Part II: Horizontal Tax Coordination within States in Federal Systems – Role of the Courts

Chapter 3: Tax Coordination between Regions in Austria – Role of the Courts

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3.1. International tax law and the Austrian Federal Fiscal Constitution

States can levy taxes by virtue of their sovereignty. Tax sovereignty requires either a personal or an objective connection between the taxpayer and the taxing state. In many jurisdictions, a person's worldwide income or capital is taxed if a close personal connection (i.e. residence, domicile or citizenship) between the taxable person and the taxing state exists. [1] If the connection to a state is weak or merely consists of objective factors, usually only the income earned in that state is taxed. International law places few limits on the tax sovereignty of states: a national tax legislator may, in principle, even tax situations, when, for example, only a "genuine link" between the taxable person and the taxing state exists. [2] As a result, the same event may be taxed in two or more states. Double taxation is economically undesirable as it threatens cross-border trade relations to a considerable extent. Consequently, states enter into bilateral international tax conventions that establish the extent to which each state may levy tax. Double taxation agreements apply even if one of the contracting states to which a taxing right has been allocated does not impose tax at all. In this respect, the application of double taxation conventions can lead to double non-taxation. [3] In cases that are not covered by double taxation conventions, states enact unilateral measures to prevent international double taxation. [4]

If regions within a federal state enjoy a certain fiscal autonomy, similar issues may arise in a purely domestic context. When intra-state bodies are entitled to define taxable objects, the risk of double taxation inevitably occurs. Overlaps between tax competences cannot be totally prevented. However, some limitations to tax competences exist in Austrian constitutional law: On the one hand, the central legislator is competent to set out measures to avoid double taxation or bind intra-state bodies by limiting their fiscal autonomy beyond constitutional law. On the other hand, the Federation (*Bund*) can oblige the regions (*Länder*) or the municipalities (*Gemeinden*) to provide for qualified measures to avoid double taxation on their own motion. [5]

While legislative competences outside the tax field are governed by the Austrian Federal Constitution [6] itself, tax competences are set out in the Federal Fiscal Constitution [7] ("FFC"). Generally speaking, under the FFC, the Federation, the regions and also, under restricted circumstances, the municipalities *(Gemeinden)* enjoy fiscal autonomy. The FFC sets out different types of taxes. Accordingly, there are taxes that are "exclusively federal", "exclusively regional" or "exclusively municipal", meaning the revenue of which is exclusively attributed to the Federation, to the regions or to the municipalities, respectively. Secondly, there are taxes the revenue of which is to be shared either "between the Federation and the regions" or "between the regions and the municipalities". [8] Eventually, the central legislator is entitled to allocate taxing rights between itself, the regions and the municipalities by determining the concrete type of tax beyond constitutional law. In doing this, it has to take into account the ability of the regions and municipalities to perform the duties they have under law. [9] Thus, the federal legislator may not abuse its competence to "starve out" the regions and municipalities. In practice, the allocation of taxing rights is subject to a negotiation process between the Federation, the regions and the municipalities.

