THE PRINCIPLES OF TAXES ADMINISTRATION

VIOREL ROŞ*

Abstract
In the management of taxes and contributions are involved three categories of professionals: government officials, economists and lawyers. Somehow or another, everyone involved decide on a significant part of the taxpayers' income and wealth who constitute the state's budget revenues. Therefore, the basic rules of tax administration should be known by everyone, including the taxpayers. And they must be applied uniformly. This requires their knowledge.

Keywords: *taxes, principles, tax administration, equitable, fair.*

Introduction

The need of principles in taxation

Nevertheless, as we know, a principle is the general rule, the basic rule or the general compulsory conduct line rule which nobody cannot avoid, only in and on the basis of an exception expressly provided by the law and that permits it.

Even that we like it or not, the state is interested in everything that people do. The state is a *habentes causam* for all our acts and facts. But we are ourselves interested in and for all that the state where we are living is doing, and taxation is the material expression of this interest.

The state and the taxpayers are in extremely complicated legal, economic, social and political relations. Each other are following, from different positions, their individual and social wellbeing, and between them should be developed a true partnership. This partnership is a modality in which it can be developed a lot of activities in the interest of the both parties, reciprocally favorable, and that is supposed to, except the right and honest intention, fully trust each other, respect, cooperative attitude, conformity between engagements and actions, making compatible the interests for the common wellbeing.

Although taxation is a field in which in Romania (also in other countries) the trust in the both partners (the state and taxpayers), which represent also the subjects of the tax law report, it was and it is extremely low, the lack of trust between them has a long history, which has made deep wounds. At the origin of the taxes most probably there is the plunder. Today taxes are just a more evaluated plunder, because it is, same as its gender, a wealth and/or income dispossession, only now the taxes are made under the law dispositions, not on the sword threat. But even at the shelter of the law, the state is still behaving as a cruel plunderer towards the taxpayer and its interests. It behaves with cruelty or without conscience, and in this way the attitude of the state raises a lot of questions regarding the fact if the state knows its own interests.

The abusive attitude of the state generates normal resistance reactions related to the Revenue Service on behalf of the taxpayers (the normal reaction is, as we know, the tax evasion), so the state is in a permanently and sometimes declared conflict with the taxpayers. The state responds to the denial, the resistance on the excessive taxes, and the escape of the taxable items in the underground, with a more suffocating regulation, with a more discretionary application of the law and with an inadequate treatment applied to the taxpayers, which in fact are the ones that make the state "living". According as the fiscal burden becomes more difficult to bear and the civic sense of the tax is less visible, the statement that the state (the modern states, not the revolute ones!) and the taxpayer are in a partnership, is as in the time of Justinian[1] same utopian (according to the Financial Law – Digests,

* Professor, PhD, "Nicolae Titulescu" University, Bucharest (viorelros@asdpi.ro).

[1] Justinian Digests have a chapter called "the tax law", that comprises rules both for fiscal debtors and for the federal agents to which was recommended *"to behave same as parents with their children, to be wise ruling the*

Justinian was asking to his federal agents to behave with the taxpayers as the parents with their children, even that in fact the taxpayers could only choose between death and the tax paying). The statement justifies Louis Aragon ascertained fact: ***"there are only two ways to govern: the power and the ruse!"***

It is obvious that there is a need for a new kind of relations between the state and the taxpayers! The tension between these two partners must be reduced, if it cannot be annihilated, and this having in mind the fact that the state cannot survive without the taxpayers, and, the taxpayers, social beings, cannot fulfill themselves without the state. The first step for a normal relation between the state and the taxpayers is to recognize that the taxpayers are not only taxes and contributions payers, but partners of the state which have the obligation to pay their taxes and also have rights. This is a normal situation because also the state – the fiscal authority has not only rights, but also obligations. The fiscal partnership cannot be the result of a convention, it has to be the result of the law, and it presumes identifying the rights and the obligations, accepting them, respecting the rights of the partner and accomplishing the obligations. Truly, only in this way it can be done a partnership between the state and the taxpayers. It is what we propose in the following: identifying the rights and the obligations of the parties in the procedure of administering the taxes.

10 years ago, the state seemed disposed to a reposition in its report with the taxpayers, since in the tax laws adopted in 2003, it made a number of rules, taxation and taxes administration principles which, if it were been better formulated, if it were been respected and properly interpreted and applied, they would be capable of conferring the state - taxpayer relationship other dimensions than those with which the State has accustomed us.

Undoubtedly the Romanian legislator was influenced at that time by the solutions and positions expressed by Romanian and foreign academics and by the importance they attach to the principles. Not so much, of course, in order that the Romanian legislator to assume the principles formulated by Adam Smith and Adolph Wagner, although they are simple and clear. And always adding to them (compare in this sense the codes adopted in 2003, with the last ones in effect: you'll see how instable the tax legislation in Romania these years was!), including its principles and formulated them in a way that causes surprise and confusion, because enable tax authorities to abuse the law and to interpret it at their will.

To recognize the need for principles, to state them in the tax laws and to require to be implemented by state agencies and the taxpayers is still an important step. And we regard it as such.

We all have to admit that taxation principles are useful for the subjects of fiscal law relations (substantive and procedural), because if they are known and applied, they *"bring an element of flexibility in applying the law; are to prevail the spirit of the law its letter, it's the common sense and justice on the mere technical by allowing to penetrate beyond the positive law, to the profound aspirations of our legal order"*[2]. But they are necessary because the state finances are governed and managed by different profile institutions (political, administrative, judicial) and with interests that do

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disputes, to protect the innocent ones, to punish according to the law the ones that were not paying the taxes, to not take bribery". Quote Gh. D. Bistriceanu, Romanian fiscal system, University Publishing House, 2008, p. 12. The Byzantine Empire dispose of a well tax system adjusted by the Cappadocian John, Justinian treasurer, thus it is told that in that period the taxpayers which were not paying their taxes or were making the national treasury empty, or they were dyeing, so sometimes the taxpayers where choosing death as the final fiscal form resistance. As it is known, the excessive rate of the taxes during Justinian period, even that the taxes were used in order to reconstruct the empire, have generated general complaints and culminated in the year 532 with a popular revolt, which was stop with cruelty by the emperor. No wonder that at the death of Justinian the population was very poor, but very happy for Justinian death, and forgot the great achievements of the emperor.

[2] Pierre Pescatore, quoted by R. Bufan and his assistants, p. 63. P. Pescatore was a judge at the European Court of Justice for 18 years and has an important theoretical and practical contribution to the development of Community law.

not always coincide (for example: different interests of the government and the parliament), running with different backgrounds (economists, lawyers, specialists in public administration, etc.). Or, at least in principle, the institutions involved and their officials should agree, they should talk in the same "language" about this phenomenon so complicated and so important to the state and taxpayers.

As for their consistency, quality and efficiency in and for the practical work, we are not the only ones disappointed. The doctrine in other European countries where such principles are developed in law states that ***"the legal principles of taxation are far from being a coherent whole, even if some of them have constitutional value"***[3]. Should not be surprising that a lot of Romanian authors are critical regarding the way in which the principles of taxation are formulated in the tax laws in our country. But all authors agree that the right of taxation, taxation and tax law should be based and meet a few basic principles; although everyone knows even that the principles are formulated, some of them in the Constitution, others in special laws, are not always respected.

