Decision 61/2006 (XI. 15.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

In the matter of petitions seeking posterior review of the unconstitutionality of a statute, the Constitutional Court has – with dissenting opinions by *dr. András Bragyova, dr. András Holló and dr. László Kiss*, Judges of the Constitutional Court – adopted the following

decision:

The Constitutional Court establishes that Act LX of 2006 on the Tax on Petty Cash is unconstitutional and, therefore, annuls it. As a consequence, the Act of Parliament concerned shall not enter into force.

The Constitutional Court publishes this Decision in the Hungarian Official Gazette.

Reasoning

I

1. The Constitutional Court has received several petitions seeking establishment of the unconstitutionality and annulment of Act LX of 2006 on the Tax on Petty Cash (hereinafter: the ATPC). Under Section 28 para. (1) of amended and consolidated Decision 3/2001 (XII. 3.) Tü. by the Full Session on the Constitutional Court's Provisional Rules of Procedure and on the Publication Thereof, the Constitutional Court has consolidated the petitions and judged them in a single procedure as they are of the same subject.

One of the petitioners requests annulment of the ATPC, alleging the violation of several constitutional provisions. According to the petitioner, by adopting the ATPC, the legislation extended over the right to levy taxes as granted in Article 70/I of the Constitution when imposed an "administrative sanction under the name of a tax" – with a few exceptions – on every business company in order to prevent a *"mala fide"* (tax evading) conduct by the companies. As argued by the petitioner, the ATPC does not, in fact, tax any income or assets; it is simply a "*quasi* sanction" applied for the purpose of an administrative restriction. As a

result, the tax on petty cash (the obligation to pay that tax) is so far from the constitutional ground enshrined in Article 70/I of the Constitution that makes it unconstitutional.

The petitioner holds that the ATPC is in violation of Article 13 of the Constitution, as by "levying a tax on non-assets, it withdraws the coverage of the creditors' claims, and by this, their potential property", which is, in fact, a way of "expropriation" without the constitutional guarantees granted in Article 13 para. (2) of the Constitution.

The petitioner alleges a further violation of Article 9 of the Constitution (the freedom of economic competition) in the context of the regulations in the ATPC, as by providing that "depositing the relevant sums in a bank is the only way to be exempted from the tax on petty cash" the legislature favoured a preferential "group of entrepreneurs" against other entrepreneurs, since the costs of banking transactions (depositing and withdrawing cash) are to be paid to the banks.

The petitioner holds that Article 70/A is also violated by the ATPC, subjecting the companies to unjustified discrimination by the obligation to pay tax depending on the "type of the entrepreneur possessing" and "the activities run by the business subject to company tax disposing over" the petty cash.

According to the petitioner, in respect of the tax obligation laid down in the ATPC, the constitutional prohibition of discrimination is violated by the provision allowing the subjects of company tax to approve the payment of dividends (ordering the payment of dividends) and also to determine the date of dividend payment, while the "sole entrepreneurs have to pay the tax at the end of the year in every case, without a possibility to make a decision on whether or not to pay any (entrepreneur's) dividend."

In the opinion of the petitioner, the ATPC applies unconstitutional discrimination also within the scope of the subjects of company tax as it imposes no petty cash tax on the petty cash held by financial institutions and on those subjects of company tax (social organisations, foundations, non-profit organisations, and other organisations) that "by virtue of the law, may not pay dividends".

As argued by the petitioner, the legislature did not identify in the preamble of the ATPC the real aim of the legislation; the real aim of the legislation was "to impose a *quasi* »tax on dividends« upon petty cash not considered to be assets" "(...) in the case of the subjects of taxation that take the lawfully granted opportunity to postpone the payment of dividends." Identifying in the relevant Act of Parliament a false legislative aim instead of the real one is, according to the petitioner, contrary to the principle of the democratic State under the rule of law as granted in Article 2 para. (1) of the Constitution.

Another petitioner also claims the ATPC to be in violation of several constitutional provisions. As held by the petitioner, the legislature tries to implement the legislative aim defined in the preamble of the ATPC by levying a tax on circulating funds (petty cash) not regarded to be assets or income.

In addition, the petitioner challenges the legislature for not taking into account the real conditions of the market economy, presupposing that the entrepreneurs act *"mala fide"*, and disregarding both the scope of persons affected by, and the extent of, the deprivation of rights caused by the challenged regulation. The petitioner holds this to be in violation of the constitutional provisions specified in Article 2 of the Constitution.

According to the petitioner, the ATPC attempts to restrict the freedom of contracting enshrined in the Constitution by means (taxation on petty cash) unsuitable for reaching the desired objective, in order to reach a legislative aim (suppressing the circulation of cash) which cannot be regarded as either a fundamental constitutional right or a fundamental constitutional freedom.

As held by the petitioner, all the above provisions result in an unconstitutional restriction of the right to the freedom of contracting subject to constitutional protection.

In addition, the petitioner argues that the ATPC makes negative discrimination – prohibited in Article 70/A of the Constitution – between sole entrepreneurs and companies. According to the petitioner, this unconstitutional differentiation is caused by the fact that "there is no supertax of a similar aim and weight affecting the sole entrepreneurs".

In a petition submitted jointly by several petitioners, the ATPC is alleged to be in violation of the rule of law granted in Article 2 para. (1) of the Constitution and of the proportionality of bearing public burdens enshrined in Article 70/I of the Constitution.

The petitioners hold that by introducing the tax on petty cash, the legislature misused the power of legislation, wherefore the ATPC impairs the constitutional provision of the rule of law granted in Article 2 para. (1) of the Constitution. According to them, the bearing of public burdens may not be based on a *"mala fide"* presumption by the legislation, namely that the companies use their petty cash inadequately in order to evade taxation. This presumption may, in many cases, lead to the taxation of incomes actually not obtained by the subjects of taxation.

The petitioners emphasise with reference to Decision 31/1998 (VI. 25.) AB that the ATPC may not be held as a constitutional tool of suppressing tax evasion by the enterprises.

The petitioners allege the violation of Article 70/I of the Constitution on two grounds. They argue that the legislature "used the above mentioned *mala fide* presumption as the hypothetical basis for the introduction of a new type of tax", making this presumption the general rule. This is – in the petitioners' opinion – contrary to the requirement underlined in Constitutional Court Decision 57/1995 (IX. 15.) AB concerning the statutory presumption applied in the taxation procedure that such presumption may only be applied exceptionally and subject to additional guarantees. The petitioners hold that the presumption which the ATPC is based upon does not comply with the requirement of exceptionality mentioned before.

