

ON CERTAIN SPECIFIC FEATURES OF TAX PROCEDURE AS A TYPE OF ADMINISTRATIVE PROCEDURE

ABSTRACT: Due to numerous specific characteristics, but also the importance of regular functioning of Republic of Serbia in terms of financing public expenditures, our legislator pays a special attention to the tax system, tax administration and tax procedure. The activity of our legislator in this area is extremely intensive, so the changes in tax regulations have become more frequent, and public authorities, whether in the form of laws or some bylaws, often intervene in the area of the tax system. On the other hand, the rules of tax legislation, both material - in terms of the very bases of tax obligations, and procedural must be clear, in the way the citizens can determine and settle their tax obligations. In addition, in the interest of legal certainty, the legislator should not frequently change substantive and procedural tax regulations, and he should move within certain limits. Having that in mind, the legislator has limited himself by defining the tax procedure as a special administrative procedure, which is regulated by a special law, whereby the protective provisions provided by the Law on General Administrative Procedure must be kept in mind. Deviations from the rules of general administrative procedure are, of course, necessary and justified, but only to a certain extent, which is determined by the peculiarity and importance of the tax system, which

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results in special rules for establishing the obligation, determining the amount and fulfilling tax obligations. Guided by the peculiarities of tax legislation, the authors point out the deviations of the tax procedure from the general administrative procedure in terms of principles, initiations, nature of legal acts and other specific issues.

Keywords: *tax procedure, administrative procedure; special administrative procedure; principles of tax procedure; administrative act; tax administrative act.*

1. On the relationship between tax procedure and general administrative procedure

Tax procedure is a special administrative procedure, the subject of which is resolving tax matters, as one type of administrative matters. The tax procedure is conducted for the purpose of determining the tax liability of a natural or legal person or other taxpayer, as well as for the purpose of determining the amount of tax and for the purpose of fulfilling the tax liability. In relation to the above, the relationship between tax and general administrative procedure is the relationship between the special and the general (Kulić, 2012, p. 106).

The need for special forms of administrative procedure is justified by a wide range of administrative areas, as well as the specifics of each of them. For these reasons, the Law on General Administrative Procedure (hereinafter: LGAP) sets, ie seeks to set a minimum of rules common to all different administrative activities and, accordingly, different administrative procedures. Certainly, even the most perfect legislator and the legal regulation on general administrative procedure cannot provide solutions for all possible features of various special administrative procedures, and our legislator and LGAP are far from perfect.¹ Hence, Article 3 of the LGAP already prescribes “*Certain issues of administrative procedure may be regulated by a special law only if it is necessary in certain administrative areas, if it is in accordance with the basic principles determined by this law and does not reduce the level of protection of rights and legal interests of the parties guaranteed by this law.*”

Therefore, the LGAP itself provides for the possibility of deviating from its provisions. However, the legislator who enacted the LGAP did not give the next legislator, nor the executive power, the free hand to prescribe deviations at their will. On the contrary, relatively clear conditions are set when deviations

¹ On the shortcomings of the “new” LGAP from 2016, see extensively Milkov, 2017.

from the rules of general administrative procedure are allowed and justified. Thus, the legislator has set himself the framework in which the future legislator must adhere to when prescribing special rules of special procedures.² In administrative areas for which a special procedure is prescribed by law, the provisions of that law are followed and those provisions must be in accordance with the basic principles established by this law (Dimitrijević, 2019, p. 232). First, as it clearly follows from the provision of Article 3 of the LGAP, special administrative procedures cannot be fully regulated by a special law, but it is possible and allowed only to regulate certain issues of administrative procedure in a different way. The next restriction refers to the formal act and the issuer of that act which may provide for the rules of a special administrative procedure. Namely, only the law in the formal sense, ie the parliament as its enactor, can prescribe deviations from the rules of general administrative procedure. This is certainly reasonable and justified, having in mind that the legislator has defined the rules of general administrative procedure, and only he can foresee deviations from them. In addition, as Milkov (2017) rightly observes, the legislature is the most democratic body, and bearing in mind that the rules of general and special administrative procedure cover a wide range of people, ie almost every citizen, only the parliament is authorized to adjust the general administrative procedure to the specifics of certain administrative areas, when necessary (p. 76).

