

Decision n° 2007-555 DC – August 16th 2007

Act pertaining to work, employment and purchasing power.

On August 2nd 2007, the Constitutional Council received a referral, pursuant to paragraph 2 of Article 61 of the Constitution, from Mr Jean-Marc AYRAUT et al.... Members of the National Assembly,

THE CONSTITUTIONAL COUNCIL

Having regard to the Constitution;

Having regard to Ordinance n° 58-1067 of November 7th 1958 as amended (Institutional Act on the Constitutional Council);

Having regard to the General Tax Code;

Having regard to the Social Security Code;

Having regard to the Employment Code ;

Having regard to Institutional Act n° 2001-692 of August 1st 2001 as amended pertaining to Finance Acts;

Having regard to Finance Act n° 2006-1666 of December 21st 2006 for the year 2007

Having regard to the observations of the Government registered on August 9th 2007;

Having heard the Rapporteur;

ON THE FOLLOWING GROUNDS

1° The Members of the National Assembly making the referral for review by the Constitutional Council of the Act pertaining to work, employment and purchasing power contest in particular the compliance with the principle of equality before public burden sharing of sections 1, 11 and 16 thereof ;

2° Article 13 of the Declaration of the Rights of Man and the Citizen proclaims : " A common contribution is indispensable for the maintenance of the public force: it should be equally distributed between all citizens, in proportion to

their ability to pay". Under Article 34 of the Constitution, it is the task of Parliament, to determine, in due compliance with constitutional principles and taking into account the specificities of each tax, the rules applicable to the assessment of such ability to pay, without such assessment entailing any patent infringement of the principle of equality before public burden sharing;

3° Although the principle of equality does not preclude Parliament from providing in the general interest incentives based on tax breaks, this should be done on the basis of objective and rational criteria depending on the purpose sought to be achieved, and the tax break thus granted should not be disproportionate to the effect such incentive is expected to have;

- WITH RESPECT TO SECTION 1

4° Section 1 of the statute referred for review introduces a new regime departing from normal rules governing payment of social security contributions and income tax which is designed to encourage the working of overtime. To this end money earned by working overtime is exempted from income tax, while employers benefit from a reduction in social security charges and a flat rate deduction of employer contributions in connection with this overtime.

5° The parties making the referral contend that this regime infringes both the right to employment and the principle of equality before public burden sharing;

As regards the right to employment :

6° The parties making the referral argue that by having employers encourage their employees to work overtime rather than hiring other workers, even on a temporary basis, and by making overtime a normal means of performing a contract of employment, section 1 infringes the right to employment and offers no statutory guarantees to employees;

7° Firstly, paragraph 5 of the Preamble of 1946 provides : "Everyone has the duty to work and the right to employment". Article 34 of the Constitution provides : " Statutes shall determine the basic principles of ... employment law". It is thus up to Parliament to lay down specific rules to ensure the right of everyone to obtain employment while enabling the greatest number of people to exercise this right;

8° Parliamentary debate leading up to the passing of the statute referred for review shows that exempting overtime from income tax and social security contributions is intended to increase the number of hours worked and so boost employment and growth. Thus by the purpose it seeks to achieve, section 1 contributes to compliance with the requirement deriving from paragraph five of

the Preamble of 1946. The Constitutional Council is not vested with any general power of appreciation and decision-making similar to that conferred upon Parliament. It is therefore not incumbent upon the Council to seek whether the purpose fixed by Parliament could be achieved by other means, once the means retained are not patently inappropriate for the attainment of the purpose it is sought to achieve;

9° Secondly, as X of section 1 reiterates, the Works Committee or, failing that, workers' representatives, are informed and consulted by the employer on the use and amount of overtime worked by the employees of the company or establishment in the conditions provided for by the Employment Code. Section 1 does not moreover provide for any departure from the normal legal limits on working hours. Parliament has therefore not failed to comply with the requirements of paragraph eight of the Preamble of 1946 whereby "All workers shall, through the intermediary of their representatives, participate in the collective determination of their working conditions ", nor those of paragraph eleven whereby the Nation "shall guarantee to all ... protection of their health";

