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Constantin D. Popa, Ph.D.
Associate Professor

CONSIDERATIONS ON THE TAX AND ADMINISTRATIVE CLAIMS COURT

The tax and administrative claims court has been defined in legal literature[1]as a species of the administrative claims court, designating "the group of remedies at law against assessment acts by which one solicits the diminishing or cancellation of assessments, taxes, contributions to special funds, price charges due to delay, penalties and fines or other sums established and enforced by the local and central revenue services, qualified by law, to carry out control or assessment acts, which are solved through a special procedure by the administrative services and/or courts".

The tax and administrative claims court is a part of the administrative claims court, alongside with the ordinary tax court (the appeal against enforcement settled by articles 169-171 in the Code of Tax Procedure, and the claim for reexamination in the area of legal stamp taxes, settled by article 18 of Law no. 146/1997).

The first step towards the unification of all dispositions in the tax area in one code[2] was taken by the enforcement of Law no. 105/1997 for the resolution of objections, challenges and complaints against the sums established and enforced by the control and assessment acts of the services belonging to the Ministry of Finances.

Law no. 105/1997 was partly declared as unconstitutional by the Decision of the Constitutional court no. 208/October 25th, 2000.

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[1] **C.-D. Popa,** *Notiunea, natura juridica si importanta contenciosului fiscal*, in R.D.C. nr. 7-8/2001, p.302.

[2] **D.D. Saguna,** *Tratat de drept financiar si fiscal*, Editura All Beck, Bucuresti, 2001, p.975.

Following that decision, the institution of tax claims court was settled by the Government's Emergency Ordinance no. 13/2001 concerning the resolution of challenges against the measure taken through control and assessment acts drawn up by the services of the Ministry of Public Finances, as approved and amended by Law no. 506/2001.

As regards local budgetary revenues, the tax and administrative claims court was stipulated by the provisions of articles 190-199 in the Government's Ordinance no. 39/2003 on the procedures regarding the administration of local budgets' claims.

The new Code of Tax Procedure came into force on January 1st, 2004, by the adoption of the Government's Ordinance no. 92/2003. Thus, there were reunited all dispositions on tax procedure in one code, and, among others, there occurred the unification of procedures on the solving of challenges against tax and administrative acts.

The tax and administrative claims court is settled by Title IX - "The Resolution of challenges against tax and administrative acts", as well as by articles 175-188 in the Code of Tax Procedure adopted by the Government's Ordinance no. 92/2003, by the Government's Decision no. 1050/2004 for the approval of Methodological Norms of applying the Government's Ordinance no. 92/2003 on the Code of Tax Procedure, as well as by the Order of the National Agency of Tax Administration no. 519/2005 regarding the approval of Instructions for the application of Title IX in the Government's Ordinance no. 92/2003 on the Code of Tax Procedure, as amended.

LEGAL NATURE

1.1. The legal nature of the tax and administrative claims court

The tax and administrative claims court shapes out as a special subjective administrative claims court. This legal nature results from its resemblance with the institution of the general administrative claims court, settled by Law no. 554/2004, taking into account the two procedural levels: the level of the administrative remedies at law and the judicial level. Also, the subject matter of litigation is represented in both cases by administrative acts by which the rights or interests of natural or legal persons were damaged.

But the special character of the tax and administrative court derives from the fact that the formal source, namely the Government's Ordinance no. 92/2003, is different from the formal source of the general subjective administrative claims court, i.e. Law no. 554/2004.

In the domain of the preliminary administrative procedure there are fundamental differences between the general administrative claims court and the tax claims court (the special one).

In this sense, in the books of authority[3], there was considered that it is highlighting that article 7 of Law no. 554/2004 states the obligation of introducing an appeal for delay, with the injured party, whether a natural or legal person addressing themselves, for the defense of their damaged subjective right, to the authority which issued the act, the hierarchical appeal on facts being only optional, while article 179, 1st paragraph in the Code of Tax Procedure stipulates that the challenge will be solved, taking into account the amount of the rejected sum, either by the competent services constituted at the level of the general department where the contesting parties are registered as tax payers, or by the competent services constituted at a central level.

Thus, the challenge may be either an appeal for delay or a hierarchical appeal on facts, exerted *omisso medio*.

In case of the general administrative claims court, the object of the review is represented by any administrative act of authority adopted or issued by infringing the legal dispositions and for which the special law does not provide another judicial remedy at law, and in case of the tax and administrative claims court, the object is also an administrative act of authority, but the latter has a special character, since it is a tax and administrative act.