These principles are especially useful in a tax system such as in Romania today, characterized by inconsistency and unpredictability due to too many legislative changes which do not meet even the basic rules of adoption of such amendments. Principles should be properly and clearly formulated and adapted to the realities of Romania, because they, their respect and their correct implementation, are essential conditions for the development of the Romanian tax law. That is why it is necessary to dwell on them, not before stating that the legislature and theorists do not have a common view on principles, not even for their enunciation.

Taxes, fees and contributions administration principles under the Fiscal Procedure Code

The legal framework for the administration of taxes and fees imposed by the Fiscal Code is set by the legislation on the tax procedures, namely the Fiscal Procedure Code[4], which deals **within its introductory part with the principles for the management of taxes and fees.**

Examining the tax administration principles formulated in the Romanian Fiscal Procedure Code, however, we find that in reality, not all so named like this by the legislature are principles, that some are unnecessary and others are formulated incorrectly, that they do not only address to the tax administration bodies but also to the taxpayers and by the way in which their content is explained they offer rights to the state agents that can make possible an improper conduct of the state agents and such obligations that do not prevent the abuse.

At the same time, comparing the tax administration principles formulated in the Fiscal Procedure Code, the fundamental principles set out in the **Code of Ethics of the public fiscal administration operating in taxpayer assistance**[5], it appears that apart from the principle of equality, for the authors of the Code of Ethics, none of the principles of tax administration does not seem to be really important, do not seem to have a serious meaning and do not seem to be accepted as principles of the Ministry of Public Finance since all the other fundamental principles set out in the Order approving the Code of Ethics are different from the Fiscal Procedure Code[6].

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[3] M. Bouvier – Public Finances, p. 588.

[4] The Romanian Fiscal Procedure Code is based on a draft prepared by German specialists after the German Tax Procedure Code. It was adopted in haste, by GEO no. 92/2003, in order to enter into force simultaneously with the Fiscal Code adopted by Law no. 571/2003.

[5] Approved by Order no. 137 of 19 January 2004 for approving the Code of Ethics of the public tax administration operating in taxpayer assistance, published in the Official Gazette no. 66/2004.

[6] The fundamental principles formulated in the Code of Ethics are: i) The principle of equality; ii) The principle of non-discrimination; iii) The principle of access to public information; iv) The principle of free tax assistance to taxpayers; v) Principle of transparency; vi) The principle of adaptation to the requirements of the tax authority to the taxpayers demands; vii) The principle of respect and consideration to the taxpayers; viii) The principle of confidentiality.

1. The principle of uniform application of the law (article 5 Fiscal Procedure Code)

According to article 5 of the Fiscal Procedure Code, **the tax authority** is obliged to apply uniformly the tax legislation in Romania, following a correct assessment of taxes, contributions and other amounts owed to the general consolidated budget. In reality, the principle of uniform application of the law as expressed in the Fiscal Procedure Code merely repeats almost useless, but especially unfair, in our point of view, **the constitutional principle of legality**, which is required to be respected equally by legislature, the tax authority and the judicial authority.

It is useless because it only repeat a general rule of conduct for the state bodies and officials, but also is incorrectly formulated as referring only to the tax, it may be understood that other authorities and the persons with responsibilities in the area of taxation, should not be kept to comply with this principle. Or the obligation to respect and to enforce of the fiscal law is a general one: of all the state organs and officials.

But the principle is not correctly formulated and it appears to formally limit the application field only to **"the correct assessment of taxes, fees and contributions"**, while according to article 1 paragraph 3 of the Fiscal Procedure Code, the management of taxes, fees, contributions and other amounts owed to the general consolidated budget includes *"all the activities carried on by the tax authorities in relation to: a) tax registration; b) declaration, **setting**, **verification and collection** of taxes, fees, contributions and other amounts owed to the general consolidated budget; c) **settling the disputes against the administrative fiscal acts"***. And, in our opinion, we don't believe that the intention of the legislature was to limit the scope of the principle of uniform application of the law, exclusively to the "fiscal body" and to **"the correct establishing"** of the taxes, fees and contributions.

In accordance with article 6 of the Fiscal Code, by the Order no. 877/2005[7] of the Minister of Public Finance was established within the Ministry of Finance, the Fiscal Central Committee, which has the responsibility **for making decisions about the uniform application of the Fiscal Code**, and pursuant to article 4 of the Fiscal Procedure Code, by the Order no. 1995/2007[8] of the same Minister, within the National Agency for Fiscal Administration Commission was established the **Commission for fiscal procedures**, which is responsible for **making decisions on the uniform application of the Fiscal Procedure Code**. Both commissions adopt decisions (each for their field of expertise) which are published in the Official Gazette.

The decisions taken by the **Central Fiscal Commission** represent **documents with interpretative value**, and, according to the order by which the commission was established, they *"are applicable from the date of entry into force of the legislative act considered in resolving each case"* and the Commission's decisions are *"binding and enforceable against the whole staff of the National Agency for Fiscal Administration and its subordinate bodies, from the date of publication"*.

Of course, to the legislature cannot be opposed the Commission's interpretation done by decisions, which is held in the legislative process only by the limits which are set by the Constitution. But these decisions may be opposed to judges and judicial bodies?

Regarding the judges, the answer can be only one: the interpretation of the law made by the fiscal body, if it doesn't comply with the will of the legislature, obviously it cannot hold and cannot be invoked as required. Moreover, the judge as an independent interpreter of the law can find the very existence of the conflict between the law that must apply and the Constitution and he can cause, even ex officio, the constitutionality control of the law (which may, of course, be challenged by the parts) by notification to this end, of the Constitutional Court[9].

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[7] Replaced by Order no. 1318/2008 of the Minister of Public Finance, which was replaced by Order no. 183/2010, which was replaced by Order no. 1765/2011.

[8] Replaced by Order no. 1765/2011.

[9] See article 146 of the Constitution and the Law no. 47/1992, as amended, and also the comments on them.

But regarding the bodies with judicial activity, their independence is limited by the quality of the tax administration institutions employees, quality which is obliging them to fully implement the decisions of the two commissions. From this point of view, the tax officials and the bodies with jurisdictional activity will not even be able to avail of the provisions of article 13 of the Fiscal Procedure Code ("Interpretation of the law"), which provides that the interpretation of the tax laws should respect the will of the legislature as expressed in the law.

2. Exercising the right of discretion, freedom of management and the abuse of rights

The tax continues to be associated with coercion and oppression because it is undeniably a burden. This kind of the tax reveals the legal definition of it when speaking about it as being a *"compulsory levy, without consideration and grant, in order to meet the general interest needs"*. Sure, a different burden than robbery, taxes, tribute or requisition which preceded it and to which compared are considered a progress, but how big are the differences between taxes and levies that preceded it? The tribute, the toll were rise with the sword in hand. The tax is payable, usually willingly, and in case of refusal, are used more subtle forms of coercion and less violent: execution by seizure or sale of the properties of the tax debtor. Thus, the tax appears as an evolved tribute and some authors are even considered it as a "liberal technique" because *"is the mean to make citizens to contribute to society's needs and the needs of their own leaders, leaving them most of freedom"*[10].

The taxes, no matter how compelling they are, they should be viewed with understanding, because they and only they allow the operation of the organized societies. Therefore, whether we pay them out of conviction or because we cannot evade to their payment (even when we subtract we are risking criminal sanctions), as long as the states' economies are not sufficiently developed, and the monetary resources are not sufficient to that people should be free from the burden of taxes, they will continue to be part of our lives. And as long as they exist, the taxes and trough taxes we will limit the individual freedom, and it will be limited the freedom of the business management.

