2009/04/21 - PL. ÚS 29/08: REAL ESTATE TRANSFER TAX

HEADNOTES

Tax is a general burden that is binding on all residents, according to their income, property, and purchasing power, to finance the general purposes of the state. the state's authority to tax under certain precisely defined conditions was institutionalized precisely for the purpose of gathering funds to secure public assets.
Under Art. 11 par. 5 of the Charter, taxes and fees can be imposed only on the basis of law. This provision makes it impossible for the executive branch to impose taxes. On the contrary, taxes are a prerogative of the Parliament, which has the exclusive authority to impose taxes. Art. 11 par. 5 is also the constitutional authorization for Parliament to legitimately limit property rights through statutes it adopts. Thus, the public authorities are permitted to interfere in the individual's autonomous sphere, which is also defined by property rights, on the grounds of constitutionally approved public interest, the essence of which, in the case of taxes, is the collection of funds for securing various types of public assets. The legitimacy of taxes comes from, among other things, the fact that the results of taxation are used to protect and create conditions for the development of ownership, and this protection and creation of conditions must, of course, be paid for. However, this is not the only purpose of taxation; tax interference in the property and legal sphere of the individual is justified by the equality of allocation of these burdens.
Thus, in the case of taxes, this involves review of the limitation of the fundamental right to property guaranteed by Art. 11 par. 1 of the Charter on the grounds of public interest in meeting the state budget, approved by Art. 11 par. 5 of the Charter, for purposes connected with fulfilling the functions of the state.
The Constitutional Court states that, in reviewing the constitutionality of the contested provisions, it does not intend to deviate from its case law, and therefore will take as its starting point the modified version of the principle of proportionality, and will review possible violation of the ban on extreme disproportionality in connection with the criteria that arise from the constitutional principle of equality. It is precisely review of the matter in terms of observing the constitutional safeguards of accessory and non-accessory equality that permits applying the requirement that the legislature not be able to impose tax on completely irrationally chosen conduct, actions, or behavior of persons, because by doing so it would obviously, or willfully violate the constitutional principle of equality; we must point out that violation of accessory equality is conceptually tied to violation of another fundamental right.
As indicated by the decision-making practice of the Constitutional Court, making distinctions that lead to violation of the principle of equality is impermissible in two ways: it may function as an accessory principle that forbids discriminating against persons in the exercise of their fundamental rights, and as the non-accessory principle, enshrined in Art. 1 of the Charter, which consists of ruling out arbitrariness by the legislature when distinguishing

the rights of certain groups of subjects. In other words, the second case involves the principle of equality before the law, which is a component of the Czech constitutional order.
The question that the Constitutional Court could not avoid is whether the Constitutional Court is competent to review the real estate transfer tax in terms of the function of taxes. In the Constitutional Court's opinion reviewing taxes is within the competence of the democratically elected legislature. If the Constitutional Court did so, it would enter the field of individual policies whose rationality cannot be reviewed very well in terms of constitutionality. As a rule the Constitutional Court also does not review the effectiveness of taxes, with the exception of those cases where the inefficiency of a particular tax would establish obvious inequality in the tax burden on individual residents. The Constitutional Court is only competent to review whether particular tax measures interfere in an owner's constitutionally guaranteed property substratum, or whether they can be considered to unjustifiably conflict with the principle of equality, i.e. whether they are arbitrary.
The Constitutional Court will not use its evaluation of the suitability of public policy to replace the evaluation of the democratically elected legislature, which has wide scope for discretion in the sphere of public policy, and also bears political responsibility for any failure of its choices. In other words, the legislature may also take irrational steps in the tax sphere, but that is not yet a reason for the Constitutional Court to intervene. The Court will intervene only if property rights are limited in an intensity with a "strangulatory" effect or if there is violation of the principle of equality, in either the accessory (here in connection with other fundamental rights) or non-accessory form.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

On 21 April 2009, the Plenum of the Constitutional Court, consisting of Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Pavel Rychetský, Eliška Wagnerová (judge rapporteur) and Michaela Židlická, ruled on a petition from the Supreme Administrative Court, submitted under Art. 95 par. 2 of the Constitution of the Czech Republic seeking a declaration of unconstitutionality of § 8, 9, 10 and 15 of Act no. 357/1992 Coll., on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax, in the version in effect before amendment by Act no. 420/2003 Coll., with the participation of the Chamber of Deputies of the Parliament of the Czech Republic and of the Senate of the Parliament of the Czech Republic as parties to the proceeding, as follows:

I. The petition to declare unconstitutional § 8 par. 1 let. a), § 9 par. 1 let. a), § 10 let. a) first sentence and § 15 of Act no. 357/1992 Coll., on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax, in the version in effect before amendment by Act no. 420/2003 Coll., is denied.

II. The remainder of the petition is denied.

REASONING

I.
Recapitulation of the Petition

1. On 9 October 2008, the Constitutional Court received a petition from the Supreme Administrative Court (the "SAC") seeking a declaration of unconstitutionality of § 8, 9, 10 and 15 of Act no. 357/1992 Coll., on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax, in the version in effect before amendment by Act no. 420/2003 Coll.

2. The petitioner did this after, in connection with its decision-making activity, in accordance with Art. 95 par. 2 of the Constitution of the Czech Republic (the "Constitution") and § 48 par. 1 let. a) of Act no. 150/2002 Coll., the Administrative Procedure Code, it concluded that § 8, 9, 10 and 15 of Act no. 357/1992 Coll., on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax, in the version in effect before amendment by Act no. 420/2003 Coll., are inconsistent with Art. 3 par. 1, Art. 4 par. 4 and Art. 11 par. 1, 4 and 5 of the Charter of Fundamental Rights and Freedoms (the "Charter").

3. In the cited matter, file no. 2 Afs 178/2006, the SAC is deciding on a cassation complaint from the complainant Ing. M. P. against a decision by the Regional Court in Brno of 26 May 2006 ref. no. 29 Ca 129/2004-22, in which he claims that § 15 of Act no. 357/1992 Coll., on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax, conflicts with the constitutionally guaranteed property right enshrined in Art. 11 of the Charter of Fundamental Rights and Freedoms and also in Art. 1 of the Protocol to Art. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"). The decision of the Regional Court in Brno denied his complaint against the Financial Directorate in Brno of 2 March 2004, ref. no. 8069/03/FŘ 140, which denied teh complainant's appeal against a tax assessment by the Financial Office in Brno III of 8 August 2003, ref. no. 144773/03/290961/1675. This decision assessed the complainant real estate transfer tax of CZK 3,120, from the sale of real estate in the land registration area Soběšice by the husband and wife P., the company NDL, s. r. o., and the company DPN, s. r. o., to the husband and wife B.

4. The SAC interrupted the proceeding in the matter, and submitted a petition to the Constitutional Court, seeking a declaration that the provisions in question are unconstitutional, because it thinks that the real estate transfer tax itself is unconstitutional. In its petition, the SAC seeks only a declaration that the relevant statutory provisions are unconstitutional, not annulment of them, because the amendment implemented by Act no. 420/2003 Coll. amended all these provisions, and within a specific review of norms the SAC has active standing only to submit a petition seeking a declaration of unconstitutionality of those statutory provisions, and in the version, that it is required to apply. In the SAC's opinion (the SAC here referred to decision of the SAC of 13 March 2008, file no. 5 Afs 7/2005, in: no. 1575/2008 Coll. SAC), in proceedings that take place before administrative courts,

an interpretative verdict from the Constitutional Court (a declaration that an already derogated, or amended, legal norm is unconstitutional) has the same significance and meaning as a verdict that annuls a legal regulation. As regards the Constitutional Court's competence to declare an already derogated, or amended, legal norm unconstitutional, the SAC refers to the Constitutional Court's settled case law from the most recent period [above all judgment file no. Pl. ÚS 38/06 of 6 February 2007 (N 23/44 SbNU 279; 84/2007 Coll.), which stated the opinion that, under Art. 95 par. 2 of the Constitution, the Constitutional Court is competent to review on the merits the constitutionality of a contested provision, even if it was already annulled (amended), on the condition that the addressee of the claimed grounds for unconstitutionality is a public authority, and not a subject of private law].

5. The SAC also asked itself a question about the Constitutional Court's ability to substantively review the constitutionality of a tax law, because imposing a particular tax must be viewed in the context of the state's budget policy, and it is primarily up to political representatives, what to tax, and what form and level of tax to impose (this is a typical "political question"). According to Constitutional Court judgment file no. Pl. ÚS 33/01 of 12 March 2002 (N 28/25 SbNU 215; 145/2002 Coll.) as well, "the concept of tax policy is a matter for the state, which determines what the tax burden of particular taxes on taxpayers will be." The Constitutional Court most recently attempted to define certain referential criteria in its judgment file no. Pl. ÚS 24/07 of 31 January 2008, promulgated as no. 88/2008 Coll. [but see also judgment file no. Pl. ÚS 3/02 of 13 August 2002 (N 105/27 SbNU 177; 405/2002 Coll.) and judgment file no. Pl. ÚS 12/03 of 10 March 2004 (N 37/32 SbNU 367; 300/2004 Coll.)], under which the legislature has "wide discretion to decide on the subject, degree and scope of taxes, fees, and monetary fines" and bears primarily political responsibility for its decisions. Although tax is a required financial performance to the state under public law, and thus is interference in the property right of an obligated subject, it does not, in the absence of other circumstances, affect property positions protected by the constitutional order. In these cases the Constitutional Court also specified the content of constitutional review, which includes reviewing observance of the safeguards arising from the constitutional principle of equality, both non-accessory and accessory, and formulated the concept of strangulatory (suffocating) effect. The judgment published as no. 18/2008 Coll. (file no. Pl. ÚS 50/06 of 20 November 2007) was characterized by the Court's restraint in political questions, when it referred the petitioner to the resources of political competition. Based on analysis of the case law, the SAC concludes that it is possible to designate as unconstitutional a tax that would (1) unjustifiably violate the principle of equality and/or (2) have confiscatory effects. Nevertheless, the SAC believes that a third criterion must be added to these criteria: (3) the legitimacy of the tax obligation imposed. In the SAC's opinion, a tax must be described as unconstitutional if, while it does not have a discriminatory or strangulatory effect, is nonetheless not based on any legitimate and rational reason. Only a tax that also withstands the test of legitimacy and rationality is constitutional. The legitimacy of a tax is not drawn exclusively from the manner in which it was adopted and a reason, consisting of meeting the state budget. In this context the SAC refers to the rationality test, which is a standard component of the Constitutional Court's case law in recent years [judgment file no. Pl. ÚS 61/04 of 5 October 2006 (N 181/43 SbNU 57;

16/2007 Coll.) or judgment file no. Pl. ÚS 83/06 of 12 March 2008, promulgated as no. 116/2008 Coll.].

