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PROCEDURES FOR ASCERTAINMENT OF TAX VIOLATION AND IMPOSITION OF SANCTIONS

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Abstract

Tax penalty proceedings are part of the tax procedure. Its legal framework is regulated in the Tax and Social Insurance Procedure Code (TSIPC) and Administrative Violations and Sanctions Act (AVSA). Hence, the proceedings are normatively established and realized mainly in two phases. The first is associated with the ascertainment of tax violation and the issuance of an instrument on the ascertainment of such an offence. The second encompasses the imposition of the respective sanction, which materializes in the issuance of a penalty decree.

Key words: penalizing authority, instrument on ascertainment of administrative violation, penalty decree

JEL: K34, K42

The subject of the article is to define tax penalty proceedings and to analyze in detail the proceedings for the ascertainment of tax violations and imposing sanctions.

Main features

It could be emphasized that tax penalty proceedings are part of the general tax procedure. As a legal institution, it represents a legal possibility to impose sanctions for non-compliance with the obligations established by tax laws. Thus, its subject encompasses public relations associated with the violation of the tax regime established in the country. The imposition of castigations in the manner prescribed by law is envisaged because of such offences (Петканов, 1966, p. 198). Furthermore these public relations arise, develop and terminate in the field of both substantive and procedural tax law. From a procedural point of view, problems are related to the proceedings for the ascertainment of tax violations and the imposition of administrative sanctions. From a substantive point of view (a matter not in the scope of the article) problems are affiliated with the legal nature of tax infractions and penalties.

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Principles

As part of the tax procedure, the proceedings for the ascertainment of tax violations and the imposition of sanctions are settled and developed on the basis of the principles established in the Tax & Social Insurance Procedure Code (TSIPC[2]). At the same time, the principles established in the Administrative Violations & Sanctions Act (AVSA) are also pertinent:

Legality of tax offences and castigations. This presupposes the necessity for the normative formulation of each tax violation as well as the corresponding sanction.

Fairness of tax violations. This principle is fundamental in administrative penalties, which implies that the sanctions provided for must be commensurate with the degree of public nuisance of the offense committed.

Inadmissibility of re-imposing a sanction for the same contravention. Imposing a second penalty for the same act is a gross violation of the law (Дерменджиев, Костов, Хрусанов, 2001, p. 308).

Another principle that is mentioned in the literature and is relevant to the topic is **the principle related to guilt.** It is associated with the fact that an administrative punishment may be imposed only if the perpetrator is personally guilty of the offense (Петканов, 1966, p. 199).

Prohibition of a retroactive effect and application by analogy. This is a general principle in administrative castigation, which also manifests itself in the tax regime.

Public relations, which arise, develop and terminate in the tax penal procedure, are subject to regulation primarily by the rules of the administrative penal procedural law (Петканов, 1966, p. 199). This proposition is normatively supported by the current provision of Article 280, paragraph 2 of the TSIPC, which states that the ascertainment of the contraventions, the issuance, the appeal and the enforcement of the penal decrees are carried out by the rules of AVSA. Consequently, it can be said that the tax penal procedure is part of the general administrative penal procedural law. The latter is based on the determined procedural rules, which the competent authorities are obliged to observe in the implementation of the state policy for prosecution and punishment of perpetrators. In tax penal proceedings the public enforcement agents or the revenue authorities, as the case may be, are responsible for the detection of infractions and the issuance of an instrument on the ascertainment of administrative violations. Penalty decrees are issued by the Executive Director of the National Revenue Agency or an official empowered thereby (art. 279 TSIPC).

[2] Legality – article 2, objectivity – article 3, autonomy and independence – article 4, ex officio principle – article 5, good faith and right to defense – article 6.

Ascertainment of tax violations as well as the imposition of sanctions procedure

In order to impose an administrative penalty for tax offence, a procedure established by law must be developed. The latter passes mainly through two phases. *The first* is related to determination of tax contravention and drafting an instrument on the ascertainment of such a violation. One of the parties always acts as an authority and aims its powers at the discovery of an administrative infraction. The other party is the person indicated as the perpetrator. *The second* comprises the compulsion of the respective castigation, which manifests itself in the draw up of a penal decree.