Bearing reference to the arguments used by the Constitutional Court in Decision 666/B/1992 AB, the petitioners argue that having regard to the purpose and the functioning of petty cash, the tax payment obligation laid down in the ATPC "is not directly related to the taxpayer's income and wealth conditions".

The taxpayers who manage petty cash as required are disproportionately burdened by the obligation to pay tax on petty cash, as the object of taxation is beyond the scope of their incomes and assets. This circumstance, too, violates Article 70/I of the Constitution.

Another petitioner seeking annulment of the whole of the ATPC also alleges that the challenged statutory regulation violates several constitutional provisions. According to this petitioner, the ATPC "does, in general, restrict the right to property", i.e. "the use of cash". In addition, the ATPC is deemed "to be in violation of Article 9 para. (2) of the Constitution for hindering the right to free enterprise (as an activity) and the freedom of economic competition."

As held by the petitioner, the challenged Act of Parliament violates the provisions under Article 8 para. (2) as well as Article 35 para. (1) item *a)* of the Constitution.

Upon a call for filing corrections, the petitioner has supplemented the petition by making reference to Article 11 and Article 13 para. (1) of the Constitution from among the constitutional regulations impaired. The petitioner argues that the regulations in the ATPC are contrary to the "principle of independent and responsible financial management", repeating the arguments that the challenged Act – "determining by an administrative act the quantity of cash in circulation" – restricts, "to a damaging extent", the right to property "for the benefit of the bank sector".

The Constitutional Court has consolidated the cases and judged upon the petitions in a single procedure.

During its procedure, the Constitutional Court has obtained the opinions of the Minister of Justice and Police as well as of the Minister of Finance.

II

1. The provisions of the Constitution relevant to the petition are as follows:

“Article 2 (1) The Republic of Hungary is an independent democratic state under the rule of law.”

“Section 8 (2) In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined in Acts of Parliament; such Acts, however, may not restrict the essential contents of fundamental rights.”

“Article 9 (1) The economy of Hungary is a market economy, in which public and private property shall receive equal consideration and protection under the law.
(2) The Republic of Hungary recognises and supports the right to enterprise and the freedom of competition in the economy.”

“Article 11 Enterprises and economic organisations owned by the State shall conduct business in such manner and with such responsibilities as defined by Act of Parliament.”

“Article 13 (1) The Republic of Hungary guarantees the right to property.
(2) Expropriation shall only be permitted in exceptional cases, when such action is in the public interest, and only in such cases and in the manner stipulated by Act of Parliament, with provision of full, unconditional and immediate compensation.”

“Article 35 (1) The Government shall
a) defend constitutional order, and defend and ensure the rights of natural persons, legal persons and unincorporated organisations; (...)”

"Article 70/A (1) The Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, colour, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever."
(2) The law shall provide for strict punishment of discrimination on the basis of Paragraph (1)."

"Article 70/I. All natural persons, legal persons and unincorporated organisations have the obligation to contribute to public revenues on the basis of their income and wealth."

2. The relevant provisions of the ATPC are as follows:

"The Parliament hereby adopts the following Act for the purpose of suppressing the circulation of cash.

General Provisions

Section 1 (1) The persons determined under Section 2 (subjects of taxation) shall pay a supertax upon the tax basis defined herein, when in the tax year, the closing balance of average daily petty cash exceeds the confirmed money stock.
(2) The revenues from the supertax shall become part of the central budget.
(3) If the tax year of the subject of taxation is different from the calendar year, the subject of taxation shall perform the tax payment obligation according to the regulations in force on the first day of the tax year.
(4) The issues not regulated in the present Act shall be governed, as appropriate, by the provisions of Act XCII of 2003 on the Rules of Taxation.

Tax Payment Obligation Related to Petty Cash

Section 2 (1) The company shall determine and pay a supertax of 20 percent upon the tax base established on the basis of the company's books of the tax year, as specified in paragraph (2).
(2) The basis of the tax is the positive amount of the closing balance of the average daily petty cash less the confirmed money stock.
(3) The tax according to paragraph (1) shall be paid and declared in the company's tax declaration on the 150th day upon the last day of the tax year.

Definitions

Section 3 For the purposes of this Act

1. *company*: taxpayers falling under the scope of Act LXXXI of 1996 on Company Tax and Tax on Dividends, with the exception of credit institutions and financial enterprises falling under the scope of Act CXII of 1996 on Credit Institutions and Financial Enterprises, the organisation of the Employees' Co-ownership Programme, public benefit companies, non-profit companies with a public benefit or extra public benefit status, water management associations, foundations, public foundations, social organisations, public bodies, churches (including the organisational units of the foregoing having a legal entity according to the rules or the statutes of the above organisations), cooperatives of flats, school cooperatives, social cooperatives, voluntary mutual insurance funds and the higher education institutions (including the institutions established by the foregoing), and the students' homes;
2. *closing balance of the average daily petty cash*: the quotient of the aggregate amounts of the daily closing balances of petty cash and the number of the days used in the calculation of the daily closing balances (with the exception of the days without any cash circulation), where, in the calculation of the closing balance of average daily petty cash, the cash held for the purpose of organising gambling activities can be deducted from the daily closing balance;
3. *confirmed money stock*: 0.8 percent of the total absorbed annual revenue in the tax year by the subject of taxation, but not less than HUF 300,000;
4. *total absorbed annual revenue*: total revenue stated in the report on the tax year – not including the consolidated report (or in the absence of the foregoing, the total revenue established on the basis of the closing accounts for the last day of the tax year).

Provisions on Putting into Force and Interim Provisions

Section 4 This Act shall enter into force on 1 January 2007."

III

The petitions are well-founded.

1. As a precondition, the Constitutional Court has examined whether it is within its scope of competence to review the Act of Parliament promulgated but not taken effect, as challenged by the petitioners.

Based on Section 42 para. (2) of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC), according to the practice of the Constitutional Court, an Act of Parliament (or a provision thereof) promulgated but not taken effect may be subjected to posterior abstract constitutional review. As a consequence of establishing the unconstitutionality of the challenged provisions, the Constitutional Court declares that the Act shall not take effect. [Decision 28/1993 (IV. 30.) AB, ABH 1993, 220, 225; Decision 19/1999 (VI. 25.) AB, ABH 1999, 150, 158; Decision 14/2002 (III. 20.) AB, ABH 2002, 101, 114]

Accordingly, the Constitutional Court has performed the constitutional review of the ATPC on the basis of the consolidated petitions.

