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## ABILITY-TO-PAY PRINCIPLE IN THE MONTENEGRO TAX SYSTEM CONSTITUTIONAL COURT CASE PRACTICE AND LEGISLATIVE APPROACH

*The tax systems of many countries have faced major changes because of the global financial crisis. A budget deficit and decrease in revenues have forced the Montenegrin legislators to introduce new taxes and to increase the rates of already existing taxes. Indirect taxes (VAT, excises and custom duties) represented the biggest source of tax revenues in 2011 and 2012. Due to this fact, changes in the tax system were scrutinized in the light of their social effects, especially regarding the principle of ability to pay. This article will analyze the understanding of this principle in the case practice of the Constitutional Court of Montenegro and the Parliament of Montenegro. Precisely, it will show that these two important institutions do not understand this important tax principle correctly. On one side, the analysis will show conclusions of the Constitutional Court of Montenegro that there is no legal basis for the introduction of the ability to pay principle in the Montenegrin tax system and that it has no authorization to assess the impact that the burden of a fiscal duty has on taxpayers are totally incorrect. On the other side, the introduction of the progressive tax scale regarding employment income earned only from a single employer had left other types of income and employment income generated from more than one employer out of the tax progression.*

Key words: *Principle of equality before the law. Ability to pay principle. Progressive taxation. Effective tax rates.*

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## 1. INTRODUCTION

In October 2012, the Constitutional Court of Montenegro (hereinafter: the Constitutional Court) passed a decision about the constitutionality of the Law on Fees (Taxes) on Public Services (hereinafter: the Law on Fees). The reason for the enactment of the disputed Law on Fees was the financial crisis and the unexpected budgetary deficit which the Government of Montenegro (hereinafter: the Government) faced in the beginning of 2012. The Parliament of Montenegro (hereinafter: the Parliament) adopted the Law in March 2012, and introduced a fee (tax) on five types of services:<sup>1</sup> 1) mobile telephone cards; 2) electricity consumption meters; 3) cable connection for the transmission of radio and TV channels; 4) consumption of tobacco products in hospitality facilities; and 5) use of electro-acoustic and acoustic devices in hospitality facilities after midnight. The fee (tax) is payable at a fixed amount (1 Euro). It is charged monthly, and the provider of the service has an obligation to calculate and pay the fee (tax). Shortly after the enactment of the Law on Fees an initiative for a constitutionality review was filed. The applicant demanded from the Constitutional Court to declare provisions related to fees on mobile telephone cards, electric meters and cable connections unconstitutional. One of the basic claims from the initiative was that the contested taxes violate the principle of equality before the law.<sup>2</sup> The Constitutional Court rejected the whole initiative, and regarding this contention by the taxpayer, scrutinized the disputed provisions of the Law on Fees for the first time in its practice in the context of the ability-to-pay principle.

Only a couple of months later, in January of 2013 the Parliament adopted amendments to the Law on Tax on Income of Natural Persons (hereinafter: the Law on Income Tax). The essential feature of these amendments was the introduction of progressive taxation of income from employment (personal earnings). The main reason for the subject changes of the Law on Income Tax was the same as in the case of the Law on Fees – the financial crisis and the budgetary deficit<sup>3</sup>. The basic justification for the switch from proportional to progressive taxation was, according to the members of the Parliament who proposed these changes, the ability-to-

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<sup>1</sup> Article 1 of the Law on fees on access to certain services of public interest and on consumption of tobacco products and acoustic and electro acoustic devices, *Official Gazette of Montenegro*, No. 28/12.

<sup>2</sup> Initiative for the assessment of constitutionality of the Law on fees on access to certain services of public interest and on consumption of tobacco products and acoustic and electro acoustic devices, 2. [http://www.mans.co.me/wp-content/uploads/2012/06/Inicijativa\\_Ustavnom\\_sudu.pdf](http://www.mans.co.me/wp-content/uploads/2012/06/Inicijativa_Ustavnom_sudu.pdf), last visited 06 March 2014.

<sup>3</sup> Report on the discussion of bill of Law on amendments of the Law on tax on income of natural persons, no. 16 02/13 1/, EPA 72 XXV, Podgorica, 28 January 2013, 1.

pay principle. In this way, in only a few months, the ability-to-pay principle was trying to find its place for the first time in the tax system of Montenegro. This study provides analysis of the understanding and the effects of this principle in the tax system of Montenegro.

