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## Articles

# Statutory General Anti-Abuse Rule in the Slovak Tax Code: Some Expectations and the Reality of Its Implementation?[1]

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**Abstract:** This article aims towards an analysis of the Slovak Statutory General Anti-Abuse Rule (henceforth GAAR) which entered into force under the initiatives of the EU and OECD on 1 January 2014. The article provides an analysis of the particular construction elements of the implemented GAAR with respect to the European Court of Justice (henceforth ECJ) case law and GAAR legislative practice at EU level, which is seemingly, with regard to the Anti-Tax Avoidance Directive GAAR, unstoppable.

**Keywords:** statutory general anti-abuse rule; tax code in Slovakia; counteracting tax avoidance; implementation of EU initiatives

## 1. Introduction

In recent years, the abuse of tax law has become a topical issue in the European Union. This is clearly demonstrated by the case law of the ECJ, the significance of which has contributed to the creation of the principle of prohibition of the abuse of tax law, and it is convincingly justified by the papers in tax law science.[2] ECJ established the prohibition of the abuse of tax law in both indirect and direct taxation areas by Halifax and Cadbury Schweppes rulings.[3] Some years later, a strong legislative initiative in incorporating statutory GAARs began at EU level.[4] Tax jurisdictions of the Central and Eastern European Countries (henceforth CEE countries) were understandably a rather obvious target: most of them had not contained statutory GAAR provisions in their domestic tax systems before. Neither their judicial GAARs – the prohibition of abuse of tax law doctrines had been developed. Or, at the same time, under the judicial development, the domestic doctrine had to face ECJ's developing prohibition of abuse doctrine in the tax law area.

EU statutory GAARs have the refore played "a model role" by their application in domestic tax systems. However, the way of implementation with regard to the Slovak tax

law is not that obvious, as it will be shown later on. Implementing statutory GAAR without previous experience is rather a serious issue and authors will try to analyse if the Slovak GAAR had been implemented correctly (if not, what would be the way of its implementation). Due to the limited scope of the article, the emphasis will not be fully given to national judicial doctrine of prohibition of tax law abuse. Under the ECJ's case law development, particular construction elements of statutory GAAR will be analysed in detail.

## 2. "EU GAAR" as an Implementation Model

GAAR as a rule devoted to prevention of tax evasions and tax avoidance has been in force in the Slovak Tax Code since 1 January 2014, following international initiatives in tax evasions and tax frauds prevention. Under the Explanatory report to Act no. 435/2013 Coll., the reasons for amendment are represented by:

- measures proposed by the Analysis of the payments for goods, services and other forms of payments made by taxpayers for the benefit of persons established in non-cooperative and off-shore jurisdictions, as well as
- Commission recommendation of 6 December 2012 on aggressive tax planning (C(2012) 8806 final).[5]

Especially the wording of the "EU GAAR" that is included in the Commission's recommendation proved to have a strong influence on the implementation of statutory GAARs within the CEE region. By the wording of legally non-binding recommendation the Slovak law maker had rather promptly transposed the new clause into the Slovak Tax Code. This article is not a comprehensive analysis of the whole abuse of tax law doctrine; attention is devoted only to the analysis of the criteria which had been established by the ECJ taking into account requirements of the statutory GAAR provisions at EU level.

It seems to be clear that "EU GAAR" incorporated in the text of recommendation codifies the formerly developed ECJ doctrine on the prohibition of abuse of tax law.[6] This has already been established in Emsland-Stärke – the case dealing with the refund of agricultural levies – where ECJ for the first time identified abuse of law under a twofold test of objective and subjective element of abuse.[7] The case became enormously influential for the next development, waiting however until 2006 when abuse of tax law in both areas of indirect taxes (Halifax)[8] and direct taxes (Cadbury Schweppes)[9] were confirmed. Landmark cases on the prohibition of the abuse of the tax law both followed a twofold test of objective and subjective element of the abuse of tax law settled by Emsland-Stärke.[10] However, the concept of the prohibition of tax law abuse in the area of direct taxation established by Cadbury Schweppes developed a much narrower line, limiting the concept of abuse only to wholly artificial arrangements.[11] The concept of "artificiality" at EU level, developed by the ECJ found its place in the wording of "EU GAAR" incorporated in the recommendation on aggressive tax planning. EU GAAR was introduced and proposed to be incorporated into national tax systems by means of the following clause: *"An artificial*

*arrangement or an artificial series of arrangements which has been put into place for the essential purpose of avoiding taxation and leads to a tax benefit shall be ignored. National authorities shall treat these arrangements for tax purposes by reference to their economic substance".*[12] Apart from that, the recommendation provides few paragraphs that explain concepts used in the wording of the clause – which constitutes particular elements of tax law abuse. Most importantly, after the implementation of the EU GAAR, objective and subjective elements of the Slovak GAAR in Tax Code will be analysed in the following text.

## 3. Slovak GAAR in Tax Code and Its Application Elements

As mentioned above, apart from the objective and subjective elements which represent the core testing of tax law abuse, other supplementary elements and application problems arise when analysing the wording of the national GAAR. At the very beginning, it is important to stress that GAAR is a new provision without previous experience in the application practice of the Slovak tax law, which is rather supplementing (not replacing) the formerly applied substance over the form rule that has been present and developed within the national case law.[13]

Statutory GAAR has recently became a part of our tax legislation by the following wording: *"A legal action or other facts essential for identification, assessment or collection of a tax without an economic substance and resulting into a purpose-built tax avoidance or acquisition of such tax benefit to which the taxpayer would not be otherwise entitled or resulting into a purpose-built reduction in tax liability shall be disregarded within administration of taxes."* With the next text, particular construction elements will be analysed with respect to the implemented clause.

When analysing Slovak GAAR in Tax Code, which had been implemented under the Commission's recommendation on aggressive tax planning, some differences are already present with regard to the application scope of the implemented provision. Contrary to the EU GAAR that had been adopted in order to counteract aggressive tax planning in the area of direct taxation,[14] the scope of the implemented Slovak GAAR is broader and covers all taxes within our tax system – indirect taxes, direct taxes and local taxes.[15] The issue of the application of GAAR with the other levies/fees that are present in our legal system[16] has not been confirmed yet and is rather the oretical, but in our view it could not be fully excluded. GAAR had been implemented as a rule which is aimed at directing not only taxes, but also tax avoidance cases arising from the whole tax system.

When it comes to the scope of situations in which GAAR should find its application, Slovak GAAR refers to *legal action or other facts,* and it seems that the scope of situations which are mentioned by the EU GAAR overlaps it. However, *a legal action or other facts* seem to be, in the narrower sense, compared to the concept of *arrangement* which for the purposes of the recommendation means *any transaction, scheme, action, operation, agreement, grant, understanding, promise, undertaking or event. An arrangement may comprise more than one step or any part of it.* Even the fact that by the wording of recommendation the arrangement may comprise more than one step or might partly bring

some chaos by interpreting national GAAR. What could be an important moment for the application of GAAR? The verbatim Interpretation of the wording of the Slovak GAAR, the provision in itself shall be applied as soon as there is a legal action or some other fact that fulfils the statutory requirements of the applicable provision. This might rather be an expression of the need to introduce GAAR as an instrument which is applicable to all taxes, not only to tax avoidance schemes in the area of direct taxation that typically consists of more transactions, steps and operations in order to reach the final "tax arrangement". The terminology seems to be somehow confusing, nevertheless legal actions create arrangement(s). The issue is becoming interesting when it comes to the analysis of the objective and subjective testing of the Slovak statutory GAAR.

### 3.1. The Objective Test of the Slovak GAAR

The objective element of the abuse of tax law testing has been present already from Emsland-Stärke where ECJ held that *despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved.*[17] Subsequently, the objective element has been confirmed under actions that resulted in obtaining tax benefit contrary to *the purpose of those provisions* in Halifax.[18] Similarly, in order to find an abusive arrangement under Cadbury Schweppes ruling *the objective pursued by the freedom of the establishment* has not been achieved.[19]

The objective element is specified in the EU GAAR as well. Under paragraph 4.5 of the text of recommendation, *"the purpose of an arrangement or series of arrangements consists in avoiding taxation where, (regardless of any subjective intentions of the taxpayer), it defeats the object, spirit and purpose of the tax provisions that would otherwise apply*". It is the refore clear that the objective element is particularly emphasized by the wording of the above mentioned provision. But the requirement is given rather cumulatively and the objective element, interpreting the provision literally may be present only when the action of the taxpayer is of such kind that it defeats the object, spirit and purpose of the tax provisions that would otherwise apply.[20] Interpretation problems are connected with the fact whether the object, spirit and purpose of the tax provision are of the same meaning or whether this should be examined separately. Lastly, EU GAAR is only a non-binding soft law and member states are free to implement the provision under their domestic interpretation standards, the refore a closer look at the wording of the implemented provision at the issue is needed.

Reading the wording of the Slovak GAAR in Tax Code the very first impression evokes that the objective element has to be deduced since it is not really clear from the wording of the clause. Where is the objective element in the Slovak GAAR? If we interpret the objective element in accordance with the ECJ case law and the EU GAAR, the objective element is actually not explicitly present within the wording of the clause. There is no explicit reference regarding the objective testing neither under the explanatory report with the amending law.[21] The economic substance as an emphasized concept could not represent the objective test, it is rather a subjective criterion that is connected with the issue of artificiality. If we regard the objective test under EU law as a tool of testing

the taxpayer's action against the object, purpose or the spirit of the particular tax provision (law), then such a test is simply not present within the wording of the Slovak GAAR. The provision in itself rather accounts for three statutory alternatives (besides the lack of the economic substance of the legal action or the other fact) if the abuse of tax law shall be confirmed. In order to apply GAAR, *a legal action or other facts without an economic substance* that fulfil one of the three alternatives have to be present. Either the y have to *result in*:

- *a purpose-built tax avoidance or*
- *an acquisition of such tax benefit to which the taxpayer would not be otherwise entitled or*
- *a purpose-built reduction in tax liability.*[22]

An interesting point of these statutory alternatives in order to meet the legislative criteria of abuse is represented by the fact that only one of them mentions directly the obtainment of tax benefit as a substantial element when GAAR should be applied. Seemingly, it looks as if the words' purpose and result have been mixed in implementing the statutory GAAR. However, incorporating the test of "result" is not quite obvious. If there are more results of the particular transaction, which one should be decisive for the application of GAAR? Are non-tax results of importance interpreting the clause? The necessity of "result" in testing abuse brings only more chaos to the interpretation of the provision. After all, at the end of the day, in determining whether an arrangement or series of arrangements has led to a tax benefit, national authorities are invited to compare the amount of tax due by a taxpayer, having regard to those arrangement(s), with the amount that the same taxpayer would owe under the same circumstances in the absence of the arrangement(s).[23] This is in our view the way the result should be understood. However, the wording of GAAR evokes that apart from the unclear objective test, the subjective test plays an important role on the whole in identifying abuse.

### 3.2. The Subjective Test in the Slovak GAAR

Being of equal importance, the subjective test (starting already in Emsland-Stärke) represents besides the objective test the second criterion in identifying abuse. Reliability of the subjective testing had been partially disturbed by opinions of the general advocate in Halifax.[24] Nevertheless, the ECJ had never resigned of finding both elements in order to identify abuse. Under the ECJ doctrine of prohibition of abuse, the subjective test is represented by *the intention of the taxpayer to obtain tax benefit*.[25]

Again, a closer look on how the subjective test is reflected by the wording of the Slovak GAAR is needed. Subjective testing is at EU level terminologically bounded by the concept of artificiality which has been brought to the wording of EU GAAR from the ECJ rulings. It was the ECJ in the first place, who mentioned the concept of (wholly) artificial arrangements, the combat which authorizes the restriction of the freedom of the establishment.[26] The concept of artificiality lies apparently at the heart of the Commission's recommendation on aggressive tax planning. Under par. 4.4 of the recommendation, for

the purposes of EU GAAR an arrangement or a series of arrangements are artificial when it lacks commercial substance.[27] Such an explanation only replaces one ambiguous concept by another one and does not make it clear at all.[28] An ambition to provide some examples of artificiality is rather positive; however, the shortlist might be only seen as a codification of few situations of abusive practices coming from the more developed national judicial doctrines of tax abuse, such as the German or British. A non-binding recommendation left the door open for transposing the subjective testing under the national standards and imaginations of the member states.

If we examine the wording of the Slovak GAAR in detail, there is nothing like an artificiality concept within the GAAR at all. However, apart from fulfilling one of the three statutory alternatives in order to identify abuse, the legal act or some other fact has to lack economic substance. Already from the wording of the clause it is evident that finding "economic substance" is prioritized in order to identify abuse, apart from the cumulative fulfilment of the one of the three above mentioned statutory alternatives. "Searching for" the economic substance of a transaction has a rather long history in our judicial doctrine with respect to the substance over form principle that has been applied in our tax system for a long time. The role of the principle within its meaning was to counteract simulation actions and sham transaction within the tax administration before the adoption of the statutory GAAR. The adoption of the statutory GAAR and a developed ECJ case law on prohibition of abuse rather involved application problems. There is a clear confusion in the contemporary judiciary when it comes to testing the abuse of tax law. Developing case law started to operate not only with finding the objective and subjective element of abuse as it was brought by the ECJ rulings, but also to hold on the finding of economic substance of the transaction.[29] This might create confusion but on the other hand the substance over form principle is still present in the Tax code. After all, the economic substance may be easily found and proved on the value added tax cases, but it has not been tested on corporate tax avoidance cases from the area of direct taxation by courts yet. The finding of the "real" economic substance in such cases might be in our view much more difficult and the economic substance test might become less reliable. Subsequently, the purpose test as a part of subjective testing (or as a separate additional element of finding abuse) is of significant importance by identifying abusive practices as well.

### 3.3. Purpose Test

Purpose test represents one of the most controversial issues when discussing GAARs. The terminological chaos has already been caused by different "intensity" expressions of testing the purpose of arrangements what has been brought by the ECJ. First of all, the essential purpose had been presented by Halifax as a criterion in identifying abuse.[30] After that, things became more complicated under Part Service ruling in which more "levels" of purpose were illustrated.[31] Following the development of ECJ ruling, the expression of the intensity of tested purpose is far from being clear and the ECJ and domestic courts collide amongst many alterations – from the sole purpose, through

principal purpose, one of the principal purposes up to the essential purpose of the arrangement (transaction).

Purpose test is a part of the EU GAAR brought by the Commission's recommendation on aggressive tax planning. Under the meaning of the EU GAAR, the essential purpose of the arrangement (transaction) is relevant. An attempt to clarify "the essential purpose" is subsequently provided by par. 4.6 of the recommendation, under which "for the purposes of point 4.2, *a given purpose is to be considered essential* where any other purpose that is or could be attributed to the arrangement or series of arrangements appears most negligible, in view of all the circumstances of the case". In our view, this merely contributes to understanding of what actually the essential purpose is. It only makes the situation more difficult by identifying more purposes, the negligibility and circumstances of which have to be compared. Apart from that, the wording of the clause of EU GAAR is contrary to the ECJ's case law since par. 4.2, mentions an artificial arrangement or an artificial series of arrangements which has been put into place for *the essential purpose of avoiding taxation.* Consistently with the ECJ's rulings, an essential purpose of arrangement should be manifested by obtaining tax benefit in the first place.

Implementing EU GAAR, the intensity of "purpose testing" had (luckily) not been specified within the wording of the Slovak GAAR.[32] On the other hand, the explanatory report brings more chaos providing the aim of the new clause which is "to enable tax authorities to disregard within administration, e.g. artificial transactions and structures created for the purpose of an undesired tax optimization, even in a case *when such an optimizing is not the sole purpose of the transactions and structures"* (what is actually contrary to the wording of the clause).[33] The wording of the Slovak GAAR rather leaves the door open for tax authorities and courts to interpret and potentially sets limits to the required purpose for abusive arrangements. Purpose test as such is in our view a rather unreliable and questionable criterion that might easily tempt tax authorities and courts to focus on the purpose of the arrangement instead other criteria by identifying abusive practices.[34]

### 3.4. Tax Advantage and Legal Consequences

Tax advantage presents a part of GAAR testing and the EU GAAR provides in this respect under par. 4.7 with a few situations when tax benefit may occur.[35] A demonstrative list of a few situations under which tax benefit occurs is rather promising, suggesting that the idea of the tax benefit is of a broader scope. However, assessment of the situation if arrangement or series of arrangements lead to a tax benefit under par. 4.2 of the recommendation relies on a fiction.[36] In our view, tax advantage represents the result of the arrangement (transaction) and it is up to the tax authority to prove its obtainment. Nevertheless, the finding and confirming of the objective element and subjective element of abuse should be performed in the first place. Otherwise, the fictitious reconstruction of the arrangement without having any specified discretionary limits might unjustifiably strengthen decisive powers of tax authorities. Once the obtainment of tax benefit is confirmed by the tax authority, the taxpayer fails to prove the opposite.