As regards the principle of equality before public burden sharing:

10°. The parties making the referral contend that section 1 would entail a patent infringement of the equality of taxpayers to the extent that, for a same hour worked, an employee could be required to pay different levels of social security contributions and income tax. They add that overtime which may be taken into account in the framework of the new Article *quater* of the General Tax Code would be defined in varying fashions for employees in the same company and lastly that part-time employees working for private individuals would be excluded from the special measures concerning overtime;

11° The parties making the referral also contend that the measure provided for in section 1 would exempt overtime from payment of the generalised social contribution and the contribution to the repayment of the social debt, and that such an exemption, which does not take into account income of the taxpayer from other sources nor the income of other members of the household, nor dependants of the taxpayer, would create between taxpayers a patent disparity running counter to Article 13 of the Declaration of 1789;

12° Firstly, as stated hereinabove, the exemption mechanism retained is intended to increase the number of hours worked in the economy in order to boost growth and employment. It thus meets the requirement of being in the general interest;

13° Secondly, the exemption mechanism applies to all overtime, irrespective of how working time is organized within individual companies. It also applies to

overtime worked by part-time employees. The measures adopted thus meet objective and rational criteria intended to further the purpose which Parliament seeks to achieve;

14° Thirdly, by reserving the benefit of exemptions from income tax and social security contributions solely for overtime worked beyond the legal limit, whether the latter be calculated in hours or days, Parliament, far from infringing the principle of equality between workers, avoided the occurrence of just such an infringement;

15°. Fourthly, neither the Employment Code nor collective bargaining agreements involving employers who are private individuals provide for the possibility of working overtime; the parties making the referral have thus no grounds for arguing that these employees should have been included for the measures concerning overtime;

16° Lastly, new Article L 241-17 of the Social Security Code which introduces a reduction in employees' overtime social security contributions has not introduced any exemption from the generalized social contribution nor the contribution to the repayment of the social debt. Although, given the methods of applying the statutory provisions indicated by the Government, the amount of this reduction covers the amount of contributions due by an employee working overtime, this measure, which is limited in scope, does not constitute any infringement of the principle of equality as derived from Article 13 of the Declaration of 1789;

17° In view of the foregoing, section 1 of the statute referred for review does not run counter to any constitutional rule nor principle of constitutional status;

WITH RESPECT TO SECTION 5 :

18° I of section 5 of the statute referred for review inserts a new Article 200 *quaterdecies* into the General Tax Code; this new Article introduces income tax relief for interest paid on mortgages taken out to buy or build the principal place of residence of the taxpayer during the first five years of mortgage repayments. Eligibility for such relief is reserved for mortgages taken out with a financial institution and requires that the housing concerned comply with minimum standards of surface area and fitness for occupancy. Maximum tax credit, calculated on the basis of 20% of interest paid, will be 3750€ for a single person, widow(er) or divorcee, 7500€ for a couple taxed jointly, plus a further 500€ per financial dependant;

19° Parliamentary debate shows that the tax relief for the construction or purchase of the principal place of residence after the coming into effect of the

statute is intended to encourage people to become homeowners and thus serves a purpose in the general interest. The aim, nature, duration and conditions of said tax relief are objective and rational criteria as regards the purpose Parliament seeks to achieve. The amount of said tax relief does not represent a patently disproportionate tax benefit when set against said purpose;

20° Parliamentary debate shows that tax relief for the construction or purchase of the main place of residence prior to the coming into effect of the statute is intended to boost consumer spending and purchasing power. However, when deciding to boost the purchasing power solely of those citizens who have built or purchased their main place of residence less than five years ago, Parliament has introduced a difference of treatment between taxpayers which is not justified by the purpose which it seeks to achieve. This tax relief leads to the State having to bear outgoings which are patently disproportionate to the incentives they are expected to constitute and is thus a patent infringement of the equality of taxpayers before public burden sharing;

