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On Evidence Preclusion in Tax and Control Procedures: a Comparative Legal Approach

Abstract: In the framework of tax collection procedures in different legal orders, various mechanisms may be introduced aiming at the implementation of the economy and the promptness of proceedings, which are aimed at observing the rule of evidence material concentration. One of the ways of securing it is the institution of so-called evidence preclusion, which constitutes a certain limitation on the possibility of referring to new evidence due to the stage of particular proceedings. The objective of the paper is to establish whether the institution of evidence preclusion in the tax procedure is necessary. One should search for the clues to answer the question presented through comparative legal studies. Implementing such a complex aim of research, we analysed legal regulations connected with the concentration of evidence material in selected states. So far, this question has not been a subject of a separate analysis. The results of the studies demonstrated that in the legal orders under analysis there are solutions, the aim of which is, to prevent lengthy proceedings and seeking that the resolution occur in the shortest possible time; if possible, without any harm for the actual and legal clarifying the matter. Evidence preclusion cannot be used by tax authorities as an instrument limiting the taxpayer's right to a fair tax process.
Keywords: comparative law research, evidence in tax proceedings, evidence preclusion, tax audits, tax proceedings

Introduction

As the subject literature suggests, comparative law research allow us to draw conclusions as to what solution is the most suitable for a particular problem, in particular social and economic circumstances[1]. In the framework of different branches of law, the need for comparative law studies raises no reservations. They are especially desired at the stage of making legal regulations. They often help to create a research platform to suggest solutions applicable in other countries which could become inspiration for solutions applied in the national legal order. The essence of comparative research in tax law raises no doubts. In order to learn more about tax issues in general, it is primarily necessary to have the knowledge of comparative law issues[2]. The literature also points at aims of comparative works, such as broadening perspectives, better understating of national law, and creating foundations to identify the ways of solving emerging problems[3]. "The comparative approach allows us to fully comprehend what the advantages and the weaknesses of native regulations of procedural law, as well as to determine the directions of desirable changes, and including foreign experience may, and should also, be an impulse to outline a program of the rationalization of the legal system"[4].

Quite surprising, was an idea in the draft of the law (hereinafter the Bill) of October 5, 2020 on the amendment of the Act on the National Revenue Administration and some other laws, which proposes adding to the provisions of the Act of August 29, 1997, Tax Ordinance (hereinafter TO)[5], Article 187a, which is nothing more than transferring onto the ground of tax issues the norm characteristic of contradictory proceedings connected with the rule of evidence material concentration.

In the framework of different procedures of tax collection in different legal orders, various mechanisms aimed at the implementation of economy and promptness of proceedings may be introduced, with a goal of realizing the rule of evidence material concentration, the aim of which is preventing lengthy proceedings and seeking the resolution to occur in the shortest possible time, if it is possible without any harm for the actual and legal clarification of the matter. One of the ways of securing it is the institution of so-called evidence preclusion, which constitutes a certain limitation on the possibility referring to new evidence due to the stage of particular proceedings. The objective of the paper is to establish whether the institution of evidence preclusion in the tax procedure is necessary. One should search for the clues to answer the

1 K. Zweigert, H. Kotz, Introduction to Comparative Law, New York 1998, p. 11.
2 V. Thuronyi, Comparative Tax Law, Hague 2003, p. 1.
3 R.N.J. Kamerling (ed.),The International Guide to Tax Auditing, t. 1, International Bureau of Fiscal Documentation 2011, p. 14.
4 Z. Kmieciak, Zarys teorii postępowania administracyjnego, Warsaw 2014.
5 Journal of Laws 2020, item 1325 with further amendments.

question presented through comparative legal studies. It is worth scrutinizing how these issues were regulated in selected states.

1. Comparative Law Research in the Area of Tax Procedure: Initial Assumptions

When commencing comparative law studies on the specific issue, which is the analysis of provisions connected with evidence proceedings in tax cases, it is important first to make certain observations setting things in order.

First, the European Union system does not provide for regulations unifying or harmonizing the provisions referring to tax proceedings in individual countries. In this matter, we can talk about a procedural autonomy occurring in the member-states[6]. The existing procedural autonomy is a kind of difficulty involving comparisons and analyses of particular regulations[7].