2. The Constitutional Court first examined the alleged contradiction between the ATPC and Article 70/I of the Constitution as claimed in the petitions for establishing of unconstitutionality on that ground.
It is to be established with regard to the contents of the petitions that the petitioners have used essentially the same arguments when alleging the violation of Article 70/I of the Constitution by the ATPC.
In the opinion of the petitioners, the regulations of the ATPC do not pertain to the income and the assets of the companies obliged to pay the tax (Section 3 item 1 of the ATPC), and it levies a tax upon incomes or assets practically not obtained by the subjects of taxation.
The petitioners further argue that they hold the tax on petty cash – as presented in the ATPC and serving the legislative purposes specified in the Minister's reasoning attached thereto – to be a "*quasi* sanction", which is so far from the regulation under Article 70/I of the Constitution that it is to be deemed unconstitutional.

3. When judging upon the petitions alleging the violation of Article 70/I of the Constitution, the Constitutional Court has made an overview of the statutory regulations in the ATPC as summarised below.
As laid down in the preamble of the ATPC, the legislature indicated the suppressing of cash circulation as the aim of introducing the new type of tax. According to the detailed reasoning

and the Minister's general reasoning attached to the Act, the legislature regards the stock of petty cash significantly exceeding over a long period the companies' own average daily cash flow not as a stock of cash necessary for operation, but as assets of the companies and "in most cases" as incomes used for personal purposes by the members of the companies concerned.

Thus, beyond any doubt, the aim of the legislation related to the ATPC was not only to suppress cash circulation, but also to prevent using for personal purposes the stock of petty cash by the members of the companies concerned.

According to the ATPC, the new tax is to be paid by companies with a few exceptions (Section 3 item 1 of the ATPC). The tax on petty cash is a supertax to be paid by the subjects of taxation upon the tax base defined in the Act, when in the tax year, the closing balance of average daily petty cash exceeds the confirmed money stock as determined in the Act. The company shall determine and pay a supertax of 20 percent upon the tax base established on the basis of the company's books of the tax year, as specified in Section 2 para. (2) of the ATPC.

The basis of the supertax is the positive amount of the company's closing balance of the average daily petty cash (Section 3 item 2 of the ATPC) less the confirmed money stock (Section 3 item 3 of the ATPC).

The supertax is to be paid and declared in the company's tax declaration on the 150th day upon the last day of the tax year. [Section 2 para. (3) of the ATPC]

4. Based on the petitioners' claims detailed under point 2 of the reasoning and the statutory regulations explained under point 3, the Constitutional Court has to form an opinion in the constitutional question of whether the new supertax introduced by the ATPC causes the legal institution of the tax to fall so far from the constitutional basis under Article 70/I of the Constitution as to make the challenged Act unconstitutional.

In the present case, the Constitutional Court has also had to examine if taxation, as a legal institution, may be constitutionally used as a "*quasi* sanction" (legal consequence) for the purpose of asserting – by means of economic force – an administrative restriction (the aim of the legislation) on cash payments, assuming that this was the intention of the legislation when adopting ATPC.

In several of its decisions, the Constitutional Court has been engaged in examining the criteria of enforcing the constitutional provisions related to the sharing of public burdens as laid down in Article 70/I of the Constitution.

During the present constitutional review, the Constitutional Court has made an overview of its earlier decisions related to Article 70/I of the Constitution, and summarised below the holdings of principle laid down in those decisions and to be followed in the present case as well.

As already declared by the Constitutional Court in 1991, Article 70/I of the Constitution regulates the obligation of sharing public burdens as well as the relevant restrictions among the citizens' fundamental rights, applicable as appropriate to legal entities as well. [Decision 62/1991 (XI. 22.) AB, ABH 1991, 466, 467]

As pointed out by the Constitutional Court, the Constitution itself does not provide for a definition of "public burdens", but this category includes, beyond doubt, the payments that may be required to be effected to the State under the Act on Public Finance, as sources of revenue for the State, in order to finance the State's economic activities and the operation of its institutions.

Consequently, Article 70/I of the Constitution, on the one hand, requires all natural persons, legal persons and unincorporated organisations to contribute to public revenues and, on the other hand, empowers the State to specify such payments in Acts of Parliament. (Decision 821/B/1990 AB, ABH 1994, 481, 486)

The legislation has a wide range of discretion when specifying the level of public burdens, and it is also relatively free to define the subjects of public burdens, i.e. in selecting the economic resources serving as the basis of the obligation to share public burdens. (Decision 620/B/1992 AB, ABH 1994, 539, 541)

However, as underlined by the Constitutional Court in the reasoning of Decision 448/B/1994 AB, the legislation is not absolutely free in selecting the economic resources serving as the basis of taxation and in defining the objects of the tax; according to the constitutional provision on the sharing of public burdens as granted in Article 70/I of the Constitution, taxation should remain bound to income and wealth conditions. (ABH 1994, 724, 727)

There is only one requirement in the Constitution pertaining to the legislation with regard to the contribution to public burdens, i.e. the given payment obligation should be in line with – and proportionate to – the subjects' income and wealth conditions. (Decision 1558/B/1991 AB, ABH 1992, 506-507)

Examining the relation between public burdens as well as the income and wealth conditions of the subjects obliged to share these burdens, the Constitutional Court established that the obligation to make a contribution to public burdens must be in direct relation with – and

proportionate to – the citizens' (obliged subjects') conditions and status of income and wealth. (Decision 66/B/1992 AB, ABH 1992, 735, 737; Decision 544/B/1998 AB, ABH 2000, 893, 898)

When examining the constitutionality of the regulations on the taxation of the free securities of cooperatives, the Constitutional Court pointed out in the reasoning of Decision 3/1993 (II. 4.) AB that an income actually not obtained by the citizen may not be considered taxable income. (ABH 1993, 41, 45.) In the case concerned, the Constitutional Court examined, on the basis of Article 70/I of the Constitution, the relation between the income status (conditions) of the obliged subjects and the public burdens to be paid by them, establishing that in the case of personal income tax, the constitutional limit granted in Article 70/I of the Constitution is deemed to be surpassed when the legislation imposes a tax on any income which is not actually obtained by the subject of taxation.

As in the case of an income practically not obtained by the obliged subject, there is no relation of any kind between the public burden (the tax) and the income status (conditions) of the obliged subject, this is contrary to the constitutionally required proportionate sharing of public burdens as laid down in Article 70/I of the Constitution.