21° The words " interest paid " and the words "from the first day of the following month" of III of section 5 of the statute referred for review are thus unconstitutional;

WITH RESPECT TO SECTION 11:

22° Section 11 of the statute referred for review amends Articles 1 and 1649-0 A of the General Tax Code pertaining to the capping of direct taxes. It lowers from 60% to 50% the maximum percentage of income which a tax household may be required to pay in direct taxes, and henceforth includes social security contributions in the amount of said taxes ;

23° The Members of the National Assembly making the referral contend that these provisions will result in a virtually systematic exemption from the wealth tax and local taxes inuring to the sole benefit of persons paying taxes at marginal rates; they argue in particular that they create inequality between taxpayers as regards the ability to pay taxes depending on whether or not taxpayers have substantial personal wealth;

24° The requirement deriving from Article 13 of the declaration of 1789 would not be complied with if taxation were to be of a confiscatory nature or subjected a certain category of taxpayers to an excessive burden in comparison with their ability to pay taxes. The principle of the capping of the proportion of a tax household's income allocated to paying direct taxes, far from infringing the principle of equality before public burden sharing, is intended to avoid a patent infringement of this same principle;

25° Firstly, the generalised social contribution, the contribution to the repayment of the social debt, the social levy on income from property and financial investments together with the further contribution to the National Autonomy Fund are all taxes of all kinds within the meaning of Article 34 of the Constitution. Including such taxes in the total of direct taxes taken into account is not inappropriate for the purpose which Parliament seeks to achieve;

26° Secondly, the fixing at 50% of the percentage of income beyond which payment entitles the taxpayer to a refund is not flawed by any patent error of appreciation;

27° Lastly, the capping mechanism which consists in refunding the taxpayer the amounts paid in direct taxes over and above the ceiling fixed by the statute is based on an overall calculation of tax paid and not on any calculation of each type of tax. The argument that this mechanism inures to the benefit of those who pay certain taxes in thus to be dismissed;

28° In view of the foregoing, section 11 of the statute referred for review does not run counter to Article 13 of the Declaration of 1789;

WITH RESPECT TO SECTION 16 :

29. Section 16 of the statute referred for review inserts into the General Tax Code an Article 885-0 V bis which introduces mechanisms allowing for a reduction in wealth tax for investments in small and medium-sized companies. I of this new Article 885-0 V thus allows persons paying this tax to deduct from the total thereof 75% of their investment in the initial capital or capital increase of this type of company to a limit of 50 000€. II of the same Article makes the benefit of this measure dependent upon the taxpayer keeping the shares purchased until December 31st of the fifth year following that in which the shares were purchased. III of the same Article provides for a further reduction in wealth tax for investments in regional managed funds of which at least 20% of the value of the shares is constituted by shares received in consideration of subscriptions to the capital of small and medium-sized companies doing business for less than five years. This benefit is also dependent upon the taxpayer keeping these shares for five years. Payments eligible for such relief are calculated pro rata the initial percentage of the assets of the fund invested in small and medium-sized companies. The right to deduction is limited to 50% of sums invested and the tax benefit is capped at 10 000€ per year. These two tax benefits may be cumulated to a limit of 50 000€;

30. The parties making the referral argue that this section introduces a patent infringement of equality of taxpayers by allowing some of them to be exempted

from payment of the wealth tax through specific investments. They consider that the purpose of general interest, namely the development of small and medium-sized companies cannot justify, in the absence of any risk for the investor, a tax reduction equal to 75% of the amount invested. They consider that this infringement of the principle of equality is particularly blatant, in the absence of any risk, when the taxpayer does not invest directly in a company but in a regional managed fund. They also contend that treating this mechanism as a form of "chosen tax" may also make it possible not to take into account the reduction in taxes thus obtained when calculating the amount of wealth tax to be taken into consideration for determining whether the taxpayer is entitled to a tax refund;