Second, it is important to recognise that there is a rich legacy of legal thought on the issue under scrutiny. Procedural regulations, including those regulating the rules of evidence proceedings or tax control in individual states, differ from one another, which is natural, due to the influence of factors such as culture, the tax system, traditions of law execution, and the history of public administration[8]. The differences may be a consequence of historical, ideological, and political circumstances, but basically in each of the presented systems of procedural law evidence proceedings are subject to certain legal control[9]. Discrepancies between the systems concern not only the form, but also the way of forming process regulations itself. We can see that in certain systems, procedural norms are the creation of judicial legislation and statutory law, whereas in others, it is the status that creates the fundamental standards of proceeding. In particular countries we may discover different scopes of unification and codification operations in terms of regulating the

6 Z. Kmieciak, A. Wróbel, S. Biernat, Przystąpienie Rzeczpospolitej Polskiej do Unii Europejskiej: Wyzwanie dla organów stosujących prawo, (in:) B. Dolnicki, J. Jagoda (ed.), Prawo polskie a prawo Unii Europejskiej, Warsaw 2003, p. 108; A. Wróbel, Wpływ prawa europejskiego na prawo o postępowaniu administracyjnym, (in:) Administracja pod wpływem prawa europejskiego, Bydgoszcz-Katowice 2006, p. 154; Z. Kmieciak, Zasada autonomii proceduralnej państw członkowskich Unii Europejskiej i jej konsekwencje dla procesu orzekania przez sądy administracyjne i organy administracji publicznej, „Zeszyty Naukowe Sądownictwa Administracyjnego" 2009, no. 2, p. 9 and further.

7 B. Adamiak, Europeizacja prawa postępowania administracyjnego (in:) Z. Janku, Z. Leoński, M. Szewczyk, M. Waligórski, K. Wojtczak (eds.), Europeizacja polskiego prawa administracyjnego, Wrocław 2005, p. 19; Z. Kmieciak, Postępowanie administracyjne w świetle standardów europejskich, Warsaw 1997; Principles of Administrative Law Concerning the Relations Between Administrative Authorities and Private Persons, Strasburg 1996.

8 M. Alink, V. van Kommer, Handbook on Tax Administration, Amsterdam 2011, p. 314.

9 L. Morawski, Argumentacje, racjonalność prawa i postępowanie dowodowe, Toruń 1988, p. 130.

procedure applicable in taxes. Besides, in certain states, instruments guaranteeing the protection of taxpayers' rights, for instance in the form of the Charter of Taxpayer Rights, or a charter of the audited, also have an indirect influence. Rules referring to tax evidence proceedings are regulated differently in particular states. In certain countries the provisions referring to evidence proceedings are included in separate acts which contain procedural regulations, or in acts regulating general tax law. It also happens that evidence proceedings are regulated partly in the tax act, whereas in unregulated cases the provisions of general administrative procedure are applicable. Moreover, the range of auxiliary use of civil law regulations in tax cases may vary. Differences are also revealed in the available procedures allowing for the verification of taxpayers' settlements. There are states where tax control and tax assessment proper are distinguished, and also ones where the distinction between these procedures blur. In yet others, however, there may occur discrepancies in terms of available procedures themselves, which are applicable in various situations. Also, the model on which the tax procedure itself was based may be different. In certain countries it may be contradictory proceedings, especially as for the distribution of rules connected with the burden of proof, and in others it may be based on a model of inquisitional proceedings and the rule of substantive truth.

2. Selection of Legal Orders under Analysis

When beginning comparative research, it is advisable to identify the aim connected therewith, because it is the aim of research that should determine the selection of comparable legal systems[10]. A method of selection often used in comparative works is collating the states representative of different procedural models signalled in the subject literature, i.e. developed codification (traditional), assuming the existence of extended, substantively coherent codification, free from gaps; a concise framework regulation constituting a collection of rules allowing for flexibility; compound – combining different procedural solutions, along with the regulations of constitutional and substantive law, multi-layered and dispersed, a variation of an uncodified procedure, where only a few of the solutions are regulated in the statutory acts[11]. One may also compare the solutions characteristic of the common law system, through opposing them to continental legal orders of well-established traditions, as well as those of new states.

The aim of this analysis was to create a comparative platform for indicating solutions in force in other countries, which could become an inspiration for

10 Th.M. de Boer, Uitgangspunten van een rechtsvergelijkende theorieL een paradigma voor de lage landen, Nijmegen 1994, p. 43, after: R.N.J. Kamerling (ed.),The International Guide to Tax Auditing, p.14.

11 Z. Kmieciak (ed.), Postępowanie administracyjne w Europie, pp. 10–11.

solutions eliminating problems connected with evidence proceedings as well as with procedures of evidence material acquisition, and not model solutions[12]. In view of the above, it seems worthwhile to compare solutions from the states whose legal systems possess certain essential, also connected with their historical circumstances, common qualities. The aim outlined in this way determined the selection of the legal systems which have been covered in this paper.

