

THE LACK OF FUNCTIONAL JURISDICTION OF THE DIVISION FOR ADMINISTRATIVE AND TAX DISPUTES IN SETTLING THE APPEAL PETITION WITHIN THE APPEAL AGAINST ENFORCEMENT IN TAX MATTERS ARGUMENTS REGARDING THE CIVIL NATURE OF THE DISPUTE

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Abstract

The Romanian legislation sets out the practical and theoretical manner of establishing the legal nature of disputes in the light of the applicable legal dispositions, establishing a specific statutory system for challenging enforcement proceedings.

The characterization of a dispute as civil or commercial in character should be done based on the legal standards applicable to the legal relationships existing between the parties.

As regards the challenge against tax enforcement, establishing the legal nature of the dispute under judgment and establishing the functional jurisdiction of the court that is asked to judge on the substance of the challenge against tax enforcement, as well as of the court invested to settle the appeal has generated over time a number of controversies and opposite solutions.

There were and still are some discussions and confusions regarding the functional jurisdiction of the enforcement courts having jurisdiction to judge on the substance of the challenge against tax enforcement, lodged on the basis of a writ of execution issued under some administrative tax acts.

Keywords: *challenge, enforcement, object, admissibility, functionality, administrative tax acts.*

1. Introduction

As it is well-known, the civil trial consists of two complementary phases, the judgment (cognitio) and the enforcement (executio), which are at the same time autonomous. The judgment is a condition of enforcement, when the creditor has no writ of execution at its disposal, but when, for various reasons, regarding especially the discharge of the courts of law, the consolidation of credit, the law acknowledges as writs of execution not only the court judgments but also other orders and instruments¹, an instance in which the enforcement is established as being actually the only phase of the civil trial under such circumstances.

All those concerned or injured by enforcement may lodge an appeal against enforcement.

The appeal against enforcement may be defined as the procedural means specific to the enforcement phase, whereby one may request from the court with jurisdiction either the annulment of the illegal enforcement acts, or the obligation of the enforcement body which refuses to enforce a writ of execution to implement it according to law, or the clarification of the meaning, scope and application of the writ of execution.

The appeal against enforcement is a special means of appeal for dismissing some procedural acts fulfilled illegally by the enforcement bodies, and should not be confused with the action for annulment.

As regards the tax enforcements applied according to the Code of Fiscal Procedure, the writs of execution are the result of tax administrative acts issued by the tax authorities, whereby rights and liabilities in charge of taxpayers were established.

The tax administrative act is defined under art. 41² in the Code of Fiscal Procedure, as being the act issued by the tax authority with jurisdiction to apply the legislation on establishing, changing or settling tax rights and liabilities. The following are, for example, tax administrative acts: the taxation decision, the tax return, the certificate of tax registration, the certificate of tax record, the reimbursement decision, the decision on applicable measures, the setoff note, the deduction note, the decision on settling a challenge, etc.

The enforcement of the writs of execution issued pursuant to the dispositions of the Code of Fiscal Procedure is a simplified procedure regarding the initiation of enforcement proceedings and the procedural stages in these matters, by comparison with the enforcement implemented according to the dispositions of the Code of Civil Procedure.

The tax procedure establishes that any person concerned, who proves to have an interest may appeal³

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¹ Art. 632 par. 2, art. 635, art. 638 par. 1 point 2 and 3 in the NCCP

² Art.41 Code of Fiscal Procedure. In the meaning of this Code, the tax administrative act is issued by the tax authority with jurisdiction to apply the legislation on establishing, modifying or settling tax rights and liabilities.

³ Art.172 Code of Fiscal Procedure „(1) The persons concerned may lodge an appeal against any execution act implemented through the execution bodies breaching the provisions of this code, as well as if such bodies refuse to implement an execution act according to law.”

against the enforcement proceedings, against any mode of enforcement, any enforcement act issued and implemented by the enforcement bodies with jurisdiction, the refusal of the enforcement body to fulfill an enforcement act according to law.

The legislator set forth that the appeal against enforcement may be lodged also against the writ of execution based on which the enforcement proceedings were initiated, if such a writ is not a judgment pronounced by a court of law or another jurisdictional authority, and exclusively if there are no other proceedings according to law for challenging it.

As regards tax enforcement challenges, we should mention that the dispositions of the Code of Fiscal Procedure prevail and are supplemented by the dispositions of the Code of Civil Procedure, and this is the reason why, as regards the relevant issue set forth by the Code of Civil Procedure, in case another writ than a court judgment is applied, the appeals may be lodged also against the substance.

As regards this last consideration, some courts of law set forth correctly that there are two categories of challenges in tax matters, namely:

- the appeal against the tax administrative act, within which the injured person is to follow the procedure expressly set forth in the dispositions of the Law no. 554/2004 on administrative disputes, corroborated with the dispositions of the Code of Fiscal Procedure;

- and the appeal against enforcement lodged against the writs of execution issued within the execution procedure of the tax administrative acts executed, such as expressly set forth in the dispositions of the Code of Fiscal Procedure, supplemented by the dispositions of the Code of Civil Procedure.