1. See generally Martha, *The jurisdiction to tax in international law* p. 88 et seq. (Deventer: Kluwer Law, 1989).
2. Vogel, *Der räumliche Anwendungsbereich der Verwaltungsrechtsnorm* p. 101 et seq. (Hamburg: Metzner, 1965); Bayer, *Das Völkerrecht in der Rechtsprechung des BFH*, Steuer und Wirtschaft p. 69 et seq. (1981).
3. See Lang, *Double Non Taxation*, *IFA General Report*, in *Cahiers de droit fiscal international* p. 73 et seq. (Deventer: Kluwer Law, 2004).
4. See Urtz, *§ 48 BAO und die Methoden zur Vermeidung der Doppelbesteuerung*, in *Die Methoden zur Vermeidung der Doppelbesteuerung* p. 359 et seq. (Gassner, Lang & Lechner eds., Wien: Linde Verlag, 1995).
5. Ruppe, *Art. 7 of the Austrian Federal Fiscal Constitution*, in *Bundesverfassungsrecht* 3rd ed., MNs. 4 et seq. and 27 (Korinek & Holoubek eds., Wien/New York: Springer, 2000).
6. Federal Gazette I No. 1/1930 as amended by No. 98/2010 (*Bundes-Verfassungsgesetz*).
7. Federal Gazette I No. 45/1948 as amended by No. 103/2007 (*Finanz-Verfassungs-gesetz*).
8. Ruppe, *Art. 6 of the Federal Fiscal Constitution*, in *Bundesverfassungsrecht* 3rd ed., MN. 3 (Korinek & Holoubek eds., Wien/New York: Springer, 2000).
9. See Ruppe, *Finanzverfassung und Bundesstaat* p. 36 et seq. (Wien: Jupiter Verlag, 1977) and the decisions of the Constitutional Court of 23 June 1984, A 6/82 and A 18/84 and of 1 March 2002, A 6/01.

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The result of the negotiation process is a statute limited in time containing the concrete tax types. [10] This statute usually reflects a consensus between the parties involved. Whenever an agreement between the Federation, the regions and the municipalities has been reached, the Austrian Constitutional Court assumes that the parties' capabilities have been considered to an adequate extent. [11] Constitutionally, the central legislator is allowed to provide rules for exclusively federal taxes and taxes to be shared between the Federation and the regions. [12] The regional legislators are entitled to provide rules concerning exclusively regional and exclusively municipal taxes and taxes to be shared between the regions and the municipalities. [13] Furthermore, the central legislator can authorize municipalities to design their own taxes. [14] Due to its right to determine the type of tax, the central legislator can unilaterally draw upon the tax revenue of a certain tax formerly attributed to the regions or municipalities. It is also entitled to attract taxable objects that used to be subject to regional or municipal tax laws into its own competence. If the central legislator has not exercised its more or less comprehensive right to allocate taxing rights by assigning a specific tax to one of the above tax types, regions are in principle entitled to "invent" their own taxes. [15] In order to ensure tax coordination between federal and sub-federal (regional or municipal) levels of government ("vertical tax coordination"), regionally "invented" taxes must not be similar to the types of taxes levied by the Federation. If so, the region has to obtain the Federation's consent. [16] If the taxing right with respect to a certain tax is allocated to the regions or if a region has legitimately "invented" a tax of its own, the regions may likewise authorize a municipality to levy the respective tax by itself. [17]

According to a 1998 Austrian Constitutional Court case, the regional and municipal taxing powers are subject to limitations. Interestingly, the Court derived those limitations from international law, namely from the "genuine link" principle. [18] It thereby implicitly acknowledged a prohibition of "federal" double taxation to be enshrined in the FFC. First of all, this paper analyses the Constitutional Court's approach to the problem of double taxation in federal tax systems. Second, it offers a few brief observations on whether it can be justified to apply principles of international tax law in order to tackle problems of intra-state double taxation. Third, this paper examines related case law that either has paved the way or reflects and elaborates the position taken up by the Constitutional Court in the case at issue.

3.2. The case at hand

The decision of the Constitutional Court of 17 December 1998, G 15/98, V 9/98, concerns a tax on commercial announcements. At that time, the tax fell within the competence of the municipalities. The Federation's consent to levy the tax did not contain any further determination than a "commercial announcements' tax". The municipality of Vienna enacted a decree according to which "commercial television and radio announcements" put together in studios located within the municipality of Vienna were subject to tax. The tax rate amounted to 10% of the collected charge. The commercial announcement in question was essentially composed in a Viennese studio. However, the TV or radio commercial could only be received outside the municipality of Vienna. The Viennese tax administration took the position that the tax was applicable to all commercial television or radio announcements emanating from a studio located within the municipality of Vienna irrespective of where the announcement could ultimately be received ("studio principle"). The Constitutional Court rejected the position of the Vienna tax administration, abolished the notice (*Bescheid*) and concluded that only commercial announcements that can be received within the municipality of Vienna may be actually taxed ("receivers' principle").