In the classification of tax law systems prepared for the needs of comparative studies, V. Thuronyi counted Poland among a vast category of the countries which had undergone political transformation in the relatively recent past. He counted in this category both the states which emerged as a result of the decomposition of the USSR in 1992 (e.g., Estonia), and those which did not, in fact, belong to the USSR, but whose tax systems were adjusted to the central planned economy (e.g., the Czech Republic). Therefore, the analysis covered regulations in force in Czechia, Slovakia, Estonia, Bulgaria, and Slovenia. These countries are characterized by a high dynamic of transformations in terms of tax law. The common quality of the tax systems in these states is the fact that they built them over the last three decades, practically from scratch[13], which was accompanied by operations of creating new acts of law concerning the procedures. From the moment of abandoning the system of a centrally planned economy, they all experienced at least one "round" of fundamental transformations of their tax systems, including the tax procedure. An example of such significant changes is, for example, the transformations, presented in the further part of the chapter, which took place in Bulgaria, where in 2006 the framework act of law consisting of merely a few pages was replaced by an extensive act, which comprehensively, at times even casuistically, regulated the procedural aspects of tax

12 One of such solutions is the model of Tax Code of 29 September 2000 published by the International Monetary Fund (Tax Code of the Republic of Taxstan) https://www.imf.org/external/np/leg/tlaw/2000/eng/stan.html. The model, in the framework of a separate editorial unit dedicated to the taxpayer's rights, introduces, for example, a right of the taxpayer to produce evidence of documents and to submit explanations before the authorities referring to their settlements, tax payments and reports of inspections. (art. 32). The catalogue of the taxpayer's rights is not exhaustive, because certain rights are provided for also in specific provisions. Also, the powers of tax authorities are regulated separately (with the reservations of possible limits in specific provisions); however, the taxpayer and tax authorities' obligations were not distinguished in separate editorial units. The model also provides for a rule referring to the burden of proof, in accordance with which it is the taxpayer that is obliged to prove that the tax amount established by the tax authority is incorrect (art. 91). Another model of taxcode is the CIAT Tax Code Model of 1997 published by the organization CIAT associating tax administrations of both Americas., http://www.ciat.org/biblioteca/opac_css/doc_num.php?explnum_id=3126, which, in the title on the tax procedure includes a chapter on the burden of proof (Art. 106), and the rule of discretional assessment of evidence (Article 110). The model also contains the catalogue, separated, and described in detail, of the obligations and rights of the taxpayer, with which corresponds, also separated, the catalogue of competences and responsibilities of the tax administration.

13 V. Thuronyi, Comparative Tax…, *op. cit.,* p. 34.

law. This paper analyses the regulations of the post-communist countries with quite extensive tax procedures. Before discussing the regulations in force in the systems selected in this way, German solutions will be analysed. They were prototypes of the regulations introduced in the majority of the aforementioned countries.

3. Solutions for Concentrating Evidence Material in Selected European Union Member States

Germany is one of those countries with a long tradition of codified procedural provisions in the field of administrative proceedings. The first act containing regulations in this area was dated 1919[14]. Currently, the issues referring to proceedings in tax cases are normed by the Act of 1976 (*Abgabenordnung*)[15], which regulates, among other things, the specific kind of administrative procedure, and simultaneously one of the three pillars of the German administration, beside the general administrative procedure[16]. The model of tax procedure in Germany is based on an investigative rule, which means that the tax administration *ex officio* determines the circumstances, defining the scope of the investigation procedure; in this matter it is not bound by motions reported by the participants in the proceedings. The scope of the procedure and the obligation of explaining the actual state of affairs is shaped by the circumstances of the individual case. Moreover, the principle of inquisitiveness in this regard, and therefore, the obligation of establishing the facts concerning all the circumstances of the case rests with the tax authorities, no matter whether or not they are in favour the participant in the proceedings (§ 88). However, the principle was modified by the growing number of reporting, documentation, and declaration obligations imposed on taxpayers[17]. The participants in the procedure are obliged to cooperate with the authorities in order to establish the facts connected with the case, in particular through complete and truthful revealing the facts of importance for the taxation and through providing evidence to support them (§ 90). The scope of this obligation depends on the circumstances of a particular case, and the provisions make it more specific, in particular in reference to cross-border economic events. The method the taxpayer fulfils the obligation of cooperation affects the scope of the evidence assessment performed by the authorities. The less the tax authority knows about the particular tax case, the less are the grounds for the application of different

