

# TAX APPEAL - AN INSTRUMENT FOR DEFENDING THE TAXPAYERS' RIGHTS

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**Abstract:** *The legislative consecration of the taxpayer's right to appeal tax administrative acts represents a guarantee of the rule of law. The Romanian legislator provides the taxpayer with two important defence tools to protect his/her rights in fiscal procedures: the fiscal appeal and the administrative and fiscal action. The Fiscal Procedure Code and the Administrative Court Proceedings Law no.554 / 2004 govern the terms, conditions, procedure and the fiscal authorities or the competent courts. These legal provisions are intended to protect taxpayers from the possible illegal actions and abuses of tax authorities.*

**Key words:** *tax administrative act, tax appeal, taxpayers.*

## 1. Introduction

The issuing of the tax administrative act must protect the taxpayer's interest regarding the possible illegal actions and abuses of tax authorities. In this context, the legislative consecration of the taxpayer's right to appeal the fiscal administrative acts issued by the tax authorities in the enforcement and interpretation of the specific legislation is a constant of the rule of law.

Tax litigation is the central part of tax proceedings in any state and represents the framework for the general affirmation of the taxpayer's fundamental rights and interests [2] [3] [6] [7].

In Romania, after 1989, several laws were adopted providing for the right of the taxpayer to challenge the measures taken following an audit by the tax authorities, as well as the amounts determined as

differences and taxes, late payment penalties and fines.

This was a confirmation of the legislature's optics regarding the appeals on tax matters, but these were usually administrative remedies, the solution given in such cases being final.

As an example we mention the provisions of article 15 and article 16 of Law No. 32/1991 on the payroll tax, article 37 of Government Ordinance No. 3/1992 on value added tax, article 19 of Law No. 12 / 1991 regarding the tax on profit that contained provisions to this effect. Subsequently *Decision No. 34/1993 of the Constitutional Court*, the specific legislation has provided the opportunity to challenge the determinations made by the tax authorities, both before administrative bodies and in courts.

We take notice of a *first unifying tendency of the law* applicable in resolving

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the complaints on tax matters, depending on the nature of the various amounts owed to the components of the general consolidated budget, established by Law no. 105/1997 on resolving objections, appeals and complaints on the amounts established and applied by the controlling or enforcement papers of the Ministry of Finance's bodies, subsequently repealed by Government Emergency Ordinance No. 13/2001 on the determination of appeals against measures taken by the controlling or enforcement papers by MPF bodies, a legislative act continuing the unifying trend, the Government Emergency Ordinance no. 58/1999 on the settlement of objections and complaints filed against controlling or enforcement papers concerning the declaration and establishment of local taxes, the delay increments, penalties and other amounts and measures of the Government Emergency Ordinance no. 96/2001 on the control of social security contributions and the determination of appeals against measures taken through the controlling papers drawn up by the inspection bodies of the National House of Pensions and Other Social Insurance Rights and of the territorial houses of pension, Government Ordinance No. 36/2002 on local taxes and Government Ordinance No. 39/2003 on the procedure for the administration of local taxes.

An analysis of the procedures for contesting through administrative channels the measures ruled by the tax authorities established by the legislation above mentioned reveals the terminological inconsistency of the legislature.

We observe that the names of the remedies established by these laws are different, using concepts such as: appeal, review, objections, complaint.

Also, these remedies were sometimes qualified as administrative remedies, sometimes administrative and judicial

remedies, issues contributing to intensifying the debate in the literature on this subject and generating a conflicting case.

However, the number of administrative appeals that could be followed before the formulation of legal actions differed from a regulatory document to another.

However, a common feature of all the above procedures is that subsequent to Decision No. 34/1993 of the Constitutional Court, regardless of the number of administrative appeals, the legal action has always been a tool available to those dissatisfied with the administrative way of settlement of the appeals related to the measures ruled by the tax authorities.

By the entry into force of the Fiscal Procedure Code, all the legal provisions related to the settlement of tax appeals were repealed, these being carried out under the legal provisions contained in Title IX of this legal act.

The Fiscal Procedure Code made the unification of the procedure for resolving tax appeals, being the second largest stage of unification of the relevant legislation. It should be noted the impact of the Administrative Litigation Law no.554 / 2004 on tax appeals procedure governed by the Fiscal Procedure Code, since it contains explicit provisions on tax administrative litigation [1].

## **2. The formal and substantive conditions of tax appeal**

Under Title IX of the Tax Procedure Code, the wording of tax appeal is subject to **the substantive and formal conditions** [1].