In Decision 31/1998 (V. 25.) AB – referred to by the petitioners as well – (hereinafter: the CCDec) the Constitutional Court already examined the question of whether it was acceptable to use taxation for the purpose of asserting a restriction by means of economic force in order to apply an administrative restriction on cash payments (as the aim of the legislation), in the form of making the tax payment obligation a legal consequence ("*quasi* sanction") for surpassing the fixed limit.

As pointed out in the reasoning of the Constitutional Court's decision: "it is the duty – and at the same the political responsibility – of the legislative power to judge whether, on the one hand, the conditions for the radical suppressing of cash payments are given in Hungary, considering the potential disadvantage that it might cause to certain actors of the economic life and, on the other hand, if it is absolutely necessary to impose an administrative restriction for the purpose of achieving this objective, and whether it would be more reasonable to apply material incentives on behalf of both the State and the financial institutions. Accordingly, the above question – as one falling into the scope of economic policy considerations – has not been examined by the Constitutional Court. (...) Although, even in the conditions of the market economy, the State may intervene into the processes of the economy by means of legislation, this right is not unlimited. Undoubtedly, it would be beyond the limits of this right

to regulate arbitrarily the economic life on the basis of the presumption of bad faith, without considering the actual conditions of the market economy, and without due account to the potential victims and the extent of the legal damage caused by the unfounded regulation.
The Constitutional Court holds that applying taxation as a »*quasi* sanction« connected to the breach of an administrative restriction, as found in the three Acts of Parliament under review, resulted in making the taxation fall far from Article 70/I of the Constitution due to the challenged provisions impairing the prohibition of abusing the empowerment of legislation – deductible from Article 2 para. (1) of the Constitution – as a principle generally accepted in the democratic states; and indeed, the challenged regulations in the case of all the three tax types mean the taxation of incomes practically not obtained.
Accordingly, the Constitutional Court has annulled the challenged statutory provisions as contained in the holdings." (ABH 1998, 240, 247, 249-250)

5. With regard to the principle established in the above decisions in connection with Article 70/I of the Constitution, and with due account to the contents of the CCDec, the Constitutional Court has established the following in the present case about the petitions alleging the violation of Article 70/I of the Constitution.

Article 70/I of the Constitution provides constitutional empowerment for the legislation to impose on the subjects of law specified in Article 70/I (obliged subjects) obligations to pay tax, by way of introducing new tax types through Acts of Parliament for the purpose of securing a proportionate sharing of public burdens.
Under Article 70/I of the Constitution, the only constitutional restriction on introducing a new type of tax resulting in a tax payment obligation for the obliged subjects is that the new tax type shall be bound to the constitutional function of taxation as a legal institution (i.e. proportionate contribution to public burdens), and therefore it may not become independent from the income and wealth conditions of the obliged subjects.
When judging upon the case, the Constitutional Court has paid due attention to the fact that Article 70/I of the Constitution does not give a constitutional definition of income or wealth, as those definitions are provided by the legislation in the material laws on taxation. Consequently, the Constitutional Court shall decide whether the regulation remains within the limits of being bound to the conditions of income and wealth, as specified in Article 70/I of the Constitution, when it examines the concrete provisions of a tax law under constitutional

review, assessing it on a case-by-case basis with due account to all features of the regulation, and in particular to the object of the tax.
The Constitutional Court maintains its position explained in earlier decisions, underlining that when a statutory regulation on a new type of tax is introduced, the legislation enjoys a wide range of discretion in selecting the economic resources serving as the basis of the tax and in establishing the way the tax base is to be defined.
At the same time, as stressed by the Constitutional Court, the single constitutional restriction laid down in Article 70/I of the Constitution shall apply to all taxes regulated by way of legislation, regardless of the type of the tax and the object of the tax regulated by the material statute concerned.

6. The tax on petty cash is regulated as asset type supertax, i.e. the taxable economic resource is the assets of the obliged subjects.
Accordingly, in the present case, the Constitutional Court shall examine if the tax on petty cash – as asset type supertax – complies with the constitutional requirement on a proportionate sharing of public burdens granted in Article 70/I of the Constitution, i.e. whether the introduction of the new tax by the legislation remains within the constitutional limits specified in the above constitutional provision – with due account to the purpose of petty cash and to all particulars of the regulation.

When assessing the purpose of petty cash, the Constitutional Court has set out from the presumption that its function is to supply the cash needed for the financial management (operation) of the companies obliged to pay the tax, and the Constitutional Court has also considered that petty cash is stated in the company balance sheet as circulating funds among the assets, the sum of which changes irregularly, consisting of cash paid in under various titles and derived from inhomogeneous sources (in addition to the company's own funds, it may contain cash from alien sources as well).
The Constitutional Court has also taken account of the fact that the actual level of petty cash is determined by the nature of the economic activity pursued by the company, and petty cash is circulating funds aimed at securing the performance of incoming and outgoing payments (undisturbed cash flow) during – and related to – the company's business activity, wherefore, it has nothing to do with the accumulation of funds.
Having regard to the regulations in the ATPC, the Constitutional Court has established that the new asset type tax is not directly connected to the income and wealth status (conditions)

of the obliged subjects (the companies bound to pay the tax), and consequently, the new tax type falls so from the constitutional foundations of taxation as determined under Article 70/I of the Constitution as to cause an unconstitutional situation.
Under the preamble of the ATPC and the Minister's reasoning, the primary aim of the legislation is not the enforcement of the constitutional function of taxation, as the tools of taxation are applied partly to enforce an administrative restriction (the suppressing of cash circulation) and partly to prevent (suppress) the undue utilisation of petty cash.

In the opinion of the Constitutional Court, the above-mentioned – otherwise legitimate – legislative aim may not be constitutionally implemented by way of the legal institution of taxation (the introduction of a new tax type); the tax on petty cash as a "*quasi* sanction" may not be applied as a legal consequence under tax law upon the breach of an administrative restriction.
According to the Constitutional Court, the tax on petty cash imposes a tax payment obligation upon income or assets practically not realised or obtained by the companies. In the definition of the tax base, the legislation determines the taxable assets as the positive amount of the company's closing balance of the average daily petty cash less the money stock confirmed by the legislation.
However, in line with Article 70/I of the Constitution, the stock of petty cash – determined under Section 2 para. (3) of the ATPC – as the tax base, may not be regarded as income or assets practically obtained by the companies, to form a constitutional basis for a proportionate sharing of public burdens.
The stock of petty cash of the companies obliged to pay tax on petty cash under the ATPC – or the actual amount thereof at any time – is not in direct relation with the factual income and wealth conditions or status of the subjects of taxation, to form a lawful basis for the constitutional sharing of public burdens.
In addition, when determining the tax base, the legislation failed to take note of the fact that – due to the nature of their activities (business) – many of the companies to be taxed maintain in the long run a stock of petty cash exceeding the amount acknowledged in the ATPC, and they use the petty cash properly, in line with its lawful purpose (holding a stock of cash to secure the continuous operation). In the case of the above-mentioned enterprises, the tax on petty cash restricts their enterprising and daily business activities without a constitutional reason, by imposing on them a negative legal consequence under tax law in relation to their lawful conduct.