But how and why this limitation of our freedom through taxes is produced? The answer seems simple: the state raises a part of our incomes and property and wishes that the amount that is taking to be as high as possible. And in order that this amount to be as high as possible, the state restricts us the possibility to decrease the taxable matter, assuming the right to control our acts and deeds which we tend to ease our fiscal burden and to reconsider them, sometimes, according to its interests.

2.1. The ideally taxable economic reality

The state, the fisc and the legislative power, in particular, have their eyes pointed to the economic reality, because this is the matter that can be taxed, it is rooted in that and keeps them alive. In fact, however, between economic and legal reality, between taxable reality and taxed reality are significant differences for many reasons, some of which are attributable to the State, other to the taxpayers. The state and the tax authorities' aim, of course, to tax the reality and not the appearance, but the state should do the same even when the reality is less favorable than the appearance.

The state is interested on the economic reality in many respects: **it determines** by the way in which regulates social relations, **it develops** or, conversely, **makes it backwards** through its policies and measures it adopt and implement, but also **through manner and efficiency with which it manages the revenues**, of which the most important are taxes, fees and contributions.

The legal position of the State in relation to tax law, however, is difficult to classify: a third part towards the private legal relationships in which they engage the taxpayers, the state is interested in these relationships because they generate taxable matter and because the state is the eternal creditor (rarely, the state is the debtor) of its taxpayers, to which most often is linked only by relations of citizenship, without this connection to be absolutely necessary for them to have the tax debtor position. The state became a kind of an associate of each business, of each working individual and to each individual household from which raise a share of profits, income or wealth.

[10] G. Ardant, The history of tax, quoted by M. Bouvier.

But apart from the fact that the state has, directly from the power of the law, the tax credit position, the state also enjoys other privileges: not only has the law on his side (which he himself do it), but also the public force (which he also organizes and maintains), and regarding the legal tax law, governed by rules of public law, the parties are not on equal footing, the taxpayer is the one who, according to the tax law has a disadvantage to the state. The taxpayer has an obligation (fundamental duty) to pay taxes, in return for which, however, the state is not subject to consideration. In principle, to the obligation of the taxpayer to pay the tax does not correspond to a concomitant right. Of course, not this is the case of taxes and contributions, the first ones, due to the service provided by a public institution, and the contributions in order to return, in various forms (pensions, benefits, health care) to the payers.

Interested in the reality that tithed and its claims and having a discretionary power, the state has given itself also a right to control this economic reality, the acts and the facts of the taxpayers, the state has taken a right to appreciate these acts and deeds and a right to decide for itself whether these acts and deeds are in accordance with the regulations that also he has adopted and which really gave us the consent trough the representatives sent to Parliament. A power that authority often faces abuses and in front of which the defenses of the taxpayers are less.

In fact, however, nowhere in the world the states do not tax all that, theoretically, could be taxed but not only what, in fact, should be taxed. The taxable reality and the taxed reality are different things. State seeks to take as much as he can; the taxpayers seek to give as little as they can and each act according to his purpose. Therefore, to the economic reality of taxes always stands with more or less success, the legal reality, but from the latter one is a part, unfortunately, the different treatment of taxpayers and the benefits (not always, rightly) granted to some of the taxpayers by the state itself. The unmeasured greedy character of the state, in its quest for resources, it is opposed the tax resistance in various forms: some legal, some illegal.

Between these extremes there is only the middle way characterized by moderation, proportionality, dialogue, respect for the law and for the rights of others, equality before the law and authority, individual and trade freedom. And the justice is called to curb the excesses of any side of the tax law and to punish them.

2.2. Exercising the right of discretion and proportionality

Because the state is interested in the economic reality, it is recognized to the state, with a principle value, a right of judgment on the acts and deeds of the taxpayers. The principle formulated in article 6 of the Fiscal Procedure Code ("the exercise of the right of discretion") **is not found in any other regulation**, and its explanation in the Romanian Fiscal Procedure Code seems likely to establish **not a normal rule of conduct**, but a provision which can **assign to the tax authority a right and a discretionary appreciation power**.

Indeed, according to article 6 of the Fiscal Procedure Code, "***the tax authority is entitled to determine***, within the limits of its duties and competences, ***the relevance of the fiscal facts and to adopt the solution permitted by law, based on the complete findings on all relevant circumstances enlightening"***.

The agreement between the conduct of public officials and their decisions, on the one hand and the law, on the other hand, it is the duty of any officer, authority or magistracy and not just of the fiscal agent, an obligation rooted in the principle of legality, the latter being a fundamental principle in all legal systems for all branches of law. A principle established also by article 1 paragraphs 3 and 5 and article 16 paragraph 2 of the Romanian Constitution, which requires the observance of the law by all its recipients: citizens and the state, meaning by the state, its institutions and its officials. Therefore, the principle of the pre-eminence of the law should be an integral part also from the administrative and fiscal culture.

In a democratic state, the pre-eminence of the law appears as a response to the need for legitimacy, and it is necessary for the exercise of the public power. Collection of taxes, fees and contributions is vital for any state (because allows its operation), but their good management cannot

be an end in itself, but a means to materialize the rule of law in the sensitive area of taxation, which is part of our lives, both as a society and as individuals.

In the Community law, **the legality and not the exercise of discretion right, is regarded as a principle of good administration**, the idea being formulated in Recommendation CM/Rec(2007)7 of 20.06.2007 of the Committee of Ministers of the Council of Europe, addressed to Member States of the Council Europe on good administration. Article 2 of this recommendation referring to the principle of legality in the administration, which includes also the tax administration, has the following form:

*"(1) The public administration authorities **act to comply with the law**. They **can not take any arbitrary measure, even in the exercise of a discretionary power**.*

(2) It complies with all national and international rules and general principles of law that regulates their organization, operation and activity.

*(3) They **act according to the rules of jurisdiction and procedure required** by the legal dispositions governing their activity.*

*(4) They **exercise their powers for reasons of fact and law which justifies their use and with the purpose** to which **these powers were attributed to them"**.*

It follows that, in accordance with the rules of the national law, but also with those of the Community law, among the conditions of legality of the administrative acts are those that relate to their issue by the competent authority, on the basis and the enforcement of the law, because between the administrative acts and law there is a subordination report. And the Constitutional Court ruled constantly, in line with our Constitution and the case law of the ECtHR and the ECJ that the legality should be the foundation of all legal relations of the rule of law and the rule of law governs the entire activity of the public authorities.

But even if we admit, however, that the exercise of the discretion right of the tax authorities, as stated in the Fiscal Procedure Code, has the value of a principle, then we must also show that **this appreciation right can just only be limited**, because where **the right of citizen is starting, the appreciation right of the administration is ending**.

Even where the legislature uses phrases that give the appearance of discretion power assigned to the tax administration (for example the use in the law of the words "may", "is entitled" etc.), it can't be interpreted as a freedom or a power outside the law, but one of its limits. For the respect of the principle enshrined in article 16 paragraph (2) of the Constitution, the exercise of discretion right cannot be conceived outside the law. In any case, the exercise of discretion right by the tax authority, in violation of the limits of the jurisdiction, or in violation of tax law or the rights and freedoms of citizens, constitute a breach of the principle of legality and is a manifestation of excess power.