The special legal nature of the tax claims court settled by Law no. 554/2004 results also from article 10 of the formerly mentioned law, which establishes the material competence of the courts called upon to solve litigations concerning assessments and taxes, contributions, customs debts and their accessories. Consequently, the legislator decided to approach the tax and administrative claims court as being a special form of administrative claims court.

The Legal Nature of the Challenge

Romanian doctrine and judicial practice are not unanimous as regards the legal nature of the challenge against tax and administrative acts, therefore there are two fundamentally opposed positions.

Thus, according to one opinion, in the area of remedies at law against legal debentures arising from assessments and taxes, we can speak of jurisdictional-administrative appeals on facts[4], while according to another opinion, these remedies at law are nothing but administrative appeals on facts[5].

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[3] **A. Fanu Moca,** *Contenciosul fiscal*, Editura C.H. Beck, Bucuresti, 2006, p. 163.

[4] **I. Deleanu,** *Tratat de procedura civila*, Editura Servo-Sat, Arad, 2001, vol. I, p. 235 ; **D.-C. Dragos**, *Legea contenciosului administrativ. Comentarii si explicatii*, Editura All Beck, Bucuresti, 2005, p. 193; **D. Dascalu, C. Alexandru,** *Explicatiile teoretice si practice ale Coduluide procedura fiscala*, Editura Rosetti, Bucuresti, 2005, p.483-493.

[5] **T. Draganu,** *Actele administrative si faptele asimilate lor supuse controlului judecatoresc potrivit Legii nr. 1/1967*, Editura Dacia, Cluj, 1970, p. 214.

To this end, it is necessary to define the notions of *administrative appeal on facts* and *contentious appeal on facts*.

Thus, by administrative appeal on facts one designates the claim forwarded to an administrative authority by which the individual solicits that administrative measures be taken as regards the damaging act, which may consist in the annulment, modification or issuance of an act, when the administration refused to do that.

The contentious appeal on facts is the judicial way by which the individual, unsatisfied with the solution given subsequent to the administrative appeal on facts, brings his/her conflict with the administration before the judge.

The administrative appeal on facts has two forms: that of the appeal for delay and that of the hierarchical appeal on facts.

The appeal for delay represents a form of internal administrative control, consisting in the complaint filed by an individual to the administrative authority which issued the administrative act, requesting that the act be cancelled, modified or reconsidered.

The hierarchical appeal on facts is a form of external hierarchical administrative control, consisting in the complaint filed by an individual to the superior administrative authority, requesting the annulment of an act issued by an inferior authority and which damaged his/her rights or interests, or else an imposition on that authority to modify the act or carry out a certain performance[6].

In case the administrative authority enjoys autonomy, having no hierarchical superior, the administrative appeal on facts may take the form of guardianship appeal, intended to be filed to the body which exerts administrative guardianship on that administrative authority[7].

The reasons of providing for the administrative appeal on facts consist in that, from the standpoint of the administrative authority, the latter is given the opportunity to correct its possible errors, and from the standpoint of the individual, the latter benefits from a summary, fast, stamp tax-free procedure.

Moreover, this way, there occurs an unburdening of law-courts of the litigations that can be solved through an administrative procedure.

In establishing the legal nature of the challenge against tax and administrative acts settled by the new Code of Tax Procedure, one needs to consider the dispositions of article 175, 1st paragraph in the Government's Ordinance no. 92/2003, according to which the challenge is an administrative remedy at law, as well as the dispositions of article 185, 1st paragraph, according to which the forwarding of the challenge by way of some administrative remedy at law does

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[6] **R.-N. Petrescu,** *Drept administrativ*, Editura Cordial Lex, Cluj-Napoca, 1996, vol. II, p. 8.

[7] **D.-C. Dragos,** *Legea contenciosului administrativ. Comentarii si explicatii*, Ed. All Beck, Bucuresti 2005, p.199.

not suspend the execution of the tax and administrative act. Also, within the order of the National Agency of Tax Administration no. 519/2005, the challenge is analyzed as being an administrative remedy at law (points 9.8, 9.10, 9.11).

Consequently, it is obvious that the challenge is an administrative remedy at law, not a jurisdictional-administrative one.

With an aim to inferring the legal nature of the challenge against tax and administrative acts, it is necessary to define the jurisdictional-administrative act.

According to the dispositions of article 2, 1st paragraph, letter d) of Law no. 554/2004, the jurisdictional-administrative act represents "the judicial act issued by an administrative authority of jurisdictional attributions in solving a conflict, following a procedure based on cross-examination, and by which the right to defense is guaranteed".