The Constitutional Court holds that its position explained in the CCDec is to be followed in the present case as well, namely that the legislation may only use the legal institution of taxation for purposes in line with the constitutional objective defined in Article 70/I of the Constitution, and any taxation securing as a "*quasi* sanction" the enforcement through economic means of a statutory restriction of administrative nature, serving a different legislative purpose, is considered to violate Article 70/I of the Constitution, and as such it is unconstitutional.

As noted by the Constitutional Court in connection with the relevant statutory regulations, the legislative aims specified in the ATPC and in the Minister's reasoning may, of course, be legitimate objectives determined by the legislation, and it is also constitutionally acceptable when the legislation attempts – on the basis of taxation policy considerations – to influence the conduct of the subjects of taxation by using taxation as a tool. However, the legislation may only apply constitutional measures to realise the above objectives and considerations by not violating the constitutional provision on proportionate contribution to public burdens.
The Constitutional Court holds that taxation may only be regarded as a constitutional tool if it serves a constitutional purpose (proportionate contribution to public burdens), and until it remains within the limits of being bound to the conditions of income and wealth as laid down in Article 70/I of the Constitution.
In addition, the Constitutional Court notes that the rules on supervision within the tax administration procedure allow a chance for "screening" the companies that misuse petty cash, and therefore the illegal conducts can be sanctioned. There are economic and financial regulatory tools (incentives) other than taxation available for suppressing cash circulation – provided that it is justified in the present situation of the market economy. (Consequently, the legislation enjoys a wide range of discretion in selecting the tools serving the purpose of realising legitimate legislative aims and taxation policy considerations, although when it elects to use taxation as a tool, it is required to regulate the issue in the constitutional framework specified in Article 70/I of the Constitution, i.e. to remain within the above constitutional limits.)

Therefore, as the Constitutional Court has established that the provisions of the ATPC violate the constitutional requirement of proportionate contribution to public burdens as granted in Article 70/I of the Constitution, it has ordered on the basis of Section 42 para. (2) of the ACC

that the relevant Act of Parliament promulgated but not yet put into force shall not enter into force as of 1 January 2007.

As the Constitutional Court has established the unconstitutionality of the ATPC on the ground of Article 70/I of the Constitution, the Constitutional Court – acting in line with its established practice – has not performed any further review of unconstitutionality with regard to other constitutional provisions referred to in the petitions. [Decision 61/1997 (XI. 19.) AB, ABH 1997, 361, 364; Decision 16/2000 (V. 24.) AB, ABH 2000, 425, 429; Decision 56/2001 (XI. 29.) AB, ABH 2001, 478, 482; Decision 35/2002 (VII. 19.) AB, ABH 2002, 199, 213; Decision 4/2004 (II. 20.) AB, ABH 2004, 66, 72; Decision 9/2005 (III. 31.) AB, ABH 2005, 627, 636]

The publication of the Decision is based on Section 41 of the ACC.

Budapest, 13 November 2006.

Dr. Mihály Bihari
President of the Constitutional Court
Judge of the Constitutional Court, Rapporteur

Dr. Elemér Balogh
Judge of the Constitutional Court

Dr. András Bragyova
Judge of the Constitutional Court

Dr. Árpád Erdei
Judge of the Constitutional Court

Dr. Mihály Bihari
President of the Constitutional Court
on behalf of
Dr. Attila Harmathy
Judge of the Constitutional Court,
prevented from signing

Dr. András Holló
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

Dr. Mihály Bihari

Dr. István Kukorelli

President of the Constitutional Court
on behalf of
Dr. Péter Kovács
Judge of the Constitutional Court,
prevented from signing

Judge of the Constitutional Court

Dr. Péter Paczolay
Judge of the Constitutional Court

Dissenting opinion by Dr. András Bragyova, Judge of the Constitutional Court

I do not agree with the majority Decision. The primary reason therefor is my interpretation of Article 70/I of the Constitution being different from that of the majority. According to the Decision, Act LX of 2006 on the Tax on Petty Cash (hereinafter: the ATPC) violates the constitutional rule on the proportionality of bearing public burdens as enshrined in Article 70/ I of the Constitution. However, in my opinion, Article 70/I of the Constitution should be interpreted differently, and therefore the ATPC is not unconstitutional.

Under Article 70/I of the Constitution, "all natural persons, legal persons and unincorporated organisations have the obligation to contribute to public burdens on the basis of their income and wealth." The first question to be examined in this respect is the definition of public burdens and what we mean by bearing public burdens. Public burdens are the expenditures of the State serving the purpose of covering community services (in a broad sense); the level of those services is defined in the State's budget. Bearing public burdens means allocating the amount of the State's expenditure in a given period (financial year) among the subjects of law, with the State determining in the tax laws the conditions and the level of the tax payment obligation. (The State may also cover its expenditures from loans – debiting its future tax revenues. Thus, the State's expenditures covered from loans in the given financial year are not part of the "public burdens to be borne".) Paying taxes is the basic legal form of bearing public burdens. According to the classic definition given by Otto Mayer (Deutsches Verwaltungsrecht, 3. Auflage, Leipzig 1924. vol. II, 316), tax is a monetary service to be provided to the State, imposed by the public authority upon the natural and legal persons "subordinated" to the State, for the purpose of raising State revenues, in general, on the basis of regulations. According to this definition, the main elements of the definition are the

following: tax is (1) without consideration; (2) a monetary service; (3) binding natural and legal persons, as well as unincorporated organisations; (4) a source of revenue for the State; and (5) it is determined in an Act of Parliament.

