

SECURITY MEASURES IN TAX ADMINISTRATION AS A TOOL TO ELIMINATE TAX EVASIONS¹

MIROSLAV ŠTRKOLEC²

Abstract

The paper focuses on security measures in tax administration and the possibilities of their use as a tool to eliminate tax evasions. The aim of this paper is to define security measures in tax administration, describe their functions and identify the possibilities of the effective application on concrete examples manifesting how to eliminate tax evasions. The Author employed the scientific methods of analysis and synthesis and approached the issue using the method of comparison as well. The Author provides a definition of tax evasion and security measures and describes their legal nature and respective functions. It proves necessary to consider *de lege ferenda* the possibility to extend the scope of security measures, especially, that of surety as the general security measure in tax administration.

Keywords

Tax evasions; security measures; tax administration

JEL Classification: H26, K34, K42

1 Introduction

The relationship between tax evasions and security measures in tax administration can be characterized as that of undesired consequence and legal measures taken to

1 This paper was written as a partial output from the project VEGA no. 1/0375/15 "Tax evasion and tax fraud and their prevention by legal measures (in the context of Tax Law, Commercial Law, and Criminal Law)" and VEGA no. 1/0846/17 "Implementation of the initiatives of the EU institutions in the area of direct and indirect taxes and their budgetary and legal impacts".

2 Assistant lecturer at the Department of Financial Law, Tax Law and Economy at the Faculty of Law of the Pavol Jozef Šafárik University in Košice, member of The Center For Information And Research Organization In Public Finance and Tax Law Of Central and Eastern European Countries. Contact email: miroslav.strkolec@upjs.sk.

prevent this consequence. Security measures are regarded to be measured by means of which the legislator seeks to secure timely and proportionate payment of taxes. To put it differently, security measures in tax administration, viewed in terms of their legal delimitation and functions they fulfill, contribute to direct or indirect elimination of tax evasions.

The aim of this paper is to define security measures in tax administration, describe their functions and identify the possibilities of the effective application on concrete examples manifesting how to eliminate tax evasions. The Author employed the scientific methods of analysis and synthesis and approached the issue using the method of comparison as well. The paper builds on up-to-date scholarly papers of the Author in the researched field of security measures (Štrkolec, 2012: 1168; Štrkolec, 2015: 301) and emerges from the works of other Authors who have dealt with the issue either directly or indirectly (Gomułowicz, Małecki, 2013: 392; Karfíková, Karfík, 2015: 255; Babčák, 2015: 101).

2 Tax Evasions and Security Measures

Not only tax evasion is a phenomenon but also a problem of our times. The most general way to define tax evasions is to consider it a failure to pay taxes that is contrary to the law (Ryllová, 2007: 13). Understandably, it is not a legal definition, since such a definition is lacking in our legal rules (Karfíková, Karfík, 2015: 255).

This basic definition is by no means exhaustive; in principle, tax evasion must be distinguished from tax avoidance. Whereas tax avoidance consists in, for example, making use of loopholes in the tax system, or decreasing of tax liability that is directly allowed by the law, tax evasion means such acts or omissions that can establish the open or latent violation of tax rules (Babčák, 2015: 101).

Non-payment of taxes contrary to the law amounts to tax evasion. Tax evasion may have different forms.

Those simplest are based on, for instance, a failure to use the electronic cash register, failure to report some income within a taxpayer's taxable income, accounting of fictitious taxable transactions, increasing the actually incurred expenditure or including personal spending within the tax-deductible expenditure. Complicated cases of tax evasion are based, for example, on the use of sophisticated forms of carousel transactions, which, as a rule, have a nature of tax fraud.

Security measures in tax administration play an important role also in cases of elimination of potential loss in tax revenues that are not based on fraudulent acts, but rather on simple insolvency of the taxpayer, or on absence of property that in

case of realization in executory proceedings could aid to attain the final purpose of tax administration. Such cases can be subsumed under the term of tax evasion, because, in their essence, they amount to the failure to pay taxes contrary to the law.

Viewed from the perspective of revenue into the state budget, it is economically irrelevant to investigate the reasons why such loss of expected tax revenue caused by the failure to pay taxes contrary to the law actually occurs. Such acts or omissions, either intentional or negligent, will have the negative impact on the revenue into the state budget. Despite maintaining the theoretical differentiation between the terms tax evasion and tax avoidance, in practice, these terms can hardly be separated.