When it comes to legal consequences of the application of GAAR, Slovak GAAR corresponds with the EU GAAR which provides that an abusive arrangement (or series of arrangements) shall be ignored. As it is provided by par. 4.2 of the recommendation, *national authorities shall treat these arrangements for tax purposes by reference to their economic substance,* what brings us back to the substance over form principle applied in our national tax law for decades.

## 4. Implementation of Anti-Tax Avoidance Directive GAAR?

Legislative ambitions of EU law makers of recent years with respect to statutory GAARs have been intensified and manifested by the prompt adoption of Anti-Tax Avoidance Directive (henceforth ATAD).[37] ATAD GAAR represents in itself the ultimate force to adopt statutory GAAR for those member states who have not entered statutory GAAR in their domestic laws by now.[38] GAAR incorporated in the art. 6 of Anti-Tax Avoidance Directive[39] is the measure of "minimum standard" and shall not preclude the application of domestic or agreement-based provisions aimed at safeguarding a higher level of protection for domestic corporate tax bases.[40] As the preamble of the Directive says, it is important to ensure that the GAARs should be applicable in domestic situations, within the Union and vis-à-vis third countries in a uniform manner, so that their scope and results of application in domestic and cross-border situations do not differ.[41] It is outside the scope of the article to bring a closer analysis of the issue, however, ATAD GAAR seems like a follower of previous statutory EU GAARs and ECJ's case law and becomes a "codification mixture" of all.[42] However, the question of application scope makes it different as it was constructed to apply only to corporate taxation. Despite the fact that Slovakia already has GAAR incorporated in its Tax Code, several implementation possibilities could be mentioned. The situation becomes more interesting regarding our tax system compared with member states that lack statutory GAAR in their tax systems (and are obliged to incorporate ATAD GAAR into their domestic tax legislation). As we already have statutory GAAR, the following possibilities could be mentioned:

- incorporation of the ATAD GAAR into the domestic law for all tax purposes with the corresponding repeal of the existing statutory GAAR; or
- implementation of the ATAD GAAR according to the original scope of the Directive and preservation of traditional statutory GAARs for all other taxpayers and tax liabilities; or
- no explicit implementation of the ATAD GAAR in the domestic legislation holding the view that existing GAARs suffice.[43]

It seems likely that none of these three options could be rejected from the very first impression while applying the GAAR concept for the Slovak tax system. However, due to the limited extent of the article the issue of the implementation possibilities of the ATAD GAAR is fully left for another time.

## 5. Conclusion

The concept of statutory GAARs is currently gaining a remarkable attention in tax systems all around the world. Statutory GAARs at EU level became such phenomena that member states had to deal with in the last years. CEE countries are especially targeted by the implementation of GAARs since the statutory (and often judicial) concept of GAARs had been lacking in their tax systems and (or) is just under development. The case of statutory Slovak GAAR that has been implemented under the Commission's recommendation on aggressive tax planning (EU GAAR) shows that the implementation went rather on its own way and the final wording of the GAAR in the Tax code is rather different from what was requested by the EU GAAR and ECJ's case law at the end of the day. In our view, the main issue of the Slovak GAAR is that it totally gives up on objective testing and attracts its attention to "economic substance" testing what is still not really "clearly" developed by courts and only expresses the nature of the substance over form rule applied by tax authorities and courts for decades before.[44] The new clause has however not been tested properly by courts, so the interpretation could only be presumed. The abuse of tax law was judicially confirmed in Slovakia only a few years ago under the decision of the Highest Court[45] issued after answering preliminary ruling by ECJ (Tanoarch).[46] After that, the way of the identification of abuse of tax law by courts is not consistent relying on objective and subjective testing on the one hand, and finding of the economic substance on the another one. Nevertheless, it is, in our view, just the beginning of the journey in which statutory GAARs will play a more important role. However, for next time the way of the implementation should not be underestimated.

## References


1. This paper was written as a partial output of the research project APVV-16-0160: *"Tax evasions and tax avoidance (motivation factors, formation and elimination)",* as well as the output of the project VEGA 1/0846/17: *"Implementation of the initiatives of the EU institutions in the field of direct taxes and indirect taxes and their budgetary law implications".*
2. Rita de la Feria, Prohibition of Abuse of (Community) Law – The Creation of a New General Principle of EC Law Through Tax?, 395 et seq., in *Common Market Law Review*, vol. 45 (2008). https://doi.org/10.2139/ssrn.3475123
3. Wolfgang Schön, Abuse of Rights and European Tax Law, 78 et seq., in *Comparative Perspectives on Revenue Law* (Cambridge, University Press, 2008). https://doi.org/10.1017/CBO9780511585951.006
4. Starting with the first Common Consolidated Corporate Tax Base (henceforth CCCTB) proposal GAAR, followed by a GAAR in financial transaction tax proposal, by the "EU GAAR" represented by the Commission's recommendation on aggressive tax planning, as well as GAARs in direct tax directives, leading subsequently to the last resort – Anti-Tax Avoidance Directive GAAR.
5. For more information see: Anna Románová, The New Anti Abuse Rule in Slovak Tax Law: Strengthening of the Legal Certainty?, 214, in *System of Financial Law (System of Tax Law)* (Brno, Masaryk University, 2015). Similarly: Anna Románová, Karolína Červená, Nová úprava zásady skutočného obsahu právneho úkonu v Daňovom poriadku [The New Regulation of the Principle of Material Content of Legal Act in the Tax Ordinance], 198 et seq., in *Marketing, manažment, obchod a sociálne aspekty podnikania: zborník recenzovaných príspevkov z 2. ročníka medzinárodnej vedeckej konferencie: 23–24 október 2014, Košice [Marketing, Management, Business and Social Aspects of Enterprises: Reviewed Book of Proceedings from the 2. Season of International Scientific Conference: Košice, 2017 October 23–24]* (Košice, Ekonomická Univerzita v Bratislave – Podnikovohospodárska fakulta so sídlom v Košiciach, 2014). Similarly: Miroslav Štrkolec, Fighting Tax Evasion and its Reflection in the Procedural Tax Law, 468 et seq., in *Tax Codes Concepts in the Countries of Central and Eastern Europe*. Similarly: Vladimír Babčák, *Daňové právo na Slovensku [Tax Law in Slovakia], 439 et seq.,* (Bratislava: EPOS, 2015). As well as: Mária Bujňáková, [Fundamentals and Principles of Tax Proceedings], 11, in *Zeszyty Naukowe Universytetu Rzeszowskiego: seria prawnicza [Scientific Writings of the University of Rzeszow: Law Series] vol. 91, no. 18 (2016).*
6. See more: Markus Seiler, *GAARs and Judicial Anti-Avoidance in Germany, the UK and the EU*, 145 et seq., (Vienna, Linde, 2016).
7. C – 110/99.
8. C – 255/02.
9. C – 196/04.
10. According to paragraphs 52 and 53 of Emsland-Stärke ruling, *"a finding of an abuse requires, first, a combination of* ***objective circumstances*** *in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved. It requires, second, a* ***subjective element*** *consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it".*
11. Under Cadbury Schweppes ruling (55 et seq.), restriction of freedom of establishment might be justified only when it is aimed at the preventing of the creation of wholly artificial arrangements intended to escape the national tax normally payable.
12. Par. 4.2 of recommendation, available under http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012H0772&from=EN (accessed 20 June 2017).
13. A principle explicitly incorporated in the provision of § 3 p. 1 of the Tax code that directly stresses that an actual content of the legal action (transaction) over the form should be preferred. See more: Karin Prievozníková, Implementácia zákazu zneužitia práva do daňového poriadku [Implementation of the Prohibition of Abuse of Rights in the Tax Ordinance], 161 et seq., in *Daňové právo vs. daňové podvody a daňové* úniky*: nekonferenčný zborník vedeckých prác. II. diel [Tax Law vs. Tax Fraud and Tax Evasion: Non-conference Book of Scientific Work. II. part.],* (Košice, Univerzita Pavla Jozefa Šafárika v Košiciach, 2015). Also see: Anna Románová, Karolína Červená, Nová úprava zásady skutočného obsahu právneho

úkonu v daňovom poriadku [The New Regulation of the Principle of Material Content of Legal Act in the Tax Ordinance], 189 et seq., in *Marketing, manažment, obchod a sociálne aspekty podnikania: zborník recenzovaných príspevkov z 2. ročníka medzinárodnej vedeckej konferencie: 23–24 október 2014, Košice [Marketing, Management, Business and Social Aspects of Enterprises: Reviewed Book of Proceedings from the 2. Season of International Scientific Conference: Košice, 2014 October 23–24]* (Košice, Ekonomická Univerzita v Bratislave – Podnikovohospodárska fakulta so sídlom v Košiciach, 2014).

14. Par. 1 defining subject matter and the scope of the recommendation.
15. Similarly: Lubica Adame, GAAR in Slovakia, 585, in *GAARs* – A Key Element of Tax Systems in the Post BEPS World (Amsterdam, IBFD, 2016).
16. Such as local fee for municipal waste and minor construction waste and local fee for development under the law no. 582/2004 Coll. Concerning the issue of the local fee see more: Ivana Štieberová, Local Fee for Municipal Waste and Minor Construction Waste in the Light of Legislative Changes, 405 et seq., in *Local Government Financing and European Charter of Local Self-Government* (Warszawa, CeDeWu, 2016). Concerning the issue of the other fee see as well: Adrián Popovič, Reflection on the Local Fee for Development, 57 et seq., in *Local Government Financing and European Charter of Local Self-Government* (Warszawa, CeDeWu, 2016) and Adrián Popovič: Zamyslenie sa nad miestnym poplatkom za rozvoj [Thoughts on Local Fee on Development], 1263 et seq., in *Justičná revue*, vol. 68, n.11 (2016).
17. C – 110/99, p. 52.
18. C – 255/02, p. 74.
19. C – 196/04, p. 64.
20. Markus Seiler, *GAARs and Judicial Anti-Avoidance in Germany, the UK and the EU,* 183 et seq. (Vienna, Linde, 2016).
21. Explanatory report to the law proposal no. 435/2013 Coll. amending the law no. 563/2009 Z. z. on administration of taxes. Available online https://www.nrsr.sk/web/Default.aspx?sid=zakony / zakon&MasterID=4553 (accessed 20 June 2017).
22. Similarly: Anna Románová, The New Anti Abuse Rule in Slovak Tax Law: Strengthening of the Legal Certainty?, 214 et seq., in *System of Financial Law (System of Tax Law)* (Brno, Masaryk university, 2015).
23. Par. 4.7 of the recommendation.
24. As it was provided in opinions of general advocate Maduro in par. 71 of Halifax judgement: *"It is the consideration of the objective purpose of the Community rules and of the activities carried out, and not the subjective intentions of individuals, which, in my view, lies at the heart of the Community law doctrine of abuse*".
25. Par. 53 of C – 110/99, par. 75 of C – 255/02, par. 64 of C – 196/04.
26. Par. 55 of C – 196/04.
27. After that, in determining whether the arrangement or series of arrangements is artificial, national authorities are invited to consider whether the y involve one or more of the situations as provided by the par. 4.4 of the recommendation.
28. Seiler, *supra n. 20*, 204. Similarly: T. Lyons, The Financial Crisis, Tax Avoidance and an EU GAAR, 114, in *British Tax Review*, no. 2 (2013).
29. The identification of the absence of the economic substance had been present in the judgment of the Highest court of Slovak Republic no. 3 Sžf/45/2010 from 2 June 2011.The case dealt with the simple fictitious VAT transactions, where the actual content of transaction has not been found contrary to the formal declarations in order to obtain VAT returns.
30. Par. 75 of C – 255/02. Purpose test has not been specified in Emsland-Stärke ruling at all.
31. Under par. 40 of C – 425/06 a following reference had been made to the court: "...whether the Sixth Directive should be interpreted as meaning that there can be a finding of an abusive practice when the accrual of a tax advantage is ***the principal aim*** of the transaction or the transactions in question, or if such a finding can only be made if the accrual of that tax advantage constitutes ***the sole aim*** pursued, to the exclusion of other economic objectives.

32. The clause provides with its wording only purpose-built tax avoidance and purpose-built reduction of tax liability (by obtaining tax benefit it is rather evident that the purpose has to be present).
33. See more: Románová, *supra n. 22,* at 218.
34. Similarly: Seiler, *supra n. 20*, 212.
35. Under par. 4.7 of the recommendation following situations are mentioned:
    a) an amount is not included in the tax base,
    b) the taxpayer benefits from the deduction,
    c) a loss for tax purposes is incurred,
    d) no withholding tax is due,
    e) foreign tax is offset.
36. National authorities are invited to compare the amount of tax due by a taxpayer, having regard to those arrangement(s), with the amount that the same taxpayer would owe under the same circumstances in the absence of the arrangement(s).
37. Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market. Adoption of the directive represents one of the measures that have been introduced by the European Commission on 28 January 2016 as a part of "Anti-Tax Avoidance Package".
38. For example in the case of the Czech Republic or Croatia.
39. The wording of the ATAD GAAR is the following: *"For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part."*
40. Art. 3 of Directive. See more: Luc De Broe & Dorien Beckers, The General Anti Abuse Rule of the Anti-Tax Avoidance Directive: An Analysis Against the Wider Perspective of the European Court of Justice's Case Law on Abuse of EU Law, 141, in *EC Tax Review,* no. 3 (2017).
41. P. 11 of the preamble to the Directive.
42. Similarly: Broe & Beckers *supra n. 40,* at 139.
43. Andrés Báez Moreno, A pan-European GAAR? Some (un)expected consequences of the proposed EU Tax Avoidance Directive combined with the Dzodzi line of cases, 143 et seq., in *British Tax Review*, no. 2 (2016).
44. Karin Prievozníková, Implementácia zákazu zneužitia práva do daňového poriadku [Implementation of the Prohibition of Abuse of Rights in the Tax Ordinance], 168, in *Daňové právo vs. daňové podvody a daňové* úniky*: nekonferenčný zborník vedeckých prác. II. diel [Tax Law vs. Tax Fraud and Tax Evasion: Non-conference Book of Scientific Work. II. part.]* (Košice, Univerzita Pavla Jozefa Šafárika v Košiciach, 2015). Similarly: Ivana Forraiová, Právne dôsledky zneužívania daňovo-právnych noriem [Legal Consequences of Abusing Tax-Law Norms], 86 et seq., in *Zneužitie a iné formy obchádzania práva [Abuse and Other Forms of Law Avoidance]* (Košice, UPJŠ, 2016). Similarly: Ivana Štieberová, Zneužívanie práva pri uplatňovaní nadmerných odpočtov dane z pridanej hodnoty [Abuse of Law in the Application of Excess VAT Deductions] 305 et seq., in *Zneužitie a iné formy obchádzania práva [Abuse and Other Forms of Law Avoidance]* (Košice, UPJŠ, 2016).
45. Judgment no. 5 Sžf/66/2011. See more: Peter Huba, Jozef Sábo & Miroslav Štrkolec, *Medzinárodné daňové* úniky a *metódy ich predchádzania [International Tax Avoidance and Methods of The ir Prevention],* 146, (Košice, UPJŠ, 2016).
46. C – 504/10 Tanoarch.

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# Tax Procedure Code in the Czech Republic

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**Abstract:** The paper deals with Tax Procedure Code in the Czech Republic. The aim of this paper is to describe the Czech Tax Procedure Code and to present and evaluate its significant possible change. The basic principles of the Czech Tax Procedure Code are set out and the basic structure of the Tax Procedure Code is introduced. The study concludes that the tax procedure has been successfully codified in the Czech Republic. The adoption of Tax Procedure Code is a great achievement and the result of many years of work undertaken to preserve the autonomy of the tax procedure. Then the article is focused on the considered change of Tax Procedure Code related to the principle of tax self-assessment and tax additional self-assessment. It is further concluded that every tax in the broad sense should have a clearly stated model which is applicable for its assessment. Establishing the tax self-assessment and tax additional tax-assessment regime could make the examination stage of tax administration much clearer.

**Keywords:** tax; tax procedure law; tax codification; tax self-assessment

## 1. Introduction

The aim of this paper[1] is to describe the Czech Tax Procedure Code which came into effect in 2011 and to present and evaluate its significant possible change. The substance of this possible change is to introduce the principles of tax self-assessment and tax self-additional-assessment.