3.3. International law requirements

In fact, the outcome of the case as explained above is less interesting than its reasoning. The Constitutional Court's decision involves an interpretation in line with requirements of public international law. This was essential due to the following reasons: "International custom permits the taxation of foreign economic transactions when a sufficient connection exits between the

10. Federal Gazette I No. 103/2007 as amended by No. 111/2010 (*Finanzausgleichs-gesetz 2008*); see Wißgott, *Der Finanzausgleich im Österreich der zweiten Republik* (Wien: Orac, 1973).
11. See the decision of the Constitutional Court of 1 March 2002, A 6/01 with reference to Thienel, *Vertrauensschutz und Verfassungsrecht* p. 68 et seq. (Wien: Verlag der österreichischen Staatsdruckerei, 1990).
12. Art. 7(1) of the Federal Fiscal Constitution (FCC).
13. Art. 8(1) FFC.
14. Art. 7(3) FFC.
15. Ruppe, *Art. 8 of the Federal Fiscal Constitution*, in *Bundesverfassungsrecht* 3rd ed., MN 10 et seq. (Korinek & Holoubek eds., Wien/New York: Springer, 2000).
16. Id., MN 15. See also Taucher, *Kompetenzfragen bei der Ankündigungsabgabe auf Rundfunkwerbung*, Zeitschrift für Verwaltung p. 165 (1997).
17. Art. 7(5) FFC.
18. International Court of Justice (ICJ), 6 Apr. 1955, *Nottebohm*, ICJ Reports pp. 4 to 27 (1955). For details, see Seidl-Hohenveldern, *Der Fall Nottebohm*, Recht der Internationalen Wirtschaft p. 147 et seq. (1955); Glazer, *Affaire Nottebohm – A Critique*, Georgetown Law Journal p. 313 et seq. (1955-56); Loewenfeld, *Der Fall Nottebohm*, Archiv des Völkerrechts p. 387 et seq. (1956); Makarov, *Das Urteil des Internationalen Gerichtshofs im Fall Nottebohm*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht p. 407 et seq. (1956); Kunz, *The Nottebohm Judgment (Second Phase)*, American Journal of International Law p. 536 et seq. (1960); Jones, *The Nottebohm Case*, International and Comparative Law Journal p. 230 et seq. (1965); Harris, *The Protection of Companies in International Law in the Light of the Nottebohm Case*, International and Comparative Law Quarterly p. 275 et seq. (1969); Sloane, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality*, Harvard International Law Journal p. 29 et seq. (2009).

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taxpayer and the taxing state." [19] The distributive rules of a double taxation convention and national constitutional provisions allocating taxing rights pursue the same objectives. Both of these primarily aim at the limitation of tax sovereignties and the appropriate distribution of taxing rights. Therefore, intra-state bodies must likewise comply with the fundamental principle of "genuine connection" when exercising their taxing rights. Thus, the municipality of Vienna is only entitled to tax objects with which it is "sufficiently connected". This is true irrespective of whether the central legislator has imposed a respective tax by virtue of its more or less comprehensive right to "invent" taxes or whether municipalities levy the respective tax by virtue of the Federation's consent. [20]

The Court held that the aim of the tax on commercial announcements indicates whether there is a sufficient connection between the taxable object and the municipality of Vienna. A tax on TV and radio commercials aims at taxing the promotional effect obtained. So, from a constitutional perspective, Vienna's taxing right is limited to the promotional effect obtained within its territory. Municipalities cannot just tax the promotional effect in respect of commercial announcements emanating from its territory irrespective of *where* the promotional effect eventually is obtained. Accordingly, the charge has to be excluded from the taxable base as it cannot be attributed to the municipality because the promotional effect is obtained elsewhere.