## 2. THE PRINCIPLE OF ABILITY-TO-PAY AS A SPECIAL DIMENSION OF THE PRINCIPLE OF EQUALITY BEFORE THE LAW

A definition of tax discrimination does not exist. The concept of discrimination, therefore, can be determined only on the basis of the general meaning of the term and the general concepts that the term comprises and, as regards forbidden discrimination, on the basis of situations and characteristics provided for the purpose of this prohibition. The concept of discrimination recalls that of equality, being its opposite, and therefore in principle it corresponds to the concept of inequality.<sup>4</sup> Therefore the principle of equality before the law and the principle of non-discrimination represent two sides of the same coin. This concept is very well defined in the practice of the Court of Justice of European Union (hereinafter: CJEU), where discrimination is based on the general principle of equality, which is eminent to all Member States' legal systems: "... the prohibition of discrimination laid down in the aforesaid provision is merely a specific enunciation of a general principle of equality..."<sup>5</sup>

According to Constitutional Court case practice, discrimination does not constitute simple differentiation, but its negative feature: "The principle of non-discrimination is based on the Constitution in such a way that it prohibits something that is equal or similar from being treated differently according to the law, as well as that what is essentially different is treated equal according to the law."<sup>6</sup> Therefore, prohibition of discrimination indicates the criteria of differentiation that are not allowed.<sup>7</sup> The Constitutional Court also explicitly prohibits reverse discrimination: "The principle of non-discrimination (equality) does not refer only to the

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<sup>4</sup> P. Adonnino, "General Report", (in: *Non discrimination at the crossroads of international taxation*, Vol. 93a *Caheires de Droit Fiscal International*), International Fiscal Association, 2008, 22.

<sup>5</sup> Joined Cases C 117/76 and C 16/77, *Albert Ruckdeschel & Co. and Hansa Lagerhaus Stöh & Co. v Hauptzollamt Hamburg St. Annen; Diamalt AG v Hauptzollamt Itzehoe* (19 October 1977), 1769.

<sup>6</sup> Constitutional Court of Montenegro (24 March 2011) Decision U I no. 27/10, 30/10 and 34/10.

<sup>7</sup> K. Van Raad, *Non discrimination in international tax law*, Kluwer Law International, 1986, 9.

same treatment of equal situations but also to the substantive equality – different treatment of unequal cases in proportion with their inequality.”<sup>8</sup>

It must be noted that there are a number of countries that have no case practice in the area of the application of the principle of equality in the area of taxes. In Great Britain the judiciary cannot abolish laws because of unconstitutionality, except in cases of non-compatibility with the European Union law. In the Netherlands, although the principle of equality before the law is formulated in Article 1 of the Constitution, the courts cannot assess the compatibility of laws and international agreements (Article 120). In France laws can be assessed regarding their compatibility with the Constitution only before enactment, therefore the case practice is scant.<sup>9</sup>

In contrast, probably the most comprehensive definition of the non-discrimination principle regarding taxation can be found in the Spanish Constitution: “Everyone shall contribute to sustain public expenditure according to their economic capacity, through a fair tax system based on the principles of equality and progressive taxation, which in no case shall be of a confiscatory scope.”<sup>10</sup> The violation of the principle of equality before the law (discrimination) in the area of taxation exists when there is deviation from: 1) the principle of universal tax liability; 2) the principle of equal treatment; 3) the principle of ability-to-pay; and 4) the principle of proportionality. Therefore, the principle of ability-to-pay represents a special dimension of the equality principle in taxation. Its other name is the principle of justice in taxation, and it contains a two-level standard: 1) horizontal ability-to-pay – the requirement that persons with the same economic capacity (tax capacity) must pay the same amount of tax; and 2) vertical ability-to-pay – the requirement that persons with greater economic capacity (tax capacity) must pay a larger amount of tax.

In relation to the constitutional principle of equality, as the main source of the principle of ability-to-pay, we can find two approaches. The first one states that its tax dimension is developed from the general principle of equality in combination with the principle of the welfare state (Germany). Court practice of the German Constitutional Court considers that the Basic Law’s principle of equality “forbids any regulation imposing a tax for which the ability-to-pay is not a principle consideration”.<sup>11</sup>

<sup>8</sup> Constitutional Court of Montenegro (24 March 2011) Decision U I no. 27/10, 30/10 and 34/10.

<sup>9</sup> D. Popović, G. Ilić Popov, “Jednakost građana u poreskom pravu” [*Equality of Citizens in the Tax Law*], *Banja Luka University School of Law Yearbook*, Vol. 33, 2011, 152–155.

<sup>10</sup> Section 31.1 of the Spanish Constitution.

<sup>11</sup> W. B. Baker, “The Three Faces of Equality – Constitutional Requirements in Taxation”, *Case Western Reserve Law Review*, 2006, 52.