The first part is about the recent legal regulation of tax procedure in the Czech Republic. The basic principles on which this legislation rests are set out and the basic structure of the Tax Procedure Code is introduced.

The second chapter is focused on the considered change of Tax Procedure Code. This change deals with the assessment of tax and additional assessment of tax. The tax assessment legislation is not uniform today. The general regulation in the Tax Procedure Code is supplemented by a number of special modifications in individual tax laws. The main principle of tax self-assessment and additional tax self-assessment are described and analysed.

## 2. Recent Tax Procedure Code

Developments in the codification of financial law, i.e. tax procedure law[2] culminated through the adoption of a new act[3] in 2009. The new legislation contained 266 sections and came into effect on January 1, 2011, thus the requirement of *vacatio legis* was fulfilled. Regarding the relationship to the Administrative Procedure Code, the former legislation's principle based on the separation of the two codes has been followed. Section 262 therefore states that "The Administrative Procedure Code shall not apply in tax administration". As regards the application of the provisions of the Tax Procedure Code, the provision 4 states that "the provisions of the Tax Procedure Code shall apply unless another law on tax provides otherwise". This implies that even after the effective date of this Act, procedural provisions contained in other tax laws shall prevail before the procedural provisions of the Tax Procedure Code.

*The Tax Procedure Code embodies a new comprehensive regulation of the tax procedure* and compared to former legislation, contains higher amount of provisions (more than 260) with short paragraphs and sentences and is essentially organized in a systematically new way. The explanatory memorandum to this draft law stated that the aim of the new legislation was to establish a transparent and clear regulation of tax administration with emphasis on reducing the administrative burden and encouraging the use of electronic means for tax administration and communication with taxpayers. Many institutes are adopted from the Act on Administration of Taxes and Charges and the legal text also comprises some ideas from the current case law. The Tax Procedure Code has also introduced a unified terminology for other tax laws.

The Tax Procedure Code *provides for procedural rules in tax administration involving regulation of the actions of tax administrators and the rights and obligations of taxpayers and third parties arising in connection with the administration of taxes.* It also contains provisions concerning the rights and obligations common for special tax laws where it is assumed a minimum number of reasonable derogations from the common provisions due to differences in various types of taxes. Addressed are in particular the consequences of breach of payment. Tax administration is a term that is used in the broadest sense for administration of financial considerations. The Tax Procedure Code specifies tax administration in all of its provisions, it is therefore a procedure (activity) regulated by tax laws which involves the interaction between the tax authorities and other persons and entities involved in tax administration. This process should be directed to meet the basic objective of tax administration, i.e. correct identification and assessment of a tax duty (in the original proceedings) and also ensuring its payment (payment stage of the proceedings). In this regard, the objective of tax administration continues to develop the very meaning of taxes that is to ensure the financing of public needs, although this is not explicitly stated in the Act.

It is therefore essential to ensure the participation of individuals (tax subjects) on the costs necessary for the effective functioning of public bodies and on the provision of public services. Therefore, the main purpose is to carry out the determined payment into the public budget in a manner specified by law. However, achieving this goal shall always be realized in accordance with the law and must be based on the proper application of

the principles of tax administration and of the procedure law. Only when respecting these conditions can the public interest be achieved. The purpose of tax administration is conceived more generally and more balanced, as the initial criterion is not the elimination of possible tax evasion, but the correct identification and assessment of a tax duty and ensuring its payment. The main activity of tax administrators lies in the initiation and conduct of proceedings (especially tax procedure), through which a tax is transformed into the income of a public budget, and further in the application of procedural steps provided by the Tax Procedure Code (as for example local inquiry, tax audit etc.). However, in tax administration other persons and entities also participate, especially third persons that significantly affect the final result and success of the realization of the state's entitlement to collect taxes.

Tax administration is based on the principle that the tax subjects carry the burden of persuasion regarding their tax duties. The taxpayers shall cooperate in determining their tax duty, in particular by stating properly the amount of tax that must be paid. The tax authority then revises this statement resulting in the acceptance of the alleged amount of tax determination and issuing a declaratory tax assessment or in a decision consisting in a change of the amount stated so that it corresponds to the tax duty specified by law.

The Tax Procedure Code is divided into titles, chapters, divisions and comprises six parts. Part One (sections 1 to 9) entitled Introductory Provisions is divided into two titles and contains the purpose of the Act and a list of elementary principles applied in tax administration. Part Two (sections 10 to 124a) entitled General Part on Tax Administration contains general provisions applicable to various proceedings within tax administration, in particular tax procedure. Part Three (sections 125 to 245) entitled Special Part on Tax Administration contains mainly special provisions on various types of proceedings, payment of taxes, tax administration and legal succession and relation to insolvency proceedings. Part Four (sections 246 to 254) entitled Consequences of Breach in Tax Administration contains a comprehensive set of sanctions, both for the breach of duties of financial character, and for the breach of duties of non-financial character. Part Five (sections 254a to 265) contains common, enabling, transitional and final provisions and Part Six (section 266) entitled Effect contains a provision on the entry into force of the Tax Procedure Code which shall be January 1, 2011.

The Tax Procedure Code is structured in a way that each phase of the tax procedure (from registration through assessment of the tax to its payment, collection and its enforcement) appears in Part Three. To these multiple stages of tax procedure, it is necessary to add explanatory definitions and general provisions in Part One and Two of the Tax Procedure Code. In case of breach of obligations arising from tax administration, it is necessary to focus on Part Four.

The process of creation of tax laws reflects, among other things, also the fact that tax law is a branch of law, which, by its nature, is subject to economic development and considerable political influences. The consequence of this influence results in remarkably numerous changes in tax laws. However, it should not be this way regarding the tax procedure law, more specifically the procedural legislation, which sets rules for the administration of taxes.

The Tax Procedure Code as a codified tax procedure legislation that provides for transparent procedural rules in the framework of tax administration with emphasis on reducing the administrative burden and enhancing the use of electronic means in tax administration and communication with taxpayers. The adoption of the Tax Procedure Code has ensured a higher legal certainty for taxpayers and tax administrators, as it responds to the experience gained from the problems of interpretation relating to the former Act on Administration of Taxes and Charges.

This legislation constitutes a comprehensible text based on unified terminology and systemic links, which can be considered a primary requirement for any legislative text in general. The desired characteristics of a new legislation can be summarized as a long-term stability and resistance to changes in the related legislation, its universality, i.e. it is applicable to all cases of the same nature with no formal barriers to overcome unwanted fragmented legislation. This requires the wording to be general enough (instead of being casuistic), to be ready to resolve specific situations and to accommodate the application of specific terms within its structure. Only the legislation that is based on a combination of general principles (whether expressed or not) and specific rules has the potential to deal with situations that were not anticipated in advance. These general requirements meet in the Tax Procedure Code in the framework of the tax procedure because it provides a stable legal environment even in a situation where there are significant changes in substantive tax laws and in the organizational structure. This Code has proven its qualities even in an ever closer involvement of the economy and public administration into international structures which occurs in the area of taxation.

It is possible to state that *in the Czech Republic the tax procedure has been successfully codified*. The adoption of Tax Procedure Code is a great achievement and result of many years of work undertaken to preserve the autonomy of the tax procedure.[4]

## 3. Considered Change of Tax Procedure Code

There is an emerging tendency in relation to the suggested amendment to the Tax Procedure Code to speak about a tax self-assessment and an additional tax self-assessment (together also sometimes called "tax self-determination"), which should replace or enhance the current general regime of a tax assessment under the Tax Procedure Code. A project called "tax self-assessment" is currently being conducted by the Ministry of Finance, which focuses on both topics mentioned above. This project's realization is one of the Ministry of Finance's[5] priorities, and this priority exceeds the current election period because it is a long-term project.[6]

The general regime of the tax assessment is stated in Title IV of Part Three of the Tax Procedure Code which is called "Examination procedure". The substance of an examination procedure is a correct tax assessment, i.e. its assessment and additional assessment. The tax shall be assessed on the basis of a tax return, tax report or ex officio according to Section 139, Par. 1 of the Tax Procedure Code. Nevertheless, this general provision is not applicable to all payments that are recognised as taxes under the Tax Procedure Code, but it applies only to payments that also bring the duty to submit a tax return.

It is in the nature of things that this general provision cannot be applied to payments that are administered in a form of divided administration, because there is no examination stage. These payments are regulated only by provisions concerning the payment stage, because there is no examination stage for this type of payments, e.g. fines imposed during an administrative procedure.

Furthermore, a number of different payments (or considerations) exist that are not subjects to submitting the tax return, and a tax administrator does not determine the value of a tax duty. These payments (e.g. some administrative fees) are only paid and no formal act is conducted (e.g. issuing a decision) by a tax administrator. The value of such payments (in most cases) is stipulated by a statute or a calculation of its value, and is not complex. Some of these considerations are assessed by a tax administrator if the payment is not completed during a set period of time (e.g. municipal fees). Finally, it is necessary to add that it has already been possible to find a solution in the legal order taxes, which are administered using the tax self-assessment and additional self-assessment. Specifically, they are value added taxes in a one-stop shop regime and gambling tax.[7]

It can be concluded that the legal regulation of tax assessment is not uniformed. Even though there is one general legal regime for tax assessment, this regime is not applicable for all taxes (and fees) and there are different tax assessment regimes (or provisions under which no tax assessment is conducted at all).

Taxes in the broad sense may be divided into: taxes assessed by a tax administrator based on a submitted tax return or ex officio; taxes self-assessed and additionally self-assessed based on a submitted tax return or an additional tax return; taxes that are only paid and a tax administrator assesses them in case they are not paid in time; taxes that are only paid and a tax administrator never assesses them and payments, administered through divided administration that are imposed during an administrative procedure or other procedure and/or are assessed without further action based on provisions of the law.

It is obvious that different regimes of tax assessment exist but the general regime is only the regime stipulated in the Tax Procedure Code, which is the tax assessment by a tax administrator based on a submitted tax return or assessed ex officio. It is a question whether there should exist more different general regimes. We think it should be so because the general legal regulation should explicitly cover every basic form of the tax assessment. This should be one of the goals of the self-assessment project.

Essentially, the tax self-assessment and the additional tax self-assessment regime is a tax assessment without further action (ex lege) based on a submitted (eventually not submitted) tax return or based on a carried out (eventually not carried out) identified payment.

While in the general tax assessment regime under the Tax Procedure Code based on the submitted tax return there is the tax assessment by a decision issued by a tax administrator (i.e. payment assessment, additional payment assessment, eventually collective prescriptive list), there is no payment assessment or additional payment assessment issued by a tax administrator in the tax self-assessment and self-additional assessment regime and a tax is assessed independently based on legal rules (therefore the name self-assessment and self-additional assessment).

The tax self-assessment and tax self-additional assessment regime based on tax return (regardless whether in a form of acts of commission or omission) means that the tax is:

- self-assessed based on a submitted or not submitted regular tax return,
- additionally self-assessed based on a submitted additional tax return,
- additionally assessed ex officio by a tax administrator based on a tax investigation (esp. tax control).

A declared goal of the tax self-assessment and additional self-assessment is to lower the tax administrator's administrative burden, because a tax administrator will not be forced to issue payment assessments or additional payment assessments that are only filed and tax payers are not notified.[8]

For tax subjects the regime of tax self-assessment and tax additional self-assessment may in relation to taxes with returnable tax deductions (e.g. excessive deduction under value added tax) bring an advantage. When a tax subject submits regular or additional tax return in which he/she will state a tax deduction, the tax deduction in the stated amount will be self-assessed or additionally self-assessed after a period stated by a statute. In relation to this, a legal regulation is considered that would allow a tax administrator to withhold only a disputed part of such tax deduction. Nowadays, a tax administrator withholds a whole tax deduction even though only a part of the tax deduction is disputed. This leads to a situation where the tax subject cannot deal with money that rightfully belongs to him/her. This situation is unsustainable and it is necessary to change it.

A further undisputable advantage of tax self-assessment and additional self-assessment regime is that a tax subject will know what his/her last tax duty was. In a general regime under the Tax Procedure Code the tax subject in most cases does not know whether a tax administrator has assessed his/her tax duty based on a submitted tax return. A tax subject therefore does not know what his/her last tax duty was and it is unclear for him/her whether an additional tax return will lead to an additional tax assessment or whether it will serve only as a basis for tax assessment.

As stated above, taxes in the broad sense can be, based on the form of their examination stage, divided into:

a) *taxes that are assessed by a tax administrator* based on a submitted tax return or ex officio,
b) *taxes that are self-assessed* or additionally self-assessed based on a submitted tax return, eventually on an additionally submitted tax return,
c) *taxes that are only paid and a tax administrator assesses them in a case that they are not paid* in time,
d) *taxes that are only paid and a tax administrator never assesses them,*
e) *financial considerations* that are administered through a divided administration regime which are imposed during an administrative procedure or in a different procedure and/or they are imposed without any formal act (ex lege).

Taxes referred to in point a) would be assessed as nowadays. It is a recent general regime of the tax assessment under the Tax Procedure Code. In such a case tax would be assessed on

the basis of a submitted tax return or ex officio. Moreover, additional tax assessment would be done on the basis of a submitted additional tax return or ex officio.

We believe that a model referred to in point a) could be supplemented by a model described under point b) if there was not the tax subject's duty to submit a tax return but tax would be assessed, eventually additionally assessed ex officio by a tax administrator. This model could be used in cases when the tax administrator has enough information necessary for tax assessment so that it is not necessary to have a tax subject submit a tax return but with a complicated calculation the tax administrator has to calculate the value of a tax duty and to assess such a tax.

Models described under points c) and d) are models that use self-assessment and additional self-assessment of tax. Either based on a tax return or based on a payment. The self-assessment and self-additional assessment of tax based on a tax return [letter c)] are currently used in the legal order for value added tax and for gambling tax. The tax self-assessment and additional self-assessment based on a payment [letter d)] would be explicitly stated and it would be used for various taxes in the broad sense which already use this model. Examples of this are especially administrative and municipal fees but also other fees sui generis (e.g. fees in atomic act).

For pecuniary considerations administered through a divided administration, a current legal regulation would still exist. These considerations are imposed during an administrative procedure or other procedure, eventually they stem directly from the law. Therefore, the tax assessment regime under the Tax Procedure Code is not applicable for these considerations.

Every tax in the broad sense should have a clearly stated model which is applicable for its assessment. Establishing the tax self-assessment and tax additional tax-assessment regime could make the examination stage of tax administration much clearer.

## 4. Conclusion

The aim of this paper was to describe the Czech Tax Procedure Code and to present and evaluate its possible significant change.

First and foremost, according to recent legal regulation of tax procedure in the Czech Republic, the basic principles of the Czech Tax Procedure Code were set out and the basic structure of the Tax Procedure Code was introduced. It was concluded that the tax procedure has been successfully codified in the Czech Republic. *The adoption of the Tax Procedure Code is a great achievement and the result of many years of work undertaken to preserve the autonomy of the tax procedure.* The second chapter was focused on the considered change of the Tax Procedure Code. The substance of this possible change is to introduce and analyse the principle of tax self-assessment and tax additional self-assessment. Benefits resulting from these new principles were presented.

As a conclusion, *it can be stated, that every tax in the broad sense should have had a clearly stated model which is applicable for its assessment.* Establishing the tax self-assessment and tax additional tax-assessment regime could make the examination stage of the tax administration much clearer.

## References

1. This paper has been elaborated within the programme *"PROGRES Q02 – Publicization of Law in the European and International Context"* which is realized in 2017 at the Faculty of Law of Charles University.
2. Milan Bakeš, Marie Karfíková, Petr Kotáb & Hana Marková (eds.), *Finanční právo. 6. Upravené vydání. [Financial Law. 6th Edited Issue]*, 255 (Praha, C. H. Beck, 2012).
3. Act no. 280/2009 Coll., Tax Procedure Code.
4. Alena Kohoutková, *Co zůstal daňový* řád *dlužen? [What the Tax Code Still Owes]* (Systém ASPI – ASPI_ ID LIT34542CZ, Wolters Kluwer, 2017) (accessed 19 August 2017).
5. *Ministerstvo financí představilo své* úspěchy *a plány. [The Ministry Introduced Its Successes and Plans],* http://mfcr.cz/cs/aktualne/v-mediich/2016/mf-predstavilo-sve-uspechy-a-plany-24535 (accessed 19 August 2017).
6. *Alena Schillerová o prioritách a plánech* v *oblasti daně. [Alena Schollerová About the Priorities and Plans on the Field of Taxes],* http://mfcr.cz/cs/aktualne/v-mediich/2016/alena-schillerova-o-prioritach-a-planech-23809 (accessed 19 August 2017).
7. See Act No. 187/2016 Coll., On Gambling Tax, as amended by Act No. 298/2016 Coll.
8. *Vládní návrh zákona o dani* z *hazardních her [Government Draft Regulation on Gambling Tax],* 53, http://psp.cz/doc/00/11/55/00115509.pdf (accessed 19 August 2017).