Article 70/I of the Constitution, while creating a constitutional ground for the special obligations aimed at sharing the public burdens, contains the principle of fair taxation. In other words, it is similar to the first principle of taxation by Adam Smith [An Inquiry into the Nature and Causes of the Wealth of Nations, V. ii. b (Oxford, 1976, Vol. II, 825)], according to which: "The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state. [...] In the observation or neglect of this maxim consists what is called the equality or inequality of taxation." The fairness of taxation requires the burdening of the tax subjects to be equal, i.e. the sacrifices they make by paying the tax should be of equal level. The fairness of taxation is to be realised through the whole of the tax system. Therefore, when examining the constitutionality of specific tax types (or tax regulations) on the basis of Article 70/I, its position held or the role played in the tax system is to be taken into account in each case.
According to the majority opinion, it follows from Article 70/I of the Constitution that there must be a direct link between the income and wealth conditions of the obliged subject and the tax to be paid. I hold that the Constitution requires no such direct link, especially because as this requirement is strictly applicable to straight taxes only. Article 70/I should be interpreted much more as a special restriction on the tax payment obligation arising from the Constitution, which requires aligning the tax payment obligation with the payment and load-bearing capacities of the tax subject as a business entity, i.e. it should not be a disproportionately heavy financial burden for the subject. Clearly, this is to be assessed on the basis of several criteria. The Constitution applies the standard of "on the basis of (...) income and wealth", according to which, in the allocation of tax burdens, the legislation must strive for equal financial sacrifice by the subjects of taxation, which is clearly not the same as an equal level of taxation. This is particularly true in the case of straight taxes where the object of the tax is the income obtained or the wealth possessed by the tax subject. It is much more difficult to define the "appropriate" level of financial load-bearing capacity in the case of indirect taxes (e.g. VAT, excise duties, customs etc.), where the financial subject of the tax is different from the person who pays the tax. In these cases, the seller is the one who collects the tax, but it is actually paid by the end user, the customer, or the consumer. Accordingly, the

obliged person may evade the payment of the indirect tax by not concluding the transaction (typically a contract) from which a tax payment obligation would arise. As in the case of indirect taxes, the financial subject of the tax is never bound to realise the act from which a tax payment obligation would arise, the bearing of the tax burden is always the result of his decision. In the case of indirect taxes, the biggest problem incurred during the examination of proportionality is that under Article 70/I of the Constitution, there should be proportionality between the contribution to public burdens, i.e. the tax – or any other contribution of a similar nature – and the conditions of income and wealth. In that case, as I have already pointed out, proportionality means the load-bearing capacity of the tax subject. The question of the proportionality of the tax is related to that. It represents the relation between the object and the level of the tax. In the case of indirect taxes, it means nothing else but the requirement of determining the level of the tax in a general way, as the subject directly paying the tax – since the tax is a part of the consideration paid for the transaction – may decide whether it is in compliance with his conditions of income and wealth, namely, whether he can afford it or not.

The tax systems of the modern states are known to serve several economic and social policy purposes in addition to securing State revenues. Tax policy is one of the most important tools of the states' economic and social policies. So far the Constitutional Court has accepted the Constitution's neutrality in respect of economic policy, and it has always been consistent in acknowledging the freedom of the legislative power to form the economic policy. Tax policy is aimed at influencing and regulating the conduct of economic actors by way of determining the conditions and the level of tax payment obligations. These tax types intend not only to secure state revenues, but also to change the economic conduct (and not always just that) of the tax subject. By way of regulative taxes, the State intends to influence certain economic conducts by providing incentives to pursue the desired activities and deterring from the undesired ones, through raising or decreasing the tax burdens on the financial subjects of taxation (or by determining the conditions and the level thereof). Such taxes result in making some lawful conducts more costly than other ones, which – according to the intentions of the legislation – may amend the tax subjects' economic conduct; however, reaching the objective always depends on the tax subjects' decision. It is a speciality of regulative taxes that– as against other taxes, where the tax subjects have no option to lawfully evade tax payment – the legislation offers a chance for the financial subject of the tax to choose between abstaining from the conduct held undesirable by the State and evading or decreasing the tax payment

obligation. Regulative taxes are regarded as a benefit in respect of the conduct preferred and supported by the legislation, and as an extra tax burden in respect of the conduct to be avoided. Regulative taxes offer a chance for choosing between conducts implying no or less tax burdens and the ones resulting in a higher tax burden – e.g. between smoking or not smoking. Accordingly, regulative taxes may hardly be held unconstitutional under Article 70/ I of the Constitution with regard to the person obliged to pay the tax, since, if they reach their objective, no (or less) tax payment obligation shall arise, and therefore no disproportionate burdening of the tax subject is conceptually possible.

The tax on petty cash belongs to the group of regulative taxes. According to the preamble of the Act, it aims to suppress the circulation of cash. This regulative aim is served by the tax payable upon any stock of petty cash exceeding the statutory limit; it is, undoubtedly, an extra burden on the companies. According to the reasoning by the legislation, the stock of petty cash significantly exceeding over a long period the companies' own average daily cash flow is considered not a stock of cash necessary for the operation of the company, but the company's own assets, and in most cases an income used for personal purposes. It is within the legislature's scope of competence to decide whether this regulation is an effective tool for reaching the desired objective. With regard to constitutionality, only the suitability of the tool selected for the implementation of the legislative objective can be judged upon. This question must be answered positively, as the tax on petty cash makes the circulation of cash more costly than other methods of payment applicable in domestic transactions – transfers between bank accounts or the application of means of payment replacing cash – as defined in Section 13 of Order 9/2001 (MK 147) MNB by the National Bank of Hungary on Payment Transactions, Clearing and Settlement Transactions, and on the Rules of Money Processing Operations. This is a fact clearly encouraging the money holders to use certain means of payment. Although the regulations do not prohibit payment in cash, the related higher tax burdens motivate the subject of taxation to avoid cash payment – a conduct held desirable by the legislation. At the same time, the suppressing of cash payments can be regarded as an objective of the tax administration, as cash transactions are more difficult to control, allowing chances for the tax evasive shadow economy ("black economy").

To conclude with, let me point out that Article 70/I of the Constitution is not the only applicable constitutional standard with regard to the constitutionality of tax laws. Tax laws (just like any other Act of Parliament) may also violate any other provision of the Constitution, dealing with issues other than taxation or the sharing of public burdens; indeed, in most cases reviewed in the practice of the Constitutional Court, tax laws have always been held unconstitutional based on constitutional regulations other than Article 70/I – with the exception of a single case. Although a tax law might be constitutional under Article 70/I of the Constitution, it might be held unconstitutional according to other norms of the Constitution. Based on the contents of tax laws, in most cases, Article 70/A para. (1), the clause of the rule of law [Article 2 para. (1)], and the protection of property (Article 13) of the Constitution may form the basis of establishing the unconstitutionality of tax laws. Even the annulment pronounced in Decision 31/1998 (VI. 25.) AB, conceptually followed by the present majority Decision, could have been justified more conclusively based on Article 70/A para. (1) rather than on Article 70/I.