There are situations in which the tax authority is required and not just the justification to appreciate, but for the legislature seems to be no difference between the obligation to estimate and the justification to estimate. Thus, article 67 (estimated tax base) of the Tax Procedure Code, paragraph (1) provides that "*If the tax authority **can't assess the tax base, it must estimate it**. In this case we have to consider all the relevant data and documents for the estimation. Estimation is to identify those elements that are closest to the fiscal facts"* and paragraph (2) that *"Where, according to law, the tax authorities **are entitled to assess the tax base**, they will take into account the market price of the transaction or taxable property, as defined by the Fiscal Code"*.

The Fiscal Code provides situations when the fiscal authority (but also the taxpayers, for example article 81 of the Fiscal Code[11]) is required to make the necessary estimations, particularly

[11] Article 81 - Declaration of Estimated Income from the Fiscal Procedure Code have the following content:

(1) The taxpayers and unincorporated associations, which are starting a business activity during the fiscal year, are required to submit to the tax authorities a statement of revenues and estimated expenditures for the fiscal year to be achieved within 15 days date of the event. An exception to the provisions of this paragraph, are the taxpayers who receive income on which the tax is levied by deduction at source.

with regard to determining the taxable matter and its assessment when the taxpayer does not establish personal and sometimes strict criteria and limits and on which the tax may be estimated. Thus, in article 67 paragraph (2) is set as the criterion for assessing the tax base, the market price of the transaction or property. In the case of the tax documents of the economic agents that are lost, destroyed or damaged, article 213 of the Fiscal Code establish a strict rule: first, they are obliged within 30 days of the registration of loss, destruction or damage to reconstruct, based on the accounting records, the duty relating to such transactions. When not reconstituted the tax obligations of the economic operator, *the competent tax authority* ***will establish such amount by estimation, multiplying the number of the lost, destroyed or damaged documents with the media delivery excise invoices entered in the last 6 months of activity before aware of the loss, destruction or deterioration of fiscal documents***.

Things get complicated, however, when and if the tax authority shall recognize the right to assess the qualification of legal operations, interpretation of contract terms, the possibility of invoking the invalidity of legal acts etc. When, for example, his right of discretion is exercised in respect of acts or operations that are deemed to be terminated or carried out in accordance with the law and in good faith, and interpretation has different consequences in terms of tax obligations. The tax authority it could, for example, qualify a joint venture agreement as being, in reality, a lease contract under the word that this is the correct interpretation of the transactions of the parties? Could the same fiscal authority to declare as null a contract clause under the pretext that violates a mandatory provision of law or that the act is done to evade the law? Could be that the tax authorities can do only that a judge can do: to establish the simulation, nullity, to interpret the will of the parties or to conclude that the real will is not matching the declared will act?

To not recognize to the tax authority any right to assess the legality of acts and operations, means, of course, not just to deprive the tax authority from the right and opportunity to repress itself from the obvious acts of tax evasion, but putting it in a position to helpless witness to their multiplying by reproduction of the tax evasion process by other taxpayers. To recognize it a right of unlimited discretion, mean to jeopardize the legal relations and to remove even the presumption of good faith of the parties in legal documents and tax liability arising. To refuse to the tax authorities any right of assessment may have the effect of creating conditions for avoiding the payment of taxes or to conceal taxable matter through legal fireworks may not be the subject to the judicial review. To accept it unconditionally means leaving the taxpayers as secure victims of the authority.

We believe that in the exercise of the discretion right, the fiscal authority is bound by **the principle of proportionality and reasonableness**, in agreement with the use of law cannot be discretionary and the assessments, conclusions and its measures cannot be arbitrary. **The fiscal body must act in fulfilling its responsibilities, reasonable and balanced, and its decisions must ensure a fair proportion between the aim pursued and the means employed to achieve it.** The limits in which the fiscal authority had acted, can't escape to the judicial review.

2.3. Exercising the right of freedom versus the freedom of management

Exercising the right of assessment and the active role of the fiscal authority may not generate directly the examination or the influence of the taxpayers' fiscal activity and management, regardless of their quality (individual or legal entity, national or foreign), the nature of capital (private, state,

(2) The taxpayers who obtain income from rental and leasing of personal property must submit a statement of estimated income within 15 days of the conclusion of the contract between the parties. The declaration of the estimated income is handling at the same time with the contract between the parties.

(3) The taxpayers which in the previous year realized loss and those who have earned income for periods of less than the fiscal year, and those who, for objective reasons, expected to achieve revenues that are at least 20% from the previous fiscal year have to file at the same time a declaration of income and the estimated income statement.

(4) The taxpayers that determine the net income based on income norms and those for which the expenditure is determined in the flat rate system and opted for the determination of net income in real system shall submit, with the application of options, the estimated income statement.

mixed, local, foreign) etc., opposing to such a management intervention **the principle of freedom of administration** (management) **or the prohibition of the interference in the business management**.

The freedom of management means the right of the taxpayer who has **to act and to take management decisions that will result in reducing the tax burden, the lowest tax payment**. The principle of freedom of management is a creation of judicial practice, the priority belonging to (apparently) the Belgian and French courts, but which is found in the U.S. Supreme Court. In the doctrine, however, the idea is old and is found in a form quite close in content, long before, in "The Wealth of Nations" by Adam Smith (resumed in recent works) and applied to the U.S. Supreme Court decision mentioned before, which we will return.

The fiscal management has become for all taxpayers, an art, and a science, an industry that speaks more and even aggressive, of the „tax strategies", of „ optimizing the decisions with a fiscal impact", of „de-taxing", of "tax-planning" and even of "the eulogy that must be brought to the fiscal ability". It is recognized today that, as in the common law (civil and commercial), using concepts such as "the good father of a family" or "the prudent and circumspect administrator" in tax matters is a "good fiscal management" or a "good financial management".

The authority is everywhere, abusive and excessive, and in a permanent dispute with disgruntled taxpayers from the burden of increasing fiscal burden imposed on them by the states which continuously are looking for taxable items and for methods to increase its part. Therefore cannot be any coincidence that the science has taken a steady position and there was not only the service of the authority - who gave arguments to justify the law enforcement right, but also for improving the means and methods of taxation, criticizing and demonstrating the excesses and negative consequences - but also in the service to taxpayers, which offered solid arguments not to justify their inutile resistance tax forms, more or less violent, such as riots, antifiscale movements or illegal tax evasion in order to reduce with the means and to the shelter of the law, the tax burden which presses too much on them.

France is a good example in this way, because it is not the only country in the world who at the mid last century gave the world one of the most efficient taxes (value added tax), or the country that has experienced all the forms of tax resistance: the violent riots and evasion, by nation-wide movement (the poujadism and the nicoudism are the latest and most popular)[12], but also the country where a valuable and abundant doctrine justifies the right of taxpayers to reduce, without violating the law, the tax burden. Thus, recent French doctrine states that ***"if paying taxes is an honorable duty, the good father of a family and the good administrator also have a duty to pay the lowest tax possible, to choose the path with less taxes"***[13], and that ***"wanting to pay the highest taxes, may be for some a proof of holiness or heroism, but most will be convinced that it is, rather, a sign of lunacy, and in any case not a model of good father worth following***"[14]. But almost the same Adam Smith was expressing himself, two centuries ago, in England, and his arguments will be taken and developed by the U.S. Supreme Court judges.