31° Parliamentary debate preceding the passing of section 16 shows that the purpose of the latter is to serve as an incentive for productive investments in small and medium sized companies in view of the part played by this type of company in creating jobs and developing the economy. Having regard to the purpose of general interest it is thus sought to achieve and in view of the risk such investments may run, Parliament was at liberty to provide for a reduction in wealth tax ; contrary to the arguments raised by the parties making the referral, this measure has no effect on the scope of the right to a refund of excess tax paid, Article 1649-0 A of the General Tax Code expressly providing that tax to be taken into account when determining the entitlement to such refund is tax which has been "paid";

32° In the case of direct investments, Parliament has laid down conditions governing the percentage of the tax imputation, the capping of the tax benefit and the minimum period during which the shares must be held. In view of the failure rates of small and medium- sized businesses during their early years and the lack of liquidity of the shares involved, the tax benefit thus granted is not disproportionate as regards the purpose it is sought to achieve and does not constitute any patent infringement of the principle of equality before public burden sharing;

33° Parliament has laid down stricter conditions for payments paid to regional managed funds, in particular as regards the percentage of the tax imputation and the capping of the tax benefit, which take into account the smaller risks surrounding such investments in comparison with that run in cases of direct investment. In these conditions this tax benefit does not appear disproportionate as regards the purpose it is sought to achieve, neither does it infringe Article 13 of the Declaration of 1789;

-WITH RESPECT TO THE BUDGETARY CONSEQUENCES OF
THE STATUTE REFERRED FOR REVIEW:

34° Certain provisions of the statute referred for review, in particular those relating to reductions of social security contributions and of taxes on donations, will have an impact on the balance of the budget for the current financial year;

35° The parties making the referral argue that a Finance Review Act was necessary to take such new expenditure into account and consequently modify the rule governing the appropriation of surplus revenue provided for by the initial Finance Act of 2007;

36° Under 10° of I of section 34 of the Institutional Act as amended of August 1st 2001 referred to hereinabove, the yearly Finance Act determines in Part I thereof "the general conditions for the use of any surplus revenue generated by taxes of all kinds levied for the benefit of the State, in comparison with the estimates of the Finance Act of the year concerned"; Section 35 reserves for Finance Review Acts the possibility of changing these conditions during the course of the year. Under indent 1 of IV or section 52 of the Act of December 21st 2006 referred to hereinabove, any possible surplus revenue generated in 2007 shall be used in its entirety for reducing the budget deficit;

37° The rule governing the appropriation of surplus revenue was introduced in 2005, by the Institutional Act of August 1st 2001, in order to improve the management of the finances of the State and the information supplied to Parliament. This surplus revenue is revenue likely to be ascertained at the end of the financial year by deducting from the proceeds of all taxes of whatsoever kind levied for the benefit of the State the total provided for by the initial Finance Act. This rule is therefore not aimed at nor results in modifying the power of Parliament to decide, during a financial year, upon new tax measures:

38° Although during a financial year, it is the duty of the Government to put before Parliament a Finance Review Bill when the main outlines of the balancing of the budget are markedly different from forecasts as retained by the initial Finance Act, the statute referred for review does not lead any such discrepancy;

39° The arguments based on the budgetary consequences of the statute referred for review must therefore be dismissed ;

40° The Constitutional Council is not required proprio motu to review any other question of conformity with the Constitution,

HELD

Article 1 - the words "interest paid" and "from the first day of the following month" in III of section 5 of the Act pertaining to Work, Employment and Purchasing Power are unconstitutional.

Article 2 - Sections 1, 11 and 16 of the same Act, together with the remaining part of section 5 thereof are not unconstitutional.

Article 3 - This decision shall be published in the Journal officiel of the French Republic

Deliberated by the Constitutional Council sitting on August 16th 2007 and composed of Mr Jean-Louis DEBRE, President, Messrs Guy CANIVET, Renaud DENOIX de SAINT MARC, Olivier DUTHEILLET de LAMOTHE and Valéry GISCARD d'ESTAING, Mrs Jacqueline de GUILLENCHMIDT, Messrs Pierre JOXE and Jean-Louis PEZANT, Mrs Dominique SCHNAPPER and Mr Pierre STEINMETZ

