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Federal Constitutional Court: Successful constitutional complaint regarding the mandatory use of the special electronic tax advisor mailbox

In a decision published today the Third Chamber of the First Senate of the Federal Constitutional Court (“FCC”) overturned various tax court decisions concerning the obligation to use the special electronic tax advisor mailbox (known as “beSt”).

In the original proceedings, the lower tax court dismissed the action brought in January 2023 by a tax advisor on behalf of the complainant as inadmissible because it had not been submitted in the electronic form as required with effect from 1 January 2023. It rejected the application for restoration of the time limit for bringing the action. The Supreme Tax Court dismissed the appeal against the lower tax court's refusal to give leave appeal.

The appellant successfully challenged these decisions with his complaint to the FCC. Insofar as the lower tax court had assumed that there was fault on the part of the appellant that prevented the restoration of the time limit for bringing an action, it had failed to consider, among other things, that (i) at the beginning of 2023, it was not possible to activate beSt access across the board and therefore this had not been done, and that (ii) until the end of January 2023 the Federal Chamber of Tax Consultants had always declared the existing option of a so-called 'fast lane' procedure to be 'voluntary'. The rejection of the appeal against the decision to refuse the right to appeal violated the appellant's right to a fair hearing.

The FCC therefore overturned the decisions and referred the case back to the lower tax court for further proceedings.

Background

New provisions in the Tax Consultancy Act required the Federal Chamber of Tax Consultants to set up a beSt account for every tax consultant and tax agent as a means of electronic communication with the courts. The provisions in relation to the beSt account were set to apply for the first time from 1 January 2023. In the Autumn of 2022, the Federal Chamber of Tax Consultants announced that it would not be possible to provide tax consultants with beSt access by this date; the letters containing the registration code would not be sent out until January 2023. At the same time, the Chamber provided an option for early application for a registration letter (known as the 'fast lane').

In January 2023, within the applicable time limit for filing claims, the complainant, represented by his tax advisor, filed a complaint by post. In a letter accompanying the statement of claim, the authorised tax advisor stated that she was unable to submit the complaint electronically via beSt since the registration letter had not been delivered.

The lower tax court dismissed the action in its judgment of 27 June 2023. Referring to a decision of the Supreme Tax Court of 28 April 2023, it stated that the highest court had held that tax advisors were required to actively use the beSt system from 1 January 2023. The requested restoration of the deadline for filing the legal claim was refused. The authorised tax advisor had had the option of using the 'fast lane' option, by means of which she would have obtained early dispatch of the registration letter within a few days. It must have been clear to her, and it was also clear from her cover letter to the statement of claim, that from 1 January 2023 onwards it would only be possible to file legal actions in electronic form. The Supreme Tax Court dismissed the appeal against the refusal of leave to appeal lodged by the complainant.

In his constitutional complaint, the complainant primarily alleges a violation of Article 103(1) of the Basic Law (GG) and Article 19(4) GG.

Decision

I. The constitutional complaint is admissible. In particular, it meets the requirements of the principle of subsidiarity*. The information available at the time the action was brought did not suggest that a 'fast lane' application – which had previously been explicitly described as voluntary – should be considered from a subsidiarity perspective.

II. The constitutional complaint is also persuasive.

1. The judgment dismissing the action violates the requirement of effective legal protection (Article 19(4) of the Constitution). The lower tax court made it unreasonably difficult to obtain restoration and imposed overburdensome requirements in this regard.

Whilst the lower tax court concluded from the statements made in the cover letter to the legal claim that the legal representative was aware of her obligation to use the beSt, it attributed a meaning to these statements that could not be substantiated. The content of the letter was also consistent with a legal position according to which the obligation to use beSt only began upon receipt of the individual registration letter.

With regard to the allegation of negligence, the lower tax court should have substantiated the allegation of fault in more detail and, in particular, should have addressed the fact that a complex transition arose at the end of 2022/ beginning of 2023, in that - contrary to legal requirements - it was not possible to activate beSt access across the board at the beginning of 2023. It should have considered that – as the complainant stated in his application for restoration – the Federal Chamber of Tax Consultants had consistently stated during 2022 in its information letter and on its website, and also at the beginning of 2023, that the obligation to use beSt only began upon receipt of the individual registration letter. Furthermore, although a 'fast lane' procedure was available, the Chamber had always declared this to be 'voluntary' until the end of January 2023.

2. The Supreme Tax Court's rejection of the appeal against the refusal of the right to appeal violates the complainant's right to a fair hearing (Article 103(1) of the Constitution).

In the grounds for the appeal against the refusal of leave to appeal, the complainant described the reasons why the lower tax court had misinterpreted the meaning of the statements in the cover letter to the statement of claim; this constituted a core submission on a question central to the proceedings. However, the Supreme Tax Court did not address this core submission in its reasoning and did not rule on it.

3. The judgment of the lower tax court and the decision of the Supreme Tax Court rejecting the appeal against the refusal of leave to appeal are set aside and the case is referred back to the Lower tax court for further proceedings.

*The principle of subsidiarity states that a higher-level entity (e.g. state, EU, higher court) should only take action if a lower-level entity (e.g. municipality, Member State, lower court) cannot (or can no longer) perform a task independently or effectively.

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Keywords

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