² Here, the authors point out the existence of unresolved issues regarding the concept of “systemic laws” created through the case law of the Constitutional Court (see for example: Separate opinion of Tamas Korhec in case IUz-185/2018), which, in fact, is a kind of law - named as systemic laws - rises above other laws, to the level of “supra-laws”, and below the Constitution, although the intention of the enactor of the Constitution on the possibility of differentiation of laws can be found neither explicitly nor implicitly in the text of the Constitution. In practice, there may be problems in determining the law to be applied, because on the one hand there may be a law that may, by its nature, be a systemic law, while on the other hand there may be a special or later regulation that would derogate from “ordinary” law, but not “systemic law”. For the purposes of this paper, the authors assume that the LGAP is a so-called “systemic law”, and takes precedence over the provisions of special laws governing special administrative areas, ie, those provisions of the special law which provide for lesser rights and protection of rights and legal interests than those provided by the LGAP will not apply. The authors, however, note that the consistent application of the provision from Article 3 of the LGAP and the position on the so-called “Systemic laws” came as the only acceptable in administrative proceedings: the norm of a special law governing special administrative proceedings may derogate from the rules of general administrative procedure contained in the LGAP, but this derogation can not reduce the level of protection of rights and legal interests parties to administrative proceedings. *Ergo*, a special regulation could provide only greater rights or a wider scope of rights. Practice shows the error of this understanding and such prescribing of legal rules.

Thus, the LGAP in Article 3 allows the introduction of special rules of special administrative procedure. However, only with the adoption of the appropriate law, which deviates from the rules of the LGAP, comes the true realization of this article. In that sense, Article 3 of the Law on Tax Procedure and Tax Administration (hereinafter: ZPPPA), in paragraph 1, determines the primacy of the provisions of that law in relation to all other laws that regulate “issues in this area”,³ while paragraph two provides that *“unless otherwise provided by this law, tax procedure is carried out according to the principles and in accordance with the provisions of the law governing the general administrative procedure.”* This provision establishes a two-way link between the ZPPPA and the LGAP, by imposing a framework within which permitted deviations from the general administrative procedure must comply, while the ZPPPA directly and unequivocally returns references to the LGAP for all issues not regulated by that law. In relation to all other special administrative procedures, the tax procedure is regulated in the most detail. This regulation has been amended in recent years, almost as a rule, several times a year, with new procedural provisions, which are often contrary to the rules of the Law on General Administrative Procedure (Lončar, 2016, p. 1236).

The issue of disagreement of special laws regulating certain issues of certain special administrative areas with the provisions of the Law on General Administrative Procedure has not been resolved to date, although the deadline for harmonization of special regulations with the provisions of the LGAP expired in June 2018.

2. Tax procedural principles

When conducting tax proceedings, the principles of tax procedure contained in the Law on Tax Procedure and Tax Administration must be kept in mind, but also the principles of general administrative procedure contained in the LGAP, given the fact that they have to be applied to the tax procedure.

³ Thus, according to the author, the ZPPPA itself becomes a “systemic law” in relation to all other tax laws. This is how the problem of systemic law is created here as well; The LGAP establishes primacy with its general principles, while the ZPPPA establishes primacy by explicit provision. The question arises as to which provision should be applied if the provision of a special regulation - here ZPPPA - is less favorable for the party than the provision, ie protection, provided by the Law on General Administrative Procedure. In principle, it seems that this conflict should be resolved by applying the provision that is more favorable for the party, and a special question then arises, whether it is always feasible or acceptable.

The legal significance of these principles in the tax procedure is reflected in the fact that the tax authority must interpret the provisions of tax regulations in the sense and spirit of these principles (compare with: Kulić, 2018, p. 122).

ZPPPA states the following principles of tax procedure:⁴ 1) the principle of legality; 2) the principle of temporal validity of tax regulations; 3) the principle of providing insight into the facts; 4) the principle of keeping official secrets in tax proceedings; 5) the principle of conducting in a good faith; 6) the principle of fact.