2.1 Conceptual Delimitation of Security Measures in Tax Administration

The concept of security measures can simply denote such measures which aim to secure the fulfillment of tax liability (Gomułowicz, Małecki, 2013: 392). However, they may also be described by making use of the following defining features:

- these concern measures regulated by tax laws seeking to ensure the payment of taxes in cases when such payment is endangered, prevention of tax evasion (fraud) and elimination of the undesired consequences.
- These concern measures, which, in order to be effectively implemented, usually require the decision of the tax authority or other act of application of the law.
- they may also concern such measures which are not directly connected with the decision-making of the tax authorities, although, they also seek to ensure the immediate securing purpose in connection with the final fiscal function of taxes.

Security measures in tax administration are, therefore, considered to be legal measures taken by tax authorities and implemented by the taxpayers themselves, which are of securing nature in relation to the final purpose of tax administration and actual generation of revenue into the state budgets, and which can contribute to effective prevention of tax evasions (frauds) and eliminate their undesired consequences.

Security measures in tax administration have the potential to prevent tax evasion and tax fraud in a variety of ways. This potential is rather wide in its scope, and when effectively applied, it may be used to prevent the non-payment of taxes contrary to the law. This can be achieved in several ways, for example:

- by securing property which in the event of failure to pay taxes can be subjected to realization and the proceeds from the realization be used to settle the taxes (liens, seizure of property and forfeiture of a thing);
- by imposing preventive payment obligations on the taxpayer before tax liability commences (security for VAT and excise taxes, securing income taxes);
- by imposing preventive payment obligations after-tax liability commences the amount of which is disputable or which was not awarded (preliminary measures);
- by transferring the subsidiary obligation upon another person which extends the range of obliged persons who may be required to pay the taxes (surety), or
- by preventing the unlawfully claimed tax refund by commencing tax control to detect the eligibility of the claim.

2.2 Functions of Security Measures in Tax Administration

Variance in security measures in tax administration and their different legal nature logically induce that individual security measures can fulfill and actually do fulfill different functions. When attempting to generalize, we can state that security measures in tax administration fulfill three different functions: securing, refunding and preventive.

The securing function resides in creating factual and legal guarantees that secure the payment of taxes for the benefit of public budgets in the event when such payment is endangered or uncertain for some reason. The legal framework of security measures in tax administration in various ways seeks to ensure the timely payment of tax, whilst this function is inherent in seizing the property, in preliminary measures, liens, surety, but also in security for individual taxes. Security can be obtained from the property of the taxpayer, property of third persons other than the taxpayer, but also in other specific ways based on different forms of “pre-payment” of taxes by the taxpayer himself, which is common with securing various taxes.

The refunding function of security measures supplements and builds on the security function in such a way that their legal framework usually allows for the payment of taxes in other alternative modes that is determined by the nature of the concrete security measure. In order to attain the final purpose of tax administration, it is essential, that in the event of failure to fulfill tax liability on the part of the taxpayer, the security measures allow for the payment of tax in other alternative ways. These ways of fulfilling the refunding function differ due to variability of security

measures, for example, realization of the secured property and the subsequent use of proceeds from the realization to settle the payment of taxes, or the use of in advance provided security for tax for the purposes of settling the outstanding payment of tax due later.

The preventive function of security measures is primarily targeted at prevention of unlawful claims of taxpayers in relation to the state budget. Although it sounds paradoxical, taxes are levied for the benefit of the state budget, however, payments are frequently made from the budget back to the taxpayers. In this regard, it is the legal regulation on indirect taxes (especially of VAT) that provides for the taxpayers to assert their monetary claims in compliance with the law. The amount of the finances the state pays to the taxpayers³ necessitated that security measures be laid down primarily of preventive nature, which can be exemplified by tax control to detect the eligibility of a claim of excessive VAT refund. Security measures of preventive nature may also include the cancellation of registration for VAT which may, in general, prevent the abuse of the system of the VAT.

3 General Security Measures

The category of general security measures comprises security measures which are primarily regulated by the rules of tax procedure stipulated in the Act no. 563/2009 Z. z. (Collection of Acts) on tax administration (Code of Tax Procedure), and characterized by the universality of their application. Universality means that these measures are, in principle, applied towards all taxes, national and local, direct or indirect. The feature of universality has, though, certain limits, and in extraordinary cases, it can be limited in part or excluded from application⁴. General security measures comprise the following:

- a) seizure of a thing and forfeiture of a thing,
- b) preliminary measures,
- c) liens.

The Code of Tax Procedure structurally assigns the seizure of a thing and forfeiture of a thing to the activities of the tax administrator and, in the narrower sense, to the preliminary stage of tax proceedings. In terms of content, this tax-law security measure seeks to attain varied aims which will eventually implement the purpose

3 According to data obtained from the Annual report on the activities of the Financial administration for the year 2016, the amount of excessive VAT deduction refund in 2016 was 6.128 billion EUR, however, in comparison with 2015 it decreased between the years by 110.1 million EUR and in 2015 it was 6.238 billion EUR.