6. In the next part of its petition, the SAC considers generally the function and purpose of taxes. Citing specialized literature, the SAC describes three primary functions of taxes – allocative (exercised when the market is ineffective in resource allocation), redistributive (important because people do not consider a particular distribution of pensions and wealth to be just) and stabilizing (its purpose is to mitigate the effects of cyclical fluctuations in the economy). Based on quotations from the works of the philosopher Jan Sokol and Adam Smith, the SAC summarizes the fundamentals of fair taxex in several points, equality, certainty, convenience for taxpayers, and the least possible burden for the citizenry in comparison to the income that they bring to the ruler (the state). The SAC also analyzes other definitions of taxes, consisting of distinguishing their (1) primary functions (i.e. fiscal, where the interest in maximizing tax revenue comes first) and (2) regulatory function (where social or economic-political purposes come first). In connection with these deliberations, the SAC states that only a tax can be considered constitutional if its legitimate and rational, i.e. that setting the tax does not contravene the basic rules for the functioning of state power in the context of a democratic state governed by the rule of law, the principle of proportionality and the principle of the ban on abuse of the law.

7. The SAC briefly analyzes the significance of the real estate transfer tax in public finance. According to data from the Ministry of Finance, we can see a gradual increase in revenue from this tax, the total level of which is not even one per cent of the state's total tax income. The collection efficiency of the tax in 2004 was 2.85%, which means that the direct administrative costs incurred for collection of the tax were 2.85% of the total revenue. Although this is a relatively high value in comparison with other property taxes, with other taxes the collection efficiency is significantly below 2%. As a whole, the significance of the real estate transfer tax in terms of total budgetary income is quite marginal. Collection of it is efficient, but not to the same degree as with other kinds of taxes.

8. The core of the SAC's arguments is the test of constitutionality of the real estate transfer tax, which the SAC considers unconstitutional as a whole. The SAC conducted (1) a test, in which it investigated the confiscatory ("suffocating") nature of this tax. According to the SAC, this tax does not have a strangulatory effect, because its level is not disproportionately high. According to the SAC this tax would be unconstitutional only if it made disposition of property, as an inseparable part of the property right, impossible, or at least limited it. The SAC does not see the unconstitutionality of the real estate transfer tax in the level at which it is set, because it is not convinced that it would be disproportionately high (strangulatory, or confiscatory).

9. Nonetheless, according to the SAC the tax does not pass (2) the minimum test of rationality (the rational basis test), because the solution selected does not lead to the aim pursued. The SAC sees several grounds for illegitimacy and lack of rationality. Primarily, according to the SAC, the tax is discriminatory, because this kind of property tax burdens only one of the cases of property transfer. In the case of the real estate transfer tax, the SAC finds completely lacking a reason why the

legislature chose to tax this one particular kind of property. In a state governed by the rule of law the legislature may not proceed arbitrarily, but must have a strong and rational reason for its activity.

10. If every tax is to have its function, then with the real estate transfer tax both functions (i.e. the primary and the regulatory) are ruled out. The regulatory function is ruled out because in a market environment a real estate transfer tax of any amount causes the price of real estate to increase by the amount of the tax. However, the need for housing is not comparable to the need to own ordinary items for personal consumption. The increase in real estate prices caused by the state leads to limiting the market and making them less affordable. The real estate transfer tax does not produce social balance or a greater degree of justice, but quite unjustifiably and disproportionately limits the freedom of the people, because it limits work force mobility, limits business, worsens the social situation of the population, etc. Income from this tax is thus completely devaluated by these effects that the tax has. Although precise data do not exist, the amount of income obtained certainly does not reach the real expenses for undesirable externalities directly or indirectly caused by the tax. The real estate transfer tax also cannot have a redistributive function, whose essence is to produce social peace, because this tax does not burden only "luxury" real estate. The tax burdens all social groups to a comparable degree. In that context, the subsequent state actions, such as state support for savings for housing, for which the state paid in 2006 more than twice what it collected in real estate transfer tax in that same year, appear completely irrational. Thus, this is a paradox, because on the one hand the state massively supports meeting housing needs, and on the other hand, at the same time, it significantly burdens the satisfaction of those needs by the existence of this tax. No rational and legitimate grounds for the existence of this tax can be derived from the state's fiscal policy. Nor is it a relevant reason that the nature of the tax as budgetary income of the state comes from the ease of inspecting real estate transfers and enforcing payment of the tax. There are similar evidentiary systems for other things that are not subject to a transfer tax, and they are generally subject only to a fee [the purpose of which is different, because fees are imposed in such a manner so as to at least partly cover the expenses connected with activities that result from the activities of these individuals (sic – ed. comment)]. In the case of real estate transfers, the state imposes payments both for administrative tasks performed in these cases (a fee for registration in the real estate register), and the transfer itself, based on the value of the real estate transferred. The SAC also points out that the real estate transfer tax is a new tax in our system, and it was introduced as a replacement for the notarial fee for real estate transfers, effective 1 January 1993. There is no reason why the state should simultaneously subject the transfer of this kind of property both to a fee obligation and to a tax obligation.

11. According to the SAC, the discriminatory and irrational nature of this tax has another dimension in the overall context of the current [apartment] housing market. The housing market includes, in addition to apartments that are individually owned, a considerable number of cooperative apartments, where the transfer of cooperative membership rights to an apartment is not subject to any tax. Thus, it is more advantageous to be merely a member of a cooperative than an apartment owner, which is a significant distortion of the housing market. The tax

must also be seen in connection with the whole tax system. Because, under § 4 let. b) of Act no. 586/1992 Coll., on Income Taxes, income from the sale of real estate, among other things, is tax exempt, if the length of time between acquiring and selling it exceeds five years, so in the context of the real estate transfer tax, this regulation means that if real estate is sold within 5 years from acquiring it, the sale is subject not only to the real estate transfer tax, but also to income tax, the basis of which is the difference between the two prices. Thus, there is double taxation of the same income, which, in the context of the whole problem, has unconstitutional consequences. In the context of the whole tax system we cannot forget that even ownership of real estate is itself taxed. The chain of taxes reaches unconstitutional intensity in that the taxpayer receives certain income, which is of course subject to income tax, for that income buys real estate, which is subject to real estate tax, and knows very well that the subsequent sale of that real estate is subject to real estate transfer tax, or, again, income tax.

12. For all these reasons, the SAC concludes that the real estate transfer tax is unconstitutional, as it is nothing more than taxation of the change of one form of ownership into another form of ownership, i.e. it is not taxation of growth in value, and the tax is completely outside all the standard functions that taxes ordinarily have. This tax is asocial, demotivational, unequal in terms of ownership of various kinds of property, limits flexibility in the real estate market, and as a result also slows down the flexibility of the labor market, and its consequences also negatively interfere in family life. For the foregoing reasons the SAC proposes that the Constitutional Court declare in a judgment that § 8, 9, 10 and 15 of Act no. 357/1992 Coll., on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax, in the version in effect before amendment by Act no. 420/2003 Coll., which amends Act no. 357/1992 Coll., on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax, as amended by later regulations, and related statutes, was inconsistent with Art. 3 par. 1, Art. 4 par. 4 and Art. 11 par. 1, 4 and 5 of the Charter of Fundamental Rights and Freedoms.

II.
Responses from the Parties to the Proceedings

II. A) The Chamber of Deputies of the Parliament of the Czech Republic

13. Under § 42 par. 4 and § 69 par. 1 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, (the "Act on the Constitutional Court") the Constitutional Court sent the petition to the Chamber of Deputies. In his response of 10 November 2008, the Chairman of the Chamber of Deputies of the Parliament of the Czech Republic, Ing. Miloslav Vlček, recapitulates the process of adoption of Act no. 357/1992 Coll., on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax, in the version in effect before amendment by Act no. 420/2003 Coll., which amends Act no. 357/1992 Coll. He points out that the draft act was proposed as part of approved principles of tax reform, under which these taxes were to replace notarial fees for inheritance, gifts and transfer of real estate.

II. B) The Senate of the Parliament of the Czech Republic

14. Under § 42 par. 4 and § 69 par. 1 of the Act on the Constitutional Court, the Constitutional Court also sent the petition to the Senate of the Parliament of the Czech Republic. In the response of 12 November 2008, the Senate Chairman, MUDr. Přemysl Sobotka, stated that the petitioner did not consider how Art. 11 par. 1 of the Charter of Fundamental Rights and Freedoms, which provides that property rights have the same content and enjoy the same protection, would be fulfilled if the Constitutional Court ruled as requested in the proposed verdict, and so a situation arose where the provision regulating real estate transfer tax, in the wording "before amendment by Act no. 420/2003 Coll." were declared unconstitutional, if this were not also declared to apply to the situation "after the amendment" introduced by that statute. The Senate also pointed out that it cannot provide a statement on the matter that would arise out of direct discussion and adoption of the provisions in the original version of Act no. 357/1992 Coll., because it did not begin its activities until 1996.