In the books of authority[8] the jurisdictional-administrative act has been defined as being that willful conduct "by which a body of autonomous functioning, solves legal disputes, with the *res judicata* power and on the basis of a procedure governed by the principle of cross-examination, by creating, modifying, canceling and acknowledging rights and obligations for the parties and the executing bodies". Also, according to another definition[9], the jurisdictional-administrative act is "the typically administrative act, which, in cases well-determined by the law, solves disputes arisen in the process of participating in the operations of the state administration system, by using the force of legal truth and following a procedure based on independence and cross-examination".

A specific element for the jurisdictional-administrative act is that it aims to establish a right by an administrative way, following a procedure similar to that of the courts, but this does not mean that the jurisdictional-administrative bodies replace the law-courts, since article 21, 1st paragraph of the Romanian Constitution, as amended, has consecrated the principle of free access to justice, which can be done only by the High Court of Cassation and Justice and the other law-courts.

By the Decision no. 1/1994, the Constitutional Court stated that under no circumstance the existence of authorities of jurisdictional-administrative attributions may lead to the removal of the law-courts' activity, since respecting the principle of balance of powers is essential.

Defining the jurisdictional-administrative act is necessary in order to delimit it – on the one hand from the legal decisions passed by law-courts – and,

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[8] **T. Draganu,** *Formele de activitate ale organelor statului socialist roman*, Editura Stiintifica, Bucuresti, 1965, p.345.

[9] **A. Iorgovan,** *Tratat de drept administrative*, vol. I, Editura Nemira, Bucuresti, 1996, p. 394.

on the other hand, from the administrative deeds of authority, as well as from the tax deeds.

Thus, starting from the opinions expressed in the administrative law doctrine as regards the essential conditions that need to be met by a jurisdictional-administrative act (the functional independence and impartiality of the body of jurisdictional attributions, the special resolution procedure, the guarantee of respecting the principle of cross-examination, the stability), such conditions are not met in case of the decisions/dispositions issued by the competent bodies according to the provisions of the Code of Civil Procedure.

Primarily, the body which solves the challenge filed against the tax and administrative act has not been endowed by the law with jurisdictional attributions, and the Code of Tax Procedure makes reference neither to commissions/panels able to come up with a solution, nor to quorum or other similar requirements.

It is however strange that within the contents of the Order of the National Agency of Tax Administration no. 519/2005, point 6.1, one can come across the hypothesis of the participation of several persons in the challenge resolution, yet the text is not clear enough. The only acceptable interpretation refers to the hypothesis in which the public servant who draws up the report prior to the issuance of the decision suggests a solution, but it is not approved by his/her hierarchical superior, who considers that another solution is preferable; the decision copy which remains enclosed in the challenge file will be signed by the public servant who dissented the solution adopted by his/her superior.

This measure is destined to protect the public servant, taking into account that, according to article 16 of Law no. 554/2004, the administrative claims court action can also be filed against the persona of the public servant who drew up the damaging act.

Also, according to article 181, 5th paragraph, the decision is signed by the head of the general department, the head of the competent body set up at a central level, the head of the tax service which issued the challenged administrative act or the substitutes of the former, and not by the public servant who actually solves the challenge, since he/she loses independence in giving the solution, which clearly demonstrates the legal nature of the decision, namely that of an administrative deed of authority.

As regards *cross-examination*, an essential requirement in case of the issuance or enforcement of jurisdictional-administrative acts, we consider that the procedure followed by the body which solves the challenges against the tax and administrative acts is not governed by the principle of cross-examination.

In a civil lawsuit, cross-examination allows the parties to actively participate in the judgment, since they have the right to debate and counter-argue the statements made by each of them, as well as to express their point of view on

the initiative of the court in establishing the truth and delivering a lawful and well-grounded ruling[10].

An important aspect that needs to be emphasized is that the cross-examination rule in a civil lawsuit governs both the conduct of the parties and that of the judge, meaning that, in case some legal or factual issues are invoked *ex officio* by the court, the judge is bound to make those issues debatable by the parties, so that the latter may adopt a certain stand.

As the doctrine has put it, "cross-examination takes on a theatrical form of the confrontation between the parties arbitrated by the court, in order to reach truth and justice".[11]

Consequently, the essence of cross-examination is the existence of a litigation between two or more parties before a neutral "arbitrator", leading to a sort of triangular legal relation.

But, as regards the procedure by which challenges are solved on the basis of the legal texts in the Code of Civil Procedure, although the latter contains several dispositions which might allow for the application of the cross-examination rule, we consider that the requirement of cross-examination is not met.

