichts der dauerhaft niedrigen Zinsen sind Pensionszusagen von Unternehmen in Gefahr. Die Unternehmen sind angehalten, ihre rechnerischen Pensionsrückstellungen zu erhöhen, um die Zusagen einzuhalten. Die Wirtschaftsverbände laufen dagegen Sturm. Sie argumentieren, dass höhere Rückstellungen die Bilanz der Unternehmen und deren Wettbewerbsfähigkeit verschlechtern würden.

Ausnahme 7: Sonderabschreibungen

Die Bauminister wollen für sozialen Mietwohnungsbau neue Sonderabschreibungen durchsetzen. Was angesichts von Niedrigzinsen und nahezu vollständiger Auslastung der Baufirmen eher zu steigenden Preisen führen wird und private Bauträger fördert. Steuerexperte Binding hält stattdessen direkte Wohnungsbaubsubventionen für "transparenter und zielgenauer".

Ausnahme 8: Forschungsbesteuerung

Schäuble mochte sie nie, im Ausland gibt es sie schon lange, nun fordern die Wirtschaftsverbände, die deutsche Patentbox einzuführen. Patentboxen werden genutzt, um Einnahmen/Lizenzen aus Forschung und Entwicklung sehr niedrig zu besteuern. Die deutsche Patentbox soll verhindern, dass Konzerne diese Abteilungen ins steuergünstige Ausland verlagern. Die Bundesregierung will 2016 entscheiden.

Ausnahme 9: Kassenmanipulation

Jährlich gehen dem Fiskus bis zu zehn Milliarden Euro an Steuern verloren, weil Registrierkassen in Restaurants, Geschäften und anderswo manipuliert werden. Erst kürzlich hat der Finanzminister Nordrhein-Westfalens, Norbert Walter-Borjans (SPD), seine Forderung an das Bundesfinanzministerium wiederholt, nicht manipulierbare Kassen mit elektronischer Signatur verpflichtend vorzuschreiben. Schäubles Ministerium lehnt das ab, weil es zu hohen bürokratischen Aufwand befürchtet, etwa bei Sommerfesten. Als Kompromiss schlagen die SPD-Länder nun vor, die Kassenpflicht an Umsatz oder Unternehmensstruktur zu koppeln.

For example, the "Entstrickungsbesteuerung" may indeed be something good for the development of poor countries. On the other hand it may subsidize waste dumping. To stand firm regarding Pensionsrückstellungen is commendable. On the other hand the entire system is merely bloating the financial sector further, advancing volatility. And indeed direct support of certain economical sectors might be more sensible than just a general subsidy for all, as Lothar Binding is arguing.

6.4 Tax law and administration as a political weapon

Tax law and its administration is also a multi-purpose weapon for politicians to make acquaintances and win elections by making concessions to the public or supporters: It is not