On the other hand, there are countries in which Constitutions, besides the general principle of equality, explicitly contain this specific tax dimension. An example is the Italian Constitution: “Every person will contribute to public expenditures in accordance with his/her tax capacity.”<sup>12</sup>

In most European countries the ability-to-pay principle draws the dividing line between taxation and expropriation of property.<sup>13</sup> Ability-to-pay is a principle strictly connected to equity and equality and requires that, within a country, taxation be levied according to the taxpayer’s capacity to contribute to public spending.<sup>14</sup> Thus, taxpaying capacity operates as a limitation on the legislature when it enacts taxable events because such capacity arises from the taxpayer’s ability to be the obligor of a tax obligation. Likewise, in this regard the Supreme Court of Argentina held: “The power to establish taxes is essential and indispensable for the existence of government, but when this power is unlimited as to the selection of the taxable matter or the amount payable, it necessarily entails the possibility of destruction that is inherent in it because there is a limit beyond which no thing, person or entity will tolerate the burden of a certain tax” (*Banco de la Provincia de Buenos Aires v. Nación Argentina*).<sup>15</sup> Similarly, in its court practice the Italian Constitutional Court clarifies that: “Article 53 Paragraph 1 of the Constitution represents a clarification of the general principle of equality...Article 53 Paragraph 1 of the Constitution demands that every tax obligation be related to the tax capacity of the person: it is based on the requirement of equality, as a necessity that every tax finds its basis in a specific fact which reflects his welfare.”<sup>16</sup>

However, comparative analysis shows that the fact that some constitutions contain this specific feature of the equality principle before the law does not mean that the equality of citizens in taxation in that state is more protected than in states in which there is only a general principle of equality. The most important factor is how constitutional courts perform their duty, and accordingly to what extent they are willing to declare tax laws unconstitutional because of inequality, at least if equality exists in

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<sup>12</sup> Article 53 Paragraph 1 of the Constitution of the Italian Republic.

<sup>13</sup> M. Greggi, “The Masa Investment Group as a ‘Nec Plus Ultra’ Case for the application of the European Convention on Human Rights to Tax Law?”, *INTERTAX*, Vol 35, Issue 6/7, 2007, Kluwer Law International, 369.

<sup>14</sup> C. Bardini, “The Ability to Pay in the European Market – An Impossible Sudo for the ECJ”, *INTERTAX*, Volume 38, Issue I, 2010, Kluwer Law International BV, 2.

<sup>15</sup> A. Tarsitano, “The Defence of Taxpayers’ Rights in the Courts of Argentina”, *Bulletin for International Taxation*, August/September 2005, IBFD, 411.

<sup>16</sup> E. Marellò, *Raccolta di giurisprudenza costituzionale in materia tributaria 1957 2007* [Collection of constitutional case practice in tax matters: 1957 2007], 2008, 292 [http://aperto.unibo.it/bitstream/2318/488/1/0\\_composto.pdf](http://aperto.unibo.it/bitstream/2318/488/1/0_composto.pdf), last visited 06 March 2014.

the form of a general principle. Thus the German Constitutional Court undertook significant activity in the annulment of tax laws because they violated the principle of equality, developing the interpretation of this principle according to the doctrine that taxes must be paid in accordance with the principle of ability-to-pay (which is not formulated in the Constitution). When it comes to the application of the ability-to-pay principle, in most cases judicial practice is related to tax on the income of individuals.<sup>17</sup> The logical reason for this is the fact that this form of taxation is suitable for the application of progressive rates and different social-political reliefs, and therefore is the most suitable way to mitigate or eliminate the regressivity of indirect taxes. Precisely, individualized incomes are taxed at progressive rates to obtain a redistributive impact from taxation.<sup>18</sup>

The special value encapsulated in the German principle of equality and ability-to-pay requires, according to the Federal Constitutional Court, progressive taxation: “Here justice demands that relative equality for a more powerful economic performer means that taxes must be paid according to a higher percentage rate than an economically weaker person”.<sup>19</sup> This is the vertical ability-to-pay principle. A comparative overview shows that there are also countries in which the principle of progressiveness can be found in the Constitution.<sup>20</sup> The Italian Constitutional Court has repeated several times that the constitutional principle of progressiveness refers to the tax system as a whole, and that it is not a prerogative of all specific tax forms, and that it is applicable in accordance with preferences related to specific tax forms.<sup>21</sup> In this way it is possible not only to neutralize the regressive effect of indirect taxes, but also to achieve the outcome where people with a higher tax capacity pay more taxes as a percentage.<sup>22</sup> That is why this principle is directly related to the constitutional principle of social solidarity.<sup>23</sup>

<sup>17</sup> D. Popović, *Poresko pravo* [Tax law], Faculty of Law, University of Belgrade, 2011, 32.

<sup>18</sup> R. A. de Mooij, L. G. M. Stevens: “Exploring the future of ability to pay in Europe”, *EC Tax Review*, 2005/1, Kluwer Law International, 9.

<sup>19</sup> W. B. Baker, 52.

<sup>20</sup> Article 53 Paragraph 2 of the Constitution of Italian Republic; Article 104 Paragraph 1 of the Constitution of the Portuguese Republic; Section 31.1 of the Constitution of the Kingdom of Spain.

<sup>21</sup> E. De Mita, “Diritto tributario e corte costituzionale: Una giurisprudenza ‘necessitata’” [Tax law and the constitutional court: Necessitated case law], (in *Diritto tributario e Corte Costituzionale*, eds. Leonardo Perrone, Claudio Berliri), Deastore, Roma, 2006, 4.

<sup>22</sup> B. Jelčić, *Porez na dodanu vrijednost* [Value added tax], Savez računovoda i finansijskih radnika Hrvatske, Zagreb, 1992, 36.