In its reasoning, the Constitutional Court links principles of international tax law with constitutional requirements. From a dogmatic point of view, this approach is debatable as the FFC only addresses the avoidance of double taxation at certain points: articles 7(4) and 8(4) of the FFC [21] are considered by the Court to be exemplary. However, the Court deduces general principles from those provisions. This is why, in its view, intra-state bodies are no less obliged to limit their own tax competences than the Federation itself. As a result, the municipality of Vienna may only levy the respective tax on commercial announcements that can be received in Vienna.

The Constitutional Court primarily invokes international custom, according to which taxation of foreign economic transactions is only permitted when a "sufficient connection" exits between the taxpayer and the taxing state. According to the prevailing opinion, taxation is even permitted when a "genuine link" exists between the taxpayer and the taxing states. [22] This view obviously goes back to the International Court of Justice's (ICJ) judgment in *Nottebohm,* the facts of which will now be reviewed in some detail. [23] Friedrich Nottebohm was a German citizen and moved to Guatemala in 1905 where he established business interests and he had his principal residence. He went to Liechtenstein several times to visit his brother, but otherwise he had no links to that state. When World War II was initiated, he again travelled to Europe, trying to get Liechtenstein citizenship. Shortly after, he abjured his nationality as a citizen of Germany by acquiring the nationality of Liechtenstein. Nottebohm changed his nationality with the specific intent of avoiding the apparent consequences of the international law of war. Specifically, Guatemala could deport him and seize his substantial assets and business interests. In 1941, he actually was arrested and turned over to the US military, which detained him for more than 2 years. Guatemala, moreover, confiscated his property and business interests. In 1951, Liechtenstein instituted proceedings at the ICJ on his behalf. At that time, Nottebohm had resided in Liechtenstein for more than 6 years. Liechtenstein intended to exercise the traditional right of diplomatic espousal on behalf of Nottebohm. In 1955, the ICJ ruled that Nottebohm's connection to Liechtenstein was not sufficient. In its reasoning, the Court focused on the circumstances in which Nottebohm had acquired Liechtenstein nationality. Therefore, Guatemala was not obliged to accept that Liechtenstein afforded diplomatic protection to Nottebohm.

The *Nottebohm* judgment and its transposition to tax law are problematic for several reasons: On the one hand, the fact that Friedrich Nottebohm was sympathetic to the National Socialists seems to have affected this decision at least to a certain extent. [24] In principle, this of course should not have had an effect on the judgment. But it certainly did not raise the judges' willingness to decide in favour of Nottebohm. Furthermore, in reality, a problem of abuse was at issue since it was obvious that Nottebohm sought to acquire Liechtenstein nationality with the sole aim of avoiding becoming an enemy alien under international law. [25] Despite the fact that some scholars suggested otherwise, we believe that the ICJ's decision in *Nottebohm* does not rest on the abuse-of-rights principle. It simply involves the application of custom and general principles of international law, although the decision may well be influenced to a certain extent by the fact that Nottebohm tried to benefit from the liberal international legal regulation of nationality in his effort not to fall under the law of war.

As far as the conferral of Liechtenstein citizenship is concerned, the ICJ did not consider the connection between Liechtenstein and Nottebohm to be sufficient. The Court explicitly acknowledges that Nottebohm's formal change of nationality was in no way