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# The Fundamentals of Monetary Fulfilment in Tax Administration

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**Abstract**: In this article, the author discusses a brief definition of principles and fundamentals from a theoretical and legal point of view. Based on this division, the author characterizes and mentions principles and fundamentals that are applicable in a tax administration. The paper differentiates between the basic fundamentals of tax administration and the further fundamentals of tax administration. In this respect the author draws attention to the unnamed further fundamentals of tax administration which, until now, were not named by the theory of law. In the article the author mentions these fundamentals, analyses them and finds their application in tax administration. In particular, the author refers to the fundamentals of monetary fulfilment in tax administration, the definition of which can serve the better understanding of the nature of tax evasions and the improvement of the combat against them.

**Keywords:** fundamentals; principles of tax administration; monetary purpose of taxes

## 1. Introduction

One of the basic tasks of the state is undoubtedly the collectivization of funds and their concentration in the state budget and other public budgets. Generally, taxes are the most important forms of these funds and belong to the most important revenues of the state and other public bodies. Their strict observance and application is also a guarantee of a smooth implementation of tax administration and limitation of tax evasions. For this reason, it is necessary to pay attention to the examination of tax administration and to its individual principles and fundamentals, whose application in the implementation of tax administration ultimately determines its character.

It cannot be overlooked that the consistent differentiation of principles and fundamentals of tax administration has its own justification and they form a comprehensive complex together that can legitimately achieve the filling of public budgets while the basic rights of obligated persons are respected. This system of principles and fundamentals of tax administration forms a set of general rules in which the rights and obligations of the subjects of tax legislative relations in the implementation of tax administration are specified. Within the realization of tax administration it is necessary to intervene in the ownership of obliged person,[2] in order to achieve the monetary income. Therefore, it is important to preserve the applicability of the principles and fundamentals of tax administration as more general rules of conduct. On the other hand, the fiscal interest of the state and other bodies governed by public law is prioritized when implementing tax administration.

The fulfilment of tax administration in the Slovak Republic is characterized and limited by principles and fundamentals which are established in the Tax Procedure Code.[3] These principles and fundamentals interact with principles and fundamentals of the so called *good governance* and with principles and fundamentals which result only indirectly from the Tax Procedure Code and from special legislations applicable within the realization of tax administration.

## 2. Principles and Fundamentals from the Theory of Law

At the beginning of this subchapter, it should be noted that the distinction between principle and fundamentals is mainly a local, i.e. Slovak and Czech phenomena.[4] There is no such distinction in foreign terminology and in most foreign legal systems only one of these two terms is used to express their content.[5]

The concept of a principle comes from a Latin word "principium", which literally expresses a basis, a beginning, origin, source or base.[6] Although the modern literature of the theory of law deemed to correspond to the term fundamentals, it should be noted that in this sense a principle is understood as an original rule which constitutes a basis for other rules.[7] The principle can, therefore, be characterized generally as the fundamental and leading idea, which is valid without residue, which does not allow any exception and, for this reason, has an absolute determination. In short, the principle can be defined as a certain absolute value that appears in the human society as normal, automatic, natural or still present.[8]

The fundamentals develop, elaborate and specify the principle in a certain way. By the realization of the fundamentals in real situations, the content of an individual principle is fulfilled. The fundamentals are defined by a normative, more specific and more concrete content; however, it still has a considerably high level of abstraction. In the case of legal fundamentals it should be noted that they are a relatively general rule of law which is aimed in a specific branch of law. On the other hand, the legal principle, in the broadest sense of the word, constitutes an absolutely general rule which is applied without exception and is irrevocable.[9] Since the fundamentals elaborate and specify the principle in some way, it is possible to agree with opinions of members of the scientific community, who characterize the fundamentals in their procedural sense in particular.[10] It is important not to neglect the fact that the fundamentals, in contrast to the principle, allow the exception of their application, which means that their implementation in certain legal situations is omitted and for a particular case is not taken into account.[11]

The fundamentals are therefore the rule by which it is possible to set the boundaries, within which the rights are realised and the duties are enforced resulting for the subjects of the legal relations from a precept of law in individual branches of law. They constitute a guiding rule for these entities and by observing this rule the intended purpose of the legal process is fulfilled in accordance with the applicable legal principles of the legally consistent state of the democratic establishment as the bearer of the highest possible values of contemporary society.

## 3. Principles and Fundamentals of Tax Administration[12]

In the current legislation we do not find any mention about the principles of tax administration. § 3 of the Tax Procedure Code sets out *only* the "Basic Principles of Tax Administration". However, on the basis of the initial theoretical and legal definition of the problem of principles and fundamentals and on the basis of the nature of the principles defined in the Tax Procedure Code, it is not possible to agree with the inclusion of these principles among the fundamentals. In this context, it is possible to identify the following principles of tax administration that have been reflected in tax legislation:

- the principle of legality and the principle of legal protection,[13]
- the principle of uniformity of process decision making of a competent authority in tax administration.[14]

The fundamentals of tax administration[15] can be characterized as the *rules* under which tax administrators and persons participating in the tax administration are required to proceed and these rules have significant impact on the correct tax enquiry and securing of tax settlement. In § 3 of the Tax Procedure Code *the basic fundamentals of tax administration* are directly embedded and *expressis verbis* stated but besides these fundamentals it is possible to infer the existence of *further fundamentals of tax administration* by interpretation from the text of the Tax Procedure Code and special tax legislations. Consequently, it is possible to divide the fundamentals of tax administration into:

1. *the basic fundamentals of tax administration,* namely:
   a. the fundamentals of close cooperation between the tax administrator, taxable entities and other persons and the instructional fundamentals;
   b. the fundamentals of speed, the fundamentals of economy (of process economics) and the fundamentals of proportionality;
   c. the fundamentals of the free evaluation of evidence;
   d. the non-public fundamentals, the fundamentals of tax secrecy and the fundamentals of the protection of personal data;
   e. the fundamentals of officiality and the fundamentals of disposition;
   f. the fundamentals of informality and the fundamentals of the prohibition of purposeful abuse of rights;[16]
   g. the fundamentals of the same procedural status of tax entities;
   h. the fundamentals of unified procedure of the tax administrator in deciding factually identical cases (the fundamentals of legitimate expectation).
2. *the further fundamentals of tax administration* to which belong:
   a. the fundamentals of time-barred effect of passage of time;[17]
   b. the fundamentals of monetary fulfilment;
   c. the fundamentals of non-retroactivity;
   d. the fundamentals of material (objective) truth;
   e. the fundamentals of two-stage procedure;
   f. the fundamentals of process in a written form and the fundamentals of the use of a state language.

## 4. The Fundamentals of Monetary Fulfilment in Tax Administration

In the context of the in-depth examination of the issue of the form of fulfilment of a tax and a fee we can point at the fundamentals applied within the realization of tax administration which has been nameless up to now. In particular, it is *the fundamentals of monetary fulfilment in tax administration.* For the purpose of their content definition, it can be concluded that these fundamentals are characterized by the fade-over of the procedural legislation of tax administration with its substantive legislation.

In order to characterise the fundamentals of monetary fulfilment in tax administration it is necessary to point out the theoretical legal definition of the tax and the fee. The tax can be generally characterized as a monetary fulfilment which has a non-refundable and non-equivalent character, is established by law or in pursuance of the law in order to reimburse national or other public needs, and is generally paid in a pre-determined amount and maturity period.[18] On the contrary, it is possible to theoretically define the fee as the monetary fulfilment which is constituted by law or in pursuance of the law that is collected for a particular activity by the state or other public entities performed from the initiative or in the interest of the payer in a predetermined maturity period and in most cases in a predetermined amount. Therefore, it is a monetary payment which is of (partially) equivalent character.[19] It may be summarized that despite the differences of these two types of fulfilments, it is always the fulfilment with the monetary character.

To confirm this we can present the ruling of the Supreme Court of the Slovak Republic,[20] in which it is pointed out that we consider the tax as a payment for the benefit of the state under the law without the guaranty that the state grants any equivalent to the taxable entities for this payment. On the basis of the analysis of the word *"payment"* used in the ruling in question, it can be concluded that it is only one way in understanding it in modern economy, so it is the monetary payment, respectively the payment realized through money.

In the historical context, it can be noted that the tax liability could also be fulfilled by natural fulfilment, respectively in the form of special services. However, this is no longer the case because the fulfilment of the tax liability, if any, is required in the form of money. In the light of the above mentioned, it is possible to reflect on how these fundamentals will be followed, for example, if the taxable entity will not have enough money to pay the tax. For this case, § 98 (1) of the Tax Procedure Code allows the tax administrator to obtain unpaid taxes within the realization of the tax enforcement procedure, in which he can perform tax enforcement by wage deductions and deductions from other incomes, attachment of the claim, the sale of movable objects, withdrawing cash and other things which are not sold, the sale of securities, the sale of a real estate, the sale of an enterprise or parts of it, attachment of the ownership rights related to the business share of a partner in a business company. By these methods of tax enforcement fulfilment the tax administrator is entitled to achieve the monetary fulfilment of an own tax liability of taxable entity.

The status of money within the realization of tax administration is also emphasized when the height of the own tax liability of taxable entity is determined. In this context, the attention can be drawn, for example, to determining the income of taxable entity, which has a non-monetary nature and subject to taxation. In order to determine the own tax

liability of taxable entity, the non-monetary income which is not legally tax-exempted must be valued at the usual price at the place and time of the fulfilment, according to its type and quality or its condition and rate of wear, and then it is necessary to add the monetary income. From the point of view of determining the tax base, income is not just the monetary income, but also the non-monetary income, which has to be valued in money.[21]

These fundamentals could be applied also to the implementation of the *fiscal function of tax law* as one of the most important functions of this legal sector. The meaning of the fiscal function of tax law is to ensure sufficient satisfaction of the fiscal interests of the state, respectively of the territorial self-government. This could be achieved by obtaining enough money, which as such is the revenue of public budgets, be it the state budget or the municipality budget. After obtaining sufficient funds, the fiscal function of tax law can be fully realized, regarding the implementation of the public expenditure budget in particular. The above mentioned statement means, that in order for the fiscal function of tax law to be able to manifest at all, the fundamentals of monetary fulfilment must also influence the concrete tax-law relations. This co-operation of the fundamentals will ensure that money inflows into the public budgets are secured and guaranteed.

If the monetary fulfilment plays such an important role in fulfilling the obligations of a taxable entity, why is this rule not *a principle of monetary fulfilment?* This question can be answered simply. Both the own tax liability and the monetary fulfilment entitlement, which fulfilment is conditional by the payment in the form of money, constitute only one part of the system of authorizations and obligations, the fulfilment of which is not obligatory in the form of monetary fulfilment. In this context, it may be noted that the following authorizations and obligations are the object of tax law:

1. *own tax liability* – it is the obligation of a taxable entity, which is expressed by the monetary payment. This obligation is fulfilled at the moment of the transfer of funds from the private-law sphere to the public-law sphere without providing an adequate consideration, respectively services. Even in this case, however, the fundamentals of monetary fulfilment do not always apply, because the tax liability could be equal to zero, respectively the taxable entity may report a tax loss and fulfil his obligation even if he does not pay any money to the tax administrator;
2. *other obligations* – in this case, different non-monetary obligations exist, both on the part of the taxable entity and on the part of the tax administrator or other persons involved in the tax administration. These include, for example, the duty of the taxable entity to cooperate closely with the tax administrator in tax administration, the obligation to file a tax return and so on. On the other hand, the tax administrator has the obligation to initiate tax proceedings also on his own initiative if there are fulfilled legal conditions for the creation or existence of a tax claim, etc.;
3. *authorization for monetary fulfilment* – for instance, the taxable entity is entitled to a tax refund or return of tax overpayment and, for example, the tax administrator is entitled to charge the tax by using tools or a right to recover tax arrears;
4. *authorization of non-monetary nature* – for instance, on the side of the taxable entity it is the right to represent and be represented in the tax administration, the right to appeal and so on. In the case of the tax administrator, there is the right

to carry out a tax audit and a local enquiry, the right to extend the time limit and to forgive a delay, etc.[22]

On the basis of the above mentioned, it can be stated that the fundamentals of monetary fulfilment should be included among the *further fundamentals of tax administration.* Although the form of natural fulfilment, respectively the form of performance of specific services is not possible as the method of payment of the tax or the fee under the current legislation, the fulfilment of the obligation of a monetary nature has to be seen in the broader context of the system of authorizations and obligations existing in the tax administration, which create the content of the object of tax law itself. In this sense, the fundamentals of monetary fulfilment acts within the realisation of tax administration.

## 5. Conclusion

In the Slovak legislation, the Slovak legislator omitted to establish certain fundamentals, the existence and applicability of which have a significant impact on the lawfulness of tax administration in its broadest sense. Their importance is notable even though they stem from the Tax Procedure Code only indirectly. It can be assumed that the pronouncement of the provisions of individual fundamentals would have a positive effect, in particular, on simplifying the interpretation of tax legislation, which would have an undoubtedly positive influence on the tax discipline of the taxable entity. Therefore, the legislature should, in the future, strive for a possible legal enshrinement of the fundamentals of tax administration, the existence of which is not explicitly laid down in the Tax Procedure Code, but are applied within the realization and implementation of the tax administration.

This article pointed at the existence of the unnamed fundamentals of tax administration until now, namely the *fundamentals of monetary fulfilment in tax administration.* In this context, it should be noted that not even scientists of tax law can ignore this issue and treat it as closed. As the tax administration changes, the applicability of its individual fundamentals changes too. These aspects have to be continuously examined, it is needed to specify their content and update the scope and conditions of the application of each of the fundamentals. For this reason, the role and work of individual authors of tax-law science is getting more important.

The principles and fundamentals of tax administration should be the guiding line not only for authorized entities in tax relations but also for compulsory subjects. *It may be presumed that if the existence of these principles and fundamentals were avoided, on the one hand, the tax administrator would slip into undesirable need to act against the taxable entity, and on the other hand, the taxable entity would not know how to defend himself against such a conduct, which breaches the law.* Respecting the principles and fundamentals of tax administration creates a guarantee for the protection of a liable person and the entitled person which can be invoked in the absence of legal proceedings of any of the subjects of tax relations. At the same time, it cannot be forgotten that they serve all the entities of these relationships as a material correction by which they assess their further actions in the application and fulfilment of their rights and duties under the tax law.

