

Judicial system of Germany

Dr H. Krabbe

April 2008

The legal remedies in the German tax system

1. Overview

A separate finance jurisdiction was set up in Germany for the first time in 1918 with the creation of the Imperial Tax Court (*Reichsfinanzhof*) in Munich. In 1919 the legal foundations of first instance finance courts were laid. These courts started their activities in 1921 and 1922. They were attached to the regional tax offices. Their professional members were also civil servants of these offices. Although not subject to instructions in their capacity as judges, they could be removed from office or moved to another post without their consent. The courts were subdivided into senates, with each senate being made up of two professional judges and three honorary or lay judges. From 28 August 1939 the first instance courts ceased to exist; their functions were taken over by the regional tax offices. From then on, appeals to the Imperial Tax Court were admitted only in exceptional cases. After World War II separate and independent first-instance finance courts were set up, usually in the same cities as the regional tax offices. It was not considered necessary to have three instances as in the other branches of the judiciary. The second and last instance court was renamed the *Bundesfinanzhof* (Federal Tax Court). It kept its seat in Munich.

The judicial system of the Federal Republic of Germany consists of five branches, each with its own hierarchy, which act separately from each other:

- Ordinary courts for civil law (apart from labour law) and criminal law,
- Labour courts for labour law,
- Finance courts for tax law (taxes and customs duties),
- Social courts for social security law,
- Administrative courts for public law (apart from tax law and social security law).

Each branch has three instances, with the exception of the finance branch which has only two. Their judges are not subject to instructions of the government or administration and cannot be removed from their office or moved to another post without their consent, except under certain circumstances by a court decision. There are lay judges in a number of courts.

The top instance of each branch is a supreme federal court, e.g. the Federal Court (*Bundesgerichtshof*) for civil and criminal law, the Federal Labour Court (*Bundesarbeitsgericht*) for labour law, the Federal Tax Court (*Bundesfinanzhof*) for tax law. These courts may only decide on points of law. To assure the unity of jurisdiction, the Joint Senate of the Federal Supreme Courts has to rule in case one federal supreme court wants to deviate from a decision of another federal supreme

court (e.g. if the Federal Tax Court, when implicitly taking a decision on a civil law issue, wants to deviate from a decision of the Federal Court).

Depending on the size of the Federal State concerned, there are one, two or even more courts on the regional level. The number of first instance courts depends on the branch concerned. There are 20 first instance finance courts. A big Federal State like North Rhine-Westphalia has three finance courts (Cologne, Düsseldorf, Münster). Two or more Federal States may agree to set up a joint court. Thus, Berlin and Brandenburg have a joint finance court.

From the courts mentioned above, one has to distinguish the constitutional courts. The Federal Constitutional Court is the custodian of the Federal Constitution (Fundamental Law). The Constitutional Courts of the Federal States decide on issues regarding the Constitution of the Federal States.

2. Administrative phase

Each administrative act of the tax office including tax assessments may be contested by way of administrative appeal within one month of the service of the act. Appeal against a tax assessment does not suspend the collection of tax. Only under exceptional circumstances may the tax office suspend the tax collection by a separate act. If it refuses to do so, the taxpayer may appeal from this decision to the finance court.

The decision on the appeal is taken by the same tax office that has issued the contested act. There are special divisions in the tax offices that deal with administrative appeals, yet the officials handling the cases are not independent. They are subject to instructions and have to apply administrative guidelines and rulings.

On administrative appeal the case is reviewed entirely. This may result in a modification of the tax assessment to the disadvantage of the taxpayer. The taxpayer can avoid this by withdrawing his appeal. To the extent the appeal is not upheld, it is rejected.

The appeal procedure is free of charge. On the other hand, the taxpayer is not entitled to any cost reimbursement if his appeal was successful.

3. The Courts

a) Courts of First Instance

The first instance consists of 20 finance courts. The courts are subdivided into senates. The number of senates depends on the number of cases the court has to deal with. Each senate has three professional judges, including the presiding judge and two honorary or lay judges who participate in the procedure and the decisions in the same way as the professional judges. The court is headed by a president, who is himself the presiding judge of a senate. The professional judges have to be lawyers who have passed the two state law examinations. They are appointed by the Minister of Justice of the Federal State concerned and are often recruited from the tax administration. But any person who meets the qualification requirements may apply.

The lay judges are elected from a nomination list by a two-thirds majority of a special committee set up in each court and consisting of the president of the court, a representative of the regional tax office and seven Members of Parliament of the Federal State concerned.

b) Federal Tax Court

There are only two instances. The Federal Tax Court (Bundesfinanzhof) in Munich is the only appeal court. It is subdivided into various senates, each of which has five professional judges, including the presiding judge, and who are responsible for certain issues as decided beforehand in a distribution of duties plan. E.g. the I. Senate is responsible for issues of corporate taxation and (with a few exceptions) international tax law. The Court is headed by a president who is himself the presiding judge of a senate.