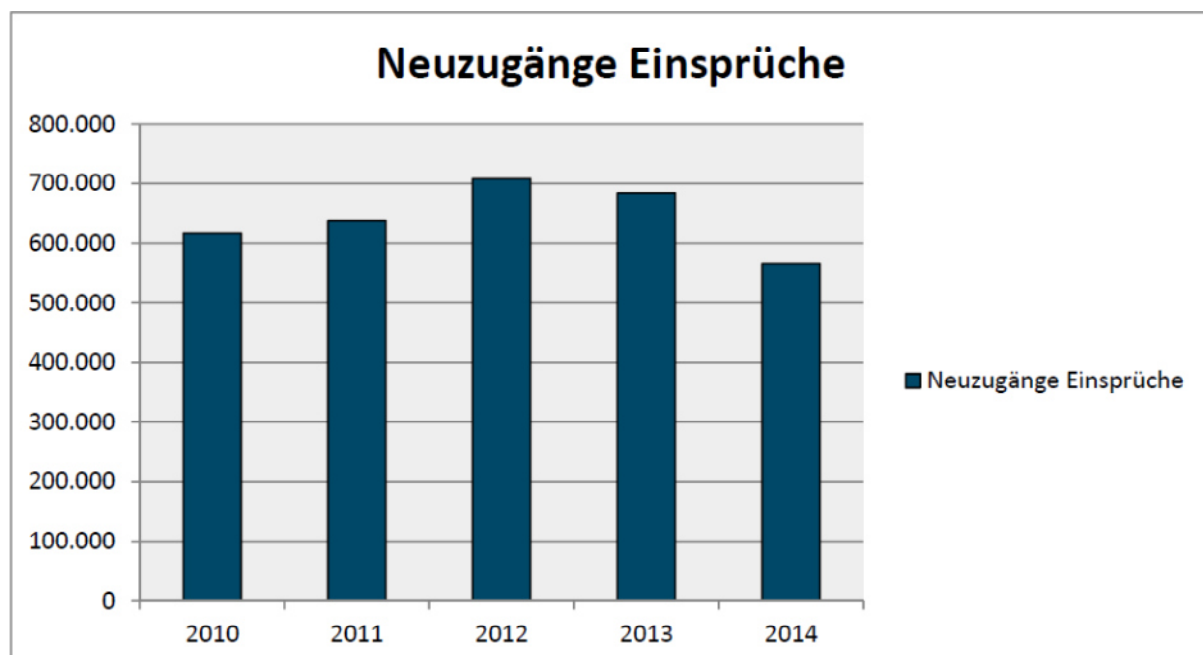
just used to collect revenue, but also for attracting businesses (via tax competition!), as a means of family planning on account of allowances and benefits. Tax law is also used for environmental protection (renewable energies levy!), economic management (subsidies for businesses in remote areas!), for nurturing some sectors of the economy (0% Turnover Tax on the trade of certain financial titles), for promoting and advancing education (BAFöG!) and even a means to reward influential and powerful electorate groups, see, e.g. the “Hotel Tax” or the move of the Real Property Office to Höchstädt! (GER/Via4.5.4).

6.5 Individual justice and redress

The most powerful argument why simple tax laws probably would not simplify tax administration in Germany is the importance of redress. The simplification of tax law will come at the price of a more typological approach to taxation, i.e. no longer individual characteristics, but group characteristics will be applied to citizens. However, a citizen who finds himself/herself unfairly treated by the tax administration can appeal against the decision and many do it. The first appeal can be lodged with the tax authority, and a second appeal with the courts. And this is more likely to happen.

Since this study has its focal point on Bavaria state, there rate of tax appeals from the 2013 Annual Report of the State Office of Taxes is as depicted in the graph here below;

Graphic 3 Development of administrative appeals 2010-2014



Source 1 (Bayerisches Landesamt für Steuern, 2015, p. 89)

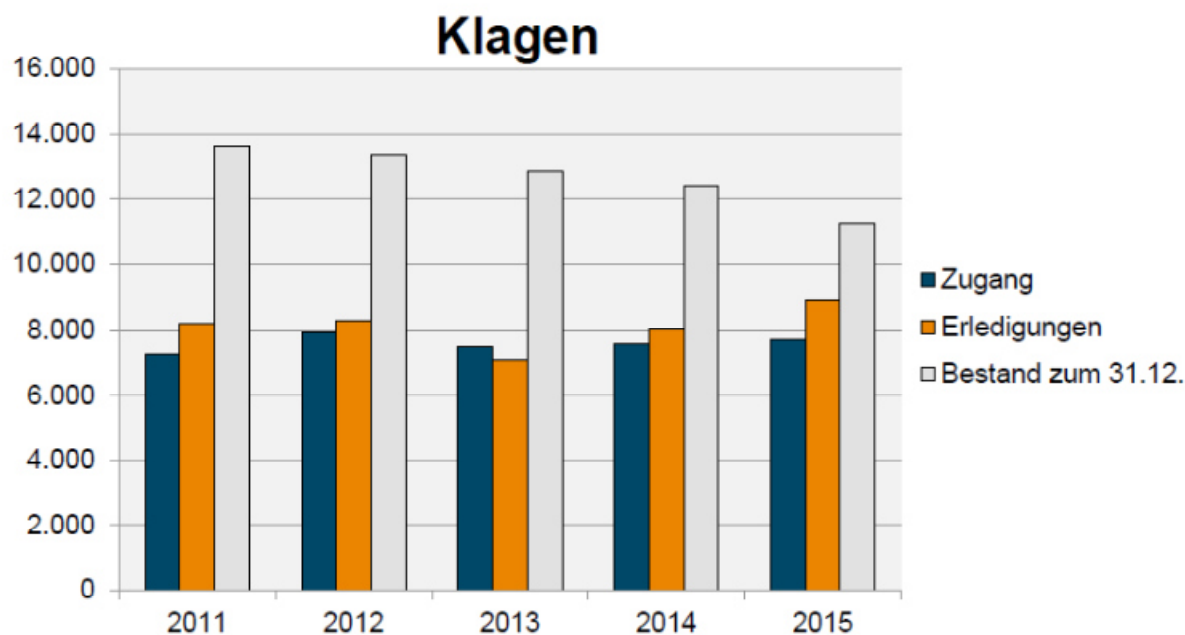
At the federal level of government the number in 2014, was 4.23 million, of which 2.83 million were successful.²⁷