The provision of Article 279 of the TSIPC stipulates that the instrument on the ascertainment of administrative offences shall be drafted by the revenue authorities, respectively by the public enforcement agents[3]. Penal decrees are issued by the Executive Director of the National Revenue Agency or by an official authorized thereby[4]. In cases when the violation is committed by a body or employee of National Revenue Agency, the instrument on the ascertainment of an administrative contravention shall be drawn up and the a penal decree shall be issued by officials empowered by the Minister of Finance (art. 2). The determination of infraction, the issuance, appeal against and enforcement of penalty decrees follow the procedure established by the Administrative Violations and Sanctions (art. 3). Moreover, it can be stated that there are established by law proceedings which end with two separate statements. These have different legal characteristics and bring forth different legal consequences.

They materialize powers of precisely defined bodies and are in certain coherence. The instrument on the ascertainment of an offence is the most important prerequisite for issuing a penal enactment. The literature states that the statement for the determination of the infraction is a typical ascertaining administrative instrument, which causes a certain legal effect. By its nature, it executes three main functions (Петканов, 1966, p. 217; Златарев, 1975, p. 212; Стоянов, 2012, p. 295).

1. Accusatory – the statement brings an accusation against a specific person for a committed tax violation;

2. Determined – the instrument officially establishes facts and circumstances regarding the committed violation, which has a certain evidential value;

[3] The instrument on ascertainment of administrative infraction may also be drawn up by the customs authorities – art. 128 of Excise Duties and Tax Warehouses Act, or by municipal authorities – art. 128 of Local Taxes and Fees Act (LTFA).

[4] Penal enactment mat be drafted by municipality mayor – art. 128 of LTFA or by Director of Customs Agency – art. 231 of Customs Act.

3. Referral – the deed is referred to the competent authority to impose a certain penalty.

The instrument on the ascertainment of contravention is comprised of the components stipulated in art. 42 of AVSA:

1. Full name of the official drawing up the statement plus his or her position;

2. Date when the statement was drawn up;

3. Date and place of the commission of the violation;

4. Description of the offence and the circumstances whereunder it was committed;

5. Legal provisions infringed;

6. The perpetrator‘s full name and age, full address and place of work, civil number. In case the former is an alien – full name, accurate address, date of birth and information (if any) for place of birth, passport or other travel document, indicating the number, date of issue and issuer of the deed;

7. Witnesses’ names and full addresses, civil numbers;

8. The offender‘s explanations or objections, if any.

9. Names and full addresses of persons who have suffered material damage in consequence of the violation committed, civil numbers;

10. A list of written materials and properties seized, if any, and the person tasked with the safekeeping thereof.

The absence of some of the specified components of the instrument may lead to non – commencement of the legal effect provided by law. Failure to indicate the issuer, lack of data on the perpetrator or lack of a written document at all may be classified as substantial defects. However, the statement will commence its legal effect if the defects are insignificant, such as an error in the address of the witness or the offender (Петканов, 1966, p. 217). The statement is an official written document which must be signed by the person who drew it up and by at least one of the witnesses identified therein. Where an offender refuses to sign a statement, this shall be certified by the signature of an eyewitness, whose name and full address shall be put down in the statement (art. 43, par. 2 of AVSA). The signing of the instrument by the witness is a guarantee of its authenticity and is in accordance with the principle of objective truth[5]. Next, the statement is presented to the offender to get acquainted with the contents thereof and sign. The signed perpetrator shall thereby assume an obligation to notify the penalising authorities of any change in his or her address (art. 43, par. 1 of AVSA). This norm guarantees the right of the infringer to get acquainted with the content of the instrument on the ascertainment of an administrative violation. The provision of art. 52, par. 2 of AVSA provides that unless it is found that a statement of violation has not been presented to the offender, the penalizing authority shall forthwith send it

[5] Ibidem.

back to the official who drew it up and would not issue a penal decree. Failure to comply with these requirements would lead to illegality of the administrative penal procedure. Since that would limit the perpetrator's right of defense in the course of the proceedings which is a serious defect by itself. The latter shall lead to the annulment of the issued penal decree[6].

The provision of article 280 of TSIPC stipulates that an instrument is drawn up even when **the perpetrator is unknown.** Upon ascertainment of an administrative violation by the authorities of the National Revenue Agency in the course of discharge of the control functions thereof, where the offender is unknown, the instrument on the ascertainment of an offence shall be signed by the drafter and by at least one witness and shall not be served. In such a case, a penalty decree shall be issued not earlier than the lapse of four months from the date of drawing up the statement, which shall come into effect as from the date of drawing up of the respective statement (art. 2).