## References

1. This article represents a partial output of the grant project VEGA no. 1/0846/17 *"Implementation of the initiatives of the EU institutions in the field of direct taxes and indirect taxes and their budgetary law implications"* and VVGS no. 2016-284 *"EU initiatives to prevent tax evasions and their implementation into national law".*
2. See also František Bonk, *Fiskálny záujem štátu verzus* dĺžka trvania daňovej kontroly *[Fiscal Interest of the State Versus Duration of Tax Control],* 40–52, in *Dny práva 2015 – Days of Law 2015: V.* část: *Dohled, dozor, kontrola ve veřejné finanční činnosti [V. Part: Supervision, Verification, Control of Public Financial Activities],* (Brno, Masarykova Univerzita, 2016), and also Ivana Štieberová, Selected Aspects of Local Enquiry in the Slovak Republic, 451–463, in *Tax Codes Concepts in the Countries of Central and Eastern Europe* (Bialystok, Temida 2, 2016).
3. The basic legislation which regulates tax administration in the Slovak Republic is the Act no. 563/2009 Coll. on Tax Administration (Tax Procedure Code) and on amendments and supplements to certain laws in the wording of later regulations. Hereinafter as "Tax Procedure Code".
4. Vladimír Babčák, as the principal representative of the School of Tax Law in Košice introduces the idea of division of the principles and fundamentals in tax administration in his research works. For more details see Vladimír Babčák, *Daňové právo na Slovensku [Tax Law in Slovakia],* 422–447, (Bratislava, EPOS, 2015).
5. Tomáš Mészáros, Kukučie vajcia...alebo zásady, ktoré nie sú princípmi [Cuckoo's Eggs...or Principles that Are Not Principles], 533, in *Základné zásady v rozhodovacej činnosti súdnej moci: Zborník vedeckých prác doktorandov [Basic Principles in the Judicial Activity: Proceedings of Doctoral Students]* (Košice, Univerzita Pavla Jozefa Šafárika v Košiciach, 2014).
6. Petr Čechák, Principy jako řídící ideje právní regulace [Principles as Leading Ideas of Legal Regulation], 13, in *Principy a zásady v právu – teorie a praxe. Sborník z konference Olomoucké debaty mladých právníků [Principles and Fundamentals in Law – Theory and Prax. Conference Proceedings Olomouc Debates of Young Lawyers],* (Praha, Leges, 2010).
7. Jan Pinz, Právní principy, zásady a legis ratio [Legal Principles, Fundamentals and Ratio Legis], 110, in *Právní principy - kolokvium [Legal Principles – Colloquium]* (Pelhřimov, Vydavatelství 999, 1999).
8. Jana Dostálová, Jaromír Harvánek, Právní principy a procesní zásady. [Legal Principles and Procedural Fundamentals], 106, in *Právní principy – kolokvium [Legal Principles – Colloquium]* (Pelhřimov, Vydavatelství 999, 1999).
9. Jan Pinz, *supra n. 7,* at 114–115.
10. For more details see Vladimír Babčák *supra n. 4,* at 423 or Martin Vernarský, *Procesné zásady daňového konania. 2. aktualizované* a doplnené vydanie [Procedural Principles of Tax Proceedings. 2nd Actualized and Amended Issue], 20–24, (Košice, Univerzita Pavla Jozefa Šafárika v Košiciach, 2013).
11. Adrián Popovič, The Rule of Time-Barred Effect of Passage of Time in Tax Administration in the Slovak Republic, 385, in *Tax Codes Concepts in the Countries of Central and Eastern Europe* (Bialystok, Temida 2, 2016).
12. Mária Bujňáková, Zásady a princípy daňového konania [Fundamentals and Principles of Tax Proceedings], 11–23, in *Zeszyty Naukowe Universytetu Rzeszowskiego: seria prawnicza [Scientific Writings of the University of Rzeszow: Law Series],* vol. 91, no. 18 (2016). https://doi.org/10.15584/znurprawo.2016.18.1
13. See Mária Bujňáková, Právne princípy v tvorbe a výklade daňového práva [Legal Principles in Legislation and Application of Tax Law], 282–286, in *Právny obzor: teoretický časopis pre otázky štátu a práva,* vol. 86, no. 3 (2003); Adrián Popovič, Princíp zákonnosti a princíp právnej ochrany v správe daní [The Principle of Legality and the Principle of Legal Protection in Tax Administration], 129–137, in *Teória a prax verejnej správy: recenzovaný zborník príspevkov z vedeckej konferencie doktorandov: 17.2.2016, Košice [Theory and Praxis of Public Administration: Reviewed Book of Proceedings from Scientific Doctoral Conference: Košice, 17 February 2016],* (Košice, Univerzita Pavla Jozefa Šafárika v Košiciach, 2016); Jozef Sábo, *Princípy daňového práva a daňová politika štátu - alebo existuje hranica, ktorá sa nesmie prekročiť? [Principles of Tax Law and*

*State Tax Policies – or Does a Border Exist Which Must Not Be Crossed?]*, 376–384, *Poňatie a charakter práva: zborník príspevkov z medzinárodnej vedeckej konferencie: 27. február 2014, Bratislava [Idea and Character of Law: Book of Proceedings from International Scientific Doctoral Conference: Bratislava, 27 February 2014]* (Bratislava, SAP – Slovak Academic Press, 2014); Miroslav Štrkolec, Zákonnosť ako princíp (zásada) daňového konania [Legality as a Tax Procedure Principle], 277–287, in *Humanum,* vol. 4, no. 1 (2010).

14. Vladimír Babčák, K problematike princípov a zásad daňového konania [On the Issue of Principles and Fundamentals in Tax Procedure], 13–25, in *Acta Oeconomica Cassoviensia No 5*. (Košice, Podnikovohospodárska fakulta v Košiciach, 2001).
15. See also Anna Románová, Vybrané zásady daňového konania tak, ako ich nepoznali klasické rozprávky [Selected Principles of Tax Procedures, as they Are not Known in Classical Fairy Tales], 25–32, in *Acta Iuridica Olomoucensia* (vol. 7, no. 1, 2012); Anna Románová, Karolína Červená, Nová úprava zásady skutočného obsahu právneho úkonu v daňovom poriadku [The New Regulation of the Principle of Material Content of Legal Act in the Tax Ordinance], 198–203, in *Marketing, manažment, obchod a sociálne aspekty podnikania: zborník recenzovaných príspevkov z 2. ročníka medzinárodnej vedeckej konferencie: 23. – 24. október 2014, Košice [Marketing, Management, Business and Social Aspects of Enterprises: Reviewed Book of Proceedings from the 2. Season of International Scientific Conference: Košice, 23–24 October 2014]* (Košice, Ekonomická univerzita v Bratislave – Podnikovohospodárska fakulta so sídlom v Košiciach, 2014).
16. See Karin Prievozníková, Implementácia zákazu zneužitia práva do daňového poriadku [Implementation of the Prohibition of Abuse of Rights in the Tax Ordinance], 161–168, in *Daňové právo vs. daňové podvody a daňové úniky: nekonferenčný zborník vedeckých prác. II. diel [Tax Law vs. Tax Fraud and Tax Evasion: Non-conference Book of Scientific Work. II. part.]* (Košice, Univerzita Pavla Jozefa Šafárika v Košiciach, 2015).
17. See Adrián Popovič, The Rule of Time-Barred Effect of Passage of Time in the Tax Administration of the Slovak Republic, 383–397, in *Tax Codes Concepts in the Countries of Central and Eastern Europe* (Bialystok, Temida 2, 2016).
18. Vladimír Babčák, *Slovenské daňové právo [Slovak Tax Law],* 25 (Bratislava, EPOS, 2012).
19. Babčák, *supra n. 4*, at 24.
20. Judgment of the Supreme Court of the Slovak Republic of 28 February 2005, sp. zn. 2 Sž-o-KS 56/04.
21. Sergej Kohout, Vecné plnenie v daňovom konaní [Material Fulfillment in Tax Procedure], 42–43, in *Justičná revue,* vol. 48, no. 2 (1996).
22. See Babčák, *supra n. 4*, 66–68.

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## Case Studies

# New Elements in the Tax Control in Hungary

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**Abstract:** The system-wide regulation of taxes in Hungary clearly represents the lawmakers' constant strive for making the law up-to-date. Currently, Hungary has approximately 60 types of taxes or fees, and it is a huge challenge to fulfill tax policy aims in order to make the regulation suitable for all of them. In recent years, tax authorities – given by the possibilities of the regulation – have introduced numerous, specific tax control methods, while some of these provide interesting legal solutions, but more importantly several of them have significant impact on taxpayers. The study introduces applicational experiences with some of these.

**Keywords:** administrative control; tax control; on-line cash register; road-trade control system; value added tax; tax rate

## 1. Online Cash Registers

Pursuant to paragraphs 159 and 166 of Act CXXVII of 2007 on Value Added Tax (hereinafter VAT Act), taxpayers are obliged to give invoice or bill in case of selling of goods or provision of services. The latter one can only be applied if, based on law, the taxpayer is not obliged to give invoice. Based on the tax authority's controlling experiences, several defaults and misuses have happened in connection with the obligation of providing invoice and bill, hence, the investigation of connected regulation has become actual.

In government decision No. 1457/2012 (X. 19.) on tasks connected to measures increasing the balance of the budget, the government decided to investigate and prepare the connection of cash registers with the national tax authority. As its result, the parliament modified the VAT Act with Act CCVIII of 2012 on certain acts' connection to the preparation of the central financial act as well as its modification with other purposes, supplementing the VAT Act with a new paragraph – 178. (1a) – making it possible to create such a law which could prescribe that the operation of cash registers serving to issue invoice should be controlled by the state tax authority through its communication device and system. Government resolution No. 1059/2013 (II. 13.) on the introduction of cash registers that feature an online data connection with the National Tax and Customs Administration Office regulated the introduction of new cash registers. The obligatory starting day of their application was May 1, 2013, while the sanction free use of traditional cash registers' was allowed until June 30, 2013.

However, due to the emerging technical difficulties, the deadline was extended[1] until September 1, 2013. Requirements connected to new cash registers were laid down in the Decree of the Minister of National Economy 48/2013 (XI. 15.). The peculiarity of cash registers and the system lies in the fact that certain taxpayers (such as retailers, pharmacies, caterers, travel agencies, repairmen, etc.) can only fulfill their invoicing obligation using online cash registers.

Online cash registers basically consist of two main parts. One of them looks like and functions as a traditional cash register, the other one is a so called fiscal control unit (furthermore referred to as FCU). Simultaneously with the printing of invoices, FCU records the data on them in an electronic diary and those data can be directly controlled and accessed by the tax authority anytime with the assistance of online connection – without the permission and knowledge of the taxpayers. At least one time a day, FCU shuts the electronic diary, provides it with electronic signature and through online connection, sends it to a server being under the commission of the National Tax and Customs Administration Office. Based on Act XCII of 2003 on the Order of Taxation, this information can be used by the tax authority for the controlling of tax payers' taxation obligations. Through a communication device and system (online system), the tax authority also has the technical and legal possibility to regularly, or even occasionally control the operation of cash registers serving the compliance with issuing invoice. For instance, the tax authority is obliged to supervise the fulfilling of invoicing obligation via an inspector doing mystery shopping in an exact time announced beforehand, without the inspector revealing him/herself after the transaction.

Of course, the database created during the operation of the system is or will be able to analyze and compare the tax payers' activity in certain periods. Such as the reasons someone has had significantly less income in the same period of the previous year compared to the period after the introduction of the cash registers.

Whether the results of the introduction can already be seen is a further question to ask. It seems that the answer is yes. According to the Minister for National Economy's statement[2] given on the 7th of March 2015, more than 180, 000 retailers used cash registers in 2014, and companies operating in the trade industry declared 250 billion HUF more VAT than the year before. Due to the success of online cash registers, this year the government would make their usage obligatory in the service sector as well. For instance, from 1 January 2017 taxi drivers, car repair shops and parts traders, plastic surgeons, dance clubs, discos, laundries, gyms are also obliged to supply the sales data to the NAV via the Automated Surveillance Unit (ASU).

Besides the on-line cash registers, currently three linked systems help to discover VAT fraud in Hungary. By detecting money's route through bank transfer investigation, the goods' movement with the help of EPRTCS system and with itemized VAT declaration invoices these can be investigated.

## 2. The Electronic Public Road Trade Control System (EPRTCS)[3]

In harmony with the VAT directive, Hungary does not levy sales tax in case of goods' sale within the Community and outside the Community.[4] However, it ensures the deduction and reclaim of VAT[5] in these cases, too. The Schengen Agreement (14 June 1985) abolished inner boarders between member states, which, in case of community sale and purchase, made it almost uncontrollable for the Hungarian tax authority to control whether goods really enter the territory of the country or they leave it, or even whether it is a real business or not.

In case of community purchase of goods and goods import it is a further question whether they announce goods' entrance at the tax authority (customs authority) and coincidentally they fulfill their VAT declaration and payment obligation or not; or they sell or circulate goods without taxation, causing damages to the budget. The lower domestic sales price without the higher VAT creates a significant competitive disadvantage for fair tax payers.

The phenomenon's legal background can be found in the norms of the European Union. Article 168(a) of the VAT Directive 2006/112 makes it possible that if goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State he carries out these transactions, to deduct the following from the VAT which he is liable to pay: the VAT due or paid in that Member State in respect of the supplies of goods or services to him, carried out or to be carried out by another taxable person. This regulation not requiring other certificate but an invoice provided a huge opportunity for tax dodgers, making it possible to deduct or even reclaim the extremely high 27% of VAT after fictive businesses.

At first, the Hungarian state saw the solution to this problem in the increase of investigations and the coherent regulation of investigation practice with directives. In 2012, however, this controlling practice of the tax authority and court rulings accepting this method mostly proved to be contrary to the law of the European Union according to the Court of Justice of the European Union. Rulings made in the combined cases of C-80/11 and C-142/11 on June 21, 2012 (ruling of combined cases of Mahageben and David) and case No. C-324/11 (Tóth case) on 6 September 2012 pointed out that the practice of case law and the tax authority need to be investigated as it is not the tax payer but the tax office who on the basis of objective evidence, has to prove that the taxable concerned knew, or ought to have known, that the transaction taken as a legal basis for the deduction was connected with fraud committed by the issuer of the invoice or by another trader acting earlier in the chain of supply.

Custom borders between member states, the lack of investigation that used to be applied there and the two conclusions described above greatly obstruct the customs authority's successful and effective procedure; hence, the Hungarian state tried to move forward with the formation of a new control system called EPRTCS in order to formalize the informal economy and control VAT deductions and reclaims. The system was launched on 1 January 2015.

The system aims at enabling the tax authority to follow products and goods' route, hence ensuring that common charges connected to them are properly paid and/or that

VAT is legally deducted. Furthermore, the system is also an adequate tool for observing food-safety rules.

In Hungary, public road carriers shall pay fee for the usage of motorways, dual carriageways and main roads. Cameras of the control system (HU-GO) formed by Act LXVII of 2013 on the mileage-dependent toll payable for the use of motorways, dual carriageways and main roads are adequate for the controlling of goods' transportation as well, hence, only the already given technical background had to be connected with the adequate legal tool.

According to the regulation: product sale, product purchase and other product movement carried out by vehicles subject to road toll payment and done by public road transportation can exclusively be completed by tax payers having EPRTCS number. Furthermore, EPRTCS number also needs to be claimed if so called risky goods are transported by vehicles not subject to road toll payment. In order to get EPRTCS number, the tax payer has to make an announcement on the electronic site of EPRTCS. In doing so, the consignor's data (name, tax ID), the consignee's data (name, tax ID), as well as other data determined in the ministerial regulation issued for the implementation of the act has to be announced at the National Tax and Customs Authority (hereinafter "NTCA" or "tax authority"). These contain information referring to that sales quantity of goods being in the possession of the tax payer that can only be transported with a document authentically proving the goods' origin. Moreover, NTCA can oblige the consignee, the recipient, the consignor and the transporter of goods for a declaration. Furthermore, if risk factors justify – except livestock and fast decaying goods – NTCA may also apply authority lock on the means of transport in order to ensure the identification of the goods.

Detailed rules regarding the operation of EPRTCS included in Regulation No. 5/2015 (II. 27.) NGM of the Minister of National Economy (hereinafter "R.") on the operation of the Electronic Public Road Trade Control System.

The scope of R. covers product purchase or other imports from other member states of the European Union for domestic purposes within the Community transported by vehicles subject to road toll payment and done by public transportation; product sale from inland to other member states of the European Union or export with other purposes; furthermore, the sale of VAT taxable product as first taxable domestic sale if it is not for and end-user inland. Public road transportation – be that either transportation of own goods or goods' transit for another party – with a few exceptions can only be carried out with having EPRTCS number[6] (in order to determine the EPRTCS number, tax payers shall make and electronic announcement at the tax authority).

In the announcement a lot of information needs to be brought to the attention of the tax authority, with which legislators aim at the smooth identification of products and subjects participating in the transportation, however, excessive administration is not incentive for tax payers. The most significant data to be announced are data of the consignor and the recipient, place and time of loading and unloading, registration number of the transporting vehicle, determination of products connected to the EPRTCS number, reason for public road transportation (product sale, purchase, etc.). In case of

purchase and selling of the so called dangerous products (which I am going to mention later on) net price of goods also needs to be provided.

For tax payers included in the database and for tax payers free from public debt, R. makes it possible to make a simplified data content announcement compared to the above mentioned,[7] if their annual income exceeded 50 billion HUF and their tax number has not been previously suspended by the tax authority, and if the goods in question is not dangerous.

In case of goods' purchase or import with other aims within the Community from a consignor's address found in another member state of the European Union to an inland recipient's address, the recipient is obliged to announce the data. From an inland consignor's address to a recipient in another member state of the European Union, involving freight road transport with the aim of selling or other aims, the consignor has to announce the data. In case of product selling with freight transportation service from an inland consignor's address to an inland recipient's address, announcement obligation is the obligation of the consignor. If non-dangerous products are transported or get transported by the consignee, the announcement obligation is the task of the consignee.

Of course, tax payers obliged to declare should also announce changes and modification at the tax authority. Based on their announcement, the tax authority sends the EPRTCS number valid only for 15 days to the announcer via the electronic page of EPRTCS.

As I have already mentioned it above, certain goods are exempt from the obligation of data submission. R. lists general and individual exemptions. Regarding general exemptions, we can mention subjective and objective ones. Hence, military, law enforcement, disaster control services, foreign armed forces, vehicles transporting humanitarian relief supplies and transportation connected to international treaties and reciprocity do not fall under the effect of the system.