4 For instance, section 40 subs. 1 of the Tax Procedure Rules stipulates that Tax Office and Customs Office are exclusively competent, not the municipality as the administrator of local taxes, to seize the goods of the entrepreneur who sells goods in the Slovak Republic and fails to use the electronic cash register.

of tax administration. The seizure of a thing primarily aims to maintain the existing factual condition of a concrete thing and to keep this thing in unaltered condition in pursuit of the purpose to obtain evidence and secure a thing for eventual subsequent sale of the thing and alternative settlement of the monetary claims of the tax administrator from the proceeds of sale of the thing. The valid legal regulation distinguishes between two types of cases when such security measure is taken. Seizure of a thing is used when the manner of acquiring of the thing, the quantity, price, quality or the proper financial arrangements in connection with the import and purchase of it cannot be satisfactorily proven. The Tax Office or the Customs Office can seize the goods of the entrepreneur who sells them in the Slovak Republic and fails to use cash register at the point of sale. The tax administrator will issue a decision on the forfeiture of a thing when the taxpayer fails to eliminate the deficiencies in the statutory period. After the decision on the forfeiture of a thing becomes final, the tax administrator will commence the sale of the thing. The Code of Tax Procedure stipulates three methods of sale of the forfeited thing (i) auction sale, (ii) commission sale and (iii) immediate sale. Proceeds from the sale of the forfeited thing shall be used to settle tax debts and the outstanding tax payments which, as a result, eliminates tax evasions.

The nature of preliminary measures in tax administration is limited by their functions which pursue the final purpose of tax administration. In taxation practice, the use of measures is to be taken into consideration especially when the tax administrator anticipates the taxpayer carry out acts directed at the reduction of his own property, and then his outstanding taxes could not be enforceable in the tax executory proceedings due to the absence of existing seizable property. The tax administrator may decide on preliminary measures when there are reasonable concerns that the undue tax or unlevied tax would not be settled or enforceable, or the exaction or collection of taxes at that time would be accompanied by severe complications. The tax administrator may order the taxpayer to deposit finances onto the account of the tax administrator or not to dispose of the property or other rights set out in the decision. If subsequently tax is assessed, which was not imposed at the time when the preliminary measure was issued, the mandatory preliminary measure will not be effective as of the day of assessment of tax and on condition that the finances set out in the preliminary measure are deposited. In such case, the taxpayer is not obliged to fulfill his tax liability according to the decision on tax assessment, because it would result in double payment of the same tax during one tax period. The transfer of finances to pay this tax represents the refunding function of preliminary measures, and, at the same time, the purpose of the tax administration is attained. Although this legal regulation entered into effect on 1 January 2017, it is seemingly the most effective solution with regards

to the variability of possible procedures, which we already pointed out in the past (Štrkolec, 2012: 1169).

Liens in tax administration are regulated on similar grounds as liens in private law regulations. In their essence, liens fulfill two basic functions, the securing function, and the refunding function. The securing function of the lien consists in securing the property of the tax debtor and creating options for alternative settlement of the claims of the tax administrator in cases when the outstanding tax is not paid on a voluntary basis. On the other hand, the refunding function of the lien is manifested in the form of realization of lien and using the proceeds from the sale to cover the secured outstanding tax. The refunding function of lien in tax administration takes the form of realization of lien in tax executory proceedings. The lien can be realized in tax executory proceedings, especially, through the sale of personal property, the sale of securities or sale of real property, apartment or non-residential premises.

4 Special Security Measures

The category of special security measures encompasses measures applied specifically to selected taxes. Further attention will be particularly devoted to security measures in the VAT. Their full-scope implementation commenced in 2012, when the Government of the Slovak Republic adopted the “Action plan to combat tax fraud” (Governments’ Resolution no. 235)⁵, which involved legislative measures be taken also in commercial laws and criminal laws.

The first legislative measure was the adoption of the amendment to the Act on VAT no. 246/2012 effective in the majority of new provisions from 1 October 2012. Based on the mentioned amendment, several new security measures in the area of the VAT, including security tax and surety for tax, were incorporated into our legal order.