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19. See Jacobs, *Internationale Unternehmensbesteuerung*, 3rd ed. p. 8 (München: Beck, 1995); Vogel, *Double Taxation Conventions*, 3rd ed., MN 7 (London: Kluwer Law, 1998); Schaumburg, *Internationales Steuerrecht*, 2nd ed., p. 20 with further references (Köln: Schmidt Verlag, 1998).
20. See the decision of the Constitutional Court of 17 Dec. 1998, G 15/98, V 9/98.
21. For more detail on these provisions, see 3.4.
22. See, e.g. Rudolf, *Über territoriale Grenzen der Steuergesetze*, in *Recht und Wirtschaft in Geschichte und Gegenwart*, *Anniversary Publication Bärmann* p. 782 et seq. (Lutter, Kollhosser & Trusen eds. München: Beck, 1975).
23. ICJ, 6 Apr. 1955, *Nottebohm*, ICJ Reports pp. 4 to 27 (1955).
24. Kunz, *American Journal of International Law* p. 540 (1960).
25. See, e.g. Sloane, *Harvard International Law Journal* p. 29 (2009).

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unlawful. Nevertheless, Liechtenstein had no right to exercise diplomatic protection via judicial espousal on behalf of Nottebohm against Guatemala. The connection between Nottebohm and Guatemala, where he had resided since 1905 and where he had disposition over substantial assets, was more intensive than his link to Liechtenstein. So, if one puts the admissibility to grant nationality on the same level with the admissibility to tax a certain person or a certain situation, ultimately, the *Nottebohm* case does not at all answer the question of how to limit tax sovereignty. [26]

Also, in state practice, the presence of a "sufficient connection" between the taxpayer and the taxing state as advocated by many commentators [27] is a merely theoretical requirement. States creatively use their tax competences; often a mere "genuine link" is enough. In Austria and Germany, for instance, employment income of a taxpayer subject to limited tax liability is subject to tax even if the respective activity is exercised abroad. It is sufficient that the "results" of the employment are used in Austria or Germany (section 98(1)(4) Austrian Income Tax Act). [28] CFC rules also serve as an illustrative example of the above fact as such rules are already triggered when only one of the minor shareholders is involved in a foreign cooperation that only generates income abroad or only disposes of foreign capital. The general public international law principle of "sufficient connection" is therefore not capable of limiting tax competences. In reality, the actual limit to the tax sovereignty of a state is the capability of a state to effectively enforce its tax claims. In order to comply with constitutional law requirements and to avoid a loss of authority on a political level, states usually only introduce tax rules when they can effectively enforce them. This shows that the international custom of "sufficient connection" between the taxpayer and the taxing state is largely disconnected with the postulates (studio principle versus receivers' principle) the Constitutional Court derives from it in the context of the limitation of federal tax competences. International custom does not exclude double taxation. In the light of the "genuine link" principle, it may even be argued that customary law *allows* double taxation.

3.4. Constitutional law requirements

Unsurprisingly, the Constitutional Court not only invokes customary international law but also constitutional law considerations. From the parallel of international custom and constitutional law, the Court develops in its judgment a general principle of accurate and constructive distribution and limitation of tax competences.

First of all, and in parallel to the above-mentioned international customary law, intra-state bodies are constitutionally obliged to respect each other's interests. In its own prevailing case law, the Court only adopts this obligation in the relation between the Federation and the regions and not expressly between regions and municipalities as well. The Court interprets this obligation as a prohibition of frustrating the interests of another intra-state body. [29] In its decision No. 10305/1984, the Constitutional Court has transferred this idea to tax law: the federal distribution of tax competences should not lead to an intolerable conflict between the Federation and the regions. Therefore, the regional tax rule will consider the Federation's directives. [30] The case concerned a federal statute under which a person has to tolerate telegraph poles on his own property. The Court held that the regional legislator is not allowed to defeat the federal legislation by levying a tax on telegraph poles. On the one hand, the transposition of this principle to the relation *between regions and municipalities* (or *regions and regions* and *municipalities,* respectively), is appealing from a normative point of view. On the other hand, it is in no way self-evident to read this prohibition of frustrating interests of other intra-state bodies as a general prohibition of federal double taxation.