The Fiscal Procedure Code establishes **two fundamental conditions** for bringing an appeal against an administrative tax act as follows:

**a. The existence or absence of a tax administrative act**

The first condition for bringing an appeal under art. 205 of the Tax Procedure Code is the existence of a tax administrative act that would impose on the taxpayer any obligation regarding loosely the administration of taxes or that the taxpayer be deprived by tax authorities by the tax administrative act that was supposed to be issued by the tax authority either on the taxpayer's request, or expiration of time limit prescribed by law for the issuance of that tax administrative act.

**b. The person in question to have the standing to bring an appeal**

First, article 205, para. 2 of the Fiscal Procedure Code provides that "it is entitled to appeal only the one who believes that his/her rights were violated by a tax administrative act or the lack of it."

Any person claiming to be damaged in his/her rights by the issuing of a tax administrative act or the lack of it has *locus standi*.

The Fiscal Procedure Code establishes in par. 5 of art. 205 a special rule on appeals to enforcement decisions where income is obtained by several people, according to art. 89 para. 1. In this case, given that the provision regarding the need of unanimous exercise of the appeal would have generated in practice situations in which the person concerned to appeal the tax decision would have been prevented by other people to exercise his/her rights, the legislature expressly stipulated the right of every person who earns the revenue in formulating the appeal.

This rule is enforced as the first consequence of involving other people in the tax appeal settlement procedure under art.212 par. 2 of the Fiscal Procedure Code, following that the effects of the tax

appeal settlement in such a case be uniform.

Therefore, the admission of the tax appeal brought by one of the people who have contributed to earning the revenue has the effect of correspondently reducing or cancelling the amounts due as taxes broadly for all those who participated in the earning of the revenue, regardless of whether they have made or not request in this procedure.

For the same reasons, the same will be the solution if people who earn revenue make each a separate appeal and the grounds of the appeal are different. Tax appeals will be settled by the same decision, unitedly, and the result of the appeal will occur correspondingly on all those participating in earning the revenue, proportional with the way these people have agreed to proceed with the distribution of the revenue thus earned.

Paragraph 1 of art. 206 of the Tax Procedure Code details the substantial and formal issues of the appeal made against the tax administrative act, stating that it will necessarily include the following: the identification data of the appellant, the object of the appeal; the factual and legal grounds for the appeal; the evidence in support of the appeal and the signature of the appellant or his/her authorized agent as well as the seal in case of legal entities [1], [3], [4], [5].

Also, para. 2 of art. 206 of the Tax Procedure Code states that the object of the appeal is represented only by the amounts and measures established by the fiscal body in the claim or in the tax administrative act appealed, except for the appeal against unjustified refusal to issue the tax administrative act, in which case the object of the appeal is represented by the taxpayer's specific request that the tax authority has unreasonably refused to settle.

In consequence, the subject to the appeal can also be the "silence" of the fiscal body, which either does not issue the taxpayer a tax administration form until he is required to do so by law, even without a request from the taxpayer, or he does not give effect to the taxpayers' request to issue a tax administration act within the statutory period [1].

Paragraph 175.1 of the rules for the application of the Fiscal Procedure Code provides that in appeals covering amounts of money, the amount of the debt object to the appeal shall be mentioned, individualised on categories of taxes, fees, contributions, as well as their accessories, and if the appeal is not made in accordance with this claim, the tax authorities will require the appellant, within five days, to communicate these elements.

For inobservance of the formal requirements imposed by law, the appeal thus expressed will be rejected [4], [5].

According to article 206, paragraph 3, the appeal is not subject to stamp duty. This provision reflects the gratuitous nature of the tax administrative courts, in full compliance with the provisions of art. 21 para. 4 of the Constitution.

### **3. Time limit and place for appealing**

According to art. 207 para. 1 of the Fiscal Procedure Code, the appeal must be lodged within *30 days from the date of the fiscal administration form, under penalty of forfeiture. As a procedural time limit, the 30 days due date shall be calculated on days off as art. 68 of the Fiscal Procedure Code* [1].

As an exception, if the tax administration document contains references to the possibility of being appealed, the time limit for appeal or the body to which the complaint is filed, the aforementioned appeal time limit is to be considered to be *three months* from the communication of the tax administrative act.

Therefore, for the same reason, it is necessary to assimilate to this situation the case when the tax administration document contains false statements about the deadline for an appeal or the body to which the appeal must be filed.

Also, the Tax Procedure Code expressly provides the appellant's right to file a new appeal, in case s/he had initially filed an appeal, but gave up on it (the tax authority taking notice through the decision of the appeal waiver) but if the appellant is still within the legal limit mentioned above for filing the appeal.

Therefore, the waiver of appeal does not amount to a waiver of the subjective right.