The freedom of management does not exclude, but rather requires the inclusion of taxation in the calculation of tax management decisions of any taxpayer. Knowledge of the tax law by the

[12] France experienced after the World War II, two spectacular rebellions against the Revenue Service. First, in the 50s, also known as the "small riot of the bout queries" (like the peasant uprising in previous centuries), led by Pierre Poujade, a small stationery products trader, who created the "Union of Merchants and Craftsmen" and that sent the Parliament elected in 1956 an important number of parliamentarians. His movement, without a program, started in southern France and swept across the country, dressed also violent actions. The second was led by Gerard Nicoud, debuted in 1969 and had as its starting point an upmarket area of France. The adherents have created a Steering and Defense Committee, dressed also violent actions against both the Revenue Service and some politicians. Quote M. Bouvier, Public finances, p. 603.

[13] Patrick Serlooten, Business Fiscal Law, Precis Dalloz, 2006, 5th edition, p. 25.

[14] Maurice Cozian, Specific business tax, Litec, 2007, 31 edition, p. 534.

taxpayers and the tax burden resting upon them is necessary not only so that they can fulfill numerous tax purposes, but also for their decisions to be consistent with the interest to pay the lowest tax as possible, taking into account the tax liabilities they generate, sometimes the law itself giving to the taxpayers, specifically, the right to opt for one or another decision[15]. But even when the law does not expressly say, the decisions with tax consequences on the contributors may be restricted only by the mandatory provisions of law. For everything that is not expressly forbidden by law, is allowed also in the tax matters.

In a proper application of this principle, the fiscal authority cannot substitute itself to auditors or censors and cannot judge the quality or the results of the activity, even weak, of the managers of the company, not for the financial or trade management. The fiscal body cannot give management lessons to the taxpayers, not even when their decisions are wrong, any company - to be established to make profit no loss - having the right to make bad business. Company administrators can do anything in the interest of society and it is in the interest of society, even in the Romanian Fiscal Code, article 3 letter b), but granting to the taxpayers not the right to ***"follow and understand the tax burden they bear***", but the one to ***"determine the impact of their decisions on the financial management of their tax burden"***. Applications of this principle we find, moreover, in the corporate law that allowed only reviewing the legality of decisions of general meetings, and not the control of their opportunity and the case law in this area is consistent in this regard.

The principle of freedom of management requires that:

a) Taxpayers have the right to refuse, pure and simple, to make taxable matters by inactivity, by refusing to work, to obtain income or taxable income, by refusing to invest their savings or interest and bearing deposits in banks. It is noteworthy, however, that this effect (underperformance taxable matter) occurs through excessive taxation, the taxpayers are not interested in creating a taxable matter, because it is seized in (almost) entirely by the state. In this case, however, the bear and other wrong consequences of fiscal policy, because inactivity increases the number of assisted persons, hence the need for state resources, but also increases the pressure on active taxpayers that the state must make to cover the deficit and/or the need for resources, thus creating a vicious circle.

b) Taxpayers have the right to choose the path that generates the lowest tax burden. Thus, taxpayers may choose to make loans - thus increasing their spending - and when they have internal resources, have the right to manage and keep unproductive economies, have the right to acquire the property needed for the activity not at the lowest prices on the market etc. The State which, through authority unreasonable measures because they are contrary to economic realities, seeks to increase the taxable matter of the taxpayers by limiting, for example, the deductible expenses, get the opposite result expected because, on the one hand the profit for that calculated tax is not real, and secondly, because such policies are causing escapist behaviors, the whole matter being subtracted from taxes, or attitudes of abandonment of the activities, or to increase in another way the expenses and to reduce taxable matter.

c) Taxpayers have the right, uncensored by state authorities, to make mistakes, to do business or bad investments, and spend their money to non-profit and to oppose their decisions to the tax administration authorities. Wrong decisions can be censored and punished in all cases, only by those with whom the decision-maker is bound by relations under which he is liable to result, and in relation to the State, represented by the tax authority, the taxpayer has not, in principle, such obligations and cannot be penalized for not producing profit or taxable matter.

In such a case, the taxpayer might find however, if, for example, it was granted to him facilities of payment, or when the taxpayer being in insolvency proceedings has been proposed and

[15] For example, for the technological equipment depreciation, i.e. machines, tools and plants, as well as computers and their peripheral equipment, the taxpayer may elect to straight-line depreciation method, diminishing or accelerated, and in the case of any depreciable asset, the taxpayer may choose the linear or regressive depreciation method. See article 24 letters b) and c) of the Fiscal Code.

approved a reorganization plan that does not realize, the situation is governed by article 177 of the Fiscal Procedure Code.

2.4. Economic reality, freedom of management and the abuse of rights

The reason of the tax law is to provide the legal framework for determining the taxable and tax matter and to ensure the collection of revenue. That is, in a strict interpretation of the fiscal law, any attempt to reduce the payable taxable matter and the due tax can only be a violation of the law, and the act not be seen only as an act in the fraud of the law. In other words, since taxation is based on the economic reality, the tax administration has not only the tempted, but also the obligation to oppose this economic reality to a "legal reality" which reduces the taxable matter.

However, the tax law provides that a taxpayer must pay the highest tax possible, leaving it the right to choose among several possible paths, the one that generates the lowest tax obligation. In addition, **it should be recalled the fact that if the taxpayer does not pay taxes, is not his reason for being, same the state's largest tax collection as possible is not his reason for being**. Furthermore, **collecting the largest possible tax from taxpayers, except that it can be only for a short time, can have only a single and catastrophic result for the state: the disappearance of taxable matter and of the taxpayers**. Therefore, **the endless dispute between the state and the taxpayer, except that should be seen and accepted as a normal thing, is generating positive effects because it is the only way to generate positive effects, to temper the excesses of the parties and to contribute to the recovery of tax laws**.

Taxpayers, therefore have the freedom to manage an individual household or their business according to their interests, have the uncensored right to do business in a good or bad way, have the right to exploit the law and its shortcomings for their own interest and **have the right to do whatever the law does not expressly prohibit**. They have the right to choose among all possible ways, the one that generates the least tax.

However, the freedom of management recognized to the taxpayers cannot be used as to its shelter the rights of others to be disregarded, can't be made in the third parties fraud of interests, or to defraud the law. Exercising in good faith the constitutional rights and liberties is a fundamental duty for every taxpayer.

But how does it is manifested the bad faith, the abuse of rights, the fraud made in the third interests and fraud in the fiscal law? It is the taxpayer the one who tried to reduce the tax burden through legal arrangements provided and permitted by law, a criminal? And who has the right to decide that a taxpayer has reduced legally the tax burden or did it in violation of the law? Who and how can draw the line between the conduct permitted by the law and the punishable one? Can this right be attributed to an organ or an official of the tax authority, or is the exclusive attribute of justice to say right?

The abuse of law, which is the legal antonym of good faith, is a concept lacking a legal definition, an indeterminate concept, identified only casuistic in concrete situations. The lack of legal definition makes more sensitive the fiscal body position, but also of the taxpayer, except that does not have many ways to defend against interpretation by the tax authorities of his acts and the law, is placed, in the fiscal right report, in an inferiority position.