If no amicable solution is reached, the aggrieved person may consider lodging the matter with the courts. Financial Courts examine whether a tax bill is just by checking the tax

²⁷ Öchsner, Th. (2015, July 30) Einsprüche gegen Steuerbescheide lohnen sich. <http://www.sueddeutsche.de/wirtschaft/finanzbehoerden-einsprueche-gegen-steuerbescheide-lohnen-sich-1.2588701>

bill assessment against all relevant laws and regulations from the municipal up to the EU level and also decisions of the EU Court of Justice on similar tax cases. If the case is difficult or if the right to appeal is granted by the lower court, higher courts can consider the case, even up to the European Court of Justice. In the case of Bavaria, the development is as follows: First, the number of cases at the lowest level, the Financial Courts, the three columns indicating (from left to right) new appeals, resolved appeals, pending appeals.

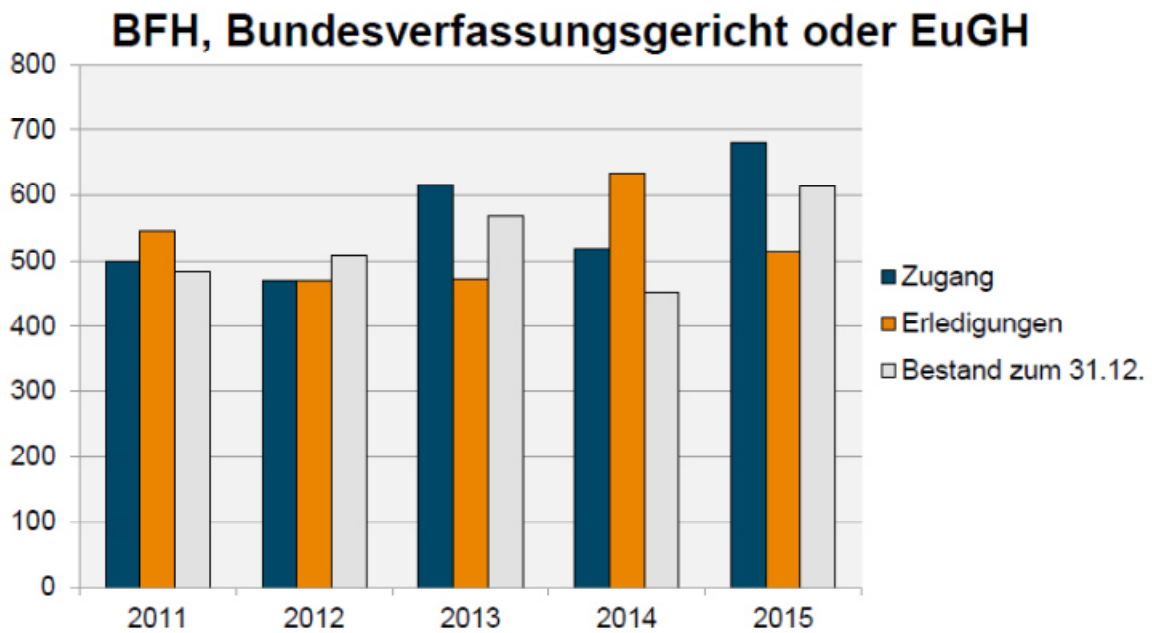
Graphic 4 Number of legal appeals in Bavaria against rejection of administrative appeals



