[AT] Constitutional Court Rules on Taxation of Radio and Television Advertising

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In late 1998, the Constitutional Court had stated its startling conclusions regarding the (always contested) «advertising tax» levied by the city of Vienna. The relevant legal provisions state that «a tax is to be paid to the city of Vienna for advertisements within the boundaries of the city of Vienna. [...] Advertisements [...] also include any external advertisements by broadcasters (radio and television) which originate from studios located in the city of Vienna». The Vienna advertising tax amounts to 10 % of the net revenues from commercial advertisements. The starting point was an attempt by the Austrian Broadcasting Corporation (Österreichischer Rundfunk - ORF) to evade taxation of nation-wide advertising programmes in the city of Vienna by outsourcing the scheduling of advertising programmes according to pre-set timetables from Vienna to St. Pölten. Basing their judgement on the studio principle, the tax authorities of first and second instance denied that the mere time-synchronous insertion of advertisments did not justify the concept of a studio, and ruled that the relevant advertisements were subject to the Vienna advertising tax provisions.

The ORF appealed to the Constitutional Court against this decision. It asserted that the legal bases of these tax provisions were questionable as to their legality and constitutionality. The Constitutional Court then opened two proceedings for judicial review of two provisions: While it discontinued the case regarding one provision for lack of prejudice, it reached the conclusion regarding the other norm provision that the original doubts were unjustified. The Constitutional Court ruled that governmental units were required to provide an adequate content-related reference to the geographical scope of taxes when formulating their taxable objectives. From a territorial point of view, the adequate reference in the present case could be derived from the purpose of taxing the revenues achieved from advertising. Therefore, the revenues of a broadcaster from nation-wide programmes are only taxable to the extent of the ratio between total revenues and revenues in the area of imposition. As the applicable (above-mentioned) provisions of the Vienna advertising tax regulation allowed for an interpretation in accordance with the constitution, the reviewed provisions were not to be abolished for unlawfulness. (The decision preceding the appeal by the ORF was rescinded in February 1999; the tax authority now has to issue a new regulation and is only entitled to tax the ORF revenues from nation-wide advertising programmes on a pro-rata basis equivalent to the advertising revenues achieved in Vienna.) The judgement of the Constitutional Court puts the federal legislator

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under pressure to create a federal regulation in order to avoid an uncontrollable increase of individual local advertising taxation schemes. Negotiations between federal, regional and local authorities are under way. However, the widely hoped for abolition of the Austrian phenomenon of «advertising tax» seems unrealistic.

Erkenntnis des Verfassungsgerichtshofes vom 17. Dezember 1998, Aktenzeichen G 15/98-23 und V 9/98-23.

http://www.vfgh.gv.at/vfgh/presse/G15-23-98.pdf

Order of the Constitutional Court, 17 December 1998, Reference codes G 15/98-23 and V 9/98-23.

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