<sup>23</sup> R. Lupi, *Diritto tributario: Parte generale* [Tax law: General part], Giuffrè Editore, Milano, 2005<sup>8</sup>, 10.

As has already been stated, apart from the progressive rates, individual income tax offers the best choice of different kinds of social elements in taxation which affect the taxpayer's ability-to-pay. A good example is the minimum substance amount – "*minimum vitalis*". According to the principle of human dignity the legislator must not tax this amount, but only the economic capacity above it.<sup>24</sup> The principle that income tax should tax only true economic capacity led the Constitutional Court of Germany to conclude that an amount representing the necessities of life, that is, a minimum subsistence amount, should be excluded from taxation.<sup>25</sup> More precisely, article 1 of the Basic Law protects human dignity: human dignity shall be inviolable. Combining it with the social state principle, the Constitutional Court of Germany determined that the state must guarantee each citizen a subsistence amount consistent with human dignity. On the tax side, this principle that the state has a duty to assure each citizen "the basic needs for a humane and dignified existence" grew into a limitation on the power of the state to tax non-disposable income, which represents that portion of the citizen's income that the citizen must dedicate to providing the family with the necessities of life. Expenditures necessary to producing the income diminish the income available for necessities.<sup>26</sup> Even CJEU in its case practice declared that this measure has: "...a social purpose, allowing the taxpayer to be granted an essential minimum exempt from all income tax".<sup>27</sup> The Constitutional Court of Colombia, in a case of VAT on basic consumer products, determined that the average person in the lowest income segments of the population spends about 85% of his or her income in acquiring the *minimum vitalis* (the fundamental right of decent living) of food, housing, health and education, so the total tax burden may only affect the remaining 15% in order to be considered constitutional.<sup>28</sup>

The next very important subject related to the ability-to-pay principle in constitutional court practice is its application within the context of the constitutional principle of family protection. The German Constitutional Court was asked to determine whether widowed or unmarried persons with a dependent child were being treated equally with married parents where the income tax law did not provide any tax relief for the additional costs of child care. The German Constitutional Court determined that this was an unjustified burden on these individuals. Hence, the prin-

<sup>24</sup> D. Popović, 32 fn. 18.

<sup>25</sup> W. B. Baker, 43.

<sup>26</sup> H. Ordower, "Horizontal and Vertical Equality in Taxation as Constitutional Principles: Germany and United States Contrasted", *Florida Tax Review*, 2006, 32–33.

<sup>27</sup> Case 234/01 *Arnoud Gerritse v Finanzamt Neukölln Nord*, para. 48.

<sup>28</sup> N. Q. Cruz, "Minimum Vitalis and the Fundamental Right to Property as a Limit to Taxation in Columbia", (in: *Human Rights and Taxation in Europe and the World*, eds. Georg Kofler, Miguel Poiares Maduro and Pasquale Pistone), IBFD, 2011, 359.

principle of equality in taxation led to the conclusion that equality unambiguously mandated that taxes be assessed in accordance with a taxpayer's ability to pay. Likewise, the German Constitutional Court considers expenditures that are "necessities," those that are unavoidable, to be relevant for appropriate and equal taxation. Expenses for child care presented just such an inescapable additional burden for single individuals and could not be ignored by the Bundestag (German Parliament) without violating the principle of equality.<sup>29</sup>

Other non-personal forms of taxation, like consumption taxes (e.g., VAT, excises, and custom duties) cannot truly conform to the more modern social construct of ability-to-pay. The main negative social feature of consumption taxes is their regressivity. Therefore, tax systems that rely heavily on consumption taxes rather than income taxes will *ceteris paribus* tolerate a comparatively higher degree of social inequality.<sup>30</sup> Acceptance of the VAT as an internal manifestation of an individual's ability-to-pay – that is, if one buys something, he or she must pay for it and the price includes the tax – is a correct one, but a narrow view. Certainly, consumers must have the ability to pay the tax if they consume, but that view misses the impact of embedded value added taxes insofar as they may limit consumers' overall ability to consume. Therefore, notwithstanding that consumption patterns purely reflect ability-to-pay, governments sometimes try to bring progressive principles to consumption taxes, especially in the case of VAT. Multiple rates (lower VAT rates on necessity goods and excises tax on some luxury goods) represent legislative determinations as to which products are more likely to be consumed by those who are better off. Like the German VAT, some of the U.S. state sales taxes use dual or multiple rate structures to ameliorate the regressivity of the sales tax or to burden limited types of expenditures more heavily.<sup>31</sup> At present, there is a broad consensus (at least in democratic societies) that a VAT should refrain, as far as technically possible, from taxing expenditure for the basic necessities of life.<sup>32</sup>

A rare example of an explicit request for social justice in the area of consumption taxation can be found in the Constitution of Portugal: "Consumer taxation shall aim to adapt the structure of consumption to changes in the requirements for economic development and social justice, and shall increase the cost of luxury consumer items."<sup>33</sup> Despite initial

<sup>29</sup> W. B. Baker, 42–43.