Source 2 (Bayerisches Landesamt für Steuern, 2016, p. 104)

And, last but in no way the least, the number of cases from Bavaria at the Financial Supreme Court, the Federal Constitutional Court and the European Court of Justice, are depicted in the graph below; the three columns indicating (from left to right) new appeals, resolved appeals, pending appeals.

Graphic 5 Number of appeals from Bavaria with Superior and Supreme Courts



Source 3 (Bayerisches Landesamt für Steuern, 2016, p. 114)

These figures above need to be correlated with the number of tax decisions and tax bills sent out by the Bavarian tax authorities every year. The following list is not exhaustive and covers only the main tax categories where tax bills are issued.

Table 1 Tax Bills sent out in Bavaria, main categories of taxation only²⁸

Tax bills sent out in	2011	2012	2013
Wage Tax	2,594,439	2,632,165	2,431,943
General Assessment	2,047,496	1,974,952	1,843,806
Assessment of Partnerships	52,373	49,737	51,180
Corporation Tax 1	201,981	194,857	Not available
Corporation Tax 2	23,632	24,997	Not available
Total	4,919,921	4,876,708	4,326,929

This indicates that approximately one seventh of taxpayers are unhappy about their tax bill. Hence they appeal against the authorities' decisions at least in the years 2012+2013.

Eventually, a critical number of sentences leads inevitably to reforms and modification of laws which triggers off another round of legal disputes, because another citizen might be encouraged to do the same, whose case is, not identical, but similar, and again a consideration is made and a decision arrived at in this individual case etc.

In the beginning of such a legal dispute following a court decision, tax authorities can reject the binding force of court decision by emphasizing that it concerns an individual constellation which is not helpful for a general administration of tax law. The instrument with which this can be done is the *Nichtanwendungserlass* or even *Nichtanwendungsgesetz* (Non Application decree or law). If a *Nichtanwendungsgesetz* is pushed through parliament it is

²⁸ Numbers taken from the Annual Performance Report of different tax authorities published on the website www.leistungsvergleich.de

normally written (and the discussion dominated) from the point of the view of the administration, especially the Ministry of Finance, since for such speedy procedures no adequate hearing of different groups are required. Both the decree and the law contain the danger that the government's point of view dominates and that the view of the plaintiff, the courts or citizens is neglected, due to the lack of public involvement, e.g. due to the absence of expert hearings.

But eventually, such tactics would not work and a change of law will come with the consequence that a simple law eventually becomes complicated in the future. Cynics among conversation partners with different professional background agreed to this analysis, but added that at least in the meanwhile tax administration would be easier and more just.

Looking back over the years, tax practitioners have noted an increasing tendency by citizens to appeal and exhaust the court process if they are dissatisfied with a tax bill. They feel that both on the part of tax lawyers and tax subjects' increasingly egoistic goals are pursued and individualism is reigning. This tendency towards individualism is also manifest in the court's judgements. In earlier days, the Supreme Financial Court had aimed to consolidate legal disputes towards a uniform application of law. However, nowadays one senate of the same court does hold a varied opinion over the other. And the same happens at the Federal Constitutional Court or the European Court of Justice.

6.6 The role of the media and "experts"

Interesting enough, both tax consultants and tax inspectors agree on the two factors promoting the tendency to seek legal court redress in tax related disputes. Over the past years the number of tax related publications in the media has increased and at the same time a number of "self-declared" experts offer advice on potential tax savings. These two issues interrelate and have created an impetus in many tax payers regarding the assumption they, too, qualify for tax savings if they only go to the right tax consultant or tax lawyer. Hence, it is not surprising that, one tax consultant also indicated the importance of creating awareness through expert discussion of prevailing tax laws.