14 Reichsabgabenordnung of 13 December 1919, RGBl. 1919, 1993.
15 Abgabenordnung of 16 April 1976, BGBl. I 1976, item 613 with amendments.
16 A. Kubiak, (in:) Z. Kmieciak (ed.), Postępowanie administracyjne w Europie, p. 309.
17 E. Reimer, National Report on Taxpayer Protection in Germany (in:) W. Nykiel, M. Sęk (eds.), Protection of Taxpayer's Rights: European, International and Domestic, Warsaw 2009, p. 206.

means and accepting the circumstances as proved in favour of the taxpayer[18]. The tax authorities' resolutions are taken in the form of administrative acts, from which the participant has the right to appeal[19]. In order to accelerate the appeal procedure and secure its concentration, the authority may set a date for the taxpayer to present evidence and documents, which is decided in § 364b of the tax ordinance[20]. In the case of presenting the evidence after the date, it is not taken into consideration by the authority (of which the taxpayer should be instructed). In accordance with the view of a part of doctrine, it is not allowed to file a separate appeal from the deadline established by the authority[21]. K. Tipke and H.W. Kruse maintain than a separate appeal from the establishment of the deadline itself would be against the essence and purpose of the provision, and the only opportunity to appeal in this case is initiating judicial proceedings in order to (re)appeal the decision of the appeal[22]. However, there is an opposing view, according to which the establishment of the deadline is an administrative act, and thus it may be challenged individually[23]. Adopting this view leads to unnecessary prolonging of the proceedings on the case and is inconsistent with the rule of concentration in force under the German act[24]. It is worth noting that in accordance with §76 para 3 of the Act on Financial Courts[25], a financial court may reject testimonies and evidence which failed to be presented within the period established by the authority, on the basis of §364b AO[26]. This so-called facultative preclusion, for taking into account the evidence previously rejected by the authority depends on the court's discretion. Thus, it may potentially happen that the necessity of considering the actual circumstances is transferred from the tax authority to the court, which seems against the intention of introducing preclusion at the level of appealing procedure[27].

In Estonia tax proceedings and evidence questions connected therewith are regulated in a separate Act on Taxation (*Maksukorralduse seadus*) of 2002[28]. In

18 R. Seer, (in:) G. Meussen (ed.), The Burden of proof in tax law, 2011 EATLP Congress, Uppsala 2–3 June 2011, p. 127.

19 D.C. Dragos, B. Neamtu (eds.), Alternative Dispute Resolution in European Administrative Law, Berlin 2014, p. 9; H. Krabbe, Legal Remedies in the German Tax System, European Taxation 2009, nr 9, p. 306.

20 R. Seer, Durchführung des Rechtsbehelfsverfahrens, (in:) K. Tipke, J. Lang (eds.) Steuerrecht, Köln 2005, p. 951.

21 D. Birk, Tax Protection Procedure in Germany (in:) D. Albregtse, H. van Arendonk, Taxpayer Protection in the European Union, 1998, p. 57.

22 Ibidem.

23 R. Seer, Durchführung…, *op. cit.,* p. 952.

24 Ibidem.

25 Finanzgerichtordnung, BGBl. I 1965, item 1477 with further amendments.

26 F.Klein, B.Rätke, Abgabenordnung. Kommentar, 2020, side no. 19–22.

27 R. Seer, Durchführung…, *op. cit.,* p. 952.

28 Maksukorralduse seadus, RT I 2002, 26, 150 with further amendments.

the Estonian tax procedure, the influence of German solutions can be perceived, which were a point of reference both at creating the general part of the Estonian administrative procedure, as well as the fundamental law[29].

The tax authority conducts proceedings in a simple and effective way, with no delay, avoiding unnecessary expenses and inconveniences, in accordance with the general rules of administrative proceedings, as well as on the way securing the protection of the rights of the participants in the procedure (§ 10). In the tax procedure an important role is also played by the rule of proportionality, not explicitly formed in the law. It requires that all actions taken in the proceedings are connected with the subject of the proceedings. This means that the tax authority is not entitled to gather information which has no connection with the proceedings[30].

According to the principle of substantive truth included in § 11, the tax authority verifying the correctness of the tax payment and assessing the tax, should take into account all facts important for the case, including the facts increasing, and the facts reducing, the range of the financial burden. The procedure is based on the *ex officio* principle; the authority decides *ex officio* on the need for actions serving to verify the correctness of the tax payment as well as on the type and scope of actions which should be taken. For this purpose, it may gather evidence indispensable to issuing a decision on the case. The authority, being the host of the procedure, while establishing facts important from the taxation point of view, is not limited by demands and evidence provided by the participants. In the process of tax law application in Estonia it is assumed that the legal form of a given transaction should be ignored, and primarily one should determine its essence and economic consequences entailed for the parties, which is also an effect of the influence of German solutions[31].