<sup>30</sup> J. Englisch, "VAT/GST and Direct Taxes: Different Purposes", (in: *Value Added Tax and Direct Taxation: Similarities and Differences*, eds. Michael Lang, Peter Melz and Eleonor Kristoffersson), IBFD, 2009, 24.

<sup>31</sup> H. Ordover, 14.

<sup>32</sup> J. Englisch, (2009) 25.

<sup>33</sup> Article 104.4 of the Constitution of the Portuguese Republic.



objections by some scholars, the *ability-to-pay* principle has in the meantime also been firmly established by the German Constitutional Court as a relevant expression of tax justice in the area of consumption taxes.<sup>34</sup> In the area of VAT it is interesting to mention the case practice of the Constitutional Court of Colombia. When examining the constitutionality of VAT for certain household products, it ruled that the tax was unconstitutional in view of the fact that the principles of progressiveness, *minimum vitalis* and equity had been violated by the law.<sup>35</sup> In another case of VAT, the Constitutional Court of Germany held that a significantly lower VAT rate for small businesses with gross receipts under 60,000 German marks than for other enterprises was a reasonable exercise of legislative discretion and did not violate the equality principle. With the significant general rate increase, the legislature carved out the exception because it was concerned that small businesses would not be able to pass the higher rate on to their customers.<sup>36</sup>

### 3. CONSTITUTIONAL COURT CASE PRACTICE REGARDING THE ABILITY-TO-PAY PRINCIPLE

#### 3.1. Constitutional Court case practice regarding taxation

The Constitutional Court developed a very reluctant attitude in its case practice towards interference in this area of the legal system. Among other examples, this is evident from its stance in the case related to the constitutionality of the Law on Tax on Income of Natural Persons<sup>37</sup>: “... Apart from the basic principles, the Constitution does not define the subject, procedure and the method of taxation nor does it contain limitations regarding their regulation, but it leaves these questions entirely to the legislator.”<sup>38</sup>

From these assumptions the Constitutional Court draws the conclusion that it has no authorization to assess the appropriateness of choices made by the legislator in the area of taxation: “...the Parliament is authorized through legislation, in accordance with the Constitution, to regulate the way of the exercising of human rights and freedoms, when it is necessary for their exercising, and other issues of interest for Montenegro, and

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<sup>34</sup> J. Englisch, “The Impact of Human Rights on Domestic Substantive Taxation the German Experience”, (in: *Human Rights and Taxation in Europe and the World*, eds. Georg Kofler, Miguel Poiaras Maduro and Pasquale Pistone), IBFD, 2011, 290.

<sup>35</sup> N. Q. Cruz, 357.

<sup>36</sup> H. Ordower, 54.

<sup>37</sup> Law on Tax on Income of Natural Persons, *Official Gazette of the Republic of Montenegro*, No. 65/01, 37/04 and 78/06.

<sup>38</sup> Constitutional Court of Montenegro (14 October 2010) Decision U I no. 2/10.

everyone is liable to pay taxes and other fiscal duties... The Constitutional Court, in accordance with the provisions of Article 149 of the Constitution, has no jurisdiction to assess the appropriateness of the disputed legal solution, such assessment being in the domain of legislative policy.”<sup>39</sup>

In this way the Constitutional Court effectively leaves all competences regarding taxation to the legislator: “...Moreover the legislative body is authorized to determine the forms of taxation and relevant elements of tax liability (the taxpayer, tax base, tax rate, assessment and payment, exemptions and other significant questions for the functioning of the tax system in its entirety), and therefore the elements of the disputed tax are formed in a way that is not inconsistent with the Constitution.”<sup>40</sup>

### 3.2. Constitutional Court reasoning in the case of the Law on Fees

Probably the most important part of the decision of the Constitutional Court is the analysis of disputed levies in the light of the special tax dimension of the principle of equality – ability-to-pay. Firstly, it should be said that the Constitutional Court correctly invoked the case practice of the German Constitutional Court, which can serve as a landmark in terms of comparative constitutional court practice regarding this area, and confirms the same constitutional basis for this principle: “Standards in determining those limits in constitutional practice that are formed by the German Federal Constitutional Court today are regarded as leading guidelines in the activities of the European constitutional courts. According to the comparable constitutional bases, they are also applicable in the Montenegrin constitutional system, because similarly in the Constitution of that state “ability-to-pay” is not a constitutional category for the distribution of the tax burden...”<sup>41</sup>

Comparative analysis shows that Montenegrin and German constitutional court practice rely practically on the same legal (constitutional) basis. The German Constitution also does not explicitly contain principles of *ability-to-pay* or of progressivity in taxation. These principles are the outcome of German Constitutional Court case practice and, as mentioned above, the legal basis is the combination of the general principle of equality and the social state principle. If we look in the Montenegro Constitution, we will find the principle of equality in Article 17 Paragraph 2 and the principle of the social state in the Preamble and Article 1. In addition,

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<sup>39</sup> Constitutional Court of Montenegro (28 January 2010) Decision U. no. 104/07.

