The Fiscal Control and the Financial Jurisdiction – Components of the Competitive Management

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Abstract. *From the financial controls can arise (starting from the control objectives and by comparison of the normative provisions with the reality from the public entities or the controlled departments) a series of deviations, shortages or shortcomings that require measures of remedy and prevention of the found deviations. The drawing out of the control papers represents the most important phase of the financial control. In the control paper are written down the conclusions that represent the synthesis of the examination activity carried out as a result of the application of the control techniques and proceedings.*

Key words: financial jurisdiction; fiscal jurisdiction; fiscal control; dispute; tax decision.

1. Solving the disputes against the measures stipulated by the tax decision as a result of the fiscal control

The disputes represent administrative paths of attack against the measures stipulated by the tax decision that was made on the strength of the report/official report of fiscal inspection by the organs of the Ministry of Public Finance or the local public authorities. These disputes solicit the diminishment or the writing off of the taxes, contributions, custom taxes, interests and delay penalties or other measures stipulated by the Ministry of Public Finance or the local public authorities.

The disputes formulated against the tax decisions are submitted to the organ that issues this decision, within 30 days from the date when the decision was communicated ((the harmful act) (Law no. 554/2004, Art. 7, paragr.1) and (GO no. 92/2003, Art.177, Paragr.1)). The organ which has the competence to solve the disputes has the obligation to solve it within 45 days starting with its receiving. In case the dispute is submitted to a non-competent fiscal organ or the solving competence does not belong to the organ that issues the tax declaration, the dispute will be submitted by this one, within 5 days, to the organ that has the competence to solve it.

In case the tax decision (which is a fiscal administrative paper) does not include all the elements stipulated by law for an administrative paper (the name of the fiscal organ, the date at which the act was issued and the date at which it produces its effects, the

identification data of the taxpayer or of the person authorized by this one, the object of the administrative document, the *de jure* motives, the *de facto* motives, the name and surname of the person authorized by the fiscal organ, the stamp of the fiscal organ, the possibility to be disputed, the term for submitting the dispute, the organ where the dispute is submitted), the dispute can be submitted within 3 months from the date when the disputed fiscal administrative document was submitted.

The date when the taxpayer is informed about the tax decision is the date when it was handed over to the taxpayer or to his legal representative (proven by signature), the date when the registered letter posted by the control organ was received. The disputes sent by post are considered to be formulated within the term if the letter was delivered to the postal office before the term expired. The 30 days-term is calculated on free days, without taking into consideration the day it began, or the day when it ends. If the term expires in a non-working day, the dispute is considered to be submitted on time if it is submitted by the end of the first day of work.

The dispute must include (Oprean, 1997):

- The name of the taxpayer, his place of residence or his head office;
- The object of the dispute and the disputed sum that needs to be split in categories of taxes, contributions, interests and delay penalties;
- Mentioning the *de facto* and *de jure* reasons that motivate the dispute;
- The signature and the stamp of the disputer or of his legal representative.

To the dispute one can attach papers meant to support the opinion of the disputer that were not taken into consideration by the control organ.

The competence for solving the dispute belongs to several public institutions and authorities (GO no. 92/ 2003, Art.17, Paragr.1):

- the disputes which have as object taxes, contributions, custom debt, as well as debts accessory to these ones (penalties and delay interests) that are owed to the state budget or to the budget of national social insurances, and which have a value of less than 500,000 lei are solved by the competent organs built at the level of the general offices of the local public finance (the services/offices for solving the disputes, where the taxpayers are registered as payers of taxes);
- the disputes formulated by the big taxpayers, that have as object taxes, contributions, custom taxes as well as their accessory debts owed to the state budget or to the budget of the national social insurances, and which have a value of less than 500,000 lei are solved by the competent organs (the services/offices for solving the disputes formed within the general office of administration of the big taxpayers);
- the disputes which have as object taxes, contributions, custom debt, as well as accessory debts owed to the national budget or to the budget of the national social insurances, which have a value of 500,000 lei or bigger, as well as the ones formulated against the documents issued by the central organs, are solved by the competent organs built at central level (The General Office for solving disputes from the National Agency of Fiscal Administration). The amount of the owed sums (500,000) which determine the competence will by updated by means of Government Decision;
- the disputes formulated against the tax decision (the fiscal administrative papers) issued by the authorities of the local public administration that have as object taxes, contributions, as well as accessories owed to the local budgets are solved by the authorities of the local public administration.