As to objective exemptions, it has to be mentioned transportation of such goods that are ensured anyway, i.e. goods requiring permission or declaration or goods which are under customs control. Hence, we can include excise goods, waste, goods requiring metal trade permission, pills for human usage or postal deliveries here.

In order to unburden everyday goods transportation, smaller amount, non-dangerous goods are also free from the effect of EPRTCS. Non-dangerous goods if their common gross weight does not exceed 2500 kilograms and their common non-taxed value does not exceed 5 million HUF do not need to be declared when they are carried from the same consignor to the same recipient in the same vehicle subject to road toll payment in one transportation. Those dangerous goods are also exempted from the announcement obligation that are transported from the same consignor to the same recipient in the same vehicle subject to road toll payment in one transport if their total gross weight does not exceed 500 kilograms and their common non-taxed value does not exceed 1 million HUF.

However, the obligation of daily declaration may be an exaggerated burden on certain tax payers. Therefore, there is a possibility for an individual exemption as well, if the tax payer's production organization peculiarities justify this and the inland loading address as well as the inland offloading address' distance (recipient) is maximum 20 kilometers.

Regarding the transportation and announcement of risky goods, R. determines different rules than the ones referring to general goods. The circle of dangerous goods is determined in the Regulation of the Ministry for National Economy (NGM) No 51/2014. (XII. 1.) on determining risky products related to the operation of the Electronic Public Road Trade Control System. Basically, we can determine risky goods as goods that are hard or impossible to individually identify as they are generally transported in bulks. This goes hand in hand with the possibility that tax payers may use the same cargo continuously, for instance for the certification of selling within the Community. Risky products can be risky food such as various types of meat, vegetables, greases, oils, sugars or other products such as building materials, lubricants, clothes, shoes.

As a basic rule, for the EPRTCS number of risky food, tax payers shall have a so called "FELIR" identification number registered at the Information System of the National Food Chain Safety Office, and in case of product purchase from the Community, the first Hungarian place of storage has to be announced as well. Moreover, tax payers shall also provide risk guarantee in case of every dangerous product. The amount of security has to reach 15 % of the net value of risky products registered in EPRTCS.

The guarantee can be accomplished via a transaction to a separated deposit account, or can be undertaken by a financial institution, cash flow institution, investment corporation, through guarantee registered at the national tax and customs authority. If tax payers can be found in the tax authority's qualified database or are included in the database for taxpayers free of public debt and the tax number of whom has not been suspended, they do not have to give guarantee.

The new system could not be effective enough without sanctions adjusted to it. As a sanction regarding the omission of the obligatory announcement or having it done with fictional content, it is determined that in this case goods shall be deemed of unconfirmed origin, upon which a default penalty amounting up to 40% of the value of the unreported goods may be imposed and The National Tax and Customs Administration may seize the goods to the extent of the amount of the default penalty or affix an official seal on each piece.

However, the system was introduced in January 2015, the relevant ministry declared that they would not levy penalty until the 28th of February for those breaking the rules, hence, we can say that the system has only been operating since the 1st of March 2015. At the time of the publication only two months passed since the 1st of March but some achievements of EPRTCS can already be seen. These are primarily connected to the exposure of food supply of unconfirmed origin which are mostly products arriving from abroad. In these cases, foreign transporters ignorance can also be the reason for the discovered disorders.

40, 000 clients have required 1,5 million EPRTCS number until the 20th of March and this number was more than 113, 500 at the beginning of April. Within the frame of the effective guarantee provision, clients paid 1,026 billion HUF, which amount reached 2,134 billion HUF until the 7th of April, furthermore, bank guarantee in the amount of 827,978 HUF was also paid by tax payers in the framework of their guarantee provision obligation.[8]

Controlling also led to great achievements as within one month the budget grew by 1,5 billion HUF only because of the tax authority's public road controlling has been activated in the framework of the EPRTCS system. The tax authority controlled 7502 cargos of which 283 ended up in the confiscation of chattel because of irregularities. The estimated value of chattels was almost 1 billion HUF. Besides, more than 0,5 billion HUF tax debit was paid by tax payers in cash in 1303 cases[9].

However, not everyone was satisfied with the introduction of this system. Most of them disapprove administrative obligations, guarantee obligations and the competitive disadvantage caused by these. They believed that as a result of these, Hungarian tax payers have a serious disadvantage on the market compared to enterprises not coming within the scope of the system.[10]

## 3. Expansion of Reverse VAT Taxation

Reverse taxation is significant in the fight against tax fraud as with its assistance, the state can achieve that pre-levied tax is paid before its deduction, reclaim. In branches where subcontractors did not get the counter-value of selling or service done by them, reverse taxation can especially be important, as these subcontractors were obliged to pay the tax in these cases as well. However, reverse taxation levies this burden on the tax payer customer, sub-contractors do not need to finance the amount of tax. At the same time, reverse taxation is also advantageous for the treasury as the possibility that the client main contractor deducts VAT without the issuer of the invoice has paid it, was abolished.

Member states may not only broaden the scope of reverse taxation based on cases listed in the current VAT directive or based on derogation lasting for years but they may do so in frames of more flexible QRM that is, quick reaction mechanism procedure against VAT fraud. At the same time, this taxation method is not practical to be introduced widely as during this it is only the end user (as the last subject of production and purchase procedure) who pays tax into the central budget; the latter means significant risk for the state, with special regards to certain probable end user misuses.

Hungary has applied the partial reverse taxation of VAT since the 1st of January 2006. At first, it was applied to constructing-assembling services, property businesses, waste trade and selling of pledges, then the scope was constantly widened from the 1st of July 2012 until the summer of 2014 by certain grain and protein plants. Later, the Council of the European Union with regards to Council directive 2013/43/EU amending Directive 2006/112/EC on the common system of value added tax, as regards an optional and temporary application of the reverse charge mechanism in relation to supplies of certain goods and services susceptible to fraud made it possible for member states to apply reverse taxation in case of grains and oily seeds until the 31st of December 2018.

In 2013, the Hungarian state had planned on introducing reverse taxation on pork as well but it was not allowed according to the European Committee's report of 19 March 2013. Furthermore, on the 17th of December 2013 and repeatedly in April 2014, the Committee refused the Hungarian petition on introducing reverse taxation in sugar

trade having various fictive businesses. Among others, this lack of success created basis ground for the introduction of the EPRTCS system.

Utilizing its possibility provided by the European Union, with Act XXXIII of 2014 on the modification of certain financial acts, the Hungarian state expanded reverse taxation on temporary employment, employment through school cooperatives, various metals, wastes, debris, recovered paper or cardboard, glass jars, glass waste, plastic waste, chips, used or new rags, ropes, used batteries, batteries, etc. the sale of property collateral, the sale of 100,000 HUF assets, the sale of greenhouse gas emission allowances, as well as on certain steel industry products from the 1st of January 2015 until the 31st of December 2018.

## 4. Application of Lower Tax Rate

A further tool against tax fraud could be if states terminated the trade interest of people committing tax fraud. One of its methods is the application of significantly lower VAT than the average. As I have previously mentioned, the average degree of VAT is 27% in Hungary, which is considered significantly high worldwide. On one hand, it provides high income for the state, on the other hand, it urges tax payers for misuses and frauds.

One type of misuse can be found in the avoidance of community and import goods' VAT, thus goods imported to Hungary can be sold 27% cheaper than goods sold regularly, decreasing competitiveness by that. The other form of fraud is connected to fictive VAT deductions and reclaims. It can be attractive for tax payers that this way they can get sources from the state via VAT reclaim after invoices with unrealistic content and especially with reclaims.

Realizing all these, there is a significant need from the Hungarian traders' part that legislators shall expand the circle of goods and services having the lowest, 5% VAT. Therefore, medicines and other health products, services were supplemented by the circle of pork and half-pork, cattle, goat, sheep and their meat. They are going to further extend the scope of goods and services with 5% VAT rate by pork meat, immobile possessions like flats to 150 $m^2$, and family houses to 300 $m^2$ from 2016, chicken meat, egg and milk from 2017, hence assisting Hungarian traders and because of the expected lower price, consumers, as well.

## 5. Tax Traffipax

One of the most recent and most interesting tax control methods applied by the Hungarian Tax Administration since the spring of 2017 is the so called "Tax Traffipax" (the term Traffipax is used in Hungary to describe traffic enforcement equipment, or in other words speedcams used by the police during roadside checks), during which the NTCA publicizes it's inspection sites on its website beforehand. In this manner, the taxpayers are able to follow the way of controls; they are able to prepare themselves for the inspection(s) as well.

The first thought seems to suggest, that this prior publication undermines the effectiveness of control, but the results so far are showing quite the opposite. Firstly: despite the fact of prior knowledge about the inspection, in 20–40% of the cases there were deficiencies found. Secondly (and more importantly): during the "tax traffipax", taxpayers almost always show up revenue growth during the announced period. For instance, during an inspection day on the 10th of March in the Budapest Grand Bazaar (a large marketplace), the average turnover growth for a taxpayer was above 40% (!) compared to the previous year. In this way the amount of revenue hidden revenues can be deducted – which in connection with the on-line cash registers can provide useful statistical data about the proportion of avowed and hidden revenues.

## 6. Conclusion

The basic aim of the Hungarian fiscal and tax policy is to ensure that the public revenues are met accordingly and in this way the Hungarian regulation and the activities of the NTCA are also subordinate to this purpose. Based on the fact that the Hungarian system of taxes is quite complex, flexible (and therefore rather volatile from a taxpayer's point of view) it is quite probable, that new types of controls, or normative solutions will emerge in the upcoming years. In my short study, I tried to point out the practice of tax controls and inspections: how and with what means are taxpayers "engaged" more efficiently.

## References

1. Government resolution No. 1315/2013. (VI. 12.) amending Government resolution No. 1059/2013. (II. 13) specifying the installation schedule of the online enabled cash registers to be connected to the system of the National Tax and Customs Administration Office.
2. www.kormany.hu/hu/nemzetgazdasagi-miniszterium/hirek (accessed 6 April 2017).
3. See further László Pardavi, New Tools against VAT Fraud in Hungary, 113–124, in Vladimír Babčák, Anna Románová & Ivana Vojníková (eds.), *Tax Law vs. Tax Frauds and Tax Evasion II.* (Košice, Pavol Jozef Safarik University, 2015).
4. VAT Act 89 §, 98 §.
5. VAT ACT Chapter VII.
6. EPRTCS number identifies that product unit which is transported by the same vehicle from one consignor to one consignee on a given route. R. 15 §.
7. Only the data of the consignor and the consignee, and the registration number of the transporting vehicle shall be announced.
8. http://logisztika.com/a-nav-tajekoztaton-mutatta-be-az-ekaer-eredmenyeit/ (accessed 6 April 2017).
9. http://portfolio.hu/gazdasag/adozas/itt_a_kormany_csodafegyverenek_elso_eredmenye.212769.html (accessed 6 April 2017).
10. The German–Hungarian Chamber of Commerce and Industry was concerned that the system significantly risks the competitiveness of every affected Hungarian enterprise. "The system can lead to serious defaults in the already existing transportation and production procedures, it imposes huge administrative burden on enterprises and has significant data protection risk that may endanger trade competitiveness." http://nol.hu/gazdasag/a-kmara-szerint-kart-okoz-az-ekaer-1511393 (accessed 6 April 2017).

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# The Limit of Tax Audit and Its Impact on the Status of Taxable Entities[1]

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**Abstract:** Tax audit is a significant control mechanism nowadays, particularly in the context of increasing tax evasion and tax fraud. Taxable entities are obliged to tolerate the performing of tax audit for a certain statutory period. But what if the tax audit exceeds this statutory time limit? What impact does it have on the status of the taxable entity? Regarding the length of the tax audit, we will deal with the impact of the interest on value added tax refund on the status of the taxable entity. Will this interest contribute to its improvement?

**Keywords:** tax law; tax audit; length of tax audit; interest on value added tax refund

## 1. A Few Notes on Tax Audit for Introduction

Nowadays, especially with regard to increasing tax evasion and tax fraud[2] it is of outmost importance to apply different control mechanisms provided by law. Such a significant control mechanism[3] in our legal system is tax audit. It is one of the most important activities of the tax authority in tax administration. The tax audit is namely an important procedural tool that allows the tax administrator to provide a realistic picture of how people abide tax law provisions, how they are implemented and applied in tax practice. In general, tax audit serves to find out or verify facts decisive for the correct tax determination or compliance with provisions of special regulations.

The importance of tax audit for the tax administration derives in particular from the fact that in the Slovak Republic (hereinafter 'SR') taxable entities apply self-application in the area of tax law. In relation to the collection of tax this means that it is the taxable entity himself who should assess his tax obligation. The taxable entity is the person who is obliged to calculate, voluntarily declare the amount and pay the tax himself. If law transfers responsibility for determining the taxable entity's own tax obligation to himself, it is logical that it also seeks to ensure effective control mechanisms for such a tax calculation in order to impose on the taxable entity the highest possible care, honesty and integrity in the calculations of his own tax obligation.[4]

The tax audit is characterised by the fact that it has such immediate and long-term contact between a tax administrator and an inspected taxable entity as in any other procedural act. Each side protects and asserts its interests. A tax administrator enforces the fiscal interests of the state or municipality and the taxable entity tries to minimize his own tax burden and thus pay the lowest tax possible, of course in accordance with the law. In addition, the tax administrator has a superior position in relation to the taxable entity.

All these lead to the need of regulating mutual rights and obligations in terms of/as regards these subjects, in particular to regulate the tax audit procedure of the tax administrator.[5]

The tax audit, as an important tool for effective tax collection is in particular a support institute that has several functions. Like any kind of control, the tax audit also has a cognitive function, whose purpose is to identify the actual facts and a comparative function, which serves to compare and evaluate the factual situation of the tax subject with the conditions that assumes the applicable tax law.

One of the basic and important functions is the preventive function. Effective tax collection is relatively closely related to the issue of tax morality, thus to the access of the taxable entity in compliance with tax laws and paying taxes itself, because taxable entities are basically not controlled in the fulfilment of obligations, such as bookkeeping, filing tax returns, reports, control statements and so on, and the control of filed documents by the tax administrator is usually only formal. And here, the potential possibility to carry out the tax audit by a tax administrator with consequent possibility of the additional assessing of tax or a tax difference against the assessed tax in assessment proceedings is a tool that could indirectly force taxable entities to comply with the tax laws. Thus, the existence of a tax audit institute serves to discourage taxable entities from socially undesirable behaviour in the form of concealing taxable income, distorting or overstating the amount of tax expenses and other illegal practices.[6] Some authors also describe other functions of tax audit, such as elimination, inspection or protective function and others.[7]

In connection with the afore mentioned issue of tax morality, a serious problem of tax audit is in looking at taxable entities for its effectiveness. Complaints about tax inspectors who sometimes try to find even the slightest mistake in the tax records of taxable entities became relatively significant and also the fact that they do not try to fight large taxable entities.[8] It is quite well described by E. Burák in his article where he writes that there is a certain parallelism in the world and so in the Slovak case, where "tax officials are charging small money, but big money (billions) of the state escapes – oftentimes – unfortunately, through visible channels that have long been known as public secrets."[9] The tax audit creates respect, fear, even stress amongst taxable entities. It is perceived as a big risk because all taxable entities may be mistaken. If irregularities are detected during the tax audit, there is not only an additional assessing of tax, but also it means imposing appropriate sanctions (fines, penalties) on the taxable entity.[10]

At present, the tax audit procedure is regulated in the Slovak legal order in Act no. 563/2009 Coll. on Tax Administration (Tax Procedure Code) and on amendments and supplements to certain laws in the wording of later regulations (hereinafter 'Tax Procedure Code'), namely in Article 44 and the following articles.

The main objective of tax audit is expressed in Art. 44, par. 1 of the Tax Procedure Code and is to find out or verify various facts that are important for correct tax determination or compliance with provisions of special regulations, such as Income Tax Act, Value Added Tax Act and individual acts about excise duties. Tax audit shall be performed in the extent which is necessarily important for achieving its purpose,[11] either directly with the taxable entity or at another place required by the purpose of the tax audit.

Based on the above, especially with regard to the self-application of tax law, it is clear that the regulation of control mechanisms, which is also the tax audit, is necessary in our legal order. Taxable entities are obliged to tolerate tax audit for a certain statutory period. But what if tax audit exceeds this statutory time limit? What impact does it have on the status of a taxable entity? The problem arises, in particular, when the payment of the taxable entity's funds, such as excess deduction of value added tax (hereinafter 'VAT'), depends on the termination of the tax audit, which is legally carried out but takes longer than usual and it is concluded that the taxable entity has requested the payment of the funds legally. Precisely in the context of tax audit being performed to verify rightfulness of the claim to refund an excessive VAT deduction or its part, a problem arises. Therefore, following the decision of the Court of Justice of the European Union (hereinafter 'the EU') of October 21, 2015 in case C-120/15 Kovozber, "default interest relating to the refund of excess VAT has been incorporated into our legal system since January 1". In this article we will also deal with the fact when the taxable entity is entitled to claim interest on VAT refund and how it is regulated in our legal system.