15. The Constitutional Court asked the parties for a statement as to whether they agree to waive a hearing. The parties consented, under § 44 par. 2 of the Act on the Constitutional Court.

III.
Position of the Ministry of Finance

16. Under § 48 par. 2 of the Act on the Constitutional Court, the Constitutional Court also called on the Ministry of Finance to respond to the petition. The Minister of Finance, Ing. Miroslav Kalousek, in his letter of 22 October 2008 ref. no. 05/99 838/2008-261 disagreed with the opinion of the SAC on the unconstitutionality of the real estate transfer tax.

17. In the opinion of the Ministry of Finance the real estate transfer tax is a historic tax, and a supplemental element of the tax system. The Ministry of Finance points out that imposing taxes or fees on the transfer or devolution of property rights to real estate was always of a nonequivalent nature, i.e. that of a tax, as immediately after paying the fee or tax the taxpayer was not provided any services or other performance by the recipients, the administrators of the public budget. This is a tax where the subject matter taxed can be clearly proved, because it is collected for a paid transfer or devolution of ownership of real estate. It is a one-time property tax. The amount of the tax depends on the price (value) of the transferred real estate. At the present time, the income to the state budget from this tax is about CZK 9 billion. Taxing of a paid devolution or transfer of property rights to real estate is practiced in all European Union countries except Slovakia.

18. The Ministry explains that the reason why only one kind of property is burdened by the transfer tax is the difference between immoveable things and other things in their character, value, and economic importance. Compared to moveable things [personal property], real estate represents considerable value. Ever piece of real estate is well invested capital, because it produces a return. The economic

importance of land is non-replaceable. The owners of houses or apartments for purposes of their own housing have income from their ownership (so-called imputed rent), unlike persons who live in rental housing. If real estate is to be used, it cannot exist separately from the infrastructure. The state expends considerable financial resources from the state budget of the Czech Republic to create the infrastructure. Property must also be secured from external threats, a police system must be built, etc., and the resulting needs must be financed. Various kinds of property also require various kinds of protection, which leads to differentiated taxation of personal property and real estate. The owner of real estate has an advantageous position, economic advantages. Property taxes are very important stabilizing taxes, so-called "economically neutral," which is their main advantage, because they influence the economic decision making and behavior of subjects considerably less than other kinds of taxes.

19. The Ministry of Finance also addressed the functions that the real estate transfer tax fulfills. The allocative function of this tax can be seen as part of the financial relationships that arise upon creation of income, drawing away certain parts of the revenues of legal entities and individuals, and the subsequent distribution of them to where they are used most efficiently, which is done through the state budget. Funds obtained from tax revenues are allocated primarily to the state budget, where they are designated to secure public goods. The redistributive function consists of redistribution from real estate owners toward non-owners, i.e. from the more well-off to the less well off. It is also insurance against tax evasion. The real estate transfer tax also fulfills a regulatory function, because the tax burden on individual taxpayers is derived from the value of the owned and transferred real estate, and so the differences in the revenues of individual persons are mitigated. From the point of view of ownership, property is distributed unequally in society. The real estate transfer tax does not fulfill the stabilizing function automatically, but it can fulfill it through the decision of political representatives to adjust the rate, or to create an exemption, with regard to cyclical fluctuations in the economy.

20. As regards the connection between the amount of the real estate transfer tax and the level of real estate prices, the ministry pointed to the trend in apartment prices from 2001 to 2007, which shows that after reducing the tax rate from 5% to 3%, prices increased anyway in 2004. The supply and demand for apartments are influenced primarily by circumstances such as apartment rent levels, state support for housing (e.g. contributions to housing savings), demographic trends in the population, the purchasing power of potential buyers, and especially the credit policies of banks.

21. In the opinion of the Ministry of Finance, there is certainly a relationship between the real estate transfer tax and workforce mobility and limitation on business, but in view of the amount of the tax this influence is minimal. The real estate transfer tax, as a property tax, has a tendency to supplement the redistributive effect of the tax system. In view of the supplemental nature of the tax, extensive statutory exemption from tax, and especially in view of its low rate, the ministry does not have specific studies focused on the relationships to other economic categories; nevertheless, during the time the law was in effect, no negative effects were registered of this tax on the real estate market, workforce

mobility, the influence of the real estate transfer tax on limiting business, or influence worsening the social situation of the population. The ministry points to the research paper of the Research Institute for Labor and Social Affairs entitled "The State and Structure of Employment and Trends in the Demand for Work – a Comparison of the State of the Employment Structure and Trends in the Czech Republic and the European Union in 2004," according to which influences that substantially limit workforce mobility include a non-functioning real estate market (the price of real estate is around five times the average annual employment income), household transportation expenses, and social psychological factors such as an unwillingness to move. An important influence on workforce mobility is the structure of economically active people; e.g. with people under 30 higher mobility is caused more by their willingness to commute or move for work, but it is not in anyway related to real estate transfers. The ministry also points to the fact that any negative influence of the real estate transfer tax on the development of the business environment in the Czech Republic is not mentioned at all in, for example, in the summary expert study of the Czech real estate market, Trend Report 2008, published by the Association for Development of the Real Estate Market.

22. The Ministry of Finance also addressed the reason for the administrative fee for registration in the real estate register, which is collected for an act by an administrative body – the land registry. The fee is CZK 500. The purpose of the fee is to cover expenses connected with the administrative proceedings of the real estate office when deciding on registration in the real estate register. Expenses for the register are paid from fees for services provided. The reason why registration in the real estate register is subject to a fee, in addition to the real estate transfer tax, is that the fee is a monetary equivalent for services provided by the public sector, whereas the real estate transfer tax is a non-equivalent payment, for which a direct counter-value is not provided, and is one of the basic budget incomes that are redistributed through the state budget and used to cover the expenses of the state budget.

23. According to the Ministry of Finance, the legal framework also undoubtedly indicates a difference between ownership rights to an apartment and the obligations of a cooperative member. The members of a cooperative have membership rights and obligations connected with membership in a housing cooperative. The rights and obligations connected with membership in a housing cooperative are transferred on the basis of an agreement on the transfer of membership rights and obligations. An agreement on the transfer of rights and obligations does not mean that a new member automatically enters into the rights and obligations arising from the lease agreement concluded by the previous cooperative member. The Ministry of Finance also points out that transfers of apartments from housing cooperatives to the members of the cooperatives are exempt from the real estate transfer tax. However, if a cooperative member acquires ownership of an apartment from a housing cooperative (becomes its owner), or another person acquires ownership of an apartment from a developer, and subsequently sells the apartment, the transfer of ownership for payment is subject to the real estate transfer tax and is not exempt from it.

24. As regards the fact that, in a real estate sale, in addition to the real estate transfer tax, the income from the sale of the real estate can also be subject to

income tax, the ministry states that this taxation happens only if this income is not exempt from tax under the Act on Income Taxes. Taxation of income from the sale of real estate through income tax has a clear anti-speculative character. If the owner of real estate sold it in a period of less than five years, or, with a family house or apartment, two years, sold the real estate for a higher price than the acquisition price, income tax applies only to the difference between the higher selling price and the lower purchase price, unless it is exempt from tax based on the relevant statutory provisions. If individuals and legal entities that keep accounting records sell real estate, their income is increased by the revenue, i.e. the price for which the real estate is sold, and reduced by the residual value (if the property was depreciated) or the purchase price (if the property was not depreciated). The income, just like the basis for income tax, is also reduced by the amount of the real estate transfer tax.

25. The Ministry of Finance also addressed the reason for reducing the tax from 5% to 3%, which was done by Act no. 420/2003 Coll. This reduction was a political decision, and some political parties had the reduction in the tax rate in their election platforms.

26. The Ministry of Finance also believes that guaranteeing the elimination of a strangulatory (suffocating) effect of this tax is ensured by the low rate of the tax. The Act includes a series of exemptions (in housing, in business, support for persons doing business in agriculture, remedying the consequences of natural disasters and the taxpayers difficult financial situation under the Act on Administration of Taxes and Fees), so one cannot say that there is a considerable tax burden.

IV.
Position of the Ministry for Regional Development

27. The Constitutional Court, under § 48 par. 2 of the Act on the Constitutional Court, also called on the Ministry for Regional Development to respond to the petition. The first deputy prime minister and Minister for Regional Development, Jiří Čunek, in his letter of 17 December 2008, ref. no. 38943/2008-77, stated his opinion that he considers teh influence of the real estate transfer tax on workforce mobility and on the housing market to be marginal and insignificant.

28. The Ministry for Regional Development addressed the connection between the real estate transfer tax and workforce mobility. It referred to the conclusions of the research study by the Sociology Institute of the Academy of Sciences of the Czech Republic entitled “Analysis of Housing Policy Measures Aimed at Supporting Labor Flexibility in the CR.” The study’s conclusions state that the effect of repealing the real estate transfer tax cannot be completely reliably estimated. Housing owners largely stay in their current housing for reasons other than payment of the real estate transfer tax, and repealing the tax would have other consequences for the housing market, which would not necessarily be positive from the state’s point of view (greater price volatility, market instability).

29. In the opinion of the Ministry for Regional Development it is not possible to clearly determine how the real estate transfer tax affects the housing market, if

one also takes into account the existence of apartments that are owned, under the Act on Ownership of Apartments, and the existence of cooperative apartments. The higher price of owned apartments, compared to cooperative apartments, is affected primarily by the different management of these apartments, because, for example, an owner can, in his discretion, rent an apartment, or subject it to a lien or an easement.