The dispute can be withdrawn by the disputer until its solving. The competent solving organ will inform the disputer about the decision by which he finds out about the giving up of the dispute. By withdrawing the dispute, that taxpayer does not lose the right to submit a new dispute within the general term for its submitting (GO no. 92/2003, Art.178, paragr. 2): (30 days, namely three months).

The file of the dispute comprises several documents: copies of the attacked act and of the other documents and appendixes that were at the basis of its drawing out; the dispute in original form and other papers submitted by the disputer; the report with the proposal of solving the dispute signed by the organ that closed the attacked document.

The paper contains mentions concerning the fulfillment of the proceeding conditions, as well as concerning the essence of the cause.

In solving the dispute, the competent organs of the National Authority of Fiscal Administration (ANAF) (the services/the offices for solving the disputes from the general offices of the local public finance and of the General Office of Administration of the Big Taxpayers), the General Office of Solving Disputes from ANAF passes a *decision* (GD no. 1050/204, Art. 179.1), and the ones of the local

public administration (the special services of taxes) pass a *disposition*.

The organ for solving the dispute *can suspend the solving, through a motivated decision* when: the organ that carried out the control activity has informed the interested organs about the existence of some signs that indicate a crime and finding this crime could have a decisive influence upon the solution that will be given in the administrative proceeding; solving the cause depends totally or partly on the existence or inexistence of a right that represents the object of another judgment.

The administrative proceeding is resumed when the motives that determined the suspending disappear (GO no. 92/2003, Art. 184, Paragr. 3).

In order to insure the seriousness and the legality of the solutions formulated with these decisions/ dispositions, the organs that solve the dispute must have an active role in the process of solving the cause. They will check the *de jure* and *de facto* motives that are at the basis of the issuing of the fiscal administrative paper (the tax decision). The verification is made depending on the argumentation of the parties, the legal dispositions they violated and the papers present in the file of the cause. *The solving of the cause is made within the limits of the intimation.* For explanations, the solving organ can ask for the point of view of the specialty offices from the ministries or from other institutions and authorities. Through the solving of the disputes *it cannot be created a worse situation* to the disputer in his own path of attack (GO no. 92/2003, Art.183, Paragr. 3).

The disputer, the persons that intervene or are empowered/authorized can submit new evidence for supporting the cause. In these situations, the organ that carried out the activity of control will be offered the possibility to pronounce himself about this evidence.

The solving organ will first express an opinion upon the exception of proceeding (exceptia de procedura) and then upon the essence. When one finds that the exceptions from the proceedings are motivated, the cause is not analyzed in its essence (GO no. 92/2003, Art. 183, Paragr. 5).

Introducing the dispute on the administrative path of attack does not suspend executing the fiscal administrative document. At the thoroughly justified request of the contestant, the solving organ can suspend the execution of the administrative document until the dispute is solved. The dispute cannot be rejected if it has the wrong name.

By decision/disposition, *the dispute can be appoved totally, partly or dismissed.* If the dispute is approved, it can be decided the total or partial cancelling of the attacked paper (meaning the tax decision), depending on the case. Through the decision/disposition, the attacked administrative paper (the tax decision) can be cancelled totally or partially. In this situation, a new fiscal administrative act will be closed, that will have strictly in view the aspects of the decision/disposition for solving the dispute (GO no. 92/2003, Art. 186, Paragr. 3).

The solving decisions/dispositions are final from the point of view of the administrative paths of attack (GO 92/2003, Art. 180, Paragr. 2). These are transmitted to the disputer by:

- delivering them under signature to the disputer or to his representative, at the head office of the fiscal organ;
- through persons authorized by the fiscal organ;
- by post, at the fiscal residence/office of the taxpayer;
- by publishing an announcement in a national daily newspaper with wide distribution or in a local daily paper or in the Official Journal, when one deals with the absence of any persons entitled to receive the act at the fiscal office/residence or when they refuse to receive the administrative paper.