## 2. The Length of the Tax Audit – Is There a Limit?

After carrying out all the necessary acts and evidence during the tax audit, the tax administrator's employee shall make a protocol of the tax audit containing the findings of the tax audit, including the assessment of evidence. So a tax audit is terminated by the delivery of the tax audit protocol, the delivery of the notification on tax determination by using tools, or the day of the expiry of the claim for refund of excess VAT deduction under the VAT Act.

In connection with the termination of the tax audit, the Tax Procedure Code also regulates in its provisions the deadline for completing the tax audit, which is one year at most from the date of its initiation. This time period is available to the tax administrator regardless of whether he is carrying out the tax audit of a small enterprise or a large enterprise, whether it is an undertaking which exclusively carries out domestic supplies of goods and services or it is a taxable entity who predominantly supplies the goods and services to other states. In case of the tax audit of foreign related persons which determinate their tax base pursuant to the Income Tax Act, the second instance authority can prolong the mentioned time period before its expiry by no longer than twelve calendar months upon a reasonable written request. The Tax Procedure Code also allows the interruption of tax audit; in case of its interruption, the provisions relating to the interruption of tax proceedings shall be applied accordingly.

The negative impact of the tax audits on the territory of the Slovak Republic is their occasionally long duration. Although the Tax Procedure Code sets out a time limit for a tax audit,[12] its termination is sometimes deferred by its interruption. This is due to the fact that during the interruption of a tax audit the time periods pursuant to Tax Procedure Code shall not lapse, and thus the time period prescribed for completing the tax audit do not lapse either. This is especially true for extensive (simultaneous or so-called network)[13] tax audits because of the extensive collection of evidences and obtaining all

the necessary documents. The interruption of the tax audit results in its extension and therefore the question arises as to whether there are in fact time limits for the completion and termination of the tax audit which should be respected by the tax administrator. Here, it will be necessary to deal with the case law of the courts of the Slovak Republic, which have many times dealt with the issue of compliance with the time limits for tax audit in their decision-making praxis. It is clear from the jurisprudence of the courts of the SR that the time period set out to carry out the tax audit must be observed. Here, for example, the Supreme Court of the SR emphasizes in its judgment[14] that "the time periods specified in Art. 30a, par. 7[15] of Act no. 511/1992 Coll.[16] are the legal procedural time periods provided by the law for a tax audit. Since they are stipulated directly by the law, it is not possible for the tax administrator to disrespect them, or to prolong it beyond the statutory limit. These are the periods during which the taxable entity is obliged to tolerate a tax audit and to fulfil the obligations stipulated by the tax administrator for the taxable entity pursuant to Art. 15, par. 6 of Act no. 511/1992 Coll.[17] The tax audit represents the intervention of the public authority in the private sector of the entity, therefore it can only be carried out in the scope and process laid down by the law (Article 2, par. 2 of the Constitution of the Slovak Republic). The tax audit of a taxable entity cannot be carried out for an unlimited time period. Any intervention by a public authority in the private sphere of a legal entity is governed by the universal principle of proportionality and the provision of time periods for carrying out the tax audit is an expression of the principle of proportionality. The Supreme Court points out that a tax audit can be continued after the expiry of the statutory period only with the consent of the concerned taxable entity. Otherwise, the activity of the tax administrator creates an unlawful state in the form of unlawful interference by a public authority."

The above mentioned was finally confirmed by the decision of the Constitutional Court of the Slovak Republic,[18] in which it confirmed the quoted conclusions of the Supreme Court of the Slovak Republic: "The time period laid down in Art., 30a par. 7 of the Tax and Fees Administration Act is a statutory time limit and for the tax administrator performing the tax audit is obligatory, because it determines the legality of the tax audit. This time period cannot be compared with the time periods for decision-making pursuant to Art. 30a, par. 1 to 4 of the Tax and Fees Administration Act. The tax audit as a process of obtaining evidence (the protocol), which is not a decision-making process on the tax liability of the taxable entity, represents a serious and intense interference by the tax administration in the individual, lawfully protected sphere of the taxable entity, which is quite apparent on the basis of the nature of obligations of the inspected taxable entity during the tax audit (Art. 15 par. 6 of the Tax and Fees Administration Act). The aim of the tax audit cannot be fulfilled without respecting the rights and legitimate interests of taxable entities. The requirement of proportionality shall be applied during the tax administrator's interferences in the taxable entity's tax affairs even during tax proceedings (Art. 2 par. 3 of the Tax and Fees Administration Act[19]). In some cases, this requirement was formulated by the legislator in a very precise way by specifying the limits of a specific type of interference." In this decision the Constitutional Court of the Slovak Republic, in accordance with the established case law of the Supreme Court of the Slovak Republic, does not neglect that "the prohibition to exceed the statutory timeframe of a tax audit

applies unconditionally only if the inspected taxable entity provides the tax administrator carrying out the tax audit with the necessary co-operation".

Similar legal conclusions were also pronounced by the Supreme Court of the SR in its other decisions.[20]

It is therefore clear from those decisions that if the tax administrator fails to respect the maximum duration of the tax audit, it violates not only the relevant provision of the Tax Procedure Code Art. 46 par. 10, which establishes the time limit for the tax audit, currently Art. 46 par. 10, but also the principle of proportionality and legality[21] applicable throughout the tax administration; therefore such a tax audit and all decisions made during it will be unlawful.

Regarding the extension of the tax audit by its interruption, we consider necessary to point out that the interruption of the tax audit can occur only in the cases regulated by the Tax Procedure Code, thus not arbitrarily. The tax administrator has to consider carefully, assess and then justify whether the interruption of tax audit is grounded pursuant to the relevant regulation. If the reasons for the discontinuation exist and the tax audit is interrupted and the term for the tax audit does not expire, i.e. the time period of the tax audit may be longer than one year. On the other hand, however, during the interruption, the tax administrator will not be entitled to require the inspected taxable entity to cooperate as during the tax audit, nor will he be able to carry out control tasks with the taxable entity. It is important that the interruption of the tax audit shall not be used for its actual extension by requiring cooperation from the inspected taxable entity in process forms that can be obtained during the tax audit (for example testimony, local enquiry), at a time when the tax audit is interrupted. Taxable entities should consistently require that no collection of evidence should be carried out during the interruption of the tax audit.[22]

In the light of the above, it can be stated that the period prescribed for the tax audit should serve the taxable entities' interest as a means of legal certainty in order to prevent the taxable entity from abusive and unjustified prolongation of the tax audit by the tax administrator.

## 3. Tax Audit of the Excess Deduction of VAT

Most tax audits are carried out on VAT, namely the tax audit of excess deduction or its part, as there is a huge tax evasion and tax fraud in connection with the unjustified application of excess deductions.[23]

However, if the taxable entity claims a refund of excess VAT deduction rightly,[24] as demonstrated at the completion of the tax audit, there is a large intervention in the sphere of property of the taxable entity. During the tax audit, to verify rightfulness of the claim to refund an excessive VAT deduction or its part, the taxable entity cannot dispose of funds corresponding to the applied excessive deduction. This follows from the fact that if the tax office (the tax administrator) initiates the tax audit within the time period for refunding the excess deduction,[25] the tax office shall refund the excess deduction within ten days of the completion of the tax audit in the amount determined by the tax office, except the return portion of the excess deduction based on the interim protocol.[26] Thus, it can be

observed that if the taxable entity claims the refund of the excess VAT deduction in the relevant taxation period and the tax audit is initiated (with the tendency among the tax administrators that if the taxable entity claims the refund of the excess VAT deduction, so they initiate the tax audit to verify rightfulness of the claim to its refund – as is already clear from the above mentioned fact, that the most tax evasion arises precisely in connection with unjustified application of excessive VAT deductions), a significant extension of the deadline for refund of the excess deduction can occur in some cases, namely twelve (or twenty-four) months, moreover, if the tax audit is interrupted, it can even be a longer period of time.

It can be stated that the taxable entity has a primarily fiscal interest in the rapid termination of tax audit in order to be able to dispose of the funds corresponding to the claimed excess VAT deduction. In many cases, this is not a negligible amount, and the non-payment of excess VAT deduction may be liquidated for the taxable entity. He counts with a certain income to be able to continue to pay his obligations. In case of doubt, it is of course the right of the tax administrator to verify whether the taxable entity applies excess VAT deduction rightfully. However, it is not conceivable for the State to do so whenever the taxable entity asks for the refund of the excess VAT deduction. This affects mainly honest entrepreneurs because the tax administrator mostly tries to reject the excess VAT deduction or reduce it as much as possible by referring to the general principle of the prohibition of abuse of law,[27] which also applies at the area of tax law.

The retention of excess deduction by the tax administrator in case the subsequent tax audit proves that the claim to refund an excessive deduction or its part was rightful, is a significant interference in the taxable entity's financial freedom (in some cases it may also be liquidation for the taxable entity) and in the violation of VAT neutrality.

### 3.1. To Introduce an Interest on VAT Refund

Here it is worth mentioning the order of the Court of Justice of the EU of October 21, 2015 in case C-120/15 Kovozber s.r.o. versus Daňový úrad Košice (hereinafter 'the Kovozber order' or 'case C-120/15'). In that case, there was a conflict between Kovozber and the Tax Office of Košice, where Kovozber brought a legal action before a competent national court after the tax authority rejected its request for the payment of default interest relating to the refund of excess VAT. Since, in our national legislation, there was no default interest relating to the refund of excess VAT, and no legislation defining the circumstances in which the redemption of excessive deduction was considered to be delayed, therefore the national court decided to suspend the proceedings and referred questions to the Court of Justice of the EU for a preliminary ruling. In its preliminary questions, the national court essentially asks whether national legislation which stipulates the calculation of default interest relating to the refund of excess VAT only after ten days of the completion of the tax audit to verify rightfulness of the claim to refund an excessive deduction or its part, is contrary to the EU law.

The Court of Justice of the EU pointed out that although Article 183 of Council Directive 2006/112/EC of November 28, 2006 on the common system of value added tax

(hereinafter 'the VAT Directive')[28] does not entail any obligation to pay interest on refund of excess VAT deduction, nor does it appoint the day from which the interest accrues, that fact does not, in itself, permit the conclusion that the provision must be interpreted as meaning that the conditions laid down by the Member States for the refund of the excess VAT deduction are not subject to any control under Union law. The EU Member States are obliged to comply with certain specific rules under Article 183 of the VAT Directive, which are to be interpreted in the light of its context and the general principles governing VAT. Then the Court of Justice of the EU notes: "The Member States have a certain freedom in determining the conditions for the refund of excess VAT, those conditions cannot undermine the principle of fiscal neutrality by making the taxable person bear the burden of the VAT in whole or in part. In particular, such conditions must enable the taxable person, in appropriate circumstances, to recover the entirety of the credit arising from that excess VAT. This implies that the refund is made within a reasonable period of time by a payment in liquid funds or equivalent means, and that, in any event, the method of refund adopted must not entail any financial risk for the taxable person".

It is clear from the case law of the Court of Justice of the European Union[29] in relation to national legislation which makes the tax authorities liable to pay default interest after terminating the tax audit procedure that the calculation of those interests being obligated to pay by a tax authority which, at the time of passing the deadline, did not take the date on which the excessive deduction of VAT would normally have been refunded under the VAT Directive is in principle contrary to the requirements of Article 183 of that directive. In that respect, the Court of Justice of the EU recognized in its Kovozber order that the period for refunding excess VAT may, as a general rule, be extended in order to carry out the tax audit without there being any need for such an extended period to be regarded as unreasonable, provided that the extension does not go beyond what is necessary for the successful completion of the tax audit.

Further on, the Court of Justice of the European Union states that it is clear from its case law that "if the excess VAT deduction is refunded to the taxable person after the expiry of a reasonable period, the principle of fiscal neutrality requires that the financial losses thus incurred by the taxable person, which results from the impossibility of dealing with that amount, are to be compensated by payment of default interest".

Subsequently, the Court of Justice of the EU referred to the national legislation such as the Slovak VAT Act, based on which the excess VAT is refunded within ten days of the completion of the tax audit (resulting in the withholding of funds corresponding to the excess VAT deduction applied during a substantial period which, according to the current situation, may be twelve to twenty-four times longer than the taxation period of one month) as not being compliant with the principle of fiscal neutrality, based on which the refund must be made within a reasonable period of time. The Court of Justice of the EU in its order further states that the "legislation, which allows the tax authorities to initiate the tax audit any time, even immediately before the deadline for refunding the excess VAT deduction, thereby enables a significant extension of the time period for refunding the excess deduction, not only exposes the taxable person to a financial disadvantage but it is also unable to predict the date from which funds corresponding to the excess VAT will be made available to him, thus entailing an additional burden for that person".

On the basis of the above mentioned and also on the basis of previous precedents, the Court of Justice of the EU declared that Kovozber was entitled to default interest in national proceedings as it had been refunded the excess VAT deduction after the completion of the tax audit which exceeded the reasonable time period. At the same time, it stated that "when calculating interest, the date on which the excess VAT would have had to be repaid in the normal course of events in accordance with the VAT Directive should be considered the starting point". Concerning the question of the conditions of the payment of default interest, the Court of Justice of the European Union pointed out that the establishment of these conditions fall within the competence of the national legislation of each EU Member State. The Court of Justice of the European Union is not competent to interpret a domestic law or to apply the EU rule in a particular case. It is for the national court, under its jurisdiction, to apply the EU law in its entirety and is under a duty to give full effect to the EU law. At the same time, the Court of Justice of the EU mentions that the conditions under which default interest is payable must not be less favourable than the conditions for similar claims in domestic law and also they may not be stipulated in such a way that the exercise of rights conferred by the law of the Union is impracticable or the exercise is excessively burdensome, that is to say, those conditions must respect the principles of equivalence and effectiveness.

## 4. Interest on VAT Refund *De Lege Lata*

Therefore, in view of the above, since January 1, 2017, an amendment of the VAT Act has been introduced which established a new Article 79a ('Compensation for VAT refund retained during tax audit'), which contains a regulation of interest on VAT refund. It follows from that provision that the taxpayer is entitled to compensation for the retained VAT refund (the law uses abbreviation interest on VAT refund) if the tax office initiates the tax audit within the time period of the refund of the excess VAT deduction and the VAT refund is not paid within six months from the last day of the same time period.

Entitlement to the interest on VAT refund does not concern the first six months from the expiry of the time period of the refund of excess VAT deduction. This entitlement arises only on the first day after the expiration of the six-month period and it is calculated until the day of the retained VAT refund. It is apparent from the explanatory memorandum that the legislature modified the entitlement to interest on VAT refund in such a way that it allows the state sufficient time to exercise power to examine the rightfulness of the excess deduction without the entitlement to the interest on VAT refund for that period. Interestingly, the taxable entity does not have such a long time when he is late with the payment of the tax and is liable to pay interest on late payment[30]. Moreover, the Court of Justice of the EU states that a taxable entity is entitled to interest on VAT refund if the excess VAT deduction is refunded to the taxable entity after the completion of the tax audit which exceeded the reasonable time period and as the onset date should be the date on which the excess VAT would have had to be repaid in the normal course of events. It is therefore questionable whether the legislation adopted in the Slovak Republic and having been in force since January 1, 2017 is consistent with the expression of the Court of Justice

of the EU. We are of the opinion that this is not that case, and that the regulation of interest on VAT refund should be defined in the law simpler and in a more comprehensible way and interest on VAT refund should be granted earlier, from the moment when it should normally be returned under the VAT Act.[31]

The interest rate on VAT refund shall be equal to twice the current base rate of the European Central Bank being valid on the first day of the calendar year for which the interest is charged. Also, if the interest rate of the European Central Bank is below 1.5%, a minimum interest rate shall be set at 1.5%. At this point, we would like to note that if the taxable entity is late with the payment of the tax (or other amounts within the meaning of Article 156, par. 1 of the VAT Act), he is obliged to pay interest on late payment, which is set at being four times the base interest rate of the European Central bank valid on the date when the tax arrears arose, while if the fourfold base interest rate of the European Central Bank does not reach 15%, the annual interest rate of 15% shall be applied. The state is required to pay interest at the rate of 1.5%, while the taxable entity who is late with the payment of the tax interest is to pay it at the rate of 15%.[32]

## 5. Conclusion

In conclusion, as the taxable entity has the right to the refund of excess VAT deduction (if the statutory conditions are fulfilled), the tax administrator also has the right in doubted cases to verify whether the taxable entity claims the reimbursement of excess VAT deduction correctly, as this may have a negative impact on the state budget and the detection of tax evasion means net savings for the state before the amount of the required excess VAT deduction is paid. These facts are verified by the tax administrator in the tax audit, which is currently effective, and can be regarded as one of the most effective tools we have in our legal system regulated to detect and eliminate tax evasion. The tax audit is an integral part of tax administration, because without it one cannot expect that taxable entities will voluntarily fulfil all their statutory obligations and comply fully with the tax laws (this is a preventive but also a repressive function of the tax audit).