Budapest, 13 November 2006.

Dr. András Bragyova
Judge of the Constitutional Court

Dissenting opinion by Dr. András Holló, Judge of the Constitutional Court

I do not agree with the holdings and the reasoning of the majority Decision.

1. According to the Decision, one of the grounds for establishing the unconstitutionality of Act LX of 2006 on the Tax on Petty Cash (hereinafter: the ATPC) is the legislation's failure to regulate the tax on petty cash in line with the constitutional purpose specified in Article 70/I of the Constitution, using it for the purpose of enforcing an administrative statutory restriction, as a "*quasi* sanction".
The above reasoning is built upon the arguments applied in Decision 31/1998 (VI. 25.) AB (hereinafter: the CCDec) as a precedent.
In my view, the CCDec should not be taken as a precedent in the present case. In that case, the Constitutional Court had to judge upon the constitutionality of a completely different

regulation. The regulations assessed in the CCDec withdrew the taxpayer's rights to charge the costs generally applicable under the tax laws and to deduct the VAT when effecting payment in cash over the statutory limit. This means that the act of cash payment induced sanctions under the tax laws. According to the CCDec, the constitutional concern was the applicability of legal consequences under the tax laws as a "*quasi* sanction" when the legislation decides to pose administrative restrictions on cash payments. Based on the interpretation of the challenged rules, the CCDec concludes that they "deprive the tax subject – without any unlawful act, as a »*quasi* sanction« - of a subjective right which would otherwise entitle him as right naturally following from the legal character of the tax type concerned." This regulation was held unconstitutional by the Constitutional Court.
The provisions in the ATPC are fundamentally different from the regulations reviewed in the CCDec as the tax regulation is not based on the fact of cash payment, and it does not withdraw subjective rights secured by existing tax laws, but it creates a new tax type, establishing a tax payment obligation upon one of the elements of the company's assets, i.e. petty cash.

In my opinion, the tax on petty cash may not be regarded as a "*quasi* sanction". The tax on petty cash, as any public burden, basically serves the purpose of covering public expenditures, raising State revenues, but at the same time it is a type of tax used by the State to implement economic policy objectives and to influence the taxpayers' conduct. The regulations under tax law do not use the classic administrative means – prohibitions, or declaring the unlawfulness of, and sanctioning, certain economic conducts – in order to suppress undesired conducts by the taxpayers; these regulations allow the entrepreneurs to make a decision. The entrepreneur has to choose on weighing his economic interests: either to decrease the amount of petty cash to the statutory level, or to pay the tax upon the excess amount. When – based on the above considerations about its economic interests – the enterprise opts for not following the conduct held desirable by the State, it is surely because of this option providing economic benefits for the enterprise, and – through collecting the tax – the State shall obtain a share of the individual benefits realised by the enterprise's economic conduct. In this case, therefore, the tax does not function as a sanction. On the contrary, it is a way of the State's influencing the taxpayers' economic conduct by economic means – instead of applying statutory prohibitions and sanctions. In the modern states, administration by means of tax law is often applied for the purpose of influencing the economic conduct of business organisations, as it is more suitable for influencing economic decisions than the classic tools of State administration, and

it is less restrictive in respect of the companies' freedom of making economic decisions. [In the German law, those taxes are grouped as a specific type of tax (Lenkungsteuer). In the constitutional law approach, see: Josef Insensee und Paul Kirchhof: Handbuch des Staatsechts 88. § Paul Kirchhof: Staatliche Einnahmen, items 53 to 62, pp 111-116]

2. The other ground for establishing the unconstitutionality of the ATPC is the fact that – as it imposes a tax on income or assets actually not realised and obtained by the companies – the tax on petty cash is not directly connected to the income and wealth conditions of the obliged subjects, consequently, it falls too far from the constitutional foundations of taxation as determined under Article 70/I of the Constitution.

For the past 16 years, the Constitutional Court's practice related to tax law has been based on the principle that in a constitutional State the determination of the budget's sources of revenue is the competence of the Parliament, while the Government is responsible for forming the economic policy.

The interpretation of Article 70/I of the Constitution has consistently rested upon the Constitution's neutrality concerning economic policy. As always stressed by the Constitutional Court on interpreting Article 70/I of the Constitution in line with the Constitution's neutrality concerning economic policy, the legislation has a wide range of constitutional discretion by virtue of Article 70/I in adopting tax laws. The Constitutional Court has explained in its decisions that due to the Constitution's neutrality concerning economic policy, the legislative decisions on regulating tax laws allow only limited possibilities for reviewing the discretionary decisions. Determining the economic policy – including the supporting of certain activities and encouraging or discouraging of investments – is, in itself, not a constitutional issue. It becomes a constitutional concern, however, when the concrete statutory regulations implementing the economic policy violate a constitutional right or they are of discriminative nature. [Decision 620/B/1992 AB, ABH 1994, 542; Decision 59/1995 (X. 6.) AB, ABH 1995, 300; Decision 963/B/1993 AB, ABH 1996, 440; Decision 26/2004 (VII. 7.) AB, ABH 2004, 398, 429]

The same position is reflected in the CCDec used in the reasoning of the Bill: "the primary purpose of the tax is to make the natural and legal persons contribute – by way of paying the tax – to the public burdens in proportion to their conditions of income and wealth as specified in Article 70/I of the Constitution, i.e. to create the financial cover for maintaining the State's administration, and – by way of redistribution – for performing different tasks of public

interest. However, in addition to that, taxes are also important tools – of secondary nature, but significant ones – of the State's economic policy, through which the legislation can directly or indirectly orientate the actors of the economic life by drawing or not drawing certain things or activities under taxation and by offering or not offering tax benefits. In this respect, the legislation enjoys a wide range of constitutional discretion." [Decision 31/1998 (VI. 25.) AB, ABH 1998, 240, 246]