V.
The Text of the Contested Provisions

30. The Petitioner seeks a pronouncement of unconstiuttionality of teh contested provisions of Division Three in Part One (§ 8, 9 and 10) and § 15 of Act no. 357/1992 Coll., on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax, in the version in effect before amendment by Act no. 420/2003 Coll. The individual contested provisions read:

The provision of § 8 of Act no. 357/1992 Coll., on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax, in the version in effect before amendment by Act no. 420/2003 Coll.
Paragraph One
The payer of the real estate transfer tax is
a) the transferor (seller); in that case the transferee is the guarantor,
b) the transferee, in the case of acquisition of real estate through enforcement of a decision or execution under a special legal regulation, expropriation, bankruptcy, settlement, adverse possession or in a public auction, or acquisition of real estate in connection with the dissolution of a legal entity without liquidation, or in connection with the distribution of a liquidation remainder in the event of dissolution of a legal entity with liquidation,
c) the entitled party under an easement or other performance similar to an easement,
d) the transferor and the transferee, in the event of exchange of real estate; in that case the transferor and transferee are jointly and severally liable for payment of the tax.
Paragraph Two
in the event of transfer or devolution of ownership to real estate from the joint co-ownership of spouses or to the undivided joint ownership of spouses, each spouse is considered an independent taxpayer, and their shares are considered equal, unless agreed or specified otherwise. In the case of co-owners by shares each co-owner is an independent taxpayer and pays the tax according to the size of his share.

The provision of § 9 of Act no. 357/1992 Coll., on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax, in the version in effect before amendment by Act no. 420/2003 Coll.
Paragraph One
The subject matter of the real estate transfer tax is
a) a paid transfer or devolution of ownership to real estate, including settlement of co-ownership by shares,
b) unpaid establishment of an easement or other performance analogous to an

easement when acquiring real estate by gift.

Paragraph Two
The subject matter of the real estate transfer tax is also a paid transfer of ownership to real estate in a case where an agreement is subsequently rescinded, and the agreement is thereby void ab initio.

Paragraph Three
If real estate is being exchanged, the transfers in exchange are considered one transfer. Tax is collected on the transfer of that piece of real estate on which the transfer tax is higher.

Paragraph Four
The provision of § 3 par. 2 applies analogously.

The provision of § 10 of Act no. 357/1992 Coll., on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax, in the version in effect before amendment by Act no. 420/2003 Coll.

The base for the real estate transfer tax is
a) the price determined according to a special regulation, payable on the day the real estate is acquired, including if the price of the real estate set by agreement is lower than the determined price; the difference in prices is not subject to gift tax. However, if the agreed price is higher than the determined price, the tax base is the agreed price,
b) the price (§ 16) of an unpaid, established easement or other performance analogous to an easement,
c) in the event of adverse possession, the price determined according to a special regulation, valid on the day when certification of adverse possession is recorded in the form of a notarial deed or the day when a court decision on adverse possession goes into effect,
d) the price determined according to a special regulation, valid on the day the real estate is acquired on the basis of an agreement on financial leasing, with subsequent purchase of the leased property,
e) in the event of an auction of the real estate in enforcement of a decision, in execution, or in a public auction, the tax base is the price obtained at auction. The tax is not assessed if the party proposing voluntary auction is a person exempt from the real estate transfer tax,
f) the agreed price in the event of transfer of real estate from ownership by a municipality.

The provision of § 15 of Act no. 357/1992 Coll., on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax, in the version in effect before amendment by Act no. 420/2003 Coll.
The tax is 5% of the tax base.

31. As part of the specific review of norms, the review of the unconstitutionality of a statute or its individual provisions is part of the resolution of an ongoing lawsuit, and therefore, within this review of norms, the constitutionality is reviewed only of a legal norm that really was and is supposed to be applied in the further

proceedings. Therefore, the Constitutional Court must first pose the question of whether the contested provisions were and are supposed to be applied in the proceeding. As the attached file shows, in this case a purchase agreement concluded on 29 November 2002 between the spouses P., the company NDL, s. r. o., and the company DPN, s. r. o., on one side, and the spouses B. (the buyers) on the other side, transferred the ownership of real estate in the registration area Soběšice, municipality of Brno, district Brno-City. The taxpayer, Ing. M. P., was assessed a tax of CZK 3,120 for transfer of the real estate, which was jointly owned by the spouses P.; the determined price of the real estate in question was not higher than the agreed price, so the tax was assessed on the determined price. From this information we can conclude that in this matter, in the proceeding on a cassation complaint before the SAC, only certain provisions of Act no. 357/1992 Coll., on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax, in the version in effect before amendment by Act no. 420/2003 Coll. were and are to be applied, specifically § 8 par. 1 let. a) [The payer of the real estate transfer tax is the transferor (seller); in this case the transferee is a guarantor,], § 9 par. 1 let. a) (The subject matter of the real estate transfer tax is the paid transfer of ownership of the real estate), § 10 let. a) first sentence (The base for the real estate transfer tax is the price determined under a special regulation, in effect on the day the real estate is acquired, including in the event that the agreed price for the real estate is lower than the determined price; the difference in the prices is not subject to gift tax.) and § 15 (The tax is 5% of the tax base.). The remaining parts of § 8, 9 and 10 of Act no. 357/1992 Coll., on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax, in the version in effect before amendment by Act no. 420/2003 Coll., were not and will not be applied in the matter, and therefore the SAC does not have active standing to submit a petition to declare them unconstitutional. For that reason, the Constitutional Court could not review the unconstitutionality of these provisions, and had to deny that part of the SAC's petition under § 43 par. 1 let. c) in connection with § 43 par. 2 let. b), as a petition submitted by a clearly unauthorized party [cf., e.g., Constitutional Court resolution file no. Pl. ÚS 39/2000 of 23 October 2000 (U 39/20 SbNU 353) or judgment file no. Pl. ÚS 43/05 of 2 December 2008, promulgated as no. 62/2009 Coll., and many other decisions].

32. Another question that the Constitutional Court had to pose in resolving this case is the question of the scope of review of contested norms. So, for example, in point 44 in the judgment of 22 January 2008 file no. Pl. ÚS 54/05 (promulgated as no. 265/2008 Coll.) the Constitutional Court stated: "In proceedings on the abstract review of norms the debate/discussion principle does not apply, and thus the Constitutional Court is not bound by the reasoning of the petition, but, on the contrary, is also required to review the contested provision in terms of its consistency with other constitutional regulations than those on the basis of which the petitioners contest it." This approach in reviewing petitions discussed in proceedings on the review of norms is also practiced by other constitutional courts; e.g., the German Federal constitutional Court, in one of its judgments concerning tax matters, stated that in proceedings on specific review of norms it is not limited, when verifying the constitutionality of a contested norm, only by the arguments of the submitting court. The subject matter of the proceedings is the norm that was submitted for review by a justified petitioner, and it is reviewed from various points of view. "Such detailed, supplemental constitutional law review is appropriate precisely if the submitting court considers tax law provisions

unconstitutional because they affect various groups of affected persons in a way that is incompatible with the principle of equality" (decision of the second panel of 22 June 1995, 2 BvL 37/91, let. C point I.).

VI.
Description of the Legislative Process of Adopting the Contested Provisions of the Act

33. The Constitutional Court is also, in accordance with § 68 par. 2 of the Act on the Constitutional Court, in proceedings to annul statutes and other legal regulations, required to review whether the contested statute, or part thereof, was adopted and issued within the bounds of constitutionally provided competence and in a constitutionally prescribed manner. Act no. 357/1992 Coll., on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax, was adopted in 1992, i.e. before the Constitution, which provides the referential criterion for reviewing the constitutionality of legislative procedure for adopting legal regulations, became valid and effective. Nonetheless, some of its provisions were later amended, before Act no. 420/2003 Coll. was adopted. The provisions of § 10 and 15 of Act no. 357/1992 Coll., on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax, in the version in effect before amendment by Act no. 420/2003 Coll., were duly adopted on 2 December 1993 at the 15th Session of the Chamber of Deputies of the Parliament of the Czech Republic. Therefore, the Constitutional Court states that the statutes containing the contested provisions were adopted and issued within the bounds of constitutionally provided competence and in a constitutionally prescribed manner.

VII.
Review of the Competence of the Constitutional Court to Review the Petition and the Petitioner's Active Standing

34. The Constitutional Court also had to consider whether it is authorized to review the petition on its merits, because the petitioner does not seek annulment of the contested provisions, but merely a statement that they are unconstitutional. The fact that the petitioner's proposed verdict seeks only a statement that the contested provisions are unconstitutional is a logical consequence of the fact that on 5 November 2003 the Parliament of the Czech adopted Act no. 420/2003 Coll., which amends Act no. 357/1992 Coll., on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax, as amended by later regulations, and Related Acts, which amended all the contested provisions. Under Art. 95 par. 2 of the Constitution, if a court concludes that a statute that is to be applied in resolving a matter is inconsistent with the constitutional order, it shall submit the matter to the Constitutional Court for review. This provision of the Constitution connects to § 64 par. 3 of the Act on the Constitutional Court, under which a court is also authorized to submit a petition seeking annulment of a statute or its individual provisions in connection with its decision making activity under Art. 95 par. 2 of the Constitution. In this case it is not decisive that the contested provisions were amended by Act no. 420/2003 Coll. As follows from the principle of legal certainty and protection of the citizen's confidence in the law, or from the ban on retroactivity of legal norms, all

bodies applying the law (including the courts) must use legal regulations in the form in effect at the time that the decisive legal facts occurred. Therefore, if an ordinary court has doubts about their constitutionality, it cannot, in a system with a specialized and concentrated constitutional judiciary, decide on its own, but has an obligation to turn to the Constitutional Court. In the Constitutional Court's opinion, Art. 95 par. 2 of the Constitution implicitly contains the Constitutional Court's obligation to fulfill its role and, in response to a petition from an ordinary court, decide on the constitutionality or unconstitutionality of the statutory provision that the ordinary court is to apply, regardless of whether the statute was later amended. In this case, breaching the principle of review exclusively of effective legal regulations in the interest of preserving constitutionality is completely legitimate, because this implicitly provides protection to the fundamental rights of a party to proceedings before the ordinary court [cf. judgment file no. Pl. ÚS 33/2000 of 10 January 2001 (N 5/21 SbNU 29; 78/2001 Coll.)]. In the present matter this procedure will undoubtedly be applied because the contested and reviewed norms are of a public law nature, and so are sovereign interference in the rights of individual persons [cf. judgment file no. Pl. ÚS 38/06 of 6 February 2007 (N 23/44 SbNU 279; 84/2007 Coll.)]. Therefore, the Constitutional Court concludes that it is authorized to accept the petition as a petition that is subject to review and decision on the merits.