Despite the above said, however, it is not conceivable for the State to initiate the tax audit every time the taxable entity asks for a refund of the excess VAT deduction. It can have a significant impact on small and medium-sized entrepreneurs when the tax audit takes a longer period of time. In the case of the initiation of a tax audit to verify the rightfulness of the claim to refund excess VAT deduction, they cannot use the funds corresponding to this excess deduction and the late payment of the requested excessive deduction may be liquidated for them. This is why they should be compensated by the payment of default interest on the refund of excess VAT. The introduction of such a default interest, which the tax administrator will be obliged to pay to the taxable entity from the amount of the rightfully claimed excess VAT deduction, may in our opinion, either reduce the number of tax audits aimed at examining the rightfulness of the claim to refund excess VAT deductions or lead to a more precise selection of the inspected taxable entities, or speed up tax audits, as the tax administrator has a certain period of time until the interest on VAT refund is reimbursed and it will be interested in avoiding the payment

of that interest. From the afore mentioned we conclude that the introduction of the interest on VAT refund will probably lead to a better enforceability concerning the taxable entity's entitlement to the repayment of excess VAT deduction, or at least to shorten the length of tax audits of excess VAT deductions.

## References

1. This paper represents a partial output of the grant projects VEGA no. 1/0846/17 *"Implementation of the initiatives of the EU institutions in the field of direct taxes and indirect taxes and their budgetary law implications"* and VVGS no. 2016-284 *"EU initiatives to prevent tax evasions and their implementation into national law".*
2. Tax evasion and tax fraud have a negative impact on overall state economy and public finances because they cause losses of the tax revenue in the state budget. These revenue losses amount to several billion euros a year.
3. The nature of tax audit as a control process has also been highlighted by the Constitutional Court of the Slovak Republic in its decisions. See for example: The Decision of the Constitutional Court of the Slovak Republic of December 16, 2008, case. no. I. ÚS 238/06, also the Decision of the Constitutional Court of the Slovak Republic of June 29, 2010, case. no. III. ÚS 24/2010. Similarly, the Supreme Administrative Court of the Czech Republic also expresses its ruling: see for example the Judgment of the Supreme Administrative Court of the Czech Republic of April 11, 2006, case no. 2 Afs 85/2005; also the judgment of the Supreme Administrative Court of the Czech Republic of September 30, 2005, case. no. 5 Afs 89/2004.
4. Compare: Tomáš Zatloukal, *Daňová kontrola v širších souvislostech [Tax Control in a Boarder Context],* 1, (Praha, C.H. Beck 2011).
5. Compare: Vladimír Babčák, *Daňové právo na Slovensku [Tax Law in Slovakia],* 422-447, (Bratislava, EPOS, 2015).
6. Compare: Miroslav Štrkolec, Prerušenie daňovej kontroly – prípustnosť, dôsledky a možnosti procesnej obrany [Interruption of Tax Control – Admissibility, Implications and Possibilities of Procedural Defense], 1354–1355, in *Justičná revue,* vol. 66, n. 11 (2014).
7. See more Zatloukal, *supra n. 4,* at 1–2.
8. Compare: Karolína Červená, Michal Karabinoš, Daňová kontrola ako nástroj odhaľovania daňových únikov [Tax Control as a Tool of Detecting Tax Evasion], 148, in *Zborník vedeckých štúdií z vedeckej konferencie „Odhaľovanie daňových únikov a daňovej trestnej činnosti" [Proceedings of Scientific Studies From the Scientific Conference "Detecting Tax Evasion and Tax Crime"],* (Bratislava, Akadémia Policajného zboru Slovenskej republiky, 2012).
9. See more Emil Burák, Vysoké daňové zaťaženie podnecuje k daňovým únikom [A High Tax Burden Encourages Tax Evasion], 20, in *Dane a právo v praxi*, vol. 4, no. 15–16 (1999).
10. Compare: Emil Burák, *Daňová kontrola – očami praxe [Tax Control – Parctical View],* 80, (Bratislava, TESFO, 2016).
11. The extent of the tax audit is to assess the actual tax administrator performing a tax audit, who decides what facts will be checked, to what extent and how does the tax administrator (employee of the tax administration) inspect them. When performing the tax audit, the tax administrator must respect the fundamental principles of tax administration, taking care to respect the rights and legitimate interests of taxable entities and of other persons in tax administration. The tax audit carried out cannot therefore disproportionately and unjustifiably interfere with the rights of taxable entities, what must also be in line with the extent of the performing tax audit, which has to be proportionate to the circumstances of the particular case.
12. For example, the previous legislation did not regulate a specific time period for performing the tax audit. See more František Bonk, Fiskálny záujem štátu verzus dĺžka trvania daňovej kontroly [Fiscal Interest of the State versus Duration of Tax Control], 41–44, *in Dny práva 2015 – Days of Law 2015: V. část: Dohled, dozor, kontrola ve veřejné finanční činnosti [V. Part: Supervision, verification, control of Public Financial Activities],* (Brno, Masarykova Univerzita, 2016).
13. Simultaneous tax audit is regulated by the Act no. 442/2012 Coll. on international assistance and cooperation in tax administration. In order to conduct simultaneous tax audits of one or more taxable entities, the competent authority of the Slovak Republic can agree with the competent authority of

the Member State or with competent authorities of Member States. These competent authorities shall conduct the tax audits simultaneously, in their own territory. Such a way the simultaneous or network tax audit will be verified by a network of taxable entities that cooperate in a certain form, based on the cooperation of several tax authorities with each other. Other bodies, such as the customs offices, the Police Force of the SR, and so on, often participate in such cooperation. The cooperation of several authorities both at home and abroad ensures higher efficiency of tax audits and thus, greater detection of tax evasion. Simultaneous or network tax audit will inspect not only the individual components of the chain but also the whole network of taxable entities. Although it is a relatively demanding activity, particularly in terms of time, coordination and possible disclosure, it has the greatest effect and results are estimated to amount to tens and sometimes hundreds of millions of euros in taxes.

14. Judgment of the Supreme Court of the Slovak Republic of January 29, 2009, case no. 3 Sžf 1/2009.
15. Currently, Article 65 of Tax Procedure Code.
16. Note: Act of the Slovak National Council no. 511/1992 Coll. on Tax and Fees Administration and on Changes in the System of Territorial Financial Authorities (hereinafter 'Tax and Fees Administration Act') was repealed by the Tax Procedure Code on January 1, 2012.
17. Currently, Article 45 par. 2 of Tax Procedure Code.
18. The decision of the Constitutional Court of the Slovak Republic of June 29, 2010, case no. III. ÚS 24/2010.
19. Currently, Article 3 par. 1 of Tax Procedure Code.
20. See for example the judgment of the Supreme Court of the SR of April 19, 2007, case no. 3 Sžf 9/2007; similarly, the judgment of the Supreme Court of the SR of October 08, 2009, case no. 3 Sžf 107/2009; also the judgment of the Supreme Court of the SR of September 21, 2011, case no. 2 Sžf 35/2010; also the judgment of the Supreme Court of the SR of March 03, 2015, case no. 3 Sžf 6/2014.
21. See more Mária Bujňáková, Maxims And Principles of Tax Proceeding, 213 et seq., in *Tax Codes Concepts in the Countries of Central and Eastern Europe* (Bialystok, Temida 2, 2016).
22. Compare: Martin Vernarský, Limity daňovej kontroly [Limits of Tax Control], 58, in *Justičná revue,* vol. 64, no. 1 (2012).
23. The Financial Policy Institute of the Ministry of Finance of the Slovak Republic has produced a number of analyses where it states that according to current estimates, the VAT tax gap in the year 2015 reached 29.2% of the potential VAT in the Slovak Republic. In nominal terms, this difference corresponds to 2.2 billion euros, representing 2.8% of GDP. The tax gap is the difference between the potential VAT, which had been paid to the state budget, if economic entities would have accepted all made transactions in accordance with the applicable legislation, as it assumes, and the VAT actually paid.
24. The taxable entities often try to get the claim of excess VAT deduction by means of various camouflage legal acts. For camouflage legal acts, their difference against an abuse of law and a circumvention of law, see more for example: Adrián Popovič, Zastierané právne úkony pri správe daní [False Legal Acts in Tax Administration], 255 et seq., in *Zneužitie a iné formy obchádzania práva [Abuse and Other Forms of Law Avoidance],* (Košice, UPJŠ, 2016).
25. The conditions for the excessive deduction of the taxable person, the process of deducting it or its return, and the time period for the refund of excess VAT are stipulated by the VAT Act in Art. 79.
26. The interim protocol is stipulated by Tax Procedure Code in Art. 47a, and this provision follows the Act on Value Added Tax. The tax administrator can return a portion of the excess deduction before the end of the tax audit in the amount defined in the interim protocol. In particular, this concerns the situations where during the tax audit the tax administrator finds out that a portion of the excess deduction is rightfully applied, but for the remaining portion further investigation is needed. Such as getting information through an international exchange of information from another Member State of the European Union, which sometimes takes a long time and therefore it is not possible to terminate the tax audit.
27. To introduce this principle into our law, see for example: Karin Prievozníková, Implementácia zákazu zneužitia práva do daňového poriadku [Implementation of the Prohibition of Abuse of Rights in the Tax

Ordinance], 161 et seq., in *Daňové právo vs. daňové podvody a daňové úniky: nekonferenčný zborník vedeckých prác. II. diel [Tax Law vs. Tax Fraud and Tax Evasion: Non-conference Book of Scientific Work. II. part.],* (Košice, Univerzita Pavla Jozefa Šafárika v Košiciach, 2015). Also Jozef Sábo, *GAAR* (všeobecné pravidlo predchádzania daňovým únikom) v právnom poriadku SR [GAAR (General Anti-Abuse Rule) in the Regulation of the Slovak Republic], 199 et seq., in *Daňové právo vs. daňové podvody a daňové úniky: nekonferenčný zborník vedeckých prác. II. diel [Tax Law vs. Tax Fraud and Tax Evasion: Non-conference Book of Scientific Work. II. part.],* (Košice, Univerzita Pavla Jozefa Šafárika v Košiciach, 2015); also Anna Románová, The New Anti Abuse Rule in the Slovak Tax Law: Strengthening of the Legal Certainty? 212 et seq., in *System of Financial Law: System of Tax Law,* (Brno, Masaryk University, 2015).

28. The Article 183 of the VAT directive regulates: "Where, for a given tax period, the amount of deductions exceeds the amount of VAT due, the Member States may, in accordance with conditions which they shall determine, either make a refund or carry the excess forward to the following period. However, Member States may refuse to refund or carry forward if the amount of the excess is insignificant."
29. See for example the Judgment of the Court of Justice of the EU of May 12, 2011 in case C107/10 Enel Marica Iztok 3 AD; also the Order of the Court of Justice of the EU of October 21, 2015 in case C-120/15 Kovozber.
30. Interest on late payment and its conditions are regulated in Article 156 Tax Procedure Code.
31. Excess VAT deduction should be refunded no later than thirty days after filing the tax return for the taxation period following the taxation period, in which the excessive deduction was created, or within thirty days after the expiration of the period for filing the tax return if the taxpayer is not obliged to file the tax return for the taxation period following the taxation period, in which the excessive deduction was created; and this applies provided that the taxpayer cannot deduct excessive deduction from its own tax obligation in that following taxation period.
32. Act on VAT in Article 79a also stipulates the decision on the grant of interest on VAT refund, the reduction and increase of such interest, and the conditions under which interest on VAT refund is not granted to the taxpayer.

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# Book Reviews

# Means of Protection of Individual Rights in Public Administration – System and Efficiency[1]

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The monograph *Means of Protection of Individual Rights in Public Administration – System and Efficiency* is the result of a scientific project lasting for multiple years (2013–2016), managed by members of the Department of Administrative Studies and Administrative Law of the Faculty of Law, Masaryk University, Brno.

A much larger group of authors, comprising of almost thirty experts participated on this project. Apart from co-authors from the Czech Republic, also a large number of experts from the Slovak republic, Republic of Poland, representatives of Austria and Slovenia contributed to the realization of the book. Authors came from academic communities and application practice, including constitutional and administrative judiciary. Despite the large number of authors, the book is connected by linking articles which discuss the issue of the protection of individual rights in the area of administrative law and public administration.

It is a comprehensive work which will be certainly utilized by students of law as well as students from other fields of public administration studies. However, this is not a typical textbook, as the legal theory, as well as legal practice itself is very appropriately incorporated into individual chapters in which the authors express their own attitudes and views on the issue. It offers a clear and simple overview of all the basic institutes that in the Czech Republic could be used to protect individual rights within public administration, in an understandable way to nonprofessionals; the book is divided into three major parts.

The first part briefly, but in principle, deals with the role and activities of public administration, the issues of (subjective) rights, their protection but also the possibility of abusing these rights. The question *whether the primary purpose of public administration is the protection of personal rights* is being asked in this section. The authors answer the question negatively; nevertheless, they acknowledge that public administration provides protection of rights even so, all the more. The very content of the book is evidence that even in the field of public administration which is primarily not dedicated to protect rights, but to the administrate public affairs in the public interest, a relatively wide variety of resources can be found which could be considered as an instrument for the protection of rights. Based on this, the authors investigate answers for another question, i.e. whether the individual means of protection of rights form a coherent system and subsequently what is the actual effectiveness of these means of protection of rights. As a result, the book represents an imaginary mirror and feedback as it attempts to confront factual reality with legal status.

The second part of the book represents its main part (pp. 41–366). The individual chapters focus on the general means of protecting individual rights that can be found in the exercise of administrative activity. The authors perceive the issue in the necessary European context, such as the actions of the Council of Europe and the European Union, including a model proposal for the European Union's Administrative Code. Following general institutes which can be considered as a means of the protection of individual rights in public administration, where the authors include the principles of good governance, the principles governing the performance of the administrative activity, or the work of the ombudsman, the following particular means for the protection of individual rights. In this regard the book is written mostly with respect to the factual figure and regulation of the Czech Republic. Among the specific means of protection of individual rights, which are subject to closer analysis, the authors present the procedural rights of the participants in administrative procedures, requirements for proper reasons for the decision, issues of ordinary and extraordinary remedies. Attention is paid to whether and how the protection of individual rights in other procedural processes is ensured, such as the conclusion of public contracts, the implementation of factual acts, the issuing of legislation by the public administration, the issuing of binding documents for the decision of the administrative authority, or the issue of measures of a general nature, which is a rather specific form of administrative activity, notably inspired by the German institute *Allgemeineverfügung*. In addition, the authors are also focusing on the selected areas of public administration where they are interested in whether and how individual rights are protected. For example, the area of self-government, immigration and asylum agendas, administrative penalties, or public services in state administration and security services.

The last part of the book is focused on the protection of individual (subjective) rights, in spite of the views of the authorities, Ombudsmen, administrative and constitutional judiciary, including the relatively provocative issues of the so-called ADR means that is also represented in this section.

Thus, the book goes from the general bases to individual institutes. Due to the systematic construction of the individual chapters it is not necessary to read the book chronologically, so the reader can focus only on the part that interests him/her. It is worth pointing out another advantage of this work, namely its practicality and connection with the reality of the legal world: an appropriate combination of theory, philosophy of law, practice, the opinion of experts from the field, as well as an outline of the issues and shortcomings brought by the currently established procedures. Therefore, we can look at issues from different angles which will give us a coherent picture of individual themes and allow readers to think and read their own attitude towards the subject.

The book is an interesting reflection of whether and how attention is paid in the Czech Republic to the protection of individual rights when the law provides a fairly wide range of instruments that can be used for this purpose. It focuses not only on the description of the legislation and legal status but attempts to take into account the actual functioning which is supplemented in some parts with specific statistical data and their evaluation. The essential contribution of this monograph lies in its practical functioning, in which it provides interesting and informative issues by presenting a variety of authors and opinions to the reader.

## References

1. Soňa Skulová & Lukáš Potěšil (eds.), *Means of Protection of Individual Rights in Public Administration – System and Efficiency,* 464 pages. (Praha, C. H. Beck, 2017).