<sup>40</sup> Constitutional Court of Montenegro (29 March 2007) Decision U. no. 12/07.

<sup>41</sup> Constitutional Court of Montenegro (9 October 2012) Decision U I no. 15/12 and 17/12.

the Constitutional Court explicitly confirms the identical constitutional basis for the creation of the ability-to-pay principle.

More precisely, as the German Constitutional Court creates the principle of ability-to-pay by combining the principle of social state and the principle of equality, in the same manner the Constitutional Court elaborates on this subject matter in its decision: “In this context, according to the findings of the Constitutional Court, the principle of the equality of citizens before the law...whose violation is indicated in the applicant’s initiative is at the same, constitutional, level as the principle of (economic and social) solidarity and the principle of benefit.”<sup>42</sup>

Therefore, the Constitutional Court takes a logical position that in the exercise of its taxing powers according to the Constitution, the state must ensure social justice: “The constitutional character of social rights as fundamental rights guaranteed by the Constitution indicates two basic requirements of the social state – the state and public authority is obliged to follow the policy of just and equal redistribution of national resources to equalize external inequality; and legislative and executive authorities are legally bound to achieve harmony between limited state budget funds and social goals which are set in the Constitution.”<sup>43</sup>

However, after quoting the principles of the German Constitutional Court, and after explicit confirmation that the Montenegrin Constitution provides for the same legal basis as the German Constitution, the Constitutional Court put forward a completely different reasoning: “The Constitution of Montenegro, however, does not establish directly ability-to-pay of a taxpayer...as a criterion to determine the proportionality of fiscal duties...According to the findings of the Constitutional Court, it stems that the solution of that question is in exclusive competence of legislator. It is the legislator who is entitled within a certain type of taxes or other levies to determine this criterion or to deviate from it, respectively, whenever it has a good reason for that.”<sup>44</sup>

In other words, instead of building the same criteria as the German Constitutional Court related to the ability-to-pay principle, the Constitutional Court overturned all views expressed herein. As a conclusion, the Constitutional Court rejected the possibility to assess the impact that the tax burden of contested taxes has on the taxpayer: “The Constitutional Court, according to Article 149 of the Constitution, from the aspect of abstract constitutional control, has no competence to assess the level of the contested fee...and to what extent it affects the taxpayer.”<sup>45</sup>

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<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

Generally, subject standings demonstrate a certain kind of fear of the Constitutional Court regarding its involvement in the questions of the constitutionality assessment in the area of taxation. This reluctance could be, on one side, the result of an inadequate level of understanding of this specific legal area which can produce wrong decisions, or on the other side, could represent an intentional retreat before the Parliament request for unlimited competence in the tax area of the Montenegrin legal system. This behavior of the Constitutional Court must be considered unacceptable. We consider that the Constitutional Court must deviate from this line of court practice. A good example of an adequate direction could be found in the case practice of the Constitutional Court of Serbia: "...the state has, regarding the regulation of the tax system, a wide margin of appreciation but not in an absolute sense..."<sup>46</sup>

#### 4. THE LEGISLATIVE APPROACH REGARDING THE ABILITY-TO-PAY PRINCIPLE

##### 4.1. Introduction of the progressive rate of tax on income from personal earnings (salaries)

Until the above mentioned changes in the Law on Income Tax, the whole Montenegro system of income taxes (of companies and individuals) was proportional. Additionally, the Law on Income Tax did not contain any social element – neither the existential minimum nor basic allowances for dependent children. For a proper understanding of the introduction of progressive taxation of salaries, the whole legislative process regarding the subject changes to the Law on Income Tax must be analyzed. This procedure was not easy or without debate, because the first proposal of the government was rejected by the Legislative Committee. The discussion in the committee dealing with the constitutional implications of the proposed progressive tax rate was very interesting. The problem for the committee was that the government's proposal provided for a global progression, implying that the tax rate of 12% would apply on salaries exceeding €400 per month.<sup>47</sup> In this way, a certain tax rate would be applicable over the entire taxable base. The result of this type of progressive taxation is that in certain cases a taxpayer with higher pre-tax income would be left with lower post-tax income than a taxpayer who had a lower pre-tax income.<sup>48</sup> It was precisely this issue that was the greatest prob-

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<sup>46</sup> Ustavni sud Republike Srbije (08.11.2012) IY3 128/2011.

<sup>47</sup> Law on amendments of the Law on tax on income of natural persons, no. 06 131, Podgorica, 11 January 2013.