2.1. The principle of legality

The principle of legality of the activities of the tax administration, ie tax authorities, as proclaimed in Article 4 of the ZPPPA, is the first principle of the tax procedure that this Law proclaims. This principle fully corresponds to the Law on General Administrative Procedure, which also states the principle of legality among its principles first. The principle of legality of the whole government administration, including the tax administration, is a further embodiment of the provision of Article 198 of the Constitution of the Republic of Serbia, which states that individual acts and actions of state bodies and local self-government units must be based on law (Kulić & Minić, 2011, p. 3).

The principle of legality is one of the fundamental principles of tax procedure, as well as, after all, general administrative procedure (Kulić, 2012, p. 107). As a key feature, or even a precondition of every administrative procedure, including *tax* procedure, it was not necessary to prescribe this principle separately by a special tax law – ZPPPA. However, we are of the opinion that, due to its extreme importance when it comes to the actions of the administration⁵, the repetition of this principle of work of the (tax) administration in the ZPPPA is justified and acceptable, and does not represent an unreasonable burden on the text of the law. The principle of legality implies that the tax authority decides tax matters on the basis of tax laws as well as on the basis of other regulations adopted on the basis of authorizations contained in those laws.⁶ The tax authority is obliged to exercise all rights and obligations from the tax-legal relationship in accordance with the law, and is obliged to determine all the facts that are important for the adoption of a

⁴ Provisions of Article 4 to Article 9 of the LCPA.

⁵ As Milkov summarizes “*The administration can and must do only what is explicitly provided by law*” which further “*indicates the complete restraint of the administration by the law.*” (Milkov, 2017, p. 86).

⁶ Compare with the text of the provision of Article 4, paragraphs 1-3 of the ZPPPA.

lawful and correct tax administrative act, paying equal and due attention to the facts to the detriment of the tax debtor (Kulić, 2012, p. 108). Kulić takes the position here that this is, in fact, the principle of truth, which is provided for in the LGAP, and which is a requirement to establish objective truth in the tax procedure, to correctly and completely determine all facts and circumstances that are important for the adoption of a legal and proper tax administrative act.⁷

The effect of the principle of legality is reflected in the obligation of the tax authority to pass a tax administrative act based on the law in the tax procedure, ie the tax authority is imperative to strictly adhere to the provisions of material and procedural tax regulations, which regulate the competence and conduct of the tax authority, as well as the rights of tax debtors themselves and other taxpayers. Violation of the principle of legality enables a party in the procedure to use legal remedies - an appeal in a tax procedure and a lawsuit in an administrative dispute. The sanction for violation of this principle consists in the authority and duty of the second instance tax authority, ie the Administrative Court, to annul or amend the tax administrative act which violates the substantive tax regulations or provisions governing the tax procedure, and in case of violation of tax regulations of particularly significant importance, then such a tax administrative act may be declared null and void by the application of extraordinary legal remedies (Kulić, 2012, p. 123).

From the aspect of the principle of legality, it should be noted that it is also expressed in tax matters in which the tax authority is authorized to decide on the basis of discretionary powers, ie at its discretion. Discretionary powers exist when the tax authority is authorized by the tax regulation to decide in the way that it considers the most expedient among several possible options when resolving a specific tax matter (Kulić & Minić, 2011, p. 4). According to the ZPPPA, in cases where the tax authority is authorized to act on the basis of discretionary powers, it is obliged to act in accordance with the purpose of those powers and within the law.

From the presented characteristics of the principle of legality in tax procedure, it can be clearly determined that there are no, essentially observed, such features of this principle, either at the abstract level or in

⁷ At the same time, it should be noted that this *principle* of truth is not absolute, and that there are certain exceptions to the application of the principle of truth. Thus, one of the exceptions is envisaged in the case when the tax base is determined by assessment, by the method of parification from Article 58a of the ZPPPA.

terms of its specific application, which differs from the general principle of legality of administration proclaimed by the LGAP itself. In this sense, it seems clear that this principle does not deviate from the rule contained in the LGAP itself; it neither reduces nor raises the level of rights or protection of the rights of a party in a special administrative procedure. The only justification for introducing this principle in the ZPPPA can be found in its fundamental importance for a lawful and reliable tax procedure and its importance for society as a whole. Any other reason would not justify the unnecessary burden of the legal text of the already overburdened and extensive ZPPPA.

