APPEAL AGAINST THE TITLES OF THE TAX CLAIM. INADMISSIBLE ACTIONS FORMULATED DIRECTLY IN COURT

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Abstract

According to the provisions of the Article 7, paragraph 5, the second thesis of Law number 554/2004, for this category of action, prior complaint is not mandatory, and according to the provisions of the Article 11, paragraph 4, the first thesis, direct action addressed to the Court can be registered anytime.

Provided that the competent tax authority has not solved substantive tax appeal regarding the payment amount representing the tax liability, is not justified, legally speaking, the annulment of the decision of taxation issued and the exemption of tax claim on the grounds that the applicant does not owe it, as a result of truthlessness manifested by the tax authority.

By proceeding in this respect, the trial Court has replaced the competent tax authority, which has not analyzed the tax appeal regarding the amount of money for tax payment obligations and which has the jurisdiction to deal with the resolution of the complaint formulated against the titles of the tax claim.

Key Words*: tax claim, tax appeal, prior complaint, decision of taxation, tax authority*

JEL Classification: [23]

According to the provisions of art. 205 paragraph one of the previous Code of Fiscal Procedure (Government Edict no. 92/2003), "against the debt instrument, as well as against other administrative acts, the claimant may appeal under the law. This appeal represents an administrative procedure, and it does not limit the right of action of those who consider themselves prejudiced in their rights by a fiscal administrative act or the lack of it, according to law provisions ".

Regarding the settlement term of the prior dispute, according to art. 70 paragraph one - previous Code of Fiscal Procedure (Government Edict no. 92/2003), "all petitions stated by the taxpayer under this Code shall be settled by the tax authorities within 45 days since the registration."

Concerning the answer of the dispute issued by tax authority, according to the provisions of art. 218, the 2nd para. of the former Code of Fiscal Procedure (Government Edict no. 92/2003), "the claimant or the person placed in dispute, may make an appeal against the decisions issued by the tax authority, according to article. 212; the competence belongs contentious administrative Court, according to law provisions ".

It must be noted that art. 218, the 2nd para. of the Code, provides the possibility to bring in Court, an action against the ruling manner of the administrative

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authority, (doing reference to the administrative act against which the complaint was lodged). Apparently and formally, art. 218 par. 2 Fiscal Code of Procedure, limits the legal proceedings object exclusively to the decision issued in the dispute.

The provisions of art. 11, the 1st para. letter c) of the Law no. 554/2004 allows an action in court within six months calculated from the time limit of the settlement of prior administrative complaint. The prescription period starts from the afore-mentioned time.

The same article sets forth that "the petitions requesting cancellation of an individual administrative act, an administrative contract, the acknowledgment of right and the remedy for the caused prejudice, can be lodged within six months from the time limit for solving the prior complaint or from expirtation day of legal term for the settlement of the petition ".

The provisions of Law 554/2004, art. 8, para 1 states: „if party is injured in a legal right or a legitimate interest, by an administrative unilateral act, or if the party is unsatisfied with the received response of prior complaint, or if the party has not received any reply within the period specified in art. 2, 1st para., letter h), he/she may notify the competent administrative court to request cancellation of all or part of the act, reparation for the damage caused and eventually repair of caused damages".

„It also may appeal to the administrative court, anyone who considers himself injured in a right or legitimate interest, by lack of settlement in due time, or by unjustified refusal to sustain the claim/ request, and by refusing to carry out a certain administrative operations required for the exercise or protection of the right or legitimate interest ".

A problem of interpretation which raised divergent solutions is: if the procedure of settling the appeals against fiscal administrative acts includes the judicial settlement phase, whose object is the annulment of the decision issued by administrative authority, as a response to prior litigation.

In this regard, it must be noticed that art. 1 paragraph 2 of Law no. 207/2015 refers to procedure for settling the appeals against fiscal administrative acts without distinguishing between the administrative and the judicial phase.

That means, the afore-mentioned issue goes with the same procedural law, since the legislator does not distinguish.

Therefore, though tax dispute is solved by fiscal-administrative authority, it doesn't mean that the procedure is complete, if the contributor appeals in court the settlement of administrative litigation.