As a general rule, the fraud is an act of deception by the debtor to the creditor, the latter one reduces his heritage or causes or increases his insolvency. Whenever an act is concluded with the intent to deceive a third party, we are in the presence of a fraudulent act. Fraud, which merges with bad faith and abuse of rights, can take many forms (doctrine identified 11 forms of fraud), but likely classified into three broad categories: ***i)*** fraud committed by one side over the other Contracting Party (*de re ad rem* fraud), who has no interest in tax matters; ***ii)*** concerted fraud in order to deceive third parties who are aliens in report to the act (*de persona ad personam* fraud) and ***iii)*** fraud consisting in concealing of an act done by parts in order to evade a legal obligation (fraud)[16].

[16] See D. Gerasimos, Bona fide in the civil legal relations, Academy Publishing House, 1981, p. 91.

In case of the first two forms of fraud, ***the author or the authors act with the intent to harm another person: the co-contractor or the third party creditor***, the latter may be a natural or a legal person. In these cases, the author or the authors have the knowledge that the fraudulently act cause an injury to the co-contractor, or, where applicable, to the third party (creditor).

In the case of **the fraud to the law**, the malicious intent ***aims to circumvent the legal imperative requirements in order to purloin their application, by conscious and voluntary adoption of means which are lawful in their appearance but pointed against the obligations of legally binding rules***. The fraud to the law does not constitute a direct violation of the law, but a roundabout of it, trough the deviation of the legal provisions from their purpose.

The fraud to the law contains two elements: one material and objective, which is the process used, which in itself is not against the law, and the second, intentional, which comprises the essence of this type of fraud, which is the avoidance or evasion of an application of a determined legal text. **The fraud to the law meets and is usually committed in order to deceive the government bodies**, category which the tax authorities are belonging.

But when a legal act is done in order that the parties or just one of them to evade the payment of the tax obligations, **such act will be considered completed the law fraud or in the fraud of the interests of a third party** to the legal act concluded, namely the state, which is the tax creditor?

The obligation to pay the tax, when the event occurred or should occur, it is a legal obligation and the legal document completed in order to avoid the payment of the tax, it is an act done in the fraud of interests of the state, as tax credit, and in the fraud of the law, which establishes the obligation to pay tax on taxable material produced or that should occur. In other words, when the legal act concluded seeks to tax evasion, the fraud of interests of third parties (the State) and law fraud are in fact one and the same.

In the common law, the first **form of fraud (damage counterparty)** is punishable by the court by annulling the sly, at the request of the party who had been injured in his rights[17] and the nullity is relative, so it can be invoked within the general limitation period of three years.

If the fraud is done in order to deceive others, the fraudulent act, act in concert of the parties[18], may be terminated by the Paulian action (set aside). Such action, which seeks to protect the rights of creditors (general lien) against the bad faith of the debtor (not against his negligence) manifested by fraudulent acts will allow the action and will void the fraudulent act to the creditor. When the debtor's assets decreased as a result of **material facts**, which occurred outside his will, the creditor who feels harmed doesn't have access to a Paulian action, because there isn't the fraud concert against his action.

The category of acts that can be challenged by a Paulian action is very high, including both unilateral acts and acts of reciprocal obligations, such as donations, sale, abandoning a duty, overpayments, voluntary assignment, giving a full prescription and even the judgments obtained by the debtor defrauding his creditor etc. But from the principle that **in order to promote the Paulian action should be a reduction of the debtor wealth**, results that **if the debtor refuses to be rich, the Paulian action is inadmissible**, and this conclusion is important and has application in tax matters.

In the common law, the penalty for the acts committed for the fraud of law is the absolute nullity, but this can only be applied by the courts.

What will be the penalty and who will apply it, when the fraud to the law concerns the application of the tax law? If a court should be invested (either a civil or a criminal action), its right to declare the absolute nullity of an act made to defraud the law, at the request of the tax authority,

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[17] See for more explanations D. Cosma, The general theory of juridical act, Scientifically Publishing House 1969.

[18] In the case of the onerous documents should be a complicity of the co-contractors in order to fraud the interests of third parties. Bona fide purchaser is protected, unless he acquired free of charge. D. Cosma, The general theory of juridical act, Scientifically Publishing House 1969, p. 355.

we believe that it can't be challenged because has an interest and therefore has a right and procedural capacity. In the case of criminal proceedings, the court is obliged to decide, ex officio, the total or partial abolition of documents, meaning also the ones committed to the fraud of law (which, of course, if the criminal actions contains facts of the law fraud in the most serious of them: crime).

Can the tax authority to control, to find the fraud, to judge and to apply the penalty or it stays exclusive the attribute of justice, who's right and power in the fiscal matter nobody contest? But we have seen that the law confers to the fiscal authority a right (exaggeratedly high) of discretion. But appreciation right is not the same as the right to find the possible fraud and to decide and apply the penalty, even if the penalty is one of "do not consider" a transaction, act, etc., because between "to not consider a transaction" and deciding that the transaction is void, through its effects, there is no difference. In fact, the theory of right abuse is the one that justifies the right of the fiscal body to retrain the acts and deeds of the taxpayers according to their economic purpose, and this right of the Revenue Service is a restriction of the enterprise management freedom.

To detect between the fraudulent act and the normal and legal management act, but also between what the law allows or stops, it is not an easy task, not a task that can be given to anyone, because it requires not only profound knowledge (legal and economic), but also experience and good faith. Here it proves the importance of the right of discretion and the limits in which it can be admitted.

Relevant for the power granted, under our Fiscal Code, to the tax authorities and for the exercise of discretion right, are the provisions of article 11 (Special provisions for the implementation of the Tax Code), which provide that:

(1) In determining the amount of a tax or charge for the purposes of this Code, the tax authorities ***may disregard a transaction that does not have an economic purpose or may reclassify the form of a transaction in order to reflect the economic substance of the transaction****.*

(1^1) The tax authorities ***may not consider a transaction*** *done by a taxpayer which was declared inactive by order of the National Fiscal Administration Agency president.*

(1^2) Also, ***are not considered by the tax authorities the transactions made with a taxpayer declared inactive*** *by order of the National Fiscal Administration Agency president. The procedure for declaring inactive the taxpayers will be determined by order. The list of the declared inactive taxpayers is published on the website of the Ministry of Finance - National Fiscal Administration Agency website and will be made public in accordance with the requirements set by order of the National Fiscal Administration Agency president.*

(2) ***As a part of a transaction between related parties, the tax authorities may adjust the amount of income or expense of any of the persons, as necessary, in order to reflect the market price of the goods or services supplied in the transaction****. The market pricing of transactions between related parties it is used one of the most appropriate of the following methods:*

a) price comparison method by which the market price is determined based on prices paid by other people who sell goods or services comparable to independent persons;

b) cost-plus method by which the market price is determined by the cost of the good or service provided by the transaction, plus appropriate profit margin;

c) the resale price method, by which the market price is determined based on the resale price of the good or service sold to an independent person decreased with the expense of the sale, other expenses of the taxpayer and a profit margin;

d) any other method recognized in transfer pricing guidelines issued by the Organization for Economic Cooperation and Development.

2.5. Taxation of the income obtained from illegal activities

The state does not seem interested in morality when it comes to his income, so that is the reason for which the income obtained from illegal activities is taxable. Of course the tax on the revenue from illegal activities is due when the illicit income will not be taken by the state as a result of special confiscation, for example.

Taxation of the income from illicit activities is justified also in the light of the principle of equality before the law and the authorities: if all income done in a professional context is taxed, how could remain untaxed the income from illegal activities. But if we admit that the income from illegal activities is taxable like the income resulted from a professional legal context, then we must admit that the expenses incurred on those revenues (illicit) are deductible.