VIII.
Referential Viewpoints for Reviewing the Petition

VIII. A)
The Right to Property

35. Under Art. 11 par. 1 of the Charter everyone has the right to own property and each owner's property right shall have the same content and enjoy the same protection. The need to protect property rights arises from the fact that property rights are an important prerequisite for the self-realization of a person for whom they provide independence, and thus create space for the exercise of his freedom. This function of property rights was reflected by the foremost creators of the present liberal democratic states, which the Czech Republic joined after 1989. So, for example, the effort to ensure the right to property is at the very foundation of the intellectual efforts of one of the main builders of representative democracy and a constitutional state, John Lock, who thought that the purpose of the state is protection of property, by which he understood protection of property, life and freedom (cf. similarly Klokočka, V., Ústavní systémy evropských států. [The Constitutional Systems of European States] Prague: Linde, 1996, p. 35). The subsequent development of liberal political thought, which stands at the very foundations of the system of values and norms of modern societies, led to a recognition that property rights are not seen as illimitable in principle. However, it is necessary that constitutionally acceptable grounds exist for limiting it.

36. The Constitutional Court has repeatedly considered the essence of property rights and accorded them special importance. In its opinion, property rights are the core of an individual's personal autonomy in relation to the public authorities. By their nature, property rights of course belong in the category of classic

fundamental rights and freedoms of individuals (core rights), and in the liberal tradition, on which the foundations of modern politics and modern law are based, and which was also present at the birth of the modern ideas of fundamental rights and freedoms, property rights are an all-inclusive category of the autonomous position of the individual vis-à-vis public authority (cf. e.g. Komárková, B.: Původ a význam lidských práv. [The Origin and Importance of Human Rights] SPN, Prague 1990, p. 103: "Locke charges the state with protection of the earthly values of life, personal freedom, and material ownership. Later he includes all these values in the concept of property …") (see judgment of the Constitutional Court file no. II. ÚS 268/06, available at http://nalus.usoud.cz/). Nonetheless, like other fundamental rights, property rights can also be limited, in the event of conflict with another fundamental right or in the event of necessary support for a constitutionally approved public interest.

37. In other judgments, the Constitutional Court interpreted the fundamental right to property as an institutional guarantee and as a guarantee of a certain legal status (cf. judgment of the Constitutional Court file no. I. ÚS 643/06 available at http://nalus.usoud.cz/). One can speak of property as an institutional guarantee because the freedom to own property is a legally constituted freedom, and therefore the legislature has relatively wide discretion to regulate the acquisition of property, its use, and disposition of it. Property as a guarantee of a certain legal status of a person limits the public authorities in interference in already constituted ownership. Interference in the guarantee of property as a fundamental right is possible only through an imperative statutory regulation, which is subject to requirements that correspond to those of the proportionality test. Such a legal regulation must also meet the requirements that arise from the principle of a state governed by the rule of law, and so must be clear and accessible; its consequences must be foreseeable, it must limit executive discretion, and there must be a possibility for review of decisions by the executive branch on interference in property by independent and impartial courts.

VIII. B)
Taxes in the Constitutional Order of the Czech Republic

38. The role of the state, as a particular expression of a political society is "to maintain the validity of the law, provide common propserity and public order, and manage public affairs" (Maritain, J. Člověk a stát. [Man and the State] Prague: Triáda, 2007, p. 15). In order for the state to be a good instrument in the service of human beings, it must have sufficient resources for its activities, most of which it obtains precisely through the institutionalization of the obligatory public law payment of taxes. It is this purpose – managing the income of the state budget – authorizes the state to require from certain, precisely defined subjects these public law amounts, if certain legally defined conditions are met. Under the case law of the German Constitutional court, tax is "a general burden that is binding on all residents, according to their income, property, and purchasing power, to finance the general purposes of the state" [cf. decision of the German Constitutional Court of 22 June 1995 – 2 BvL 37/91, let. C, point II. a)]. The funds collected through the tax system are a transfer of actual resources in the form of private assets to public assets. In other words, the state's authority to tax under

certain precisely defined conditions was institutionalized precisely for the purpose of gathering funds to secure public assets. In order to determine the offer of public assets and to allocate expenses for them, it is not possible to set tax contributions on a voluntary basis, but the compensation for the expression of preferences expressed through the market is represented by decision making on the basis of voting (cf. Musgrave, R. A., Musgrave, P. B. Veřejné finance v teorii a praxi. [Public Finance in Theory and Practice] Prague: Management Press, 1994, p. 6n.). In democratic political systems this authority is traditionally ascribed to the legislature (in English history it is directly tied to the creation of the modern parliament). As tax policy considerably affects the position of subjects obligated to pay tax, the legislature has an important power to develop and promote necessary innovations of the state's tax policy so that it can estimate and the effects of the chosen policies and then explain them to the voters, including in the light of their constitutionality. The state also attempts, through tax policy, to balance out social differences and provide a just social order as conditions for the exercise of the fundamental rights of persons who come under its jurisdiction.

39. Under Art. 11 par. 5 of the Charter, taxes and fees can be imposed only on the basis of law. This provision makes it impossible for the executive branch to impose taxes. On the contrary, taxes are a prerogative of the Parliament, which has the exclusive authority to impose taxes. The constitutional principle of the separation of powers (Art. 2 par. 1 of the Constitution), as well as the constitutional definition of the legislative branch (Art. 15 par. 1 of the Constitution), give the legislative relatively wide discretion to decide on the subject matter, degree and scope of taxes [cf. judgment of the Constitutional Court file no. Pl. ÚS 7/03 of 18 August 2004 (N 113/34 SbNU 165; 512/2004 Coll.)]. Although the permitted degree of the state's decision making on the subject matter, degree and scope of taxes is basically very wide, it is nonetheless not unlimited, because when imposing taxes and fees, protection of the property rights guaranteed in Art. 11 par. 1 of the Charter must be taken into account. However, property ownership protected by the constitutional order cannot be affected without meeting other conditions (cf. judgment of the Constitutional Court file no. Pl. ÚS 7/03).

40. As regards its purpose, Art. 11 par. 5 of the Charter is a constitutionally approved limitation on property rights, which may be legitimately limited for purposes of setting, assessing and collecting taxes (cf. judgment of the Constitutional Court file no. IV. ÚS 29/05, N 113/37 SbNU 463). Art. 11 par. 5 is also the constitutional authorization for Parliament to legitimately limit property rights through statutes it adopts. Thus, the public authorities are permitted to interfere in the individual's autonomous sphere, which is also defined by property rights, on the grounds of constitutionally approved public interest, the essence of which, in the case of taxes, is the collection of funds for securing various types of public assets. The legitimacy of taxes comes from, among other things, the fact that the results of taxation are used to protect and create conditions for the development of ownership, and this protection and creation of conditions must, of course, be paid for. However, this is not the only purpose of taxation; tax interference in the property and legal sphere of the individual is justified by the equality of allocation of these burdens (similarly. the decision of the German Constitutional Court of 22 June 1995, 2 BvL 37/91).

41. Parliament is given a wide authority to tax, in order to fulfill the state budget; a particular statutory framework defines the fundamental requirements of a specific personal relationship of legal obligation. The subject matter of tax is certain income, thing, task or property, based on which a subjective obligation arises for a particular person vis-à-vis the state in the form of a tax obligation. "The legal reason (grounds) for tax are given by a special statute, based on which an obligation for a particular person toward the state is created. The tax obligation arises when certain statutorily defined legal facts have been met, conditions, which create an entitlement to tax on the part of the state, and a tax obligation on the part of the person. Finally, tax is enforceable (it is collected on the basis of law), the law precisely defines the facts that establish a tax obligation, the amount and time of payment" [cf. judgment of the Constitutional Court file no. Pl. ÚS 14/2000 of 10 January 2001 (N 4/21 SbNU 17; 43/2001 Coll.)]. However, unlike fees, tax are monetary performances that are not collected as a settlement for individual advantage, which tax theory express as the fact that tax is a performance to the public budget that is characterized by being non-self-serving and non-equivalent. In other words, a tax is imposed as a unilateral obligation without the taxpayer being entitled to a particular counter-performance on the part of the state. However, this non-equivalence of taxes is not absolute, because "paying taxes is a contribution to the creation of a material basis for providing public assets, from which, based on the solidarity principle, the interests of the population can be satisfied, including those of the person who, by paying taxes, suffered a detriment to assets" (Mrkývka, P. Finanční právo a finanční správa [Finance Law and Finance Administration] Part 2. Brno: MU, 2004, p. 5).

VIII. C)
The Methodology of Review in Previous Case Law Concerning Taxes

42. Under Art. 1 par. 1 of the Constitution, the Czech Republic is a democratic state governed by the rule of law, founded on respect for the rights and freedoms of the human being and the citizen. We can derive basic rules for the functioning of state power from the principle of a law-based state; among them is the principle of proportionality. This principle is based on the premise that interference in fundamental rights or freedoms, even if the constitutional framework for them does not presuppose it, may take place if they conflict with each other or if they conflict with another constitutionally protected value that is not of the nature of a fundamental right or freedom (a public good) [cf. judgment of the Constitutional Court file no. Pl. ÚS 15/96 of 9 October 1996 (N 99/6 SbNU 213; 280/1996 Coll.)]. Thus, in the case of taxes, this involves review of the limitation of the fundamental right to property guaranteed by Art. 11 par. 1 of the Charter on the grounds of public interest in meeting the state budget, approved by Art. 11 par. 5 of the Charter, for purposes connected with fulfilling the functions of the state.