Based on the drafted instrument for determination of a tax infringement, the second phase of the administrative penal proceeding has commenced. It is associated with the drafting of a penal decree. The provision of article 279 of the TSIPC indicates the administrative penalizing authority, namely the Executive Director of the National Revenue Agency or an official empowered by the former[7]. As is with the statement on detection of an administrative offence, the penal decree must contain the elements provided by law. According to Article 57 of AVSA it must be comprised of:

1. Full name and position of the official who issued it;
2. Date of issuance and reference numbers of the decree;
3. Date of issue of the statement of contravention whereupon the decree was drafted, plus the name, position and location of the service unit of the official who drew up the instrument;
4. Offender's full name and full address, civil number. In case the former is an alien – full name, accurate address, date of birth and information (if any) for place of birth, passport or other travel document, indicating the number, date of issue and issuer of the deed;
5. Description of the infraction, date and place where committed, the circumstances whereunder it was committed and the evidence;
6. The legal provisions that have been violated culpably;
7. The kind and extent of punishment;

[6] The case law is in this direction, too (Decision from 04.08.2008 of Sofia Administrative court on case № 3584/2008).

[7] The municipality mayor may impose a penal decree – art. 128 of LTFA or the Director of Customs Agency – art. 231of Customs Act.

8. Aggravating and mitigating circumstances and other taken into account in determining the type and extent of the castigation;

9. The time where the punished person has been deprived administratively or otherwise of the opportunity to exercise a certain profession or activity. The time period shall be deducted from the time of serving the penalty of temporary deprivation of the right to exercise a certain profession or activity;

10. All properties seized in favour of the state;

11. Disposal of real evidence;

12. The amount of damage and to whom the indemnification shall be payable; Whether or not the penal decree shall be subject to appeal, and within what term and to which court the appeal needs to be taken.

From the above it can be stated that the penal decree, as an instrument of authority must be issued in writing, i.e. it is an official written document signed by the official who drew it up. According to literature, the statement is a judicial statute, an edict of administrative penal jurisdiction – it establishes the fact of the administrative violation and relates to a specific person, on whom the appropriate administrative penalty is imposed (Дерменджиев, Костов, Хрусанов, 2001, p. 336).

The penal decree contains mainly two parts: recitals and operative provision. The recitals are a circumstantial part, which indicates the reasons upon which the authority considers that a particular tax violation has been committed and describes it as an illegal act of a specific person. The operative provision is the efficient part, which determines and specifies the type and extent of the punishment that shall be imposed (Дерменджиев, Костов, Хрусанов, 2001, p. 337).

It implies the properties to be seized in favor of the state. In order to have legal effect, penal decrees must be entered into effect. They are enacted when: they are not subject to appeal, have not been appealed by the time fixed by law, have been appealed and subsequently upheld or amended by a court (art. 64 of AVSA). In effect penal decrees are definitive legal instruments that are subject to enforcement. Within three (3) days following the effective date of a penal decree, the authority commissioned to impose administrative sanctions, the court respectively, shall initiate actions towards the execution thereof (art. 74 of TSIPC). The penal decree that has come into effect is an independent writ of enforcement within the provision of art. 209, par. 1, item 5 of TSIPC.

Aimed at guaranteeing the principle of legality in the imposition of administrative sanctions, the legislator has provided a possibility to appeal the penal decrees before the district court. In accordance with art. 59, par. 1 of AVSA, a penal decree shall be subject to appeal before the district court in the area of which the contravention was committed or completed, and with regard to offences committed abroad – to the Sofia district court. Entities and persons entitled to appeal penal decrees, in alignment with art. 59, par. 2 AVSA, are offender,

damaged clainmant and prosecutor. The application and the objection have a particular legal conesequence. They refer the matter to the supervisory authority, in this case the court, and oblige it to pass a decision. That expresses the mentioned conesequence. The court may not act ex officio by self-referral, commencing and concluding court proceedings.

The court's powers in the proceedings for appealing the penal decrees are regulated in art. 63, par. 1, sentence 1 AVSA. A district court consisting of a judge alone shall hear the case upon its merits and rule a judgement which may uphold, amend or rescind a penal decree. It is essential to note that the court cannot aggravate the applicant's situation, i.e. amending the sanctioning enactment to increase the extent of the penalty or to impose a heavier punishment provided by the law for the committed violation. The ruling shall be subject to cassation appeal before the respective administrative court in compliance Chapter Twelve of the Administrative Procedure Code (APC).