2.2. The principle of temporal validity of tax regulations

Starting from the general principle of validity of regulations, and in close connection with the principle of legality, the tax liability is determined in accordance with those regulations that were in force at the time of the tax liability, unless, in accordance with the Constitution and law, certain provisions of law to have a retroactive effect. In that sense, Article 196 of the Constitution of the Republic of Serbia stipulates that laws and other general acts shall enter into force at the earliest on the eighth day from the day of their publication in the Republic Official Gazette. There are exceptions to this constitutional rule, so laws and other general acts can enter into force and come into force before or after the expiration of eight days. When it comes to tax laws, it often happens that the passage of time from publication to the beginning of their application, the so-called. *vacatio legis*, be longer than eight days, because it is necessary that, on the one hand, tax debtors are better acquainted with the provisions of these laws, and on the other hand, it is necessary to make certain personnel and organizational-technical preparations for their application (Kulić & Minić, 2011, p. 13). Although legal certainty requires that laws be effective only for the future, it is possible that tax laws have retroactive effect, and pursuant to Article 197, paragraph 1, of the Constitution of the Republic of Serbia, which stipulates that laws and all other general acts may not have retroactive effect. However, it follows from the restriction set by paragraph 2 of the same article of the Constitution that tax laws can have retroactive effect only when three conditions stipulated by the Constitution are cumulatively met: 1) that retroactivity is introduced by the tax law itself; 2) that retroactivity refers only to certain provisions of that law and 3) that retroactivity was introduced on the basis of the general

interest determined during the enactment of the law.⁸ However, regardless of the extremely rare exceptions, those tax regulations that are in force at the time of the tax obligation, ie at the time of conducting the tax procedure, are to be applied in the tax procedure.

2.3. *The principle of enabling insight into facts*

According to Article 6 of the ZPPPA, before passing the tax administrative act which determines the obligations and rights of the tax debtor, the tax authority is obliged to, at the request of the tax debtor or taxpayer, provide the tax debtor with insight into the legal and factual basis for passing the tax administrative act. By prescribing that principle, the legislator wanted to enable tax debtors to be fully aware of the factual situation on the basis of when the tax authority issues a tax administrative act, so that they can better protect their rights (Kulić, 2018, p. 124). This principle, clearly, was proclaimed in order to strengthen the protection of the interests and position of the party in the tax procedure. However, this type of protection can be reasonably questioned, bearing in mind that it is provided only at the request of the party, and it easily happens that, when the body initiates proceedings *ex officio*, the party does not even know that proceedings are being conducted against it, but the party finds out about the proceedings only when the first-instance decision is delivered⁹ to the party, and the party cannot invoke protection and participation in the procedure, which is so strongly proclaimed.¹⁰ This principle should be distinguished from the party's right to a statement, which, as a principle, is prescribed by Article 11 of the LGAP.

⁸ Kulić and Minić (2011) cite here, as an example, the Law on One-Time Tax on Extra Income and Extra Property acquired by exploiting special benefits (2001), by which the legislator in Serbia in 2001 wanted to tax extra income and extra property acquired by exploiting special benefits in the period from January 1, 1989 to the entry into force of the Law on strength. We are of the opinion, however, that such a law, according to the rules of the current Constitution of the Republic of Serbia, could be declared unconstitutional. State intervention with such intensity and covering such a long period of time, no matter how justified and understandable from the tax aspect, would be excessive and untimely interference of the state, which completely and permanently violates legal security. This is a serious issue and a serious danger for all *ex post facto* of the law.

⁹ Unlike the "new" LGAP, where the legislator, with unprecedented legal gymnastics, introduced the concept of "notification", ZPPPA still envisages that the act should be delivered.

¹⁰ Unfortunately, as a notorious fact, it is accepted in theory and practice that the work of tax authorities, and above all the Tax Administration, which decides in the first instance, suffers from chronic non-transparency and inaccessibility to the citizens it should serve. It is a completely different question whether this is just a consequence of the sluggishness of one state body and its employees, or whether it is a deliberate action.