It is noted that there is no procedural rule on the deadline within which the 'silence' of the tax authorities to give effect to the request made by the taxpayer in connection with the administration of taxes should be appealed.

Given that, supposedly, in such a case, the taxpayer is not aware of the period within which such a tax administrative act should be appealed, a situation caused by the default of an obligation linked by the tax authorities (i.e. the obligation to give the taxpayer an answer within the legal term, which is usually 45 days, or to issue the tax administrative act within the terms provided by law) it must be considered that the deadline for an appeal against the silence of tax authorities is 3 months from the date when the tax authorities should have addressed the fiscal appeal [1], [5].

According to Art. 206 paragraph 3 of the Fiscal Procedure Code, the appeal is submitted to the tax authorities, respectively the customs, whose administrative act is appealed.

If the appeal is submitted to an incompetent tax authority, the latter will refer this appeal within five days of its registration to the tax authority issuing the tax administrative act [4], [5].

## 4. Addressing the tax appeal

### 4.1. Jurisdiction of the tax appeal

The Fiscal Procedure Code sets out in art. 209 the jurisdiction to settle appeals against tax administrative acts according to several criteria [1] [5].

The main criterion for determining the competence of solving appeals against tax administration acts is the criterion regarding the type of tax administration act appealed, namely if this is a typical administrative act or an assimilated administrative act.

Among the secondary criteria for determining the competence of settling tax appeals, the following are mentioned:

- the criterion regarding the material competence of the issuer of the tax administration act, as it comes or not to an organ of the specialized services in the local public administration;
- the criterion regarding the content of the tax administrative act, such as disputes which concern taxes, fees, contributions, customs duty, their accessories and appeals against decisions of rechecking,
- the criterion regarding the contested amounts or the criterion of value such as the appeals which concern the fiscal loss mitigation measures, amounting to 3 million lei or more.
- the criterion regarding the category to which the taxpayer pertains, for example non-residents who do not have a permanent establishment in Romania, large taxpayers, taxpayers harmed by the unjustified refusal.

### 4.2. Appeal settlement procedure

The Fiscal Procedure Code regulates the procedure for settling tax appeals, including some legal provisions similar to those of the Code of Civil Procedure.

- *Involving other people in the appeal settlement procedure*

Based on the institution of third parties participation in the civil lawsuit of civil proceedings, art.212 of the Fiscal Procedure Code establishes two types of attracting third parties in the appeal settlement procedure: introducing third parties in the settlement procedure and the voluntary intervention of third parties in this proceeding [ 2] [3].

In connection with the introduction of a third party in the settlement procedure, the Fiscal Procedure Code leaves it to the decision of the tax authorities to take such measures.

The essential condition for the tax authorities to carry out the introduction of third parties in this case is that the latter be affected by the legal interests of fiscal nature following the decision of settling appeals.

However, prior to the introduction of third parties, the Tax Procedure Code imposes the obligation of the tax authority to hear the taxpayer pursuant to his/her right to be heard in the tax procedure, as it is established in article 9 of the Tax Procedure Code, since the introduction of other people in the process of settling the taxpayer's appeals may affect the legal interests of the latter.

As an exception, according to art.212 paragraph 2 of the Fiscal Procedure Code, involving a third person is compulsory for the tax authorities in case several people contribute to earning the revenue, in which case it is mandatory to involve all the people contributing to earning the revenue in order to avoid creating a different tax regime among these people [5].

From a procedural standpoint, the intervener will be a party in the appeal settlement procedure, the decision issued

by the tax authority in this proceeding being invoked against them.

In the absence of express provisions in the Fiscal Procedure Code relating to procedural acts to be performed when filing the tax appeal, the rules of the Code of Civil Procedure regarding the voluntary intervention and forced intervention are to be enforced.

Contesting the intervener's involvement in the appeal settlement procedure for a tax administrative act either by the person introduced in the cause or the taxpayer himself is to be made only when appealing the decision regarding the appeal filed by the taxpayer, the intervener being subsequently entitled to bring an action against this decision, under the conditions set by law and the Administrative Litigation Law and the Civil Procedure Code.

- *Procedural rules for settling tax appeals*

Article 213 of the Tax Procedure Code establishes the basic procedural rules to be followed when settling tax appeals, rules that are highly similar to the provisions in the civil procedure [1].

First, the fiscal body which settles the appeal must verify *ex officio* the jurisdiction to settle the appeal in order to avoid the possibility of cancelling the decision or disposition on the grounds of lack of material or territorial competence.