The Estonian act does not include general regulations explicitly norming the issue of evidence burden. In this matter, the principle of substantive truth is in force, combined with the *ex officio* activity of the authority. Nevertheless, it is underscored that in the appeal procedure, the burden of proof rests by rule on the taxpayer who questions the tax assessment (§ 150). On the other hand, the burden of proof is transferred onto the tax authority, if it comes to evidence remaining only in the possession of the authority. Moreover, regulations referring to applications for overpayment return provide that if the claim is not sufficiently grounded, the tax authority may set a deadline for the applicant for producing additional evidence. If the evidence fails to be produced within the specified time, the tax authority

29 K. Merusk, Administrative Law Reform in Estonia: Legal Policy Choices and Their Implementation, "Juridica International" 2004, p. 61.

30 T. Albin, M. Herm, I. Klauson, E. Uustalu, (in:) M. Lang, P. Pistone, J. Schuch, C. Staringer (eds.), Procedural Rules…, *op. cit.*, p. 196.

31 L. Lehis, Means Ensuring Protection of Taxpayer's Right in Estonian Tax Law, "Juridica International" 1999, no. 4, p. 104.

refuses to return the overpayment (Art. 107). Simultaneously, following the German model, the regulations define the participants obligations to cooperate with the tax administration during the proceedings (§ 56). In particular, the taxable person is required to inform the tax authority about all facts they know which are or may be important for taxation purposes. The act of the administrative tax authority can be appealed against. Nevertheless, tax appeal proceedings are not an obligatory stage of the taxpayer's rights protection, because they may, at their discretion, decide about bringing an appeal directly to court (§ 151). In practice, however, which is noted in the literature, due to the less formal and time-consuming nature of the tax appeal procedure than the judicial procedure, in many cases taxpayers decide to use just this path[32]. In connection with lodging an appeal, the burden of proof rests by rule on the taxpayer who questions the tax assessment. The authority may also call the person lodging the appeal to present additional evidence.

In Czechia, the administrative procedure and its science have long and established tradition, for the legacy of Czechoslovakia places it them among the states with the earliest codifications of administrative proceedings[33]. In the Czech Republic, procedural issues are currently regulated in the separate Act on Tax Procedure (*Daňový* Řád), in force since January 1, 2011[34], which replaced the previous Act on Tax and Fee Management *(o správě daní a poplatků, ve znění pozdějších předpisů)*[35]. It provides for the procedure specific in terms of tax levies, complete and independent, in the framework of which there is no need for using the rules of the general administrative procedure[36].

§ 92 contains decisions important for the distribution of the burden of proof in the procedure, according to which the tax authority is obligated to make sure that all the facts have been identified in the proceedings in a complete way (as far as possible), and it is not bound by the taxpayer's applications. The taxpayer is obligated to prove the circumstances under the obligation of revealing in the tax declaration and other declarations and testimonies, whereas the tax authority is obligated to prove: facts arising from its documents, facts important for using presumptions and legal fictions; facts questioning credibility, importance, correctness, or completeness of the documentation kept by the taxpayer, accounting entries and other records, documents, or other evidence on which the taxpayer bases their case; facts important

32 T. Albin, M. Herm, I. Klauson, E. Uustalu, (in:) M. Lang, P. Pistone, J. Schuch, C. Staringer (eds.), Procedural Rules…, *op. cit.*,p. 189.

33 A. Skóra, (in:) Z. Kmieciak (ed.), Postępowanie administracyjne w Europie, p. 82.

34 Zákon č 280/2009 Sb., danovy rad.

35 Zákon č. 337/1992 Sb., o správě daní a poplatků.

36 D. Czudek, Nowa ustawa Ordynacja podatkowa w Republice Czeskiej z ukierunkowaniem na problematykę udzielania i dostępu do informacji w administracji podatkowej, (in:) A. Dobczyńska, E. Juchniewicz, T. Sowiński (ed.), Daniny Publiczne. Prawo finansowe wobec wyzwań XXI wieku, p. 90.

for establishing the real content of the legal action or another event; facts important for the authority to find the law violated. Simultaneously, the authority should indicate in writing which facts it found as proved, and which ones not, as well as to demonstrate the evidence on the basis of which it made this assessment.