7 Conclusion

The question, whether a simplified or complex tax system is preferable is complex, much discussed²⁹ and cannot be answered easily. Opinions are divided whether a simple tax law which is easy to understand, administer and enforce (but perhaps unfair), or a complex-fair tax law which is difficult to understand, to administer and enforce, is the better option for states in general and Germany in particular. Even experts from the Tax Justice Network have 'strong doubts whether a simplified tax system really leads to more tax justice.'³⁰

Some observations and criteria of this research are the following:

²⁹ For example the emerging fields research project „Taxation, Social Norms and Compliance“ at the Friedrich August Universität at Nuremberg-Erlangen, cf. <http://www.efi.uni-erlangen.org/projects/taxation/about-the-project.shtml>. One of its key questions is the following 'What is the role of tax compliance in the trade-off between designing an equitable but complex tax system that attempts to take account of individual taxpayers' characteristics and designing a simple, easy to administer, but perhaps unfair tax system?'

³⁰ Markus Henn, coordinator of the German Tax Justice Network, via Email.

7.1 Legal simplification

The momentum and call to simplify German tax laws is understood to be popular, but yet it is far from being obvious. Yet it deserves serious consideration. An experienced prosecutor dealing with tax evasion argued, that the purpose of tax law is the raising and collection of revenue only. Taxation should not be misused to protect the climate, create jobs or prevent the acquisition of vicious dogs. Right now, the system is skewed disproportionately: Even in order to get tax compliance (and revenue), the way via tax concessions is used.³¹ If it could be reduced to the fundamental of tax collection only both tax cheating and evasion would decrease as would the surge in legal redress. Here, for example, a major motivation is that people fear that they may lose out where other can gain something – which makes them cheat. According to conversation partners in administration and politics it could be assumed that if the tax law were understandable, in clear and simple terms it would be once more a fair and just system. This could not be done overnight, of course, and would still not fit on a small paper – but this would be the only viable and sustainable solution to close loopholes, fight tax evasion and increase compliance.

Others are more outspoken when it comes to admit the inability of the state to really simplify tax law anymore. The Vice President of the Bavarian State Office for Taxes puts it as follows

Eine grundlegende Vereinfachung des Steuerrechts (wird) politisch nicht mehr diskutiert. Der Bundesgesetzgeber ist im Steuerbereich ganz überwiegend ein Reparaturbetrieb, der auf Initiative des Bundesfinanzhofs, des Bundesverfassungsgerichtes und vermehrt des Europäischen Gerichtshofes tätig wird. Einfacher wird der Rechtsrahmen dadurch nicht, ganz im Gegenteil. Auch die Gesetzesqualität leidet. Erinnert sei aber an eine Entscheidung des Bundesverfassungsgerichtes aus dem Jahr 1961 (10.10.1961 – 2 BvL1/59). Dort formulierten die Richter: „Die Grundsätze des Rechtsstaats fordern, daß die Norm, die eine Steuerpflicht begründet, nach Inhalt, Gegenstand, Zweck und Ausmaß hinreichend bestimmt und begrenzt ist, so daß die Steuerlast meßbar und in gewissem Umfang für den Staatsbürger voraussehbar und berechenbar wird.“ Jeder mag selbst beurteilen, wie weit wir uns von diesem Ziel entfernt haben. (Bayerisches Landesamt für Steuern, 2016, p. 7)

But even if simplification could be done: Doubts remain as to whether this might be the best option. The Federal Constitutional Court concedes that regressive/degressive taxation might be justifiable under certain circumstances, but that simplification of administration or the quick coverage of administrative need does not suffice to abolish any taxation in accordance to the principle of ability to pay.³²

7.2 Simplification of procedure

What should be explored and considered are procedural simplifications, i.e. whether a more computerized and automatized tax administration system contributes to making the submission and administration of tax declarations easier. Here it will be important to see whether automation indeed may achieve a balance between the two important principles of horizontal and vertical tax justice and/or whether disadvantages arising from a more computerized tax administration will be proportional and justifiable when compared with

³¹ The introduction of “Haushaltsnahe Aufwendung” reduced black labour in households since it was no longer paying to work without proper bills.