<sup>48</sup> D. Popović, 194 fn. 18.

lem, emphasized the committee, pointing out that the disputed legislative solution represented a certain form of discrimination<sup>49</sup>

For this reason several amendments regarding this legislative proposal were submitted. After a debate the Parliament adopted an amendment that replaced the initially proposed system of global progression. According to the new legislative regime, a tax rate of 15% is applicable only on the amount of the gross salary exceeding €720 per month. The goal of the amendment was to protect the amount of average salary in Montenegro from the additional tax burden.<sup>50</sup>

#### 4.2. Progressive taxation of personal earnings and the ability-to-pay principle

Notwithstanding the claim that the legislative regime in question is based on the principle of ability-to-pay, in my view this assertion is not correct, primarily for two reasons. Firstly, the Law on Income Tax subjects five different types of income to taxation: 1) personal earnings; 2) income from self-employment activities; 3) income from property and property rights; 4) income from capital; and 5) capital gains.<sup>51</sup> Hence, the above mentioned changes in the Law on Income Tax introduce only the progressive taxation of personal earnings (salaries). This puts individuals with this type of income in a less favourable position compared to individuals who generate income from other sources. The legislator tried to justify this controversial legislative solution through the fact that salary income (personal earnings) represents the largest component of the total revenue from tax on the income of individuals (more the 90% of total revenue from tax on the income of individuals) and because the taxation of other income sources with a higher tax rate would require the submission of tax returns at the end of the year and additionally complicate administrative procedures.<sup>52</sup>

Notwithstanding that the subject tax regime is in general contrary to the ability-to-pay principle, it must be noted that a number of countries provide for a similar tax regime regarding capital income – a dual income tax system. Namely, the dual income tax is a scheduled tax regime which divides total income into capital and labor income and regards them as

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<sup>49</sup> Report on the discussion of bill of Law on amendments of the Law on tax on income of natural persons, no. 16 02/13 1/, EPA 72 XXV, Podgorica, 28 January 2013, 2 3.

<sup>50</sup> Amendment 16 02/13 1/7, EPA 70 XXIV, 28 January 2013, p. 1.

<sup>51</sup> Article 12 Paragraph 2 of the Law on tax on income of natural persons, *Official Gazette of the Republic of Montenegro*, No 65/01, 12/02, 37/04, 29/05, 78/06, and 04/07; *Official Gazette of Montenegro* No 86/09 of 25 December 2009, 40/11 of 8 August 2011, 14/12 of 7 March 2012, 06/13 of 31 January 2013.

<sup>52</sup> Amendment 16 02/13 1/7, EPA 70 XXIV, 28 January 2013, p. 1.

different tax bases. Capital income includes dividends, interest income, rents, but also rental values as well as capital gains on real capital and property. Labor income consists of wages and salaries, non-monetary fringe benefits, pension payments and social security transfers. Capital income is taxed at a flat rate, whereas labor income, on the other hand, is subject to progressive tax rates.<sup>53</sup>

In many countries dividends are taxed on the personal shareholder level at lower rates than the personal income tax rates that are levied on wage income. One reason for reducing the effective tax rate on dividends has been that it is potentially the rate faced by equity investors in a new business (since such a business does not have retained profits from existing business activities available to reinvest).<sup>54</sup> Precisely, increased taxation of capital income could in principle raise additional revenues and have a significant redistributive effect. However, there could also be substantive behavioral effects that could be damaging not just to the size of the total 'cake' but also to its future growth.<sup>55</sup> A second reason for the existence of the dual income tax system is the mitigation of economic double taxation of dividends which are distributed to shareholders. In that sense the intention of the legislator is not mainly the decrease of the economic double taxation, but primarily a general decrease of the tax burden regarding capital income.<sup>56</sup>

Another fact that also suggests that this tax regime is not in accordance with the ability-to-pay principle is based on the Instruction for the implementation of a progressive tax rate on salary income. This Instruction provides for the aggregation of salary income before the application of the progressive tax rate only on the level of one employer.<sup>57</sup> This system of taxation introduces a preferential tax treatment for individuals who generate income from more than one employer. Because the aggregation of income is provided for only on the level of a single employer, the tax base for the calculation of the tax rate is fragmented and as a result there

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<sup>53</sup> B. Genser, *The Dual Income Tax: Implementation and Experience in European Countries*, *Ekonomski pregled*, 57 (3-4), 2006, 271-288, p. 276.

<sup>54</sup> B. Brys, S. Matthews and J. Owens, "Tax Reform Trends in OECD Countries", *OECD Taxation Working Papers*, No. 1, OECD Publishing, 2011, p. 6, <http://dx.doi.org/10.1787/5kg3h0xxmz8t.en>

<sup>55</sup> S. Matthews, "Trends in Top Incomes and their Tax Policy Implications", *OECD Taxation Working Papers*, No. 4, OECD Publishing, 2011, p. 28, <http://dx.doi.org/10.1787/5kg3h0v004jf.en>

<sup>56</sup> H. Blažić, *Ekonomsko dvostruko oporezivanje u Hrvatskoj*, *Ekonomski pregled*, 53 (3-4) 362-390, 2002, p. 368.