The audited taxpayer has the right to participate in meetings with his employees, may produce evidence, and also submit evidence applications. He is also entitled to deny the statements of the authority carrying out the inspection and to prove the questions which the authority found dubious (§ 88). After the audit is over the authority carrying it out is obliged to prepare a report which should contain the results of the inspection, the assessment of the collected evidence material, as well as reference to the files gathered for the case (§ 88). The taxpayer is entitled to express himself on the gathered evidence material and the legal findings presented in the report. In accordance with § 89, the taxpayer has the right to express his doubts, to point out inconsistencies, to submit statements or explanations in reference to the authorities' findings, as well as to producing evidence to support his statements or in contentious issues. He may do it within 15 days, and the authority is obliged to instruct the taxpayer about the consequences of failing to meet the deadline.

If the taxpayer fails to fulfil the imposed tax obligations, the authority may determine the tax amount by decision, the detailed elements of which are specified in § 102. Within the period of 30 days of the day of its delivery, the taxpayer is entitled to appeal against the decision to a higher authority, through the authority which issued the decision. Within the framework of self-inspection, the authority which issued the decision may take into account the appeal in whole or in part (§ 113). If the case is passed to the appeal authority, the authority may take evidence in order to complement the evidence material or to remove procedural errors, or else to impose this obligation on the authority which issued the challenged decision, setting it an appropriate period of time (§ 115). The appeal authority may also set a period, not longer than 15 days, for the appellant to attach new evidence to the evidence material. Evidence presented after this period may be ignored (§ 115).

The tax procedure in Slovakia is regulated by the Act of December 1, 2009, on the general part of tax law *(zákon o správe daní (daňový poriadok)*[37]. It replaced the previous act, which had been in force since the day of the dissolution of Czechoslovakia, i.e. the Act on Tax and Fee Administration and Amendments in the System of Local Financial Authorities (*o správe daní a poplatkov a o zmenách v sústave* územných *finančných orgánov v znení neskor*šich *predpisov)*[38].The law currently in

37 Predpis č. 563/2009 z. z. Zákon o správe daní (daňový poriadok) a o zmene a doplnení niektorých zákonov.

38 Zb. 511/1992 Zb.

force, like the previous act (§ 101)[39], regulates the tax procedure in a comprehensive way, implying that in tax issues the provisions of the general administrative procedure are not applicable (art. 163). Before that, the tax procedure was treated as a kind of administrative procedure[40].

The taxpayer's basic rights in the tax procedure are protected with the general rules of proceeding, included in Article 3[41]. On the basis of the principle of legalism, the authorities are expected to act in compliance with the generally applicable provisions of law, including the protection of the interest of public legal unions, as well as respect for the rights and legitimate interests of taxpayers and other persons. The tax authority should also strictly cooperate with taxpayers and other entities, instructing them about their rights and responsibilities.

The provisions of the Slovak law include rules referring to the burden of proof. In accordance with them, the tax authority is obligated to collect evidence, with the assurance that all the facts necessary for the needs of taxation have been identified, as far as possible, completely. The tax authority should prove all the facts concerning the actions taken toward the taxpayer, which are of a decisive significance for the correct establishment of the tax amount. Besides, there is no obligation to prove notorious facts, i.e., commonly known and known to the authority *ex officio* (Art. 24). Simultaneously, the party is entitled to initiate evidence proceedings, but the authority is not bound by the conclusions of the party. The taxpayer should be active in reference to: facts which have an impact on the correct establishment of the tax amount; facts which the taxpayer is obligated to show in their tax declaration or another testimony (which they are obliged to submit on the basis of general provisions); facts, the proving of which was demanded from them by the tax authority during an audit or tax procedure, as well as in reference to credibility, correctness and completeness of the documentation which they are obligated to keep. Moreover, filing an appeal, the taxpayer is obligated to produce evidence which justifies it, unless they question only the compliance of the decision with the provisions of law (Art. 72, para 4 letter d).

During the tax inspection the taxpayer may report evidence confirming his statements, as well apply for taking evidence available to the tax authority, which the taxpayer could not present himself – not later than on the day of the end of the audit. After the inspection is over, if the tax established during it differs from the one which the taxpayer declared and was obligated to pay, the authority, sending the report, also sends a demand for the taxpayer to express himself on the arrangements in the

39 See: W. Chróścielewski, Słowacja, (in:) Z. Kmieciak (ed.), Postępowanie administracyjne w Europie, p. 349.

40 V. Babčák, Daňove právo procesne, Košice 2000, p. 69.

41 R. Blahova, M. Jakubec (in:) M. Lang, P. Pistone, J. Schuch, C. Starginger (eds.), Procedural Rules…, *op. cit.,* p. 575; V. Babčák, Slovenske daňove právo, Košice 2012, p. 386 and further.

report, setting the period not shorter than 15 working days of the date of the report delivery. Also, at the stage of commenting on the arrangements, the taxpayer should, if possible, produce evidence from the documents which he was not able to present during the audit.