Therefore, according to this interpretation, the old provisions of the Fiscal Code of Procedure (Government Edict no. 92/2003) would be applicable to any legal action for annulment of a decision that solves a complaint registered prior to 01/01/2016, regardless of the date on which it has been issued (even if the decision was issued after 01.01.2016, the day when the new Tax Procedure Code took effect).

The conclusion of the foregoing issue is that interpretation of old Tax Procedure Code remains valid (Government Edict no. 92/2003), as long as there are still many disputes where the provisions of the code are still applicable, although it was abated on January, 1st, 2016.

As for the question of law subject in debate – i.e. admissibility of the action for annulment of the tax decision if the decision based on administrative litigation was not appealed - prior case law reveals different approaches depending on the answer to the following questions:

1. Which is the consequence of term expiration for tax dispute resolution related to birth of the judicial action right?

2. The tax decision may be appealed directly to the court or a legal action must be promoted in order to force the fiscal authority to solve the litigation?

This legal issue was raised in context of case law divergent solutions[1], when the taxpayer has requested the annulment of tax justice exclusively, without appealing the administrative decision too, (action that was promoted according to art. 205 of the former Code of Fiscal Procedure (Government Edict no. 92/2003). In this case the administrative appeal was promoted and time limit for resolving this issue (45 days) was expired without any decision, therefore the applicant has registered an action for annulment of the tax decision.

Basically, in accordance to a formal interpretation of art. 218 of the former Code of Fiscal Procedure (Government Edict no. 92/2003), the Court of Appeal Timisoara-Administrative Legal Department delivered several judgments.

Thus, the court considered all actions for annulment of tax decisions must be rejected as inadmissible actions, if the taxpayer has directly challenged in court the tax decision, without waiting for the decision of fiscal-administrative litigation, even the deadline for settlement has expired.

In the same context figures the question if it is necessary to modify the petition, more exactly meaning requesting cancellation of the decision settled in the appeal, to the extent that such a decision was issued after notification of the administrative Court.

Also, if the applicant set fiscal administrative litigation, and time limit for settling the appeal expired, it must be determined the admissibility of an action for annulment of the tax decision or the incumbency to pass an action in order to force the fiscal organ to resolve the litigation.

Herein, Court of Appeal Timisoara - Administrative and Fiscal Department issued a civil decision no. 9108 / 10.8.2013, (case no. 5448/108/2012) by which was ordered the reversal of first instance judgement, the case being sent back for retrial.

Other court opinion set as inadmissible the action for annulment of the tax decision, on the grounds that the applicant had not expected the decision of the litigation.

In motivation, the court held the following arguments: on 20.01.2012, the applicant filed an administrative appeal (in accordance of the provisions of art. 205 Fiscal Procedure Code) which was brought to Arad Court of Justice to Arad Court on 20.08.2012.

[1] For an analysis of solutions delivered by the Court of Appeal Cluj and the High Court of Cassation and Justice, see E. M., Fodor, *The Preliminary Complaint in the Fiscal Procedure*, in „Fiat Iustitia", no. 1/2015, pp. 57-66.

The decision settling the appeal (*i.e.* Decision no. 1136/21.08.2012) was communicated to the applicant's representative on 18/09/2012. The decision of settling the litigation was filed in copy to Court Arad. The cause was postponed at the request of defense lawyer, in order to take notice of the injunction lodged by the defendant one day prior of the hearing. At the next hearing, (November, 27, 2012), the trial Court discussed the objection of inadmissibility, raised by the defense.

The first instance court upheld the objection of inadmissibility, holding that, although the applicant filed a litigation (in accordance to art. 205-207 Fiscal Procedure Code), the provisions of art. 218, para.2 Fiscal Procedure Code establishes, in a specific manner and without any doubt, that the decisions issued for litigation settlement may be appealed to the competent administrative Court, according to law provisions.

The first instance court held that the applicant ignored the afore-mentioned procedural provisions, directly appealing, in court, the administrative imposing decision and the measures established by tax inspectors, instead of appealing Decision no. 1136/21.08.2012, issued by Settlement Litigation Department, (referred by the defense).