In our law there is no express provision relative to the taxation of income obtained from illegal activities. It is believed, however, that the taxation of income obtained from illegal activities is possible under article 19 of the Tax Code, which governs the computation of taxable profit, and describes the tax base as represented by ***"the income from any source"*** (....) "***minus the non-taxable income"*** and that the ***"to the determining of the taxable income are taken into computing other similar income and expenses according to the rules of use"***, which means that also for the illegal income, the taxable income is calculated as the difference between income and deductible expenses. Budget laws also contain applications of this rule, where they provide that the illicit income are taxable and even predict the amounts to be collected under this head. For example, Law no. 11/2010, the state budget for 2010, in Annex no. 1 (detail no. 1), estimated state revenues from the taxation of illicit commercial activities in the amount of 129 thousand lei, but also the budgetary laws from the previous years contain similar dispositions.

3. The active role (article 7 Fiscal Procedure Code)

In our system of law, **the principle of the active role of the judge**, without being implicit in the Code of Civil Procedure[19], was and is considered a fundamental principle of the civil process, a principle under which the judge, whose essential function to rule the law in the conflict between the parties and in the matter that he was referred, can not leave the process to the whims of the parties, *"cannot take the sphinx position which helpless assists not to the judicial duel, but to a massacre, and he should be active in the process in order to ensure a procedural balance between the parties and thus the principle of equality"*[20].

According to Professor Ion Deleanu, from the attribute of justice as "public service" drift "formalizing" the civil trial, which implies an active role of the judge, a role that does not mean impartiality or interference in the area of parties' rights and interests[21]. In respect of this principle, the judge must give the exact qualification of the demand that he is judging in relation to its content, to lead the process, to invoke violations of mandatory rules, to give guidance to the parties, to demand explanations to the parties, to order ex officio samples, to mitigate the application of some restrictive legal dispositions, through the application of other legal provisions[22].

Criticized, especially by judges, as was alleged and admitted excessively as a reason for the extraordinary appeal, which could be promoted under article 329 of the former Code of Civil Procedure, till the abolition of this form of appeal[23] only by the General Attorney, the principle of active role proves to be useful and still needed because makes from judges the law keeper and the mediator of particular interest with the public interest, provides transparency and flexibility to the process, help the celerity of the case and the quality of justice and is likely to give the procedure the advantages which results from the parties' public dialogue with the judge. But judges and often the parties are reluctant to this principle. Judges fear of not exhibit, the parties because any active intervention of the parties it may seem that the judge demonstrates partiality.

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[19] See article 129 Civil Procedural Code, it is considered to be implicit.

[20] See in this sense V.M. Ciobanu, Theoretical and practical treaty of civil procedure, National Publishing House, Volume I, pp. 125-136.

[21] I. Deleanu, Treatise of Civil Procedure, Volume I, second edition, p. 9.

[22] M. Tăbârcă, Civil procedural Right, volume I, p. 66-73.

[23] The Law no. 59/1993, which replaced it with the institution of the appeal on points of law.

The principle of the active role of the authority has been adopted and adapted in the management of fees, taxes and contributions field, in which two categories of obligations are in place: ***i)*** of the tax authority face to the taxpayer and ***ii)*** the tax authority in relation to its basic task: to correctly determine the position of the taxpayer and the tax burden that lies it. In this sense, article 7 of the Fiscal Procedure Code provides that:

i) The fiscal body shall notify the taxpayer of the rights and obligations laid down in the procedure according to the tax law and to guide the taxpayer in the application of tax laws for filing returns and other documents and to correct the statements or documents, whenever necessary. Assistance is done as a result of taxpayers request or at the initiative of the tax authority.

ii) The fiscal body is entitled to examine ex officio, the status quo, to obtain and use all the necessary information and documents for the correct determination of the taxpayer's tax situation, in the analysis made will be identified and taken into account all relevant circumstances of each case. It also provides that the tax authority is required to objectively examine the facts and the right to decide on the nature and volume of examinations, depending on the circumstances of each case and the legal limits.

The principle of the active role of the tax authority is in a conditioning relationship with the exercise of the discretion right, which results from the two texts explaining the law (article 6 and article 7 of the Fiscal Procedure Code). To assess the relevance of facts and adopt a legal solution, based on complete findings revealing all the circumstances, the tax authority must exercise its active role. Conversely, having an active role, fulfilling his obligations under this principle of tax administration, the tax authority may exercise the right of discretion and can adopt the right solution permitted by law, his decision must be based on evidence and their findings and be motivated (Article 66 Fiscal Procedure Code).

4. The official language in the fiscal administration (Article 8 Fiscal Procedure Code)

Article 8 of the Fiscal Procedure Code merely reaffirm the principle enshrined in article 13 of the Constitution, which states that in Romania, the official language is Romanian, and then details it.

According to article 8 of the Fiscal Procedure Code, the official language of the tax administration is Romanian. When to the tax authorities are handle in petitions, justified documents, certificates or other documents in a foreign language, the tax authorities will require that they be accompanied by certified translations into Romanian.

According to article 8 paragraph (3) of the Fiscal Procedure Code, legal dispositions regarding the use of the national minorities languages are applying properly also in the tax administration. Provisions to which the reference is made are those of Law no. 215/2001, of the local public government, which in article 19, provided that in the territorial administrative units where citizens belonging to national minorities have a share of over 20% of the total population, the fiscal authorities will provide to the citizens belonging to national minorities the right to address oral or written in their language and will communicate to them the responses both in Romanian language and mother tongue. The administrative acts are drawn mandatory in the Romanian language.

5. The right to be heard (Article 9 Fiscal Procedure Code)

Introducing with principle value in the tax administration, the duty of obedience to the taxpayer by the tax authority is undoubtedly a step in the procedure regulated by the Fiscal Procedure Code in force since 2004, because prior to that, the taxpayers **were just having the right to sign with "objections" the control acts of the fisc**[24]. However, the opinions expressed in doctrine, in this issue, are to the antipodes: while some authors consider that *"the right to be heard is, rather, an*

[24] See, in this regard, Law no. 105/1997 for solving the objections, appeals and complaints on the amounts found and applied through control or tax documents issued by the agents of the Ministry of Finance.

optional one"[25], others think that listening to the taxpayer is mandatory and constitutes a measure of its protection, a measure likely to strengthen the position of the taxpayer in relation to the fiscal body[26].

The law excludes any possibility of interpreting: obedience of the tax payer by the fiscal authority, before taken the decision is mandatory in order to give the taxpayer the opportunity to express its views on the facts and circumstances relevant to the decision and the establishment of some exceptions to this rule, not only strengthen it, but make it clearer and less likely to challenge or ignore.

Through exception to the obligation of obedience to the taxpayer, the tax authority is not obliged to conduct its hearing when:

a) causes a delay in taking the decision which endangers the real fiscal situation related to the taxpayer obligations that have to be carried on or in order to take other measures prescribed by law;

b) the facts presented will change slightly the amount of the tax claims;

c) the information presented by the taxpayer, which he gave in a declaration or an application, are accepted;

d) is to be taken for enforcement.

It follows that, except some specifically cases provided by law, the listening of the taxpayer is mandatory. Compliance by the tax authorities of this obligation must result from the act itself (the tax authority, accompanied by a declaration of the taxpayer), as, its disobedience in exceptional cases must be substantiated and be mentioned in the document prepared by the tax authority.