The Bulgarian tax procedure is regulated by the Act on Insurance and Tax Procedure (Данъчно-осигурителенпроцесуаленкодекс), in force since January 1, 2006[42]. The currently applicable law is an expression of a completely different concept of procedural regulation, for it norms the tax procedure completely and uses references to the general administrative procedure only to a small degree (e.g., restoring deadlines: Art. 26). The regulations of importance in evidence procedure issues, beside a separate extensive chapter, could be found among provisions concerning the rights and responsibilities of participants in the procedure, as well as in provisions regulating general rules (Art. 1–6).

Evidence should be gathered *ex officio* by the authority or on initiative of the party, and all the collected evidence should be a subject of an objective assessment and analysis (Art. 37). The taxpayer has the right to report his own evidence. Nevertheless, specific rules applicable in reference to tax audit have also been provided for, which referred to the burden of proof and the taxpayer's responsibilities in the matter. Namely, if for the establishment of the obligation of the audited it is indispensable to establish facts and circumstances outside the territory of the country, it is the audited who is burdened with the obligation of presenting evidence explaining the actual state of affairs. Moreover, if it comes to relations or transactions between people mutually connected, as well as in the case of transfers between the facility of a foreign entity in Bulgaria and the other parts of the company abroad, it is assumed that the audited is able to produce evidence (Article 116). In the case of transactions with entities mutually connected, the burden of proof rests with the audited, also, in reference to the issue of market price and the reasons why the transaction price differs therefrom – the audited should present the whole evidence, including foreign documents. A special rule transferring the burden of proof on the audited refers to procedures connected with income not revealed for taxation (Art. 123 para 1).

The party to the procedure is obligated to present all data, information, documents, letters, information carriers and other evidence, which refer to their rights and responsibilities, facts, and circumstances under the proceedings, as well as to point at all persons, as well as state authorities and local government units, which may possess them (Art. 37). The authority may call a particular person or institution, including third parties indicated by the taxpayer, to produce evidence in writing within a set period[43]. Imposing the aforementioned obligation of presenting evidence

42 SG nr 105/29.12.2005.

43 R.N.J. Kamerling (ed.),The International Guide to Tax Auditing, p. 213.

in writing, the Bulgarian law is an example of a regulation which does not impose on the taxpayer an obligation to provide oral explanations at all[44].

If the person fails to produce evidence in compliance with the demand, the authority may assume that such evidence does not exist and assess only the evidence collected during the proceedings. The authority is also obligated to take into account the evidence presented before issuing the decision in the proceedings, and in the case of tax audit, within 14 days of the day of the delivery of the summons (Art. 37 and 117). This means that in audit we deal with a special kind of evidence preclusion, because the authority does not have to include the evidence reported by the party after the aforementioned period. At the demand of the authority, the audited, as well as the person registering him, are obliged to produce a written explanation referring to facts and circumstances of importance for the procedure in progress. If the explanation is not presented within the set period, the authority may assume the facts and circumstances unexplained in writing as being unproved. The authority informs the summoned persons about the consequences of failing to perform the obligation, as well as about the possibility of suing them to court in the mode provided for in the provisions of the Code of Civil Procedure. The audited may report reservations in writing and submit the evidence within 14 days of the delivery of the audit report. The deadline may be prolonged at the request of the audited, but it cannot exceed one month. The procedures are finished through issuing a decision, and the decision issued as a result of an audit may be challenged within 14 days (Art. 152). It is required that all types of appeals include presenting evidence which, in the taxpayer's opinion, should have been collected (Art. 145 para 1 point 3), and in reference to the appeal the taxpayer is entitled to appeal against the decision issued as a result of the audit. The law includes specific regulations indicating that regardless of the right of the appellant to present evidence which should have been collected, the authority which issued the decision in the first instance, may also present in writing the evidence which should have been collected. Within the period provided for issuing the decision by the appeal authority, the appellant and the authority which issued the decision after the audit may make a written arrangement referring to the evidence which is not in dispute. After written arrangements, it is not possible to allow for new evidence undermining the evidence under the arrangement, either in appeal proceedings or in judicial proceedings (Art. 154).

In Slovenia, the tax procedure was regulated (even though incompletely; it contains numerous references to other legal acts) by the Act on Tax Procedure of November 16, 2006 (*Zakon* o *davčnem postopku*)[45]. In the investigation procedure the tax authority is obligated to identify all facts necessary to issue a lawful and correct decision, and the authority should act with due diligence establishing also facts

44 *Ibidem*, p. 173.