Trial Court pointed out that a different conclusion, as outlined above, would lead to the conclusion that the appeal procedure governed by the Fiscal Procedure Code should be classified as special administrative jurisdiction within the meaning of art. 6, of Law no. 554/2004.

This is unacceptable, especially since the High Court of Cassation and Justice constantly has ruled on, (in accordance with art. 188 2nd para, present art. 218 2nd para. Fiscal Code of Procedure), as follows: it may form the subject of the fiscal-administrative action, the decision rendered in solution of appeals against fiscal administrative act and not directly the administrative act.

In another judicial interpretation by civil decision no. 9108/08.10.2013, delivered in case no. 5448/108/2012, Timisoara Court of Appeal held that the action is admissible - featuring cassation and dispatching trial Court resolution, on the strength of the following reasons: such a formalistic interpretation does not comply with the purpose of the legislation, because the act of taxation against which the appeal was filed should not be rescinded by the courts, even if it the petition were accepted and the decision emanating from the dispute would be abolished.

However, it cannot hold that the eventual annulment of the decision issued in the review procedures would mean the cancellation of the administrative and fiscal act, against whom the complaint was made. In such a rigid interpretation, this aspect is not covered by legal provisions:

- art. 11, para. 1 letter c) of the Law no. 554/2004 would not only allow the applicant to bring the action within six months of the time limit for settlement of prior administrative complaint, but it would even impose the flowing of the prescription term from that date.

- in such cases, considering the action admissible does not ignore the fact preliminary tax appeal procedure is considered mandatory by the Constitutional

Court and the High Court of Cassation and Justice as administrative procedure – and not administrative-jurisdictional procedure (thus being compulsory).

Pursuing this procedure by the petitioner involves compulsory prior notification of the Settlement Fiscal Authority and waiting the expiration of legal term for settlement of the opposition.

But, it cannot hold that following the preliminary procedure always involve finalizing this procedure by the decision which solves the dispute, since – although it would mean a normal, typical situation - no legal text obliges the applicant to wait endlessly, in an indefinite time, the decision of litigation settling to be issued, before promoting a court action.

According to the provisions of Law no. 554/2004, art. 8, para 1 states: „if party is injured in a legal right or a legitimate interest, by an administrative unilateral act, or if the party is unsatisfied with the received response of prior complaint, or if the party has not received any reply within the period specified in art. 2 para. (1)letter h), he/she may notify the competent administrative court to request cancellation of all or part of the act, reparation for the damage caused and eventually repair of caused damages".

Regarding this regulation, it is excessive to limit the applicant the right only to the request addressed to the defendant for issuing the administrative act, as a response to the litigation, when the fault of exceeding the legal term lies solely with the administrative authority.

In such situations, the solution of the inadmissibility of the action – although it may be justified in terms of legal texts – is based on a formalistic interpretation that leads to a drastic sanctioning of the individual.

Furthermore, the Romanian procedural law promotes a concept of safeguarding the vicious procedural act legal, insofar as no harm can be sustained to the procedural rights of the adverse party.

Failure to comply with the procedural provisions cannot be accepted as a sufficient condition for the annulment of the acts issued, without compliance with the law, unless it is proved that the injury and the impossibility of remedying this injury by other means than the abolition of that act. Or, such an injury has not been proved by the defendant in the present case, and since the decision to settle the litigation confirmed the legality of the contested act, it is clear that the legal action remained the only possibility for the applicant to abolish the contested act of taxation.

Following the arguments above, we can conclude that the action brought directly against the tax decision is admissible if the plaintiff proves that he has filed the fiscal administrative appeal – according to art. 205 Fiscal Code of Procedure- and that the legal settlement time of 45 days has expired, so far as the defendant does not prove the legally prolongation of that period (the prolongation whose legality is assessed by the court at the request of the applicant).

According to the reasons outlined above, the solution is justified by the provisions of art. 8, 1st para. and art. 11, 1st para. letter. c) of the Law on Administrative Contentious no. 554/2004.

Therefore, the fulfillment of the legal term for solving the appeal gives the complainant the right to bring the issue to the court, without being necessary to begin judicial process for obliging the defendant to resolve the tax administrative litigation.