We should mention that the tax administrative acts generating writs of execution, applied subsequently by the specialist divisions/ departments of the tax authority may not be annulled through the appeal against enforcement, these being appealed against exclusively under the laws aforementioned, avoiding thus to evade some express dispositions on the appeal against tax administrative acts.

Thus, although there is a clear distinction, from a legal point of view, between the appeal against tax administrative acts and the appeal against tax enforcement, there are opposite opinions and customs in practice, due to some wrong decisions or abusive defenses of the debtors.

As a general rule, the legislator established clearly the manner of appeal or annulment of the tax administrative acts issued and applied by a tax authority, therefore, I consider that the solutions pronounced by the enforcement courts invested to settle on the merits an appeal against tax enforcement, whereby also the annulment of the tax administrative acts generating rights and liabilities is requested, without observing the special procedure pre-established by the legislator, are wrong solutions, directly against the dispositions of the Law 554/2004

on administrative disputes, corroborated with the Code of Fiscal Procedure.

The nature and qualification of the appeal against tax enforcement is determined by the purpose considered in proceeding to such an action, in this respect the legislator setting forth that by proceeding to an appeal against enforcement, the annulment of some execution acts or measures considered illegal is envisaged, therefore the annulment of some execution measures is envisaged, whether these are enforcement acts drawn up by a bailiff or by a tax officer.

In all the cases, the challenge has the nature of a means of appeal, given that, by using it, the appellant aims at the annulment of a court judgment or another jurisdictional act, respectively the annulment of some execution measures.

2. Content

Pursuant to the provisions of the Code of Civil Procedure, the enforcement court has jurisdiction to settle the appeal against the enforcement as such, as well as the appeal regarding the clarification of the meaning, scope or application of the writ of execution, if this is not issued by an authority with jurisdiction.

The enforcement court is the court of law within the jurisdiction of which, the enforcement is implemented, except for cases when the law disposes otherwise.

The nature of the appeal against enforcement is determined, undoubtedly, by the civil or commercial nature of the right under dispute, considering that, within it, substantive defenses may be invoked against the writ of execution, according to the hypothesis regulated by the Code of Civil Procedure.

Given that, by enforcement proceedings, the effective implementation of the right claimed is pursued, it results that all the requests during the entire trial, inclusively the ones in the enforcement stage, due to the civil nature of the right acknowledged through the writ of execution, should be judged by the civil court, more precisely by its specialized division.

Even if we accept that the appeal against enforcement poses only procedural problems, the civil court has the jurisdiction to judge all the disputes involving such matters, notwithstanding the main issue that resulted in the conflict between the relationships between the parties.

As far as the appeal against the enforcement as such or the appeal against a writ of execution that is not issued by an authority with jurisdiction are concerned, these shall be settled by the enforcement court with certain exceptions, as stipulated by the Code of Civil Procedure, and, pursuant to the dispositions of the same code, the enforcement court is the court of law within the jurisdiction of which, the enforcement should be performed, unless the law sets forth otherwise.

As regards the means of appeal against the solutions pronounced within the appeals against

enforcement, the same procedural rules apply, the control court being a civil court, and the nature of the writ of execution being irrelevant; therefore, the means of appeal shall be settled always by the civil division of the hierarchically higher court.

This opinion is consistent with the letter and spirit of the law.

The exceptions aforementioned regard the impossibility for the enforcement court to check the legality within the appeal against enforcement, or to annul a debt instrument, or to review the legality of other tax administrative acts issued by the tax authority, given that the legislator set forth a special procedure for appealing against administrative acts, inclusively the preliminary administrative procedure, which is often confused with an appeal against enforcement, therefore an interpretation contrary to the special law⁴.

On the other hand, we should mention that the legislator set forth that the appeal against enforcement may be lodged also „if clarifications are required regarding the meaning, scope or application of the writ of execution, if the procedure mentioned under art. 443, in the New Code of Civil Procedure was not used.”

The law regulates also the institution called generically by the specialist literature „appeal against the writ”, whereby the writ of execution itself is challenged, as regards its meaning, scope or application, and also its validity, by comparison with the existence, scope and validity of the debt challenged.

Therefore, also as regards the appeal against the execution as such, or the appeal against the writ, when such an appeal is against a writ of execution that is not issued by an authority with jurisdiction and, unless the law sets forth for this purpose another means of appeal, the court of law within the jurisdiction of which, the enforcement is performed is the one having jurisdiction to judge territorially and materially.

The interpretation of the legal standards stated shows undoubtedly that the enforcement court is always the court within the jurisdiction of which the enforcement is performed and which has no connection whatsoever territorially or materially with the court that pronounced the judgment to be enforced, and, as such, with the nature of the liability to be enforced.