Thus, as it results from the interpretation of article 177, 2nd paragraph, correlated with article 181, 2nd paragraph in the Code of tax Procedure, the tax and administrative litigation may take place even before the body that issued the challenged act, so that one of the parties is also an "arbitrator".

At the same time, the legislator didn't provide for the possibility of the body that issued the contested act to challenge the solution given by case by means of jurisdictional appeal on facts before the court, whereas in case of the jurisdictional-administrative acts, any party may challenge that solution.

Also, the authority which solved the challenge filed against the tax and administrative act, will reject the challenge without discussing the non-fulfillment of certain procedural conditions by the challenging party, the latter has no possibility of expressing a point of view concerning the conduct of the here-above mentioned authority.

Moreover, the challenging party is not summoned upon resolution of the challenge that was filed, since there haven't been fixed some legal terms within which the debates between the parties may occur.

It is true though that in the situation stipulated by article 182 in the Code of Tax Procedure, namely the third party summons for the resolution procedure, the challenging party will be heard by the authority able to solve the challenge,

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[10] **V.M. Ciobanu,** *Tratat teoretic si practic de procedura civila*, vol. I, Editura National, Bucuresti, 1997, p. 125.

[11] **I. Deleanu,** *Procedura civila*, vol. I, Editura Servo Sat, Arad, 1999, p. 33.

but the grounds of that legal disposition are rather the respect of the right to defense than the cross-examination rule, since the Code of Tax Procedure does not include correspondingly the obligation of the hearing of the authority which issued the challenged tax and administrative act.

As concerns the provisions of article 183, 3rd paragraph in the Code of Tax Procedure, which establishes the *no reformatio in pejus* principle, we consider that it represents an aspect of respecting the right to defense, and not that of the cross-examination principle.

Although the Government's Ordinance no. 92/2003 stipulated a certain form that the decision which solves the challenge, as well as its contents may take, the Code of Tax Procedure does not provide for any requirement as regards the deliberation phase or the formation of the quorum, which are compulsory in case of the enactment of jurisdictional-administrative acts.

Taking into account all these arguments and correlating the text of the Code of Tax Procedure with that of the Law on the administrative due process no. 554/2004 - we can state that, within the administrative claims court procedure, comprising two levels - the actual administrative appeal on facts under the form of the preliminary administrative procedure settled in article 7 of law no. 554/2004 – and the contentious appeal before the court – the challenge laid down in article 175 *et seq.* in the Code of Tax Procedure – the two remedies at law play the part of the *sheer administrative appeal on facts*, having the legal nature of an *obligatory preliminary administrative procedure*[12].

The issue of the legal nature of the challenge settled in the administrative and tax claims court procedure takes on uttermost importance due to the constitutional amendments that occurred on the occasion of the Law for the amendment of the Romanian Constitution in 1991, formally agreed to by referendum in October 2003, whose article 21, 4th paragraph, states that:"Special administrative jurisdictions are optional and gratuitous".

As the books of authority[13] have underlined, "the qualification of the tax and administrative procedure as having or not a jurisdictional nature is not an exclusively theoretical issue […]. If it is a jurisdictional-administrative procedure, then it is optional, according to the amended Constitution, and the party may or may not resort to it or go directly before the administrative claims court. On the contrary, if it is considered just a non-jurisdictional administrative procedure, it has to be resorted to, or else it will be rejected as undeveloped".

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[12] The Supreme Court of Justice, Decision no. 962/March 17th, 2000, published in **Th. Mrejeru, E. Albu, A. Vlad,** *Jurisprudenta Curtii Supreme de Justitie – contencios administrativ – 2000*, R.A. « Monitorul Oficial al Romaniei « , Bucuresti, 2002, p. 965 ;

[13] **C.-L. Popescu,** *Frauda la Constitutie realizata de Legea 174/2004 pentru aprobarea O.G. nr. 92/2003 privind Codul de procedura fiscala, prin calificarea expresa a procedurii fiscale drept procedura administrativa*, in C.J. nr. 7/8/2004, p. 205-206.

Yet, taking into account the arguments concerning the legal nature of the challenge settled by the Code of Tax Procedure, this new constitutional is in no way related to the procedure of the tax and administrative claims court, characterized by administrative remedies at law and not by special administrative jurisdictions.