All the judges have to be lawyers who have passed the two law state examinations. Their minimum age is 35. Like the judges of the other Supreme Federal Courts, they are elected by a special committee consisting of the Ministers of Justice of the Federal States and an equal number of Members of the Federal Parliament (Bundestag). The election procedure takes place under the auspices of the Federal Minister of Justice. The nomination list comprises mainly first instance judges, but also candidates from the private sector, the universities and the administration.

c) Constitutional Court

The Federal Constitutional Court is subdivided into two senates. There is no Advocate General. Each senate consists of eight judges including the president and the vice-president of the Court who are the presiding judges of the first and the second senate, respectively. The decisions are taken by the majority of members present, in certain cases by a two-thirds majority. Dissenting opinions may be expressed. Each senate may set up chambers within its jurisdiction with three members of the senate. These chambers decide unanimously in certain cases instead of the senate, e.g. on the non-acceptance of a constitutional complaint or on upholding a constitutional complaint, where the senate has already ruled on the issue concerned.

Four judges of each senate are elected by a special 12-member committee of the Federal Parliament (Bundestag), the other four by the Representation of the Federal States (*Bundesrat*). The term of office is limited to eight years. A person is eligible if he or she is at least 40 years old and has passed the two law state examinations or is a professor of law at a German university. Three members of each senate are elected from the judges of the Federal Supreme Courts.

The jurisdiction of the court extends to the issues enumerated in the Constitution or the law on the Federal Constitutional Court. These include e.g. divergences of opinion on the rights or obligations of public bodies under the Constitution or the rights and obligations of the Federation or the Federal States under the Constitution, the prohibition of a political party, the impeachment of the Federal President or the constitutionality of laws. The constitutionality of a law may be reviewed at the request of the Federal Government, the government of a Federal State or at least one third of the members of the Federal Parliament (general review) or on submission by a court

within the framework of a case pending in that court (specific review). Anybody, including juridical persons, may lodge a constitutional complaint on the grounds that his fundamental rights under the Constitution, including the right of equal treatment, have been violated by the public power, e.g. by the application of a legal provision considered unconstitutional, but only if he has exhausted the normal stages of appeal. Such complaints are the most frequent procedures. The Court has the power to declare a law unconstitutional or null and void.

4. Appeal

a) Courts of First Instance

Within one month from the serving of the decision on the administrative appeal the taxpayer may appeal to the finance court of the jurisdiction to which the tax office belongs. He has to have exhausted the administrative appeal procedure. Only with the consent of the tax authority may he appeal directly to the court against the act. The appeal does not suspend the collection of the tax. Only under exceptional circumstances may the court suspend tax collection. If it refuses to do so, the taxpayer may turn to the Federal Tax Court for this decision.

The appeal has to be lodged in writing (or on record of the court). The taxpayer may, but does not have to be, represented by a lawyer, tax consultant or a similar representative. The plaintiff, defendant (the local tax office) and the substance of the action (the contested act and the decision on the administrative appeal) have to be indicated in the appeal. A certain request shall be made and the facts and pieces of evidence supporting the appeal shall be given. Hypothetical cases may not be presented.

Each appeal gets a separate docket number that indicates the court senate concerned as well as the chronological order and the year in which the appeal has been lodged. There are no possibilities for class action, but the court may join and separate pending actions where appropriate. There are no special proceedings for international cases. An amicus curiae brief is not possible. For reasons of tax secrecy the parties must not be disclosed to the public except during the public hearing.

The procedure is not free of charge; the fees depend on the amounts at stake. In its ruling the court has also to decide on who has to bear the costs of the procedure. To the extent the appeal of the taxpayer is successful the costs including those of the taxpayer have normally to be borne by the tax office. The costs of the tax office are not reimbursed.

b) Federal Tax Court

Within one month from the serving of the first instance decision, the taxpayer or the tax office, as the case may be, may lodge an appeal on points of law to the Federal Tax Court, but only if the appeal has been permitted by the Court of First Instance in its decision or on appeal against denial of leave to appeal (also within one month from the serving of the first instance decision) by the Federal Tax Court. The leave of appeal by the Court of First Instance is binding for the Federal Court. If the appeal has been permitted by the Federal Tax Court, the procedure continues before that

court as a normal appeal procedure. The appeal to the Federal Tax Court is only permitted if

the matter is of major importance,
developing the law or securing the uniformity of the jurisprudence requires a decision of the Federal Tax Court, or
a deficiency of the proceedings to which the first instance decision may be due is claimed and recognized.