43. The Constitutional Court spoke on the application of suitable methodology for reviewing the constitutionality of statutory regulation of taxes, fees, or other statutorily imposed obligatory payments, as well as monetary penalties, in a judgment in the matter of reviewing conditions and rates for statutory employer liability insurance for work-related injuries or occupational illnesses, where it applied the structure of the proportionality principle in a narrower sense, i.e. the

proportionality principle in the sense of ruling out only extreme disproportionality [see judgment of the Constitutional Court file no. Pl. ÚS 7/03 of 18 August 2004 (N 113/34 SbNU 165; 512/2004 Coll.)]. In that judgment however, the Constitutional Court primarily stated that "constitutional review of taxes, fees and monetary penalties also includes [apart from the abovementioned maxim of ruling out extreme disproportionality] review in terms of observance of the safeguards arising from the constitutional principle of equality, both non-accessory (Art. 1 of the Charter), i.e. arising from the requirement to rule out arbitrariness in distinguishing subjects and rights, as well as accessory, in the scope defined in Art. 3 par. 1 of the Charter."

44. In judgment file no. Pl. ÚS 24/07, promulgated as no. 88/2008 Coll., the Constitutional Court then systematized several groups of decision on questions of the constitutionality of taxes and fees. The first group of Constitutional Court decisions consists of case law on the interpretation and application of Art. 11 par. 5 of the Charter in connection with Art. 79 par. 3 and Art. 104 par. 3 of the Constitution in matters of sub-statutory legal regulation of taxes and fees [see, especially, judgment file no. Pl. ÚS 3/95 of 11 October 1995 (N 59/4 SbNU 91; 265/1995 Coll.), judgment file no. Pl. ÚS 63/04 of 22 March 2005 (N 61/36 SbNU 663; 210/2005 Coll.), and judgment file no. Pl. ÚS 20/06 of 20 March 2007 (N 55/44 SbNU 701; 164/2007 Coll.)]. The second group consists of review of the constitutionality of the legal framework of taxes, fees, or other similar statutorily imposed required payments, as well as monetary penalties (file no. Pl. ÚS 3/02, promulgated as no. 405/2002 Coll., file no. Pl. ÚS 12/03, promulgated as no. 300/2004 Coll., file no. Pl. ÚS 7/03, promulgated as no. 512/2004 Coll.). Finally, the third group of decisions on questions of the constitutionality of the legal framework of taxes, fees, or other similar statutorily imposed required payments consists of judgment of the Constitutional Court of the CSFR file no. Pl. ÚS 22/92 (Collection of Decisions of the Constitutional Court of the CSFR, no. 11, p. 37), which set for the the points of view for review of tax equality, or tax proportionality.

45. Here the Constitutional Court finds it appropriate to point out the case law of the German Federal Constitutional Court, which, when addressing property taxes, pointed out the need to observe the imperative that property tax may not lead to creeping confiscation of property and may not interfere in the essence of the property. In these case one must consider the fiscal interest in preserving the sources of taxes, as well as the individual interest in preserving one's own property. It is also important that economic assets that provide a living for the owner and his family. These assets permit the existence of free discretion for forming one's personal sphere of life on one's own responsibility. From these postulates the Federal Constitutional Court concludes that the taxing legislature may not, by further taxation, reduce beyond a certain limit property that functions as the taxpayer's basis for forming his individual life. This economic basis for personal life develops according to the economic and cultural living standards in a particular society (cf. decision of the Federal Constitutional Court of 22 June 1995, 2 BvL 37/91). Justifying the existence of the basic minimum living income arises from fundamental law, and at the same fundamental objective constitutional values in the form of human dignity, which obligates the state to leave, or ensure for, each citizen the basic needs for dignified human existence. In another decision

in tax law the Federal Constitutional Court also addressed the interpretation and application of the equality principle in this legal area. That principle requires that a tax law burden taxpayers – legally and de facto – equally (cf. decision of the Federal Constitutional Court of 9 March 2004, 2 BvL 17/02). The principle of equality requires that every resident be equally connected, based on his capacity, into financing the tasks of the state.

VIII. D)
The Methodology of Review Proposed by the Supreme Administrative Court

46. The foregoing indicates that the Charter itself presupposes limitation of property rights in the case of taxes, because it contains a constitutional authorization to tax, given to the legislature, to which it gives wide discretion to decide on the subject, degree and scope of taxes. Precisely for that reason, the Constitutional Court reviews the constitutionality of taxes using a modified version of the proportionality test, aimed only at ruling out extreme disproportionality and verifying whether the principle of equality was not violated. The question of suitability and necessity of a particular tax measure is fundamentally left to the will of the legislature, which bears political responsibility for its decision. Nonetheless, this does not give the legislature absolute arbitrariness, because in order for a tax to be found constitutional, it may not be inconsistent with the constitutional principle of accessory and non-accessory equality. It is apparent that accessory equality can be connected with any fundamental right guaranteed by the constitutional order.

47. In the SAC's opinion, discrimination is only one of the possible ways in which a tax obligation can be illegitimate, and therefore it proposes expanding the review of constitutionality of taxes. In its filing, the SAC proposes another test, under which a tax would be unconstitutional not only if it violated the principle of equality or had confiscatory effects, but also if it did not withstand the minimal test of legitimacy and rationality. Under the SAC's proposed test, a tax would also be considered unconstitutional if it was not discriminatory and did not have strangulatory effects, but was not based on any legitimate and rational grounds. This proposed test of legitimacy and rationality is inspired by the "rational basis" test, which has in recent times also become one of the Constitutional Court's methodological instruments [see Constitutional Court judgment file no. Pl. ÚS 39/01 of 30 October 2002 (N 135/28 SbNU 153; 499/2002 Coll.), judgment of the Constitutional Court file no. Pl. ÚS 6/05 of 13 December 2005 (N 226/39 SbNU 389; 531/2005 Coll.), judgment of the Constitutional Court file no. Pl. ÚS 83/06, promulgated as no. 116/2008 Coll., and judgment of the Constitutional Court file no. Pl. ÚS 1/08, promulgated as no. 251/2008 Coll.]. Although in its judgment file no. Pl. ÚS 6/05, promulgated as no. 531/2005 Coll., the Constitutional Court identified the rational basis test with the test of impermissiblity of extreme disproportionality, the logic of the minimum test of legitimacy and rationality proposed by the SAC differs substantially from the logic of the test of impermissiblity of extreme disproportionality.

48. Regarding the rational basis test, the Constitutional Court adds that this is a test of American provenance, which represents the least intensive form of review.

The American Supreme Court annulled tax laws only in a situation where it found the classification of taxpayers and taxable subject matter to be arbitrary, which happened only in a limited number of cases. In other words, a legal framework may not arbitrarily establish discrimination. Comparative studies that the Constitutional Court has at its disposal indicate [cf. Ordower, Henry. "Horizontal and Vertical Equity in Taxation as Constitutional Principles: Germany and the United States Contrasted." (September 6, 2005). bepress Legal Series, Working paper 728, online text: http://law.bepress.com/expresso/eps/728], that the German Federal Constitutional Court is far more active in tax cases and has already found many times that tax laws conflicted with constitutional principles, which is something that happens only rarely in the United States of America. The cause of this difference must apparently be tied to the different interpretation of fundamental rights in the USA and in Europe. Whereas in the USA fundamental rights are interpreted only as negative rights (the state is obligated to respect fundamental rights), the European standard is to also interpret fundamental rights as positive rights (the state has an obligation to protect fundamental rights).

49. The Constitutional Court states that, in reviewing the constitutionality of the contested provisions, it does not intend to deviate from its case law, and therefore will take as its starting point the modified version of the principle of proportionality, and will review possible violation of the ban on extreme disproportionality in connection with the criteria that arise from the constitutional principle of equality. It is precisely review of the matter in terms of observing the constitutional safeguards of accessory and non-accessory equality that permits applying the requirement that the legislature not be able to impose tax on completely irrationally chosen conduct, actions, or behavior of persons, because by doing so it would obviously, or willfully violate the constitutional principle of equality; we must point out that violation of accessory equality is conceptually tied to violation of another fundamental right. The state has relatively wide discretion to impose taxes, but even here "the state may decided to provide fewer advantages to one group that to another, but it may not proceed arbitrarily, and it must be evident from its decision that it is doing so in the public interest" [cf. Constitutional Court judgment file no. Pl. ÚS 2/02 of 9 March 2004 (N 35/32 SbNU 331; 278/2004 Coll.)]. Thus, it is the criteria of accessory and non-accessory equality, which, in some respects, overlap with certain components of the legitimacy and rationality tests proposed by the SAC, that prevent obvious willfulness by the legislature. At the level of review of a substantive tax legal norm, the principle of equality becomes concrete in relation to the nature of the tax. A tax, as a general burden, binding residents to finance state policy, based on their income, property, or purchasing power, is justified by the equality of allocating these burdens (see decision of the Federal Constitutional Court of 22 June 1995, 2 BvL 37/91). Nonetheless, other components of the legitimacy and rationality test cannot be introduced, because they exceed the definition of points of view for review of the constitutionality of tax statutes in a degree that would no longer observe the constitutionally established competence of the legislature to impose taxes, which implies that the legislature basically has wide discretion in its choice of instruments, i.e. in the choice of the subject matter, degree and scope of taxes. Evaluating the suitability and necessity of individual components of tax policy is left to the discretion of the democratically elected legislature as long as the effect of taxes on persons does not have a strangulatory effect (is not

extremely disproportional) and does not violate the principle of accessory and non-accessory equality. In the Constitutional Court's opinion these constitutional requirements for the legal regulation of taxes fully ensure (in the context of constitutional authorization to impose taxes), that the reviewed provisions, if they withstand the test, can be described as legitimate.