In this sense, according to an opinion[14], upon introduction of the 4th paragraph of article 21 in the Constitution, "the law can no longer impose the following of a jurisdictional and administrative procedure as a pre-requisite to an administrative claims court action. Such a procedure can only have an optional character, which leaves the claimant the choice of either to resort to it before going before the administrative claims court or to go directly to court". The author emphasizes that "the constitutional disposition has annulled the pre-requisite character of the administrative claims court action only as regards the jurisdictional and administrative procedure. *A contrario*, at least *prima facie*, there is nothing in the Constitution that prohibit to the legislator to introduce a compulsory preliminary administrative procedure, unless it has a jurisdictional character (for instance, the administrative appeal for delay, the hierarchical administrative appeal or the special administrative appeal)".

The Romanian Constitutional Court, called upon to rule as regards the constitutionality of the provisions of article 5 in the Law on the administrative due process no. 29/1990, of article 109, 2nd paragraph in the Code of Civil Procedure and of articles 174-187 in the Code of Tax Procedure, clarified, by Decision no. 409/2004, the legal nature of the challenge – as settled at the time by articles 174-187in the Code of Tax Procedure, as republished, stating that: "As regards the matter concerned, not even the dispositions in the Code of Tax Procedure provide – as the author of the exception sustains on no grounds – for special administrative jurisdictions, in the sense of article 21, 4th paragraph in the Constitution, as republished[15] .

The texts in the Code of Tax Procedure settle *administrative appeal procedures*, by which the bodies that issued the challenged administrative acts, or their superiors are allowed to reconsider the measures taken or redimension them within the limits of the law. Such procedures – in which the resolution of complaints and challenges filed by the interested persons is attributed to the actual body that issued the challenged act or to the superior body – do not meet the defining elements of the jurisdictional activity – characterized by the resolution by an independent and impartial body of litigations concerning the exis-

[14] **C.-L. Popescu,** *Contenciosul administrativ potrivit dispozitiilor constitutionale revizuite*, Dreptul, nr. 3/2004, p. 19.

[15] The Constitutional Court ruled on other occasions as well on the inapplicability of the dispositions of article 21, 4th paragraph in the amended Constitution, as concerns the administrative procedure settled by article 5 in Law no. 29/1990 by Decisions 188/2004 and 98/2005.

tence, the length or exercise of subjective rights, since they are specific for the administrative function.

The acts, by which the administrative bodies solve challenges or complaints filed according to the dispositions in the Code of Tax Procedure, are not therefore acts of jurisdiction, but *administrative acts subject to the censorship of courts*".

Taking into consideration the above arguments on the legal nature of the procedure settled by the provisions in the Code of Tax Procedure, there was criticized a case decision[16] of the High Court of Cassation and Justice, passed closely after the decisions of the Constitutional Court as regards the nature of the remedy at law laid down by the provisions of the Code of Tax Procedure. Several conclusions were drawn from the case brought before the court which judged the appeal on facts: the claimant supported the claim action on the dispositions of article 21, 4th paragraph in the Constitution, according to which special administrative jurisdictions are optional and gratuitous, as well as on the provisions of article 174, 1st paragraph in the Code of Tax Procedure, by which the administrative challenge against tax acts does not do away with the right to claim action of the individual whose rights were damaged, under the law; the court which judged the case on the merits justifiably considered that the administrative procedure used to solve the challenge against the tax and administrative acts is not binding; in the case, however, the claimant resorted to this procedure, filing an administrative challenge, but did not wait for the finalization of the administrative procedure, and later on brought action before the administrative claims court, invoking as well the dispositions of Law no. 554/2004; the provisions of the Law on the administrative due process aim at completing the dispositions in the Code of tax Procedure, which settles the special administrative jurisdiction, in article 6, 3rd paragraph of Law no. 554/2004. The article provides for the possibility of the party who opted for that jurisdiction to give up the jurisdictional-administrative way, and under such circumstance he/she will notify their intention to the jurisdictional-administrative body referred to, which will issue a decision destined to attest this occurrence.

[16] The civil Decision no. 605 of February 22nd 2006 passed by the High Court of Cassation and Justice – the Tax and Administrative Claims Department

Конс̄та̄тин По̄пе, ванредни про̄фесор
Правно̄г факулте̄та у Темишвару

ОСВРТ НА СУД ЗА ПОРЕСКЕ И АДМИНИСТРАТИВНЕ ЗАХТЕВА

Резиме

У раду се даје теоријски основ за постојање судова за пореске и административне захтеве и наводи најшире прихваћена дефиниција оваквих судова у правној литератури.

Аутор истиче да је правна природа овог суда у томе да је он пре свега специјални суд за субјективне административне захтеве

У Румунији је суд за пореске захтеве успостављен Законом о пореској процедури 2004. године и третира се као специјални облик суда за административне захтеве. У раду се критички преиспитују решења из самог закона, проблеми који се јављају у вези правне природе захтева и одлука суда.