As indicated earlier, the Court specifically mentions provisions that can be found in the FFC, namely articles 7(4) and 8(4). [31] According to article 7(4), the central legislator is entitled to provide for qualified measures to eliminate double taxation. [32] The precise content of this provision is not entirely clear. It probably exclusively concerns double taxation that results from the exercise of tax competences on a regional or municipal level. In the view of the Court, article 7(4) is relevant for the following reasons: it does not allow the conclusion that the regional or municipal tax competence is unlimited and the avoidance of double taxation is a responsibility solely binding the Federation. Article 7(4) does not prevent the regions and municipalities to make an effort to avoid double taxation when exercising their tax competences. It would be quite absurd to deduce from article 7(4) that regions and municipalities should exercise their tax competence in a way that results in double taxation or double non-taxation. However, the respective provision does not actually *oblige* the regions and municipalities to set out measures to avoid double taxation as according to its wording it is solely addressed to the central legislator. Thus, the constitutional legislator obviously assumes that regions and municipalities *can* exercise their tax competences in a way that results in double taxation. Therefore, article 7(4) can at

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26. Cf. the decision of the Constitutional Court of 17 Dec. 1998, G 15/98, V 9/98.
27. See Jacobs, *Internationale Unternehmensbesteuerung*, 3rd ed., p. 8 (München: Beck, 1995); Vogel, *Double Taxation Conventions*, 3rd ed., MN 7 (London: Kluwer Law, 1998); Schaumburg, *Internationales Steuerrecht*, 2nd ed., p. 20 with further references (Köln: Schmidt Verlag, 1998).
28. Federal Gazette I No. 400/1988 as amended by No. 111/2010 (*Einkommensteuer-gesetz*).
29. See the decisions of the Constitutional Court of 23 June 1989, B 1719/88, 14 Oct. 1983, B282/92, B60/93, 5 Oct. 1998, G 117/98, 25 June 1999, G 256/98 and 9 Mar. 2005, G 137/04.
30. See the decision of the Constitutional Court of 7 Dec. 1984, B 43/83.
31. See also 3.3.
32. Ruppe, *Art. 7 of the Federal Fiscal Constitution*, in *Bundesverfassungsrecht*, 3rd ed., MN 27 et seq. (Korinek & Holoubek eds., Wien/New York: Springer, 2000).

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most be interpreted as not excluding other constitutional provisions limiting regional or municipal tax competences. It goes too far to deem article 7(4) to be a basis for regions and municipalities to be obliged to avoid double taxation on their own motion.

Article 8(4) of the FFC takes centre stage of the remarks below according to which regional or municipal consumption taxes are unconstitutional if they subject consumption outside the region or municipality to tax. [33] In the view of the Court, article 8(4) does not exclusively set out the limits of a tax competence. The provision just defines the limits of a tax competence in the field of a specific type of tax. Thus, it can be called into question whether article 8(4) is actually capable of founding a general prohibition of federal double taxation. Other case law with respect to article 8(4) concerns solely the interpretation of the term “consumption tax”. [34] This seems to suggest that the Constitutional Court does not consider article 8(4) to be more general in character. Moreover, it cannot be ignored that article 8(4) not only states that consumption outside the territory of the region or municipality may not be subjected to tax but also that a consumption tax must cover the total consumption within a territory. [35] Using international tax law terminology, this would mean that article 8(4) prohibits double taxation as well as double non-taxation. The Constitutional Court did not draw this far-reaching conclusion: it did not have any reservations about interpreting the “commercial announcement tax” levied by the municipality of Vienna in a constitutional sense instead of abolishing the concrete tax. The Court held that it is legal to subject to tax all commercial announcements that emanate from a Viennese studio as long as it is guaranteed that, in the end, the tax is levied only on TV and radio commercials that can be received in Vienna. [36]

Finally, the Court referred to the constitutional equality principle, which plays an important role in its case law. [37] That is why it is not surprising that the Constitutional Court deduces a limitation of regional and municipal tax competences from it, quoting its own case law according to which a visitors’ tax can only be justified if it is limited to the value added from tourism within the territory where the tax is levied. [38] We believe that it would probably go too far to allow only one specific type of tax from an equality-principle perspective. In the context of the concerned commercial announcements’ tax it would not be convincing either to consider only one possible connecting factor as complying with the principle of equality.