VIII. E)
Inspiration from Other Sources: The Practice of the ECHR

50. The Constitutional Court points out that the right to property is also protected by Art. 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, under which every natural or legal person is entitled to the peaceful enjoyment of his possessions. Nonetheless, even under the Convention property rights are not absolute, because Art. 1 of the Protocol to the Convention allows a person to be deprived of property under certain conditions (paragraph 1), and the second paragraph recognizes that states have the right to enforce such laws as they deem necessary to control the use of property in accordance with the general interest or to secure the payment of taxes. In order for the obligation to pay tax to be in accordance with the Convention, it must pursue the general interest; nonetheless, states have freedom to define what they consider necessary. According to the European Court of Human Rights, collecting taxes, except in the case of a discriminatory tax regime, can violate article 1 of the Protocol only if it imposes an intolerable burden on a taxpayer or disrupts his financial situation. (cf. Sudre, F. Mezinárodní a evropské právo lidských práv. [International and European Human Rights Law] Brno: Supplement, 1997, p. 217). In view of the text of the Convention, the European Court of Human Rights reviews taxes only in terms of the safeguards arising from accessory equality (Art. 14 of the Convention), not in terms of equality before the law.

IX.
The Constitutional Court's Own Review

IX. A)
The Nature of the Real Estate Transfer Tax

51. The real estate transfer tax is a traditional historical tax that completes the tax system. As the Ministry of Finance states in its response, at present the revenue from it is ca. CZK 9 billion, and this is after the rate was reduced from 5% to 3% (point 17). Virtually all European countries (with the exception of Slovakia) have one or another form of property transfer tax. Usually the tax on transfers for payment applies only to real estate; in some countries other commodities are also taxed (ships, planes, etc.). In some countries, instead of a property transfer tax, a tax is collected on the registration of property transfer, known as "stamp duty," or the property transfer tax is replaced by a tax on legal acts (cf. Radvan, M. Zdanění majetku v Evropě. [Property Taxation in Europe] Prague: C. H. Beck, 2007, p. 236n.). The real estate transfer tax, together with gift tax and inheritance tax, is one of the transfer taxes. All transfer taxes apply to the acquisitions and transfers of property that occur primarily on the basis of sales, inheritance, or gifts (cf.

Bakeš, M. and collective of authors. Finanční právo. [Finance Law] Prague: C. H. Beck, 2006, p. 323). These are taxes that are paid irregularly, because the taxation of property occurs on a one-time basis when the owner changes. The specialized economic literature says that the function of the real estate transfer tax is to prevent tax evasion on gift tax, which taxpayers could avoid by fictitious agreements on the sale of property, and in the end also on inheritance tax (see Kubátová, K. Daňová teorie a politika. [Tax Theory and Policy] Prague: ASPI, 2003, p. 235). If one of these taxes does not exist, there is a danger that because of it there will be efforts to circumvent the law. The distinguishing element of the real estate transfer tax, unlike the other transfer taxes, is the fact that the subject matter of the real estate transfer tax is paid transfer or devolution of real estate ownership. The legislature's intent is to burden the value of the transferred real estate, i.e. the financial revenue from the real estate obtained by the transferor, or, as the case may be, obtainable financial revenue from the sale of real estate, if the agreed prices is lower than the determined price (cf. Constitutional Court judgment file no. IV. ÚS 500/01, N 51/30 SbNU 47). Transfers are registered through the registration of property rights to particular real estate based on Act no. 265/1992 Coll., on Registration of Ownership and Other Substantive Rights to Real Estate, as amended by later regulations.

52. Although the SAC objects not only to the rate of tax or the definition of the circle of taxpayers, its legitimacy and rationality text consists of several components, because the SAC claims that the real estate transfer tax is (a) a discriminatory tax, which (b) will not stand when compared against the basic functions that tax theory normally applies to taxes (allocative, redistributive, stabilizing), (c) is inconsistent with the need for housing and leads to significant distortion of the housing market, and (d) because of its institutionalization, leads to chaining of taxes which, because of its irrationality and demotivating effects, reaches an unconstitutional intensity. In contrast, the SAC does not consider the rate of the real estate transfer tax to be grounds for unconstitutionality. Insofar as the SAC, as part of the evaluation conducted through the legitimacy and rationality test, claims that the real estate transfer tax is a discriminatory tax, in the Constitutional Court's opinion this is a clear case of a petition to review the tax in terms of the safeguards arising from the constitutional principle of accessory and non-accessory equality. Nonetheless, in further analysis the Constitutional Court will also address other objections raised by the SAC.

IX. B)
The Test of Ruling Out Extreme Disproportionality

53. As already stated, the legislature has wide discretion in what tax to choose in order to collect funds to secure its functions and policies, but it may not interfere in property rights so much that the property relationships of the affected taxpayer fundamentally change so much that it would lead to "defeating the very essence of property," i.e. to "destroying the property base" of the taxpayer (cf. judgment Pl. ÚS 3/02, promulgated as no. 405/2002 Coll.), or so that "the limit of mandatory public law financial performance by the individual vis-à-vis the state would reach strangulatory, suffocating levels" (Pl. ÚS 7/03, promulgated as no. 512/2004 Coll.). In other words, we can say tha the tax assessed may not limit the taxpayer's

property rights in a manner that would conflict with Art. 4 par. 4 of the Charter.

54. However, that is definitely not the case with a real estate transfer tax set at 5%. Karel Engliš writes that "the tax should not destroy the sources from which it flows" (Engliš, K. Národní hospodářství. [The National Economy] Prague: Nakladatelství Fr. Borový, 1928, p. 347), and that really is not the case with the real estate transfer tax. After all, even the SAC states in its petition that the tax is not disproportionately high (strangulatory, suffocating), including in the sense that it would markedly limit the very essence of property rights (see point 8), and the Constitutional Court agrees with this assessment, because it is quite obviously, and there is no need to verify it further. However, one can generally imagine individual cases where the combination of several relevant factors (e.g. the loss of employment and the need to sell mortgaged real estate), especially at the present time, during a financial crisis, could mean that the obligation to pay the tax has exceptionally difficult consequences for the taxpayer. Nonetheless, the law offers other institutions to mitigate those consequences, and although the Constitutional Court believes they are imperfect (the basic lack of entitlement of a decision to excuse taxes under § 55a of Act no. 337/1992 Coll., on the Administration of Taxes and Fees, as amended by later regulations, and a decision to excuse a tax shortfall under § 65 of Act no. 337/1992 Coll., on the Administration of Taxes and Fees, as amended by later regulations), it cannot review them in terms of constitutional law, because these provisions are not and cannot be contested by the present petition.

IX. C)
Equality

55. At the beginning of reviewing whether the real estate transfer tax is inconsistent with the safeguards arising from the principle of accessory equality, the Constitutional Court considers it appropriate to state the opinion that "All decision-making in all three branches of power all the time is about establishing and enforcing different decisions for different situations. In this sense, there is nothing wrong with "discriminating" [i.e. perceiving and stating differences] unless the "specific establishment of differences" pertains to what in constitutional law we call a "suspect class" such as the classes taxatively enumerated in Article 14 of the European Convention on Human Rights. … These suspect classes, it is well to point out, are simply an exception to the general rule which permits all kinds of differentiated decision-making for other non-suspect classes. Prohibition of discrimination – enforcing distinction – is thus an exception rather than the rule." (see the dissenting opinion of Judge Boštjan Zupančič in the case of Burden v. the United Kingdom, no. 13378/05 of 29 April 2008, in Reports of Judgments and Decisions of the European Court of Human Rights 6/2008, p. 319).

56. As indicated by the decision-making practice of the Constitutional Court, making distinctions that lead to violation of the principle of equality is impermissible in two ways: it may function as an accessory principle that forbids discriminating against persons in the exercise of their fundamental rights, and as the non-accessory principle, enshrined in Art. 1 of the Charter, which consists of ruling out arbitrariness by the legislature when distinguishing the rights of certain

groups of subjects. In other words, the second case involves the principle of equality before the law, which is a component of the Czech constitutional order through Art. 26 of the International Covenant on Civil and Political Rights [see judgment file no. Pl. ÚS 36/01 of 25 June 2002 (N 80/26 SbNU 317; 403/2002 Coll.)]. According to the petitioner, taxing the transfer of only one type of property was an exercise of arbitrariness, because "there must be a very strong and rational reason why [the legislature] chose the transfer of this one kind of property to be taxed." We must add to this opinion that taxing the transfer of real property will not be considered arbitrary if it is possible to identify substantial differences in the transfer of this type of property (i.e., real property) and other types of property (personal property_, that make the transfers of property in both groups non-comparable. It is not possible, in contrast, although again because of observing the principle of equality, to set up the same regime for things that are not the same and processes that are not the same. Here we must emphasize that from the point of view of the law, the legal existence of real property is tied to registration in the real estate register, and lack of that makes it impossible to exercise property rights. Personal property does not require such registration for its existence, and if some personal property is nevertheless registered in certain databases, that registration does not have a constitutive significance for their legal existence. Dividing things into real and personal property is fundamentally important not only for private law, but the legislature also ties significant public law consequences to it. Real estate also has an irreplaceable economic significance and is, of course, well invested capital. The state supports the ability to really make use of all the functions of real estate by fulfilling its obligations, e.g. in creating and protecting the public order, or supporting the development of the general well-being. As the Ministry of Finance states in its response, real estate cannot exist separately from the infrastructure, the quality of which is also substantially decisive for the price of real estate. The state spends not insignificant amounts of money for infrastructure and for protection of property from external dangers (see point 18). Because real estate owners thus receive a certain benefit from the activities of the state, it is not possible to say that taxing them, in various ways, is illegitimate (the primary means of this taxation is, of course, the real estate tax). The reason why the legislature chose to tax real estate transfers arises precisely from the difference of this form of property, and we cannot overlook the fact that the transfer of personal property is subject to different kinds of taxation, which, in contrast, do not apply to real property. The difference in taxation on the transfers of personal property and real property comes from the substantial differences between real property and personal property, and therefore the different tax regime for transfer of them does not conflict with the principle of non-accessory equality. Because of these cited substantive differences, from the point of view of the taxpayer taxing the transfer of real estate cannot be seen as unjust, because the difference regime cannot be seen to disproportionately take away a good from one subject compared to another subject when, as stated above, both these subjects are not in comparable situations.