When, at the specific date, the trial court is lodged with an action for annulment of the tax decision, and the decision to settle the appeal was issued too, (plus the applicant was aware of it, being previously communicated to him), the action is inadmissible, the applicant being obliged to attacked this decision, too (according to art. 218 Fiscal Code of Procedure).

If the claimant has brought an action for annulment of the taxing decision and the decision to settle the appeal is issued during the trial court, it is mandatory for the plaintiff to amend the legal action. In this case, the claimant must request the annulment of this decision, too, (according to art. 218 Fiscal Code of Procedure) otherwise the action will be dismissed as inadmissible.

However, considering that the applicant had the perspective of judicial action admissibility, at the moment when the trial court was lodged (when the issue of inadmissibility was not raised), it is necessary, that the trial court – before calling into question the inadmissibility of the action under the above conditions – to draw the attention of the applicant, whether or not he/she understands his to complete the initial court action, by requesting the annulment of the decision which settled the appeal (according to art. 218, 2nd para Fiscal Code of Procedure).

In view of a typical nature for dismissal of a judicial action as inadmissible, the solution is justified, since the cause of inadmissibility arose after the court hearing and it was not imputable to the applicant (the resolution authority being at fault for issuing the decision after the legal term has expired), according to art. 8, 1st para. and 11, 1st para. letter. c) of Law no. 554/2004 which allows the applicant to appear to have fulfilled the conditions of admissibility of the legal action until the decision to settle the appeal has been issued.

If the plaintiff does not understand to change his claim, that is, to request the annulment of the decision settled in appeal, the trial court will debate the inadmissibility of the action, referring to art. 218, 2nd para. of Fiscal Code of Procedure.

The court will dismiss the action as inadmissible, as it is not legally possible to examine the lawfulness of the taxation decision, by ignoring the administrative solution issued in respect of the same fiscal decisions.

Having regard to the case-law relied on the question of the inadmissibility of the action for annulment of the challenged tax decision, before issuing the decision to settle the administrative-fiscal complaint, it is to be observed that the new Fiscal Code of Procedure brings new regulation (by the provisions of art. 281 para. 5).

According to art. 281 para. 5 of the new Fiscal Code of Procedure (Law 207/2015), „if the appeal is not resolved within 6 months from the filing of the litigation, the contestant may address to the competent administrative court for the annulment of the act. The calculation of this term does not include the periods during which the procedure for resolving the appeal is suspended according to art. 277".

According to art. 281 par. 6 of the same normative act, „the procedure for resolving the contestation shall cease at the date when the fiscal authority has become aware of the action in administrative contentious formulated by the taxpayer/payer".

The provisions of art. 281 para. 5 of the new Code of Fiscal Procedure shows that „the action for annulment of the tax decision is admissible in the event of failure to resolve the appeal within 6 months from the filing of the appeal, unlike the previous regulation of the old Fiscal Procedure Code". *(Government Edict 92/2003).*

We also draw attention to the provisions of art. 281 para. 7 of the new Fiscal Code of Procedure (Law no. 207/2015), *i.e.* …according to para. (2), in the case of an appeal, to the administrative competent court, of the decision by which the tax authority rejected the appeal without going into the investigation of the tax legal relation, if the court finds that the solution adopted by the fiscal authority, is illegal and/or groundless, it will also rule on the substance of the fiscal legal relation. "

To be noted that, both art. 281 para. 5 and art. 281 par. 7 of the new Fiscal Code of Procedure (Law 207/2015), provides the court with the prerogative of examining directly the lawfulness of the act of taxation, in those situations in which the administrative authority did not – in a guilty manner – solve the litigation within the legal time.

The instance has the same prerogative when the issue was settled without analysis on its substance, that is, precisely in those situations of particular complexity, in which a reassessment of the act of imposing by the administrative authorities could have brought further and more prompt clarification of the state of affairs.

We consider that such a legislative amendment only appears to be a simplification of the procedure, given that, the way in which evidence is handled by the Court requires compliance with the principle of contradictory, with the obligation to bring to the attention of the parties any evidence.

We must also mention that the judicial administration of the evidence is far delayed by the necessity to respect some mandatory procedural legal term, as opposed to the procedure for solving the administrative-tax appeal.

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