Resumption of Administrative Penal Proceedings are regulated in art. 70 AVSA, where it is indicated that the penal decrees into effect are subject to resumption, unless:

1. In effect sentence or decision establish that some of the evidences whereupon the penal decree was passed, are untrue;

2. In effect sentence or decision establish that a drafter, an administrative sanctioning authority, a judge, clerk, prosecutor, party or participant in the proceeding have committed a crime related to the issuance of such penal decree;

3. Circumstances or evidence have been found that are significant for revealing the objective truth and which were unknown to the offender, penalizing authority or the court at the time of issuance of the decree;

4. Effective sentence has been established that the act for which the administrative penalty has been imposed constitutes a crime;

5. The act, with regard to which the administrative penal proceedings have been concluded, incorporates a crime;

6. A judgment of the European Court of Human Rights identifies a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is essential to the file or case;

7. By virtue of a major violation of the procedural rules, the person to whom the issued decree pertains, the penalizing authority or the master of the properties (disposed or seized in favor of the state) have been deprived of the opportunity to participate in the administrative penal proceedings or have not been properly represented, as well as when either could not participate in person or via a proxy due to an obstacle that he could not remove. The mentioned before is irrelevant once the master is perpetrator;

8. An effective court decision abrogates an administrative statement, the conclusions of which are considered by the penalizing authority whilst issuing the decree;

Motion for resumption is admissible if made within six (6) months following the effective date of the decree. It is made via the body that issued the decree. The latter forthwith send a copy of it to the prosecutor and other parties who have not brought motion for resumption. The file is sent to the administrative court.

A motion for resumption of administrative penal proceedings may be initiated by:

1. A prosecutor at the regional prosecutor's office and in the cases under art. 70, par. 2, items 4 and 5 as well as it comes to a crime of a general nature – the supervising prosecutor;

2. The person in terms of whom the penal decree has been issued;

3. The master of the properties disposed or seized in favor of the state, unless offender;

4. The sanctioning body (art. 72 of AVSA). The motion for resumption shall not suspend the execution of the effective decree, unless the court rules otherwise.

The motion for resumption shall be considered by the administrative court in the venue where the authority that enacted the penal decree sits (art. 73 AVSA). The Administrative court hears the case in a panel of three judges. The powers of the court are:

1. To annul the decree and return the case or file for a new inspection, indicating the stage from which it must begin;

2. To abolish the edict and terminate the administrative penal proceedings when the grounds for it were present at the time of its assignment;

3. To rescind the decree and judge the case on the merits. The decision is bond by *res judicata* (art. 73, par. 5 AVSA).

The legislator has conceived another legal prospect for the completion of the administrative penal proceedings. In conformity with art. 58g of AVSA, the administrative penal proceedings may discontinue with an agreement between the penalizing authority and the perpetrator, concluded within the term under art. 52, para. 1 of AVSA. The body shall make an offer for concluding an agreement within 14 days from the receipt of the file by the official that drafted the decree, and the infringer may initiate an offer within 14 days from the service of the decree. Such an agreement is disallowed:

1. For repeated contravention;

2 For an offence committed within one year from the effective date of a decree whereat the perpetrator has been sanctioned, out of the instances under item 1 or a warning for a violation of the same type has been issued;

3. The act, with regard to which the instrument on the ascertainment of an administrative infraction was drafted, incorporates a crime;

4. When the confession of the offender is not supported by the evidence discovered.

The agreement must be composed in writing and must contain consent of the parties on whether the act was committed, whether the act constituted a violation and its application to the norm, whether it was committed by the person against whom the instrument on the ascertainment of an administrative infraction was drawn up, and whether it was committed culpably (art. 3). When an administrative penalty is imposed by agreement, the infringer agrees to pay the amount of the fine within 14 days from the conclusion of the agreement (art.10). The agreement is in effect on the date of its signing, unless a fine is imposed on it. In such a case the effective date is the date of payment (art.11).

This legal institute regulated in AVSA is new and in effect since 2021, but in my opinion there is no obstacle to be applied also to tax violations since the latter are not explicitly excluded from the scope of the provision. Whether this approach is appropriate is a question and the answer will be given by the future execution of the norm.

In conclusion, it could be noted that the proceeding for establishing tax violations and imposing sanctions is a specific administrative penal procedure, which is normatively regulated in TSIPC and AVSA. The administrative penalizing authorities are: the Executive Director of the National Revenue Agency, mayors of municipalities and the Executive Director of the Customs Agency.

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