The absence of proof regarding hearing of the taxpayer is penalized, unless the limited cases of exception provided by law, the cancellation of the tax administration act, the requirement of obedience is one of the conditions for the validity of the act.

6. Obligation of cooperation (article 10 Fiscal Procedure Code)

In the fiscal procedure, whose purpose is to regulate the tax administration, the tax authorities and the taxpayers alike, have rights and obligations: the rights of the fiscal authorities are obligations of the taxpayer and the rights of the taxpayer are obligations of the tax authority. The tax payer obligation to cooperate with the tax authority is the reverse of the obedience obligation. If the tax authority is required to hear the taxpayer before making a decision, the taxpayer is in turn obliged to cooperate with the tax authorities in order to determine the tax status quo.

For the fulfilling of the cooperation obligation, the taxpayer must present entirely the known facts, as reality and to indicate the evidence means which are known. Also, the taxpayer is obliged to take measures to procure necessary evidence by using all legal and effective opportunities available to him. The taxpayer has the burden the proving acts and deeds which were the basis of his statements and any application to the tax authorities (article 65 paragraph 1 of the Fiscal Procedure Code).

According to article 58 of the Code, the husband / wife and the relatives of the taxpayer to the third degree may refuse to provide information, conducting surveys and submission of documents. The fiscal body shall notify the persons concerned of their right to refuse to provide information.

May refuse to provide information about the data that they acquired in their work: priests, lawyers, notaries, tax advisors, bailiffs, auditors, accountants, doctors and psychotherapists and their assistants and the participants to their work, except for the information regarding the fulfilling of their tax obligations established by law in their task. Except priests, others before shown can provide information, with the consent of the person about whom the information was requested (article 59 paragraphs 1-3 of the Fiscal Procedure Code).

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[25] Emilian Duca, Commented Fiscal Procedure Code annotated edition, Law Publishing House, 2010.

[26] Bufan Radu and his collaborators, The tax treaty, Lumina Lex Publishing House, 2005.

We note that tax law is inconsistent with the provisions of other laws (for example: the law of lawyers, art. 11, which requires that the lawyer must keep the professional secrecy) and only apparently imposed on subjects the right to choose the conduct to follow. This, because the article 59 paragraph 4) states that "In derogation from the provisions of the above, in order to clarify and establish the actual fiscal situation of taxpayers the special departments of local public administration have the power to require information and documents with fiscal relevance or to identify the taxpayers or the taxable or taxed matter, as appropriate, and **public notaries, lawyers, bailiffs**, police, customs, community public services driving licenses and vehicle registration, community public services for issuing passports, community public services for the evidence of persons and any other entity that has information or documents relating to taxable goods or taxed, as applicable, or the people who have contributors quality, **they are obliged to provide them free of charge**".

As regards the cooperation between authorities, it is governed by articles 60-63 of the Fiscal Procedure Code as follows:

a) The public authorities, public institutions and those of public interest, local and central, and also the government devolved departments will provide information and documents to the tax authorities at their request. To the purposes of this code, the tax authorities can access online the database of those institutions for the information set based on a protocol (article 60).

b) The public authorities, public institutions and those of public interest are obliged to cooperate in achieving the purpose of the tax law. The tax authority requesting collaboration is responsible for the legality of the request and the requested authority is responsible for data (article 61);

c) The cooperation between public authorities, public institutions and those of public interest is achieved within their duties according to law. If the public authority, public institution or the one of public interest refuses the collaboration, the public authority superior to both bodies will decide. If such authority does not exist, the decision will be taken by the higher authority than the one required (article 62).

d) Based on the international conventions, tax authorities will cooperate with tax authorities from other states. In the absence of an agreement, the tax authorities may grant or seek cooperation from other tax authorities of another state on the basis of reciprocity (article 63).

Applications of the taxpayer's obligation to cooperate with tax authorities we find also in other texts. Thus, for example, article 65 (burden of proof in proving facts tax) provides that "the taxpayer has the burden of proving acts and deeds which were at the basis of his statements and to any request to the tax authorities".

7. Tax secrecy (article 11 Fiscal Procedure Code)

Disclosure of information that the fiscal administration officials collect in exercising their duties can prejudice the taxpayers. Therefore, the law (article 11 of the Fiscal Procedure Code) established for civil servants from the tax authorities, including people who do not have this quality, the obligation of secrecy on the information they hold as a result of service duties.

The information on taxes, contributions and other amounts owed to the general consolidated budget may only be submitted to:

a) the public authorities to fulfill the obligations prescribed by law;

b) the tax authorities of other countries, based on mutual terms of agreement;

c) the competent judicial authorities according to law;

d) in other cases provided by law.

The transmission of fiscal information in situations other than those noted above is permitted while ensuring that they do not clear the identity of any person or entity.

The authority receiving tax information is required to keep the secret of the information received.

Failure to keep the secret attracts the responsibility according to the law.

8. Good faith in the fiscal law (article 12 Fiscal Procedure Code)

The Constitution provides four fundamental duties of citizens: ***i)*** loyalty to the country, ***ii)*** defense of the country, ***iii)*** the obligation to contribute through taxes and contributions to the public expenditure and ***iv)*** **the exercise of rights and freedoms in good faith**.

In fact, in accordance with article 57 of the Constitution, *"the Romanian citizens, foreign citizens and stateless persons shall exercise their rights and liberties in good faith, without violating the rights and freedoms of others".* As results of its contents, the constitutional provision codifies two principles: *"bona fides"* and „*neminem laedere*".

Good faith, however, as you know, is not just a legal principle but also a moral principle aimed for the exercise of the rights and freedoms itself, regardless of the manifestation on a legal basis of the rights and freedoms of other law subjects. But as enshrined the constitutional principle relates exclusively to the individuals (Romanian citizens, foreigners and stateless persons) who need to exercise their rights and liberties in good faith, without violating the rights and freedoms of others. It follows that the provisions of article 57 of the Constitution does not apply to public representatives, who may be punished for their wrongful acts and abusive conduct by other jurisdictional mechanisms.

This does not exclude from the rules of conduct of the state agents and public authorities the obligation of reasonableness and good faith in the exercise of their duties, but such obligation does not derive from the Constitution but from the obligation of the state (through its institutions and its officials) to respect and guarantee the exercise of the rights and freedoms of citizens, where the exercise of these rights may be restricted is regulated by article 53 of the Constitution[27].

The legislature felt the need to emphasize for the tax law report parties, that the relationships between them (the taxpayer and the tax authority) must be based on good faith, in order to achieve the requirements of the law. It is, we believe, an affirmation of the idea of the partnership between the state and the taxpayer subsumed to attaining the tax law scope rather than the interests of the taxpayer.

We have seen that legal antonym of good faith is the abuse of law. In respect of the principle of good faith, if the tax authority is not acting on good faith in relation to the taxpayers, it commits an abuse of law. But the possibility of sanctioning such an act, it seems hard to imagine.

[27] Article 53 of the Constitution (Restriction of certain rights or freedoms) provides that:

(1) The exercise of rights or freedoms may only be restricted by law and only if necessary, as appropriate, for: the defense of national security, public order, health or morals, rights and freedoms of citizens; conducting criminal instruction; preventing the consequences of a natural calamity, disaster, or an extremely serious disaster.

(2) Restrictions may be ordered only if necessary in a democratic society. The measure must be proportionate to the situation that caused it, to be applied without discrimination and without prejudice to the existence of the right or freedom.