Secondly, the Tax Procedure Code compels the competent body to settle the appeal to rule first on the exceptions of procedural plea and on the substantive ones, if it is determined that they are founded, to no longer proceed with the analysis of the cause, a new rule that has its source in the civil procedure and highlights the legal administrative nature of the procedure analyzed.

Thirdly, the same article obliges the fiscal authority to settle the fiscal appeal to verify the reasons in fact and in law underlying the issuing of the tax administrative act, the analysis of the appeal being made in relation to the evidence presented, the legal provisions invoked and the parties' support.

Fourth, the settling of the appeal shall be done within the limits set by the appellant in the content of the appeal.

This rule gives expression to the principle of availability in the tax procedure.

Fifth, paragraph 3 of art.213 of the Fiscal Procedure Code provides that the settlement of the appeal cannot create a more difficult situation to the appellant in his own appeal, a provision which represents a reiteration of the *non reformatio in pejus* principle within the tax procedure [5] [6].

- *Presenting evidence in the wording of the tax appeal settlement procedure*

Throughout the procedure for resolving tax disputes, the tax authority shall take into account the provisions regarding the evidence from the wording of Title IX, and is to apply as common law the provisions of Chapter 3 of Title III of the Fiscal Procedure Code [1], [5].

Samples contained in this procedure will be primarily indicated by the appellant in support of the appeal.

However, the appellant, the intervening people or their procurator can manage new evidence to support the case.

These samples can be taken on its own initiative or at the request of the body settling the appeal, however, the body that issued the tax administration act appealed or the body that conducted the inspection where appropriate, is to be given the opportunity to express their views on the

new evidence given by the taxpayer during this procedure, which represents an enforcement of the principles of contradictoriness and of the right to defence in the matter of tax procedures.

The competent body to hear the appeal may ask for clarification of the case from the point of view of the specialized ministries or other institutions and authorities.

Such a point of view will concern issues related to the application of legal rules in the respective case.

- *The deadline for settling tax appeals*

Since the provisions of the Fiscal Procedure Code do not contain express provisions regarding the term for the settlement of tax appeals, it is considered that tax authorities are required to address the fiscal appeal within 45 days provided for by article 70 of the Fiscal Procedure Code, except for the situation when the settlement of the appeal requires supplementary information in order for a decision to be made, in which case the time for settling the appeal shall be extended by the period between the date of the application and the date of receiving the information requested.

The question is whether, in the absence of a decision issued by the authority for settling the appeal within the time aforementioned, the appellant taxpayer may address directly to the court in order to appeal the tax administration act contested in this procedure.

The answer to this question can only be positive, the legal basis for this action is the lack of decision for settling the appeal within the statutory period.

The deadline for submitting a legal action is 6 months from the expiry of the time limit when the tax authorities should have settled the tax appeal filed by the

taxpayer and to have issued the tax administrative act to be appealed by the taxpayer. [3]

Moreover, this solution is drawn from the Administrative Litigation Law no.554 / 2004, given that, according to article 8, paragraph 1 of this law, not receiving a reply by the complainant within the period provided by law for the settlement of an appeal opens its way for an administrative action in which s/he may require, among other things, the cancellation of the entire contested act or a part of it.

Also, if in the appeal, the applicant had not requested the cancelling of an administrative act, but requested the issuance of such an act, in case of failing to settle the matter in the legal term or the refusal to address this appeal, the petitioner has the way open to an administrative action, which will entitle him/her to demand the court to compel the tax authority to issue the requested act according to article 18 of the same law.

We also believe that the settlement of the appeal by the fiscal body after the matter is referred to the court by the appellant taxpayer under the conditions given above, entitles the latter to complete the action by bringing to the court the decision settling the appeal [1].

- *Procedural incidents during the settlement of the appeal*

Article 214 of the Tax Procedure Code establishes several cases of voluntary suspension of the tax appeal settlement, ex officio or upon request.

The suspension ex officio occurs in two situations:

(1) there are indications of a crime, clues found by the tax authorities which had drawn up the tax administration act and who notified the prosecution about this and which, if found true, would have a crucial influence on the resolution that

would be imposed in the administrative proceedings,

(2) the existence or absence of a right that is the object of another judgement. In both cases, the procedure to settle the appeal will remain suspended as long as there is still a cause for the suspension.

Regarding the suspension on request, the Tax Procedure Code regulates the right of the taxpayer to make a claim for suspension of settling the appeal, based on reasonable grounds.

Unfortunately, in the absence of stipulations in the legal text on the reasons that could be the basis of a claim for suspension, we believe that these could consist of, for example, the taxpayer's need to obtain some evidence to submit before the tax authority in the proceedings for settling the appeal.