2.4. The principle of keeping official secrets in tax proceedings

From the nature and importance of the subject of the tax procedure, as necessary, this principle of the tax procedure derives. Namely, the tax debtor is obliged to submit tax returns in the tax procedure and to submit complete and accurate data on his business to the tax authority in another way in order to correctly determine the tax liability based on them (similarly to Kulić, 2012, p. 109). Unauthorized use or disclosure of such information may jeopardize the interests of the tax debtor as well as the public interest. Therefore, it is envisaged that certain information will be considered an official secret. They are considered an official secret in the tax procedure and are kept as such different types of data and information specified in Article 7 of the ZPPPA. Violation of official secrets endangers the interests of tax debtors and the public interest of the Republic, which prevails over the interest in access to information of public importance that is an official secret, and the disclosure of which could have severe legal or other consequences for interests protected by the Law on Tax Procedure and Tax Administration (Kulić, 2012, p. 109).¹¹ In any case, the legislator justifiably provided that all information, tax returns and other data and documents in the tax procedure should be considered an official secret. Disclosure of these data and making them available to a wider circle of persons and the public represents a serious violation of the right to privacy (right to private life), but the interests of the Republic of Serbia can also be seriously endangered. Certainly, it is clear that the stated principle of ZPPPA provides a higher degree of protection than the one proclaimed by Article 15 of the LGAP, which refers to the principle of access to information and data protection.

2.5. The principle of good faith

ZPPPA envisages, ie Article 8 proclaims, the principle of acting in good faith. What can be noticed is the deviation of our legislator from the usual terminology of our legal heritage. Namely, the standard “in good faith” is common, primarily in Anglo-Saxon legal systems, but also, by taking over, in European community law. However, it did not exist in our legal regulations until recently, and it is not widespread even today. Our legal system is far “closer” to the standard of conscientiousness and honesty. Apart from the reasons for novelty and originality, there can be no clear reason for the

¹¹ For more details on the principle of official secrecy in tax proceedings, see: Article 7 of the LCPA.

legislator to deviate from the accepted standard and introduce a new standard in the regulation, the content of which is not defined in domestic practice.

Kulić rightly concludes that this principle, in fact, indicates that the parties in the tax procedure (tax authority and tax debtor) are obliged to act in good faith (*bona fides*), which implies good intentions, honesty and conscientiousness. According to the explicit provision of Article 8, paragraph 2 of the ZPPPA, the frequency and duration of tax control should be limited to the necessary extent. In other words, the tax authority should avoid frequent and too long controls of tax debtors (Kulić, 2012, p. 111).

2.6. The principle of facticity

Tax facts are determined according to their economic essence, which means that the subject of taxation are facts that indicate the existence of a certain economic power in the taxpayer. Hiding or misrepresenting the economic essence of the legal form could violate the principle of fairness in taxation. In other words, the economic essence of the obligation or the economic element of the business prevails over the legal form or possible legal shortcomings. However, the application of this principle is relevant in situations that are not explicitly regulated by tax laws. When using such authorization, the tax authority is obliged to take care that legitimate legal transactions, regulated by the rules of obligations or other branches of private law, are not endangered (Kulić, 2018, p. 126). Therefore, if there are no evasive motives in the taxpayer, the tax authority will not apply the principle that the economic essence is more important than the legal form. If, on the other hand, the party concludes a simulated legal transaction, which, in fact, conceals another legal transaction, the basis for determining the tax liability will be the dissimulated legal transaction (Kulić, 2012, p. 111). Thus, the essence of this principle is reflected in the fact that the state, through its tax authorities, having a legitimate interest, seeks to prevent, or at least significantly complicate, the possibility of circumventing tax regulations in order to evade tax liability, either by avoiding it completely or significantly reducing it. The state has a legitimate economic and legal interest in having the tax determined and collected according to the real economic value of the transaction, and this principle is an instrument for realizing these interests.

3. Initiation of Tax procedure

The issue of initiating tax proceedings is regulated comprehensively by the provisions of the ZPPPA, in the second part of this Law. The rules of general administrative procedure are applied in a subsidiary manner to the initiation and conduct of tax proceedings, as in all other matters of tax proceedings.