45 Uradni list RS 13/2011 of 28.02.2011 with further amendments.

favourable to the taxpayer, unless the law itself provides for an exception. Moreover, the object of taxation as well as the circumstances and facts, the establishment of which is indispensable for taxation purposes, should be assessed in accordance with their economic substance (Art. 5). Rules important in terms of gathering evidence material are included in Art. 10 of the law. It states that taxpayers should provide complete and correctly prepared information the tax authorities need for taxation purposes. They should also cooperate with tax authorities in establishing facts, both those favourable to them and those unfavourable, as well as present all the facts which are a basis of their action, and refer to evidence to support the facts.

The Slovenian law, regulating the issues connected with the burden of proof (Art. 76) states that the taxpayer should present evidence to support any statements he makes during the tax procedure. Nevertheless, it is the tax authority that is obligated to prove the facts which result, or do not result, in the emergence, increase, or reduction of the tax obligation. The rule provides for an exception in reference to any statements on the basis of which the tax obligation could be reduced; in such cases, unless the law does not provide for otherwise, the burden of proof rests with the taxpayer. The evidence produced by the taxpayer to support any statements, should be in the form of a written document or books or registers kept in accordance with tax regulations. The taxpayer, however, may also propose presenting the evidence in form of alternative evidence means (Art. 77). All evidence should be produced within the period set by the authority in decisions on initiating the audit or those issued during the tax audit. Before issuing the decision, the tax authority is obligated to carefully and thoroughly investigate each and every element of the evidence material separately, and all of them together. The authority should establish all the facts and circumstances of importance to issue a decision, taking into account the whole procedure as well as enable the parties to protect their rights and interests. The auditors sum up the findings of the audit in a report, the preparation of which is preceded, as a rule, by a meeting ending the inspection. During the meeting, it is important to note contentious facts which may affect the taxation, legal consequences of the audit findings and their tax consequences. The taxpayer is entitled to report objections to the audit report (Art. 140). If the taxpayer's reservations include additional facts which can affect the tax obligation established in the report, the tax authority should prepare an additional report within 30 days of the reception of the objections. Since 2014, reporting new evidence in objections to the report has been possible only when it has been demonstrated why it was impossible to report them earlier.

Conclusion

From the comparative legal perspective, as far as the way of rationing the gathering of evidence material in time is concerned, the countries under analysis provide for regulations limiting the taxpayer's opportunities to provide evidence material. This may happen through creating regulations granting the authority a right to appoint the taxpayer a deadline for producing evidence and presenting documents, simultaneously informing him about the consequences of the failure of their submission. Simultaneously, allowing for evidence preclusion, it is important to take care of its correct placement during the procedure, so that its introduction did not mean the weakening of the implementation of the substantive truth principle and the active participation of the party in the procedure.

However, despite introducing those solutions in the legal orders discussed, tax authorities are obligated to make efforts in order to acquire necessary information, including those in favour of the party, for the authority's job is to reach the substantive truth. Interesting is the issue of evidence distribution between the authority and the taxpayer in particular legislations, as for the obligation of explaining the actual state of affairs – sometimes reduced to the problem of the burden of proof. Certain legal orders introduced specific rules modifying the principles of proving, which refer to, for example: (a) regulations preventing tax abuse: the authority often has to demonstrate that the selected form is aimed at tax avoidance or tax evasion; in turn, the taxpayer should prove that the particular form was justified by economic reasons; (b) in the case of transactions with entities from tax havens, the burden of proof rests with the taxpayer, or else the burden of proof is split; (c) while investigating overpayments: the essential activity rests with the party; (d) in reference to lodging an appeal, usually on the appellant; (e) as for establishing facts and circumstances outside the territory of the country, the obligation of producing evidence explaining the actual state of affairs may rest with the taxpayer.

A commonly applied standard in all procedural solutions in the countries under analysis is providing the party with an active participation both in the procedure and in the audit, which should not, however, be reduced only to an opportunity to contest the tax authority's actions, but should also include the taking of constructive actions by the party – at an appropriate moment of the proceedings. The way of implementing the right may take different forms and manifest itself in: a right to provide evidence, information, a right to participate in particular activities of the evidence procedure, expressing an opinion on the evidence material before a decision is issued, or even by the tax authorities informing the party about their position and a right to demand from the party to respond to the arguments. The introduction of evidence preclusion is intended to mobilize the taxpayer to actively participate in the process of providing information on his tax situation.

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