³² Verdict BvR 1656/09 of 15 January 2014, Retrieved from http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2014/01/rs20140115_1bvr165609.html

advantages. As some surveys indicate, German citizens would agree in this context with a loosening of privacy protection.³³

7.3 Complexity and enforcement

As much as it is convincing that the complexity of the German taxation law is also due to tax justice considerations, this research argues that also adequate verification and enforcement mechanism need to be in place to prevent distortions and injustices. This, of course, addresses the question of staff and personnel.

This has been argued already by the Federal Constitutional Court in 1991: The Court did not only ask for a principal and legal equality of tax subjects, a principally equal application of laws, but a de facto equal treatment of all tax subjects and a de facto equal enforcement of all laws. If the state is not able to enforce material and de facto equality, because he, e.g., does not undertake enough to combat tax avoidance or evasion, also the material equality of all is in danger.³⁴

This also applies to other departments of public administration, e.g. combating financial and economic crime, to which tax evasion can be counted. Here the Federal Supreme Court complains about an imbalance between investigation of ordinary crime and economical-financial-tax related crimes. Here only a strengthening of resources in the investigative, prosecution and legal departments is seen as remedy to restore trust of the

³³ „Zur Vereinfachung für sehr viele trägt auch die vorausgefüllte Steuererklärung bei. Eine Forschergruppe der Lehrstühle Sozialpolitik, Soziologie und Steuerlehre der FAU untersuchte im Rahmen des Emerging Fields Projekts „Taxation, Social Norms, and Compliance“ die Meinung von Arbeitnehmern in Deutschland rund um das Thema Steuern. Dabei wurden im Sommer 2013 in einer repräsentativen Telefonumfrage 1004 Haushalte befragt, deren Haupteinkommen aus nichtselbstständiger Beschäftigung stammt und die eine Einkommensteuererklärung erstellen. Mit aufschlussreichem Ergebnis: Eine deutliche Mehrheit – nämlich 71 Prozent der Befragten – ist dafür, lieber das Steuersystem zu vereinfachen als Steuersätze zu senken. Zur Vereinfachung kann die vorausgefüllte Steuererklärung beitragen. Wichtige Voraussetzungen für deren Akzeptanz scheinen erfüllt, sagen die Nürnberger Forscher: Trotz der heftig geführten Debatte über Datenschutz sind rund 75 Prozent der Befragten damit einverstanden, dass den Finanzbehörden wichtige Informationen, wie Spenden und Entfernung zwischen Wohnung und Arbeitsstätte, automatisch übermittelt werden. Mit einer Einschränkung: Nur 63 Prozent befürworten, dass die Finanzämter auch auf Informationen über weitere steuerpflichtige Einnahmen wie Zinseinkünfte und geldwerte Vorteile zugreifen können.“ (Wrede & Mangelkramer, 2014)

³⁴ 1. Der Gleichheitssatz verlangt für das Steuerrecht, daß die Steuerpflichtigen durch ein Steuergesetz rechtlich und tatsächlich gleich belastet werden. Die Besteuerungsgleichheit hat mithin als ihre Komponenten die Gleichheit der normativen Steuerpflicht ebenso wie die Gleichheit bei deren Durchsetzung in der Steuererhebung. Daraus folgt, daß das materielle Steuergesetz in ein normatives Umfeld eingebettet sein muß, welches die Gleichheit der Belastung auch hinsichtlich des tatsächlichen Erfolges prinzipiell gewährleistet.

2. Hängt die Festsetzung einer Steuer von der Erklärung des Steuerschuldners ab, werden erhöhte Anforderungen an die Steuerehrlichkeit des Steuerpflichtigen gestellt. Der Gesetzgeber muß die Steuerehrlichkeit deshalb durch hinreichende, die steuerliche Belastungsgleichheit gewährleistende Kontrollmöglichkeiten abstützen. Im Veranlagungsverfahren bedarf das Deklarationsprinzip der Ergänzung durch das Verifikationsprinzip.