Ultimately, neither international custom nor national constitutional law, including the principle of equality, can serve as a legal basis for the requirements elaborated by the Constitutional Court in the case at hand. The legal foundation instead lies in the Federation’s approval of levying specific types of taxes beyond constitutional law. The wording of the authorization is extremely narrow. It just authorizes municipalities to levy a tax on “commercial announcements”. The Constitutional Court alleges that the central legislator has assumed the provision to apply only to commercial announcements that can be received within the municipality of Vienna. A historical interpretation taking into account the legislative records would not have led to the same result. Whether such a limitation of the federal consent is supportable from a methodological perspective will not be dealt with in depth at this point. The crucial question is how to interpret the federal authorization. The parallel invoked between principles of international tax law and the distribution of tax sovereignties in a federal state in any case cannot support the finding of the Constitutional Court. Neither can this alleged parallel provide evidence for the above-mentioned constitutional law provisions to be understood as stipulating an obligation for regions and municipalities to exercise their tax competences in such a way as to avoid double taxation.

3.5. Related case law

Even before the decision at hand, the Constitutional Court had to answer the question of how to distribute taxing rights accurately: As mentioned, a visitors’ tax can only be justified if it is limited to the value added from tourism within the territory where the tax is levied. [39] The taxable object of a visitors’ tax is the business interest in tourism within a specific territory. [40] Already here, the Court had concluded that transactions triggered by tourism must have a direct territorial nexus to the territory where the visitors’ tax is levied. By now, the Austrian High Courts have further clarified that the annual turnover of a permanent establishment located within the respective territory is an appropriate means to exclusively cover the business interest in tourism occurring within the relevant territory. [41]

Here and there, Austrian courts even indicate which method to avoid double taxation must be applied. In Austria, the exemption method according to which the residence state excludes from the taxable base the income derived or the capital owned in the other state is often adopted. The taxing rights lie only with the source state. The tax rate of the source state is therefore decisive.

33. Ruppe, *Art. 8 of the Federal Fiscal Constitution*, in *Bundesverfassungsrecht*, id., MN 26 et seq.
34. See, e.g. the decisions of the Constitutional Court of 17 Mar. 1955, V 32/54, 14 Oct. 1958, B 67/58, 14 Oct. 1961, G 28/60 and the decision of the Supreme Administrative Court of 25 Mar. 1977, 1316/76.
35. See Ruppe, *Verfassungswidrigkeit der Getränkesteuer*, Recht der Wirtschaft p. 122 et seq. (1991) with further references.
36. See the decision of the Constitutional Court of 17 Dec. 1998, G 15/98, V 9/98.
37. See Gassner, *Gleichheitssatz und Steuerrecht*, Gelber Brief des Instituts für Finanzwissenschaft und Steuerrecht 64 (1970) with further references.
38. See 3.5. and the decisions of the Constitutional Court of 27 June 1969, G 1, 5, 10, 11/69, 9 Mar. 1988, G 51/87, 18, June 2001, G 6/01 and 30 Nov. 2004, G 83/04.
39. See 3.4.
40. See the decisions of the Constitutional Court of 25 Mar. 1963, G 26/92, 18 Mar. 1965, G 29 and 30/64, 3 Dec. 1965, B 45/65 and 23 Oct. 1980, B 219/78.
41. See the decision of the Constitutional Court of 27 June 1969, G 1, 5, 10, 11/69.