The decisions/dispositions by which the disputes are solved are also communicated to the fiscal organ that issued the tax decision.

The decisions/dispositions issued in solving the disputes can be attacked in the contencious administrative courts in whose territorial area is located the disputer's head office or the disputer's residence. The decisions passed by these courts can be attacked by means of appeal.

2. Solving the disputes against the contravention sanctions

The common attack path typical for the contraventions is the *complaint*. One can make a complaint against the official report of finding and sanctioning the contravention. The complaint is submitted to the organ where the agent that made the finding belongs. This one is obliged to receive it and hand it out to the one that gives evidence that he received it. In all circumstances, the complaint must be accompanied by a copy of the official report of finding and sanctioning the contravention. The organ that received the complaint has the obligation to send it right away, together with the file of the cause, to the court that has the competence to solve it, meaning to the court in whose territorial area (circumscription) the contravention was made.

The following persons can formulate a complaint: the offender (physical persons or legal entities); the damaged

part (physical person or legal entity), but only concerning the indemnifying; the person to whom the confiscated goods, other than the offender (physical or juridical persons), but only with respect to the confiscation measure.

The Government Ordinance no. 2/2001 does not stipulate what the complaint should comprise. In this situation, if we take into consideration the provisions of the art. 47 of this ordinance, we consider that the complaint should include the information stipulated by art. 112 from the Code of Civil Procedure concerning the *content of the trial request:*

- the name, the surname and the residence of the petitioner, and in case of legal entities: the name, the head office and the Unique Registration Number.;
- mentioning the office report of finding and sanctioning the contravention that is being attacked and the organ which drew it out;
- the place mentioned in the official report where the contravention was committed;
- the *de jure* and *de facto* reasons on which the complaint is based;
- the proofs brought for supporting the complaint;
- the signature of the petitioner.

The complaint must be submitted within 15 days. This term starts to pass from the date when the official report of finding and sanctioning the contravention was handed out or communicated (GO no.2/2001, Art. 31 and 34).

The complaint suspends the execution in accordance with the law (GO no.2/2001, Art. 32, Paragr. 3). The suspendation of the execution takes place *de jure*, according to the law, without being necessary to make a request in this direction. The simple registration of the complaint, within the legal term, stops the forced execution of the sanction (fine, confiscation) or if this one was started, it will be suspended through the dispute against execution.

As the execution of the sanction of fine and confiscation is made by the organ which finds the contravention, in case that was chosen the attack path against the official report of finding and sanctioning the contravention, the complaint is submitted to the organ where the agent belongs, so that this one is informed about the attack path and will not proceed with the forced execution of this sanction.

In case of the complaint made by the damaged person, the execution is suspended only for the measure of the compensation.

The complaint made by the person to whom the confiscated goods belong, other than the offender, suspends the execution only with respect to the measure of confiscation.

The complaint against the official report of finding and sanctioning the contravention is exempted from the legal stamp tax.

The general rule is mentioned in Art. 32, Paragraph 2 and in Art. 33, Paragr. 1 from the Government Ordinance no. 2/2001 that stipulates: *the organ which is competent to solve the complaint against the official report of finding and sanctioning the contravention is the court in whose territorial area (district) was committed the contravention.*

There are also exceptions from this general rule. The attack paths against applying the sanction of obliging the offender to perform activities for the community are exerted according to the dispositions comprised in the Government Ordinance no. 55/2002 concerning the juridical frame of the sanction of performing an activity for the use of the community.

Moreover, in case of the custom contraventions, it was stipulated that the solving of the complaint belongs to the court in whose territorial area (district) is the residence of the physical person or the head office of the legal entity which was sanctioned.

The presented aspects point out that the court is the only organ that has the competence to solve the complaint against any contravention's sanction if the special normative paper (with which the contravention was established and sanctioned) does not stipulate otherwise.