The appeal against the enforcement invokes, as a rule, the illegality of the enforcement act or the appearance of a cause for settling the liability after the issuance of the writ, such matters being related exclusively to the enforcement itself, the civil nature of the cause being irrelevant.

The fact that the appeal against enforcement may invoke issues related to the validity of the writ of execution, when the enforcement is performed under a writ that was not issued by a jurisdictional body, establishes the civil nature of the enforcement and is a grounded reason for the judgment of the appeal against enforcement, in these matters, by specialist judges.

At the same time, pursuant to the dispositions of art. 717 par. (1) in the Code of Civil Procedure, „the judgment pronounced on the challenge may be appealed against only by lodging an appeal”.

Therefore, apart from the exceptions expressly and limitedly set forth by the law, the means of appeal as regards the challenge against the enforcement as such, as well as against the writ that is not issued by a jurisdictional body is the appeal; the court immediately higher than the one that pronounced the relevant judgment, respectively the civil division of the tribunal has the jurisdiction to settle it and not the division for administrative and tax disputes, not having the tax relevance of the writ of execution⁵.

We should mention this specifically, given that, many times, the enforcement court invested to settle on the substance of an appeal against enforcement initiated under a writ of execution issued by a tax authority extends its functional jurisdiction, and, as such, orders the annulment of such a writ. The solution thus pronounced is subject to the legally regulated means of appeal, more precisely the appeal, to be settled by the court that is higher hierarchically, on the docket of its civil division. There were cases when such an appeal was allocated exclusively to the division for administrative disputes, although the case for the judgment on the substance regarded a real appeal against the enforcement and not an appeal against the writ according to special standards.

Therefore, it should not be accepted that an enforcement court would have the jurisdiction to examine the legality of an administrative act, given that such an assessment would infringe upon the express dispositions set forth by the law regarding the challenge against tax administrative acts.

The legislator set forth, through the dispositions of the Law no. 554/2004, the possibility that the person harmed as to one of their rights or a legitimate interest by an individual administrative act issued by tax authorities is able to address the court for administrative disputes with jurisdiction, after following the preliminary proceedings. On these lines, the legislator stated clearly, through the provisions of art. 10 in the same law, the court with jurisdiction to settle such actions for the annulment of administrative acts on substance and also the material jurisdiction, to be established according to the value of the debt

⁴ Lg.554/2004 – The law on administrative disputes

⁵ The High Court of Cassation and Justice - ÎCCJ

Decision no. 15/2007 on the review of the appeal in the interest of law, as regards establishing the jurisdiction for settling challenges against execution, in first instance and within appeals, having as its subject matter court judgments pronounced on commercial disputes, as well as on other writs of commercial nature.

challenged, namely the Tribunal or the Court of Appeal through the divisions for administrative and tax disputes.

3. Conclusions

In conclusion, based on the analysis above, we should mention that, on the one hand, as regards the appeal against the enforcement as such, or the writ that is not issued by a jurisdictional authority, the court of law has full jurisdiction, as a court of first instance, and the civil division of the tribunal, within the appeal, without distinguishing as to the nature of the writ, according to the principle "*ubi lex non distinguit nec nos distinguere debemus*".

On the other part, the definition according to which enforcement is the second phase of the trial has fallen into disuse, given that, at present, enforcement is a stage in its own right, being the effect of a writ of execution being pronounced and not a repetition of the jurisdictional stages.

The dispositions regarding the enforcement and the appeals lodged within it are included in the Code of Civil Procedure separately from other dispositions, the legislator stating clearly what courts are the enforcement courts having the jurisdiction to settle the incidents arising during enforcement.

Therefore, based on the legal acts presented above, we may conclude pertinently that the division for administrative and tax disputes has no functional jurisdiction to judge the appeal lodged against the

solution pronounced by the court of first instance as regards the challenge against tax enforcement, even if the writ of execution was issued by a tax authority or local or county public authority.

By interpreting and applying in a unitary manner the dispositions of the Code of Civil Procedure, it results at all times that the court of law has the territorial and material jurisdiction to settle the challenge lodged against the enforcement as such and the challenge regarding the clarification of the meaning, scope or application of the writ of execution that is not issued by a jurisdictional authority, and the means of appeal against the judgment pronounced on the challenge is the appeal as such, to be judged by the civil division of the tribunal.

Any interpretation contrary to the facts reviewed above shall certainly generate some different practices as regards establishing the functional jurisdiction of tribunals (civil, commercial or for administrative and tax disputes) upon settling the appeal as regards the challenge against the enforcement as such, given that the functional jurisdiction of tribunals should be established without referring to the nature of the writ of execution.

Thus, although the lack of functional jurisdiction of the division for administrative and tax disputes of the tribunal upon settling the appeal regarding the challenge against enforcement is a real problem in practice, in the absence of a clear, unequivocal law in these matters, this procedural incident is liable to generate among law specialists a lot of legal debates in the future.

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