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The residence state may nevertheless take the exempted income or capital into account in calculating the amount of tax on the remaining income or capital of the taxable person. The proviso safeguarding progression should ensure the mitigation of the advantages created through both the allocation of income to the source state and the classification of income in low tax brackets in both states. [42] The exemption method applies irrespective of whether the other contracting state actually levies a tax on the income in question. The exemption method can therefore lead to double non-taxation when the source state has taxing rights under the double taxation convention but does not levy any tax under its domestic law, and the residence state has no taxing rights (apart from the progression safeguard) since it must grant an exemption. If the double taxation convention contains a “subject to tax” clause, the exemption will depend on whether taxes are levied in the source state. [43]

In its decision of 22 December 2005, 2004/15/0063, the Supreme Administrative Court applied and clarified the position taken up by the Constitutional Court in the case at hand. Moreover, interestingly the Supreme Administrative Court resorts to the exemption method that is traditional in the field of international tax law. The Supreme Administrative Court held that it is illegal to tax an expense that accrues from a social event that takes place outside the territory of a municipality at least to a certain part. The case concerned what are known as “dancing cruises”. The municipality of Linz taxed the total entrance fee although only the actual entrance took place at a landing stage located in Linz. Aside from that, a considerable part of the event covered the territory of other municipalities: the boat leaves the territory of Linz shortly after the starting point of the cruise, passes by several other municipalities and finally returns to Linz. In the Court’s view, social events that only partly take place within the municipality of Linz may only be subject to tax to the extent they actually take place in Linz. Therefore, only the part of the entrance fee that falls upon the part of the social event taking place in Linz (in relation to the whole social event) is subject to tax. The rest is to be excluded from the tax base irrespective of whether or not the other municipalities involved actually levy a tax on the respective social event. It follows from the above considerations that a subject-to-tax clause can lead to illegal results as the municipality in question is only authorized to levy tax within its boundaries. If a taxpayer cannot, for example, provide evidence that another municipality has levied tax on the social event, the social event would as a whole be subject to tax in a certain municipality although the social event only partly takes place within its boundaries. In principle, the case law requests the application of an exemption method: The tax base is to be distributed among the intra-state bodies involved. Then, they have to exclude the parts that cannot be allocated to them.

3.6. Concluding remarks

The analysis of a few Austrian cases confirms that there seems to be a common need in federal systems to coordinate taxation rights. This is true of the European Court of Justice (ECJ), which tries to coordinate taxation rights between the Member States, and the Austrian Supreme Court, which tries to coordinate taxation rights between the various regions and even the municipalities. Under Austrian law, there are fewer examples than on the European level and this is probably due to the fact that the Austrian Federation has broad competences to impose limits on regional and municipal tax law whereas the European legislator can only take action when there is a consensus of all 27 Member States. Therefore, the ECJ has to step in much more frequently. However, both the ECJ and the Austrian courts see it as their responsibility to step in for the legislator if necessary and the legal basis, which at the European and the Austrian levels is completely different, does not really matter. This becomes even more obvious in the decision of the Constitutional Court of 17 December 1998, G 15/98, V 9/98. The analysis of the Court’s reasoning illustrates that the arguments used by the Court are not really convincing. It is obvious that the Court had been largely driven by the result it wanted to achieve. However, the analysis has also shown that approaches may be different: The ECJ, on the one hand, does not seem to be too concerned about double taxation. However, the Court seems to prevent double non-taxation. The Austrian courts, on the other hand, are not only trying to avoid double taxation but go even so far as to accept double non-taxation.

42. For more details, see Gassner, Lang & Lechner, *Die Methoden zur Vermeidung der Doppelbesteuerung* (Wien: Linde Verlag, 1995); Sutter & Wimpissinger, *Freistellungs- und Anrechnungsmethode in den Doppelbesteuerungsabkommen* (Wien: Linde Verlag, 2002).
43. See e.g. Schilcher, *Subject-to-tax-Klauseln in der österreichischen Abkommenspraxis* (Wien: Linde Verlag, 2004).

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