<sup>57</sup> Article 3 of the Instruction on the calculation and payment of taxes and contributions from and on personal earnings from the employment, *Official Gazette of the Republic of Montenegro*, No. 81/06 and *Official Gazette of Montenegro* No. 04/10 and 8/13.

is a smaller tax debt for the taxpayers earning income from more than one employer.

## 5. CONCLUSION

With respect to the principle of *ability-to-pay*, it must be pointed out that the conclusion reached by the Constitutional Court, that it has no authorization to assess the impact that the burden of a fiscal duty has on taxpayers, is completely incorrect. I agree with the settled case law of the Constitutional Court that it is not its duty to say if the tax rate subject to its scrutiny is adequate: “The regulation of the number, type and level of tax rates is considered as an expression of legislative state policy in the fiscal area, within the constitutional independence of the legislator.”<sup>58</sup>

The same reasoning can be found in the case practice of the Croatian Constitutional Court: “...The Constitutional Court can...abolish a piece of legislation but cannot create legislation in the sense of determining different tax rates of VAT, nor can it abolish the single tax rate and in this way deprive the whole system of taxation of sense only for the reason that the applicants consider that the single tax rate is too high, commercially inadequate or against the principles of social justice.”<sup>59</sup>

The level of statutory tax rates in the tax legislation is a matter for the parliament to decide. But, on the other hand, the Constitutional Court has an obligation to assess the impact that the actual tax burden has on a taxpayer after the application of the tax rate, with regard to his/her income, property or consumption. The tax rate becomes the subject of constitutional review only in cases where its application cannot be considered as proportional to the particular facts of statutory tax liability (in other words, where the tax burden is not in proportion to the taxpayer’s ability to pay).<sup>60</sup> In such circumstances, the applicable tax rate can be considered unconstitutional. Precisely because of this, the principle of *ability-to-pay* exists in comparative constitutional court practice.

The Interest Case (1991) is a good example of the German constitutional review of tax laws regarding, among other issues, the question of factual tax burden. Under the German tax law, some interest income was taxable and other interest income – for example, interest payments from banks – was not taxable. The law was also unclear as to when interest income was to be reported for tax purposes and when not, leaving the

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<sup>58</sup> Constitutional Court of Montenegro (29 March 2007) Decision U. no. 12/07.

<sup>59</sup> Constitutional Court of Croatia (5 July 2000) Decision U I /607/1996.

<sup>60</sup> D. Deák, “Pioneering Decision of the Constitutional Court of Hungary to Invoke the Protection of Human Dignity in Tax Matters”, *INTERTAX*, Volume 39, Issue 1, 2011, Kluwer Law International BV, The Netherlands, 541.

taxpayer with considerable discretion in reporting his/her taxable income. The German Constitutional Court's Second Senate held that current tax provisions related to the interest income would be held invalid unless Parliament corrected the constitutional deficiency by a fixed date. The Court emphasized that the tax burden on all taxpayers must be legally and factually equal and that the Parliament must adopt procedural measures to guarantee an equal tax burden on income from interest payments.<sup>61</sup> This case shows that the level of the statutory tax rate and the level of the actual tax burden are two different legal questions which the Montenegrin Constitutional Court obviously does not distinguish. In this way the Constitutional Court is avoiding the responsibility to develop the ability-to-pay principle in the tax system of Montenegro.

The lack of understanding and the fear of interfering in the area of taxation are best illustrated by the recent standings of the Constitutional Court. With an aim of justifying such behaviour, the Constitutional Court has tried to correlate the ability-to-pay principle with the competence of the legislator to determine certain elements of tax liability, such as the object of taxation or tax reliefs and exemptions: "Because the Constitution does not determine the ability-to-pay of a taxpayer as a criterion for the assessment of the proportionality of fiscal duties, according to the Constitutional Court view there is no restriction for the legislator to determine the object of taxation within a certain type of tax, and also to prescribe tax reliefs and exemptions for certain objects of taxation."<sup>62</sup>

The way that the legislator has shaped the progressive taxation in the Law on Income Tax (only the income from employment) is contrary to this principle, because other types of income (e.g., interest, dividends, and capital gains), which are in most cases generated by the richest individuals, are excluded from the tax progression. As a result the bulk of the burden of the financial crisis will be put on the shoulders of the middle class because the poorest citizens will also be protected from the higher tax rate on salaries (applicable only on gross income over €720 – the average salary). Additionally, the new tax regime puts individuals who earn their employment income only from one employer in a less favourable position, because the aggregation of this type of income exists only at the level of a single employer. In this way the tax base can be split by generating income from more than one employer and thus always keep the single salary below the threshold of €720 gross income. This represents clear discrimination against individuals who earn their salary income from a single employer and it is again contrary to the ability-to-pay principle.

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<sup>61</sup> D. P. Kommers, Russell. A. Miller, "The Constitutional Jurisprudence of the Federal Republic of Germany Third edition", *Duke University Press*, 2012, 246.

<sup>62</sup> Constitutional Court of Montenegro (22 March 2012) Decision U I no. 8/11.