3. Gesamtwirtschaftliche Gründen können einen Verzicht des Gesetzgebers auf eine hinreichende Kontrolle der im Veranlagungsverfahren abgegebenen Erklärungen des Steuerpflichtigen verfassungsrechtlich nicht rechtfertigen.

4. Wirkt sich eine Erhebungsregelung gegenüber einem Besteuerungstatbestand in der Weise strukturell gegenläufig aus, daß der Besteuerungsanspruch weitgehend nicht durchgesetzt werden kann, und liegen die Voraussetzungen dafür vor, daß dieses Ergebnis dem Gesetzgeber zuzurechnen ist, so führt die dadurch bewirkte Gleichheitswidrigkeit zur Verfassungswidrigkeit auch der materiellen Steuernorm.“ BVerfG-Urteil vom 27.6.1991 (2 BvR 1493/89) BStBl. 1991 II S. 654. Retrieved on 17 April 2015 from http://www.bfh.simons-moll.de/bfh_1991/XX910654.HTM

population in the unbiased treatment of crimes on part of the authorities. This is also needed to avoid Verjährung.³⁵

More recently, in the words of the outgoing head of the Federal Court of Auditors, Engels: If Germany keeps its complex taxation system it needs to provide adequate checks and controls to guarantee justice.³⁶

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³⁵ ,[54] cc) In diesem Zusammenhang sieht der Senat Anlass zu folgender Anmerkung: Nach der Erfahrung des Senats kommt es bei einer Vielzahl von großen Wirtschaftsstrafverfahren dazu, dass eine dem Unrechtsgehalt schwerwiegender Korruptions- und Steuerhinterziehungsdelikte adäquate Bestrafung allein deswegen nicht erfolgen kann, weil für die gebotene Aufklärung derart komplexer Sachverhalte keine ausreichenden justiziellen Ressourcen zur Verfügung stehen. Die seit der Tat vergangene Zeit und auch die Dauer des Ermittlungs- und Strafverfahrens (vgl. Art. 6 Abs. 1 Satz 1 MRK) werden in vergleichbaren Verfahren häufig zu derart bestimmenden Strafzumessungsfaktoren, dass die Verhängung mehrjähriger Freiheitsstrafen oder - wie hier - die Versagung einer Strafaussetzung zur Bewährung nach § 56 Abs. 3 StGB namentlich wegen des Zeitfaktors ausscheidet. Dem in § 56 Abs. 3 StGB zum Ausdruck gekommenen Anliegen des Gesetzgebers, das Vertrauen der Bevölkerung in die Unverbrüchlichkeit des Rechts vor einer Erschütterung durch unangemessen milde Sanktionen zu bewahren, kann im Bereich des überwiegend tatsächlich und rechtlich schwierigen Wirtschafts- und Steuerstrafrechts nach Eindruck des Senats nur durch eine spürbare Stärkung der Justiz in diesem Bereich Rechnung getragen werden. Nur auf diese Weise - nicht durch bloße Gesetzesverschärfungen - wird es möglich sein, dem drohenden Ungleichgewicht zwischen der Strafpraxis bei der allgemeinen Kriminalität und der Strafpraxis in Steuer- und Wirtschaftsstrafverfahren entgegenzutreten und dem berechtigten besonderen öffentlichen Interesse an einer effektiven Strafverfolgung schwerwiegender Wirtschaftskriminalität gerecht zu werden.“ BGH, Urteil vom 2. 12. 2005 - 5 StR 119/05, retrieved from <http://lexetius.com/2005,3183>

³⁶ ,Wenn der Staat ein komplexes Steuersystem will, muss er dafür die Ressourcen in der Finanzverwaltung schaffen. Das hat er aber nicht getan.“ <http://www.welt.de/wirtschaft/article125105492/Rechnungshof-ruegt-laxe-Kontrolle-von-Millionaeren.html>