The measure of security for the tax is by no means considered as new in tax law since it has been used for excise taxes, and with certain limitations, for income taxes for a long time. The legal regulation of security for VAT is grounded on the preventive single liability to pay, which is imposed on a taxable person or on a taxpayer and is of securing nature, and in case the statutory hypothesis is fulfilled, it is also of refunding nature. The tax administrator decides on the security for the tax in the scope from 1 000 to 500 000 EUR and the rendering of the security is limited for the period of 12 months. The securing function of the security for the tax resides in the indirect effect on the taxpayer towards the proper payment of his own

5 The European Commission submitted its own action plan during the same period under the title Action plan to strengthen the fight against tax fraud and tax evasion COM(2012) 722 final. www.ec.europa.eu .

future VAT tax. Once the duty to provide a security for the tax is imposed and the security for the tax is provided, legal certainty exists that, in case of failure to settle future obligations of the taxpayer, the tax administrator has an alternative source to settle the outstanding taxes. Security for the tax can be ordered before any payment obligations of the taxpayer arise in relation to the tax administrator which is also safeguarded by its securing nature. The refunding function of the security for the tax is grounded on its possible and admissible use to cover outstanding payments for VAT after the taxable person is registered as a taxpayer.

The mentioned amendment to the Act on VAT has also introduced the measure of surety for tax. Surety represents one of the most typical security measures both in private law and public law. Surety for VAT can be defined as specific legal surety governed by public law method of regulation (Kindl, 2016: 323). The aim of the legal regulation of surety for tax rests in the rules to be set to create accessory payment liability of the surety that commences when the taxpayer fails to fulfill his primary tax liability in the prescribed period. Thus, the surety himself is not the payer of the tax for which he is a surety, rather he is an alternative person whom the tax administrator may request to fulfill the unsatisfied obligation of the primary taxpayer subject to statutory conditions. Accordingly, the features of surety in private law can also be identified in surety for taxes, i.e. accessory and subsidiarity. The accessory of surety implies that it is a secondary relation which wholly depends on the principal debt; and subsidiarity defines the position of the surety as the “auxiliary debtor” in relation to the primary taxpayer (Kohajda, Sejkora, 2014: 8-9).

5 Conclusions

The limited scope of this paper does not allow for dealing with all of the general and special security measures in tax administration. The aim of the paper was to delimitate the legal nature and the possibilities of implementation to combat tax evasions. The considerations above point to the fact that security measures, when applied effectively, have the potential to eliminate tax evasions caused by failures to fulfill tax obligations in time and in the proper manner. Moreover, it is evident that this potential can be fully exploited only if the necessity of its application is early identified. The tax administrator is obliged to monitor and detect the thread of possible tax evasion especially in connection with the risk-bearing taxpayers in the widest sense and select one measure from the variety of security measures which *in concreto* appears the most appropriate for the intended purpose. It is only natural that it is the refunding nature that satisfies the importance and purpose of the security measures in the prevention of tax frauds. It proves necessary to consider

de lege ferenda the possibility to extend the scope of security measures, especially, that of surety as the general security measure in tax administration.

References

- Babčák, V.: Daňové právo na Slovensku (Tax law in Slovakia), Bratislava: Epos, 2015.
- Gomułowicz, A., Małecki, J.: Podatki i prawo podatkowe (Taxes and Tax Law), Warszawa: LexisNexis, 2013.
- Karfíková, M., Karfík, Z.: Předcházení daňovým únikům v ČR (Prevention of Tax Evasion in the Czech Republic), in: Daňové právo vs. daňové podvody a daňové úniky (Tax Law vs. tax evasion and tax evasion), Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, 2015.
- Kindl, M.: Zajištění a utvrzení dluhů (Assurance and settlement of debts), Praha: C.H. Beck, 2016.
- Kohajda, M., Sejkora, T.: Institut ručení v daňové legislativě (Institute of Liability in Tax Legislation), Daně a finance (Taxes and Finance) no 1. (2014).
- Ryllová, Z.: Mezinárodní dvojí zdanění (International double taxation), Olomouc: Nakladatelství Anag, 2007.
- Štrkolec, M.: Predbežné opatrenia v správe daní (Provisional measures in the Tax Administration), Justičná revue: časopis pre právnu prax (Justice Revue: Legal Practice Magazine) no. 10 (2012).
- Štrkolec, M.: Náčrt možností vybraných inštitútov daňového práva v predchádzaní daňovým únikom na DPH (Possibilities of selected tax law institutes to prevent VAT evasion), in: Daňové právo vs. daňové podvody a daňové úniky: nekonferenčný zborník vedeckých prác (Tax law vs. tax frauds and tax evasion: a non-concluding collection of scientific works), Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, 2015.
- EU: European Commission no. COM(2012) 722 – Action plan to strengthen the fight against tax fraud and tax evasion.
- SK: Act on VAT no. 246/2012.
- SK: Governments' resolution no. 235 – Action plan to combat tax frauds for the years 2012 to 2016.