The standing practice of the Constitutional Court is consistent when holding that it does not follow from Article 70/I of the Constitution that the basis of bearing public burdens could only be some income or assets. As explained in several decisions of the Constitutional Court, the relevant provision of the Constitution does not state that the income or the assets must or can be used as the basis of bearing public burdens; in fact, it is stated that the bearing of public burdens must be regulated in line with, and in proportion to, the conditions of income and wealth. [Decision 448/B/1994 AB, ABH 1994, 724, 726; Decision 44/1997 (IX. 19.) AB, ABH 1997, 304; Decision 1103/B/1998, ABH, 2002, 916, 918; Decision 1/2005 (II. 4.) AB, ABH, 2005, 31, 52]

As consistently held by the Constitutional Court in respect of defining the source of the obligation of bearing public burdens, Article 70/I of the Constitution does not specify the titles under which the State may provide for payment obligations, and therefore the legislator has a wide scale of discretion in choosing various economic resources as the basis of sharing public burdens, and, accordingly, in determining the objects of public burdens. [Decision 61/1992 (XI. 20.) AB, ABH 1992, 280, 281; Decision 666/B/1992 AB, ABH 1992, 735, 737; Decision 821/B/1990 AB, ABH 1994, 481, 487; Decision 620/B/1992 AB, ABH 1994, 539, 540-541; Decision 574/B/1996 AB, ABH 1996, 628, 629; Decision 44/1997 (IX. 19.) AB, ABH 1997, 304, 306-307; Decision 522/D/1992 AB, ABH 2001, 755, 758; Decision 1106/B/ 1997 AB, ABH 2003, 1018, 1021]

As pointed out in almost every decision of the Constitutional Court on tax law, under Article 70/I of the Constitution, the tax must be in line with, and proportionate to, the income and wealth conditions of the obliged person. According to this element of Article 70/I, the tax paying ability of the obliged person was the basis of assessment by the Constitutional Court as far as the selected source of public burdens is concerned. Based upon the above, the Constitutional Court did not establish the unconstitutionality of the regulation that provided

for the payment of public burdens upon the property not owned any more by the obliged person (Decision 73/B/1996 AB, ABH 1996, 608, 609; Decision 777/B/1997 AB, ABH 1998, 749, 751; Decision 662/B/1996 AB, ABH 2001, 880, 885), and in accordance with that, the Constitutional Court established that the Constitution did not prohibit the imposing of a tax payment obligation upon entrepreneurs considered to make loss with regard to income tax. (Decision 122/B/1996 AB, ABH 2002, 737, 746; Decision 56/B/2001 AB, ABH 2001, 1504, 1510; Decision 630/B/1998 AB, ABH 2005, 798, 801; Decision 682/B/2002 AB, ABH 2005, 1089, 1091-1092)

With regard to selecting the economic source, i.e. the object of the tax, so far the Constitutional Court has only determined a single requirement, namely that the source must remain within the limits of being bound to the conditions of income and wealth, in accordance with the constitutional provision on sharing public burdens. The economic source selected must be connected to income or wealth. (Decision 66/B/1992 AB, ABH 1992, 735, 737; Decision 448/B/1994 AB, ABH 1994, 724, 727; Decision 357/B/1999 AB, ABH 2001, 1321, 1326; Decision 905/B/2000 ABH 2003, 1633, 1637; Decision 952/B/2001 AB, ABH 2003, 1445, 1453) In the absence of such relation, the Constitutional Court has established the unconstitutionality of the regulation when the legislation ordered the payment of healthcare contribution – as a payment obligation of tax nature – based on the fact of possessing a personal identification card, i.e. it linked the obligation to the statutory rule requiring the possession of such card. The regulation ordered a payment obligation on the basis of a condition having no relevance for one's income and wealth conditions. [Decision 37/1997 (VI. 11.) AB, ABH 1997, 234, 242] In the same decision, however, the Constitutional Court did not establish the unconstitutionality of regulating the healthcare contribution by defining the source to serve as the basis of the public burden in the mere fact of being an entrepreneur, stating that this occupation is a legal status offering "a potential economic source". (ABH 1997, 234, 242-243; reinforced by Decision 60/B/1998 AB, ABH 2001, 976, 979; Decision 952/B/2001 AB, ABH 2003, 1445, 1454)

Reference to not obtained incomes was used by the Constitutional Court on the basis of Article 70/I of the Constitution only in the case of income-tax type taxes, when the unconstitutionality of certain tax law provisions was established. [Decision 3/1993 (II. 4.) AB, ABH 1993, 41, 45; Decision 57/1995 (IX. 15.) AB, ABH 1995, 284, 286; Decision

5/1997 (II. 7.) AB, ABH 1997, 55, 62; Decision 31/1998 (VI. 25.) AB, ABH 1998, 240, 249-250]

At the same time, in Decision 448/B/1994 AB, the Constitutional Court did not establish the unconstitutionality of the regulation which required the inclusion of expenditures and interests payable as items increasing the tax base. As argued by the Constitutional Court in the above decision, "In this case, the legislation considered the method applied by the tax subjects an economic benefit, and the State established an obligation of paying a tax upon it – for the purpose of raising its tax revenues. In the opinion of the Constitutional Court, when determining the level of taxation, the legislation remained within the limits of the Constitution, and the level of the tax is neither excessive, nor disproportionate, as it is about the interest on a loan exceeding the quadruple of equity capital. However, as pointed out by the Constitutional Court, the legislation does not enjoy unlimited freedom in selecting the economic source serving as the basis of taxation and in determining the tax object based thereon; and according to the regulation requiring the sharing of public burdens based on the conditions of income and wealth, in general, it is considered unacceptable to levy taxes on expenditures and interests paid. However, the Constitutional Court holds that the provision reviewed in the present case remains within the limits of being bound to the conditions of income and wealth, and it cannot be considered disproportionate as the other option is the possibility of evading the obligation to pay the tax." (ABH 1994, 724, 726)

The ATPC imposes a tax payment obligation upon a part of the companies' assets, i.e. the amount of petty cash exceeding the confirmed money stock, which is at the disposal of the enterprise irrespectively of its source, serving the purpose of implementing the economic objectives of the company. Accordingly, and beyond doubt, there is a direct relation with the monetary conditions of the company.

Having regard to all the above, I hold that – in line with the Constitutional Court practice, as detailed above, concerning the legislation's right to select the economic source of the tax – the unconstitutionality of the ATPC may not be established on the basis of Article 70/I of the Constitution, due to the alleged lack of a connection with the income and wealth conditions of the taxpayer.

Budapest, 13 November 2006.

Dr. András Holló

Judge of the Constitutional Court

I concur with the dissenting opinion:

Dr. László Kiss
Judge of the Constitutional Court

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