57. The foregoing also refutes the petitioner's claim that the tax in question unjustifiably discriminates against direct owners of apartments compared to owners of cooperative apartments. As indicated by the abovementioned position of Judge Zupančič, virtually every legal framework makes distinctions, which implies that it affects somebody negatively. Distinguishing between the transfers of these

two categories of apartments can be accepted, because there is undoubtedly a difference between ownership rights to an apartment and the rights and obligations of a cooperative member. A different framework for different situations is not ruled out in principle. Under judicial decision-making practice, a cooperative apartment can be defined as "an apartment located in a building owned or co-owned by a housing cooperative, which serves to satisfy the housing needs of members of that housing cooperative." The cooperative then rents the cooperative apartments to its members, who can transfer only their shares in the cooperative. The subject of transfer, in the case of an agreement to transfer membership in a housing cooperative, under § 230 of the Commercial Code, is the membership rights and obligations, even though legal practice also uses the term membership share or cooperative share. The main reason for acquiring membership rights and obligations on the part of the transferee will of course be the interest in acquiring the right to rent the cooperative apartment that is connected with that membership. The foregoing indicates that with cooperative apartments there is a different legal relationship than in the case of directly owned apartments. Even though the function of directly owned apartments and cooperative apartments is comparable in practice, upon taking a closer look it must be stated that the positions of an owner of real estate and the "owner" of membership rights are markedly different, which is most clearly visible on the example of the ability to dispose of a thing or with membership rights. In any case, the Constitutional Court's case law has already stated that the two forms are different [cf. judgment of the Constitutional Court file no. Pl. ÚS 42/03 of 28 March 2006 (N 72/40 SbNU 703; 280/2006 Coll.)]. Therefore, a different tax regime is also justified.

IX.
D) Other Objections

58. The question that the Constitutional Court could not avoid is whether the Constitutional Court is competent to review the real estate transfer tax in terms of the function of taxes, which are discussed in specialized economic literature to which the SAC refers in its petition. The SAC's petition indicates that the Constitutional Court should review the unconstitutionality of taxes in terms of three basic functions of taxes and the tax system, the allocative, distributive, and stabilizing function (this typology can be found in many publications – cf. Musgrave, R. A., Musgrave, P. B. Veřejné finance v teorii a praxi. [Public Finance in Theory and Practice] Prague: Management Press, 1994, p. 6n., Kubátová, K., Vítek., L. Daňová politika. [Tax Policy] Prague: CODEX, 1997, p. 12, Kubátová, K. Daňová teorie a politika. [Tax theory and Policy] Prague: ASPI, 2003, p. 19, Peková, J. Veřejné finance, úvod do problematiky. [Public Finance, and Introduction to Issues] Prague: ASPI, 2005, p. 323). However, in the Constitutional Court's opinion reviewing taxes in terms of these criteria is within the competence of the democratically elected legislature. If the Constitutional Court did so, it would enter the field of individual policies whose rationality cannot be reviewed very well in terms of constitutionality. As a rule the Constitutional Court also does not review the effectiveness of taxes, with the exception of those cases where the inefficiency of a particular tax would establish obvious inequality in the tax burden on individual residents. The Constitutional Court is only competent to review whether particular tax measures interfere in an owner's constitutionally guaranteed

property substratum, or whether they can be considered to unjustifiably conflict with the principle of equality, i.e. whether they are arbitrary.

59. In the Constitutional Court's opinion, it is also necessary to consider that all taxes form one system (see points 45 and 51). It follows from that, that if the Constitutional Court wanted to address the question of the legitimacy and rationality of the real estate transfer tax, it would also have to address the connection of the real estate transfer tax with other taxes. If the Constitutional Court decided to speak on the question of whether the real estate transfer tax is an appropriate and necessary element of the tax system, it would authoritatively, but without constitutional justification, enter into a debate where even the specialized economic and legal community is not in agreement, as regards petitions de lege ferenda: e.g., a compendium on the perspectives of tax policy identifies a change in the budgetary determination of the real estate transfer tax as an optimal alternative (Kubátová, K., Vybíhal, V. and collective of authors. Optimalizace daňového systému ČR. [Optimization of the Czech Republic Tax System] Praha: Eurolex Bohemia, 2004, p. 152), i.e., it is preferred to preserve it in a modified version, rather than in the current version, or rather than repealing it completely. If there is no consensus among the experts in the field, it is not the role of the Constitutional Court to speculate on the correct answer. The Constitutional Court is aware of the importance of decision-making on the tax system in the context of competition between political parties, or in the context of the wishes and preferences of members of the political society in relation to the degree of social consideration in state policies, which find their response in election results, and therefore it is necessary to leaves these questions to the consideration of the political majority that was created by elections. Karel Engliš observed that "the fight for political power in the state is a fight for directing the ideal which the state pursues, for directing the public good. To the same degree as the construction of expenses and income are related, the political battle is also a fight for the system of public revenues, primarily the tax system." (Engliš, K. Finanční věda. [Financial Science] Brno: Polygrafie, 1929, p. 101). The Constitutional Court does not intend to enter into this political competition, and is prepared to intervene only if it found tax regulations to be unconstitutional to the extend described above.

60. The Constitutional Court also does not intend to review the consistency of the tax policy with other policies, e.g. housing policy, as the SAC proposed, because it would find itself on the thin ice of economic analyses, not always provable, whose results should be evaluated and political consequences derived, by the democratic legislature, which must whether a tax regulation is appropriate and necessary from that point of view as well. In its petition, the SAC also concluded that the price of real estate increases by the amount of the contested tax, and of course the statistics provided indicated that the relationship between these two variables is not as direct as the SAC finds (point 20). Some authors are even more skeptical about the relationship between the real estate transfer tax and limitation of the housing market, mobility of the population, and other negative social consequences: "It is also not certain that removing this tax will necessarily have an effect on housing policy, that it would fundamentally increase the mobility of the population or indirectly reduce unemployment. (Radvan, M. Zdanění majetku v Evropě. [Taxation of Property in Europe] Prague: C. H. Beck, 2007, p. 353).

Because more exact economic analyses do not exist, and the SAC did not support its petition with them, but only bases its conclusions on a claims that should be "obvious from the nature of the matter" (although any social science explanation should work with complex multi-factor explanations), the Constitutional Court does not intend to authoritatively decide on the connections between the cited variables and perhaps others, when, moreover, the analyses that the Constitutional Court has at its disposal do not indicate that the real estate transfer tax is the main hindrance to the development of the relevant policies, and that its influence on workforce mobility, business, or worsening the social situation would be in any way fundamental (see point 21). The Constitutional Court will not use its evaluation of the suitability of public policy to replace the evaluation of the democratically elected legislature, which has wide scope for discretion in the sphere of public policy, and also bears political responsibility for any failure of its choices. In other words, the legislature may also take irrational steps in the tax sphere, but that is not yet a reason for the Constitutional Court to intervene. The Court will intervene only if property rights are limited in an intensity with a "strangulatory" effect or if there is violation of the principle of equality, in either the accessory (here in connection with other fundamental rights) or non-accessory form.

61. Another group of objections is aimed against the fact that in the case of real estate transfers both administrative acts and the transfer itself are taxed. The solution to this problem must be sought in the aims that these individual payments pursue. The interpretation of the relevant legal norms indicates that the real estate transfer tax and the fee for registration in the real estate register have different functions, because the need to pay a fee for registration in the real estate register comes from the need to cover the expenses connected with the administrative proceedings conducted before the real estate office during decision-making on the registration in the real estate register, whereas the real estate transfer tax pursues balanced tax burdens in terms of the value of the transferred real property.

62. The SAC proposes reviewing taxation in the context of other issues, because, in its opinion, chaining tax obligations must be considered unconstitutional. Another objection that appears in the SAC's petition is directed at the problem of double taxation of the same income in the case of real estate sold within 5 years of acquiring it (point 11), which, according to the SAC, has unconstitutional consequences. The Constitutional Court does not share this opinion. This exception was intended to prevent speculative purchases and sales of apartments in a period of transformation, which was and is accompanied by incompletely worked out housing policy. Moreover, the intensity of tax chaining in the form of unconstitutional consequences is also prevented by an extensive number of exemptions contained in Act no. 586/1992 Coll., on Income Taxes, and the fact that only the profit obtained by selling real estate is taxed, not the entire income. It is also necessary to consider the time factor, because application of the tax obligation occurs with the real estate transfer tax considerably randomly in connection with the sale of real estate by its owner, whereas the real estate tax, in contrast, is a tax that is paid regularly, yearly, which, after subsequent sale of real estate, can not longer be applied in relation to the original owner. Tax chaining cannot be considered unconstitutional if the individual links in the chain do not

necessarily connect to each other, but the application of further taxation is tied to the exercise of ownership through disposition of it.

63. The Constitutional Court states that it did not find grounds to grant the SAC's petition to declare unconstitutional the provisions of the contested Act cited in the introduction, and therefore the petition was denied in the scope of § 8 par. 1 let. a), § 9 par. 1 let. a), § 10 let. a) first sentence and § 15 of Act no. 357/1992 Coll., on Inheritance Tax, Gift Tax, and Real Estate Transfer Tax, in the version in effect before amendment by Act no. 420/2003 Coll., under § 70 par. 2 of the Act on the Constitutional Court, and the rest was denied under § 43 par. 1 let. c) in connection with § 43 par. 2 let. b), as a petition submitted by a person clearly without standing (see point 31).