The tax authority which settles the appeal must set a term for which the suspension operates, after which the procedure will be resumed, whether the reason that caused the suspension has ceased or not.

Please note that the introduction of the tax appeal does not suspend the enforcement of the tax administration act.

However, the suspension may be requested under Article 215 of the Tax Procedure Code [3], [4], [5].

- *The form and content of the appeal settlement decision*

According to article 211 of the Fiscal Procedure Code, the tax appeal settlement decision includes the preamble, the recitals and the device.

According to paragraph 2 of the same article, the preamble of the decision shall include:

- ❖ the name of the body settling the tax appeal

- ❖ the name or the designation of the appellant;
- ❖ the fiscal domicile of the appellant
- ❖ the registration number of the appeal to the competent settlement authority;
- ❖ the subject matter;
- ❖ the summary of the parties, if the competent body for settling the appeal is not the issuing body of the act appealed.

Recitals The appeal tax decision must include the factual and legal reasons that led to the conviction of the competent settlement authority issuing the decision, while the device incorporates the outcome of the appeal period within which it can be exercised and the competent court .

- *Resolutions that can be given in fiscal appeals*

According to Art.210 of the Fiscal Procedure Code, in the resolution of the appeal, the competent body rules by decision or, on the case.

Also, under Section 179.1 of the Methodological Norms, the resolutions to be delivered in the settlement of tax appealed are called decisions, when they are issued by the authorities of the National Revenue Agency system, while if they are given by the local administration bodies, they are called provisions.

The appeal will be granted, in whole or in part, or rejected. Following the admission in whole or in part of the tax appeal, the settlement body may decide to cancel entirely or partially the tax administrative act appealed, the amounts deemed owed through it or the measures imposed on the appellant are to be considered void insofar as they were subject to the appeal.

The body settling the appeal can, on the other hand, rule to abate the tax administrative act, in which case the

issuing fiscal body will have to issue a new tax administrative act.

The body settling the appeal may reject the appeal, in which case the tax administrative act appealed will be maintained.

Dismissing the appeal for failure to comply with procedural requirements is done without analysing the merits of the case.

Rejecting the appeal should not be abusive, e.g. for the reason that it bears a wrong name or that it was submitted to another tax authority than the one which had admitted the tax administrative act.

In other words, rejection should not be based on elements whose absence or erroneous statement is not likely to make it impossible for the body to settle it [1], [5].

However, the following can lead to the rejection of the appeal, without entering into the merits of the case, namely filing the appeal after the expiry of the period prescribed by law for this purpose or the failure to specify the information required by the tax body within the period provided for the appellants.

### **5. Remedies of law for the tax appeal**

According to article 218, paragraph 1 of the Code of Fiscal Procedure, the decisions issued when settling appeals are notified to the parties as follows: to the applicant, to the body that issued the tax administrative act and the people involved in the procedure of resolving disputes, as the case may be.

Under paragraph 2 of the same article, the decisions regarding the settlement of the appeal can be appealed before the competent administrative court, without specifying neither which that is, nor the time within which such an action can be brought [2], [3].

### **6. The impact of Law no.554 / 2004 on the legal proceedings of appealing the tax administrative act**

The legislature has defined the judicial administrative act within the Administrative Court Proceedings Act, contributing significantly to the crystallization process underlying its issuing. However, the Administrative Court Proceedings Act establishes the terms and conditions under which the tax administrative act may be appealed to the administrative courts.

Law no.554 / 2004 contains provisions on the jurisdiction on resolving the legal action against the administrative provisions relating to taxes, contributions, customs duties and accessories of them, this being determined by the material criteria of the constant amount size.

Respecting the criterion value, the jurisdiction to hear the merits of the cases falls on the administrative courts, respectively to the legal departments of the administrative courts of appeal.

The Fiscal Procedure Code governing tax appeal settlement by the tax authorities and the Administrative Court Proceedings Act regulates the second instrument to protect the rights of taxpayers in tax proceedings - the administrative and fiscal action.

### **7. Conclusions**

The legal foundation of the tax litigation is the taxpayer's right to have access to justice.

Given the complexity of legal tax relations, but also the large number of tax disputes, the legislature considered useful to regulate an administrative filter for the litigations aimed at establishing taxes.

The taxpayer has the right to appeal the tax administration act both in front of the

tax authorities and the administrative and fiscal court [3], [6], [7].

The settlement by the tax bodies of the appeals filed against administrative acts is regulated by the provisions of Title IX of the Code of Tax Procedure and the settlement of the action in the tax administration court is governed by the Administrative Court Proceedings Law no.554 / 2004.

Tax appeal and tax administration are two important instruments in defending the rights of the taxpayers in tax proceedings.

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