The complaint and the file of the cause are immediately sent to the competent court (GO no. 2/2001, Art. 32, Paragr. 2). The court will then set the term for the judgment. For promptness, this term cannot be longer than 30 days from the day the complaint was received.

In order to observe the principle of contradictoriality, guaranteed by the Constitution of Romania, when solving the complaint, the court will order the citing of the offender or of the person who made the complaint and the organ which applied the sanction. The contradictoriality is mainly between the offender or the person that made the complaint and the organ which applied the sanction.

For finding out the truth and clarifying all the aspects needed in order to correctly apply the law by observing the principle of contradictoriality, the participation of any other person which could contribute to solving the cause is necessary. This is the reason why the court will cite not only the offender or the person that made the complaint, but also the organ which applied the sanction and the witnesses mentioned in the official report of finding and

sanctioning the contravention or in the complaint, as well as any other persons able to contribute to solving the cause.

The court will verify if the complaint was submitted within the term. If it is found that it was not submitted within the legal term, the court will reject the complaint. If it is found that the complaint was submitted within the legal term, the competent court will listen to the one which made the complaint and to the other persons cited and mentioned previously, if they are present. The competent court manages also any other evidence stipulated by law and necessary for verifying the legality and the substantiation of the official report for finding and sanctioning the contravention (GO no. 2/2001, Art. 3, Paragr. 1).

In order to support the content of the official report of finding and sanctioning the contravention and the taken measures, the agent will enclose to the report copies of documents, statements, notes, glosses, declarations etc.

At the same time, the offender or the person who submitted the complaint will enclose copies of documents, statements that support that complaint.

The Government Ordinance no. 2/2001 does not stipulate a specific term within which the judgment court ought to solve the complaint. However, this normative paper stipulates that the term of starting the judgment, set by the court for the complaint, cannot exceed 30 days from the day the court received the complaint and that "*the complaint against the official report of finding and sanctioning the contravention is solved preeminently.*"

The court can give the following solutions:

- *Rejects the complaint,* when it is found that the sanction applied is justified and legal;
- *Totally admits of the complaint* (and cancels the official report of finding and sanctioning the contravention) *or partly admits of the complaint* when this measure is justified by the administrative evidence.

In the case of canceling or finding the nullity of the official report of finding and sanctioning the contravention, the complainer is exonerated from liability, and the confiscated goods are given back to the entitled one, unless the possession or circulation of those goods is forbidden by the law. If the confiscated goods were realized, the court will order a compensation for the entitled person, which is established depending on the market value of these goods.

The Government Ordinance no. 2/2001 stipulates that if the official report of finding and sanctioning the contravention was canceled and the confiscated goods were realized, the entitled one receives a compensation set according to the market value of the goods that covers the inflation between the realization date and the date when the compensation is paid, considering the fact that in some cases, the solving of the complaint lasts for years and the annual inflation is high. This normative act does not stipulate updating/discounting the paid fines and the confiscated and withdrawn sums of money that are returned to the offender when the official report of finding and sanctioning the contravention was canceled. Only the paid sums will be repaid. In this situation, they are damaged, considering the depreciation of the national currency between the date of the payment and the date of the repayment.

The appeal. The sentence that solved the complaint can be attacked by appeal at the administrative contentious section of the competent court. Any of the parties (the offender, the damaged party, the person to whom the confiscated goods belong, the organ which applied the sanction and the public prosecutor) can appeal. The damaged person can appeal only with respect to the compensation, while the person to whom the confiscated goods belong, other than the offender, can appeal only regarding confiscation. The appeal must be submitted within 15 days from the communication of the sentence that solved the complaint against the official report of finding and sanctioning the contravention. *Motivating the appeal is not compulsory.* The reasons can be orally stated in front of the court. *The appeal suspends de jure the execution of the sentence* that solved the complaint against the official report of finding and sanctioning the contravention and it is not necessary to formulate a request in this direction. The appeal against the decision by which the complaint against the official report of finding and sanctioning the contravention was solved is exempted from the legal stamp tax.

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