The appellant must be represented by a lawyer, a tax consultant or a similar representative. The tax office may be represented by a civil servant who has passed the two law state examinations. The appeal has to be lodged in writing and has to indicate the contested decision. Within two months from the serving of the first instance decision it has to be substantiated. At this point the appellant has to indicate to which extent he contests the first instance decision and the reason or reasons for the appeal. The appeal can only be based on points of law. Hypothetical cases cannot be presented. There is no possibility of an amicus curiae brief. However, the Federal Minister of Finance and/or the Minister of Finance of the Federal State concerned may join the procedure or be requested by the court to join the procedure. After joining the procedure, they have the same procedural status as the parties. Like in the first instance there is no class action and no special procedure for international cases. For reasons of tax secrecy the parties may not be disclosed to the public except during the public hearing.

Each appeal gets a separate docket number which indicates the court senate concerned (roman number), the nature of the procedure (R for an appeal on points of law) as well as the chronological order and the year in which the appeal has been lodged (e.g. I R 1/08). In some special procedures (e.g. appeals concerning the suspension of the tax collection or the leave of appeal), the letter B appears instead of R.

In its ruling the court has also to decide on who has to bear the costs of the procedure. This depends in general on whether and to what extent the appeal was successful. The costs of the tax office or the Ministries of Finance joining the procedure are not reimbursed.

5. Procedure

a) Courts of First Instance

The court plays an active role. It has to explore the relevant facts and, to the extent necessary, take evidence. The facts include foreign legal provisions where relevant. The parties have the right to be heard. The court may request them to express their opinion on certain issues. It may also address matters not referred to by the parties, but the contested act may not be made more severe. The tax office has to submit all the relevant files to the court. It is represented by a civil servant.

There is usually a public hearing, which implies the disclosure of the names of the parties. But the court may take its decision without a public hearing. In that case the taxpayer may apply for a public hearing within one month. In certain cases the senate concerned may give the case to a single professional judge of the senate for the final

decision. In the public hearing the court has to discuss the facts and the law issues with the parties. The judgment is announced at the end of the public hearing, on a special date within two weeks from the public hearing or by sending the judgment within two weeks from the public hearing to the court office. In all cases the ruling has to be completed as soon as possible (at the latest five months after the expiration of the two-week period) and served to the parties. Depending on the workload of the court and the complexity of the case, the procedure may take up to one to two or even more years.

b) Federal Tax Court

In principle, the procedure is the same as in the first instance, except that the senate concerned may not give the case to a single judge for the final decision. The court may take the final decision without a public hearing if it is unanimously of the opinion that the appeal is not valid and a public hearing is not necessary. Even if this condition is not met, the court may take its decision without a public hearing; but then the taxpayer may apply for a public hearing within one month. Since the court only decides on points of law, it has to rely on the facts determined by the Court of First Instance. If the appeal is held up, the court may itself take the final decision or refer the case to the Court of First Instance for the final decision, e.g. if further investigations on the facts, including foreign law, are necessary, but the Court of First Instance is then bound by the opinion expressed by the Federal Tax Court. Depending on the workload of the court and the complexity of the case the procedure may take up to one to two or even more years.

6. Decision

a) Courts of First Instance

The decision is taken by the majority of judges of the senate concerned except where the case has been given to a single judge. The law provides for a fixed structure of the ruling. This contains the names of the parties and their representatives (if any), the court and the names of the judges, the judgment, the facts including the requests and opinions of the parties, the reasons for the decision and an instruction about appeals available. The facts are usually presented in detail and the legal aspects are discussed exhaustively. The ruling may thus fill quite a number of pages. It is not summarized by the court. Dissenting opinions are not permitted in the ruling. The rulings are not published officially, but may be published unofficially in anonymous form on the websites of the courts or by private publishers, e.g. in tax reviews or in digital form, with or without the assistance of the judges.

b) Federal Tax Court

The decision is taken by the majority of judges of the senate concerned. The ruling has the same structure as the first instance ruling. The facts are presented without reference to the ruling of the Court of First Instance, except that the judgment of that court and the reasons for that judgment are presented, often by reference to the published text of the decision. The legal aspects of the case are reviewed completely and discussed exhaustively, taking into account opinions expressed in previous rulings or by other courts or by scholars or other authors. The court is not bound by preceding decisions (except by decisions of the European Court of Justice and the

Federal Constitutional Court). In practice, however, preceding decisions play an important role. They are often referred to and relied on, but there are also instances in which the court abandons previously expressed opinions. Dissenting opinions are not permitted in the ruling.

Rulings of public interest are published officially by the court in anonymous form in a series of volumes (referred to as *Entscheidungen des Bundesfinanzhofs* = BFHE) and on the website of the court and upon the proposal or with the consent of the court by the Federal Ministry of Finance in Part II of the Federal Tax Gazette (*Bundessteuerblatt* = BStBl). In the latter case, they are binding precedents for the tax administration, unless a ruling to the contrary is issued by the Ministry in Part I of the Federal Tax Gazette. The rulings may also be published by private publishers in tax reviews or in digital form, with or without the assistance of the judges or their assistants.