Thus, Article 33, paragraph 1 of the ZPPPA stipulates that *“Tax proceedings are initiated by the Tax Administration ex officio, and exceptionally at the request of the party.”*

However, the LGAP also envisages a third way of initiating administrative proceedings. Namely, Article 94 of the LGAP provides for the possibility of initiating a procedure with a public announcement. Thus, according to paragraph 1 of this Article, *“the body may initiate proceedings by public announcement against a large number of persons unknown or unable to determine, if they can have the status of a party to the proceedings, and the request of the body is substantially the same for all”*, and, according to paragraph 2. *“The procedure is initiated when the public announcement is published on the web presentation and on the bulletin board of the body.”* However, as we have seen, the ZPPPA does not envisage the possibility of initiating in such way a tax procedure, but it still contains a reference norm to the LGAP. In such a state of affairs, the question may be asked whether the tax procedure can, in some case, be initiated by a public announcement. We believe that the answer to this question must be negative. This for several reasons. First, the tax liability always refers to a well-defined person - the taxpayer, or to a well-defined thing whose owner is known. It is not inherent in the tax procedure to be initiated against a person who is not known to the authority. On the other hand, the choice of the legislator to list only two ways of initiating tax proceedings in Article 33 of the ZPPPA: ex officio and at the request of a party, should be understood as the legislator opted for these two ways, so willingly and consciously excluding the possibility tax procedure by public announcement. In the end, the narrower possibilities of the tax authority in terms of initiating the tax procedure protect the rights of citizens more, and such an interpretation is the most favorable for them. Therefore, it should be considered that the tax procedure, despite the referring norm of the ZPPPA to the similar application of the LGAP, cannot be initiated by a public announcement.

3.1. Initiation of Tax procedure *ex officio*

Initiation of the procedure *ex officio* implies that the competent body initiates the procedure on its own initiative, and without any external incentive. However, this decision to initiate tax proceedings *ex officio* does not mean that it is not possible or allowed external influence on the body to initiate *ex officio* proceedings. In that sense, initiating proceedings *ex officio* does not mean the absolute exclusion of all other persons from this activity (Milkov, 2017, p. 169). Namely, in accordance with the general rules of the LGAP, body that initiates the proceedings must take into account possible written submissions of the natural and legal entities and warnings of the competent authorities, but towards these entities the competent authority has no formal obligation (Milkov, 2017, p. 170).

The tax procedure is initiated *ex officio* when required by the tax law or some other regulation based on the tax law, or when the tax authority determines or learns that, given the existing facts, a procedure should be initiated to protect the public interest. From the way of conducting the tax procedure determined *ex officio*, it seems that for conducting the procedure it is necessary to fulfill one of the two alternatively set conditions or situations: 1) when it is provided by some tax regulation and, according to the available facts, it is not necessary to the body specifically determines the need to protect the public interest and 2) when the body determines that or finds out that, given the factual situation, it is necessary to protect the public interest (similarly to Milkov, 2017, p. 169). This understanding is a logical consequence of the plain interpretation of the said provision.¹² However, contrary to the linguistic interpretation of the norm, and having in mind the principle of legality from ZPPPA and LGAP, it should be taken that the procedure can be initiated *ex officio* only when there is an explicit legal basis for that, because every administrative activity must have a legal basis. Therefore, the initiation of proceedings *ex officio* in this second case requires the fulfillment of all requirements: both that it is provided by law and that in this case it is determined that the initiation of proceedings is in the public interest (similar to Milkov, 2017, p. 169). It is true that it could easily be argued that the conduct

¹² Article 90, paragraph 2 of the LGAP reads: "*The procedure is initiated *ex officio* when it is determined by the regulation **or** when the body determines or finds out that, given the factual situation, it is necessary to protect the public interest.*" (Underlined by the authors). So, strictly speaking, having in mind the word "or", according to the usual meaning of the word, it could be argued that the second situation would allow the proceedings to be conducted *ex officio* and without an explicit basis in law. This position would be completely legally unacceptable and indicates only the clumsiness of the authors of certain key regulations.

of the procedure for determining and collecting taxes is always in the public interest, bearing in mind that taxes are, in themselves, public revenues, which finance the regular functioning of the state and its institutions and institutions. of special importance for the wider society (schools, hospitals, etc).

3.2. Initiation of Tax procedure at the request of the party

The second way of initiation of the tax procedure, in accordance with the Article 33, paragraph 1 of the ZPPPA, is “at the request of the party.”¹³ It’s inherent in this way of initiating the procedure that the procedure is initiated by the Tax Administration at the request of the party in order to recognise a certain right to the party (Kulić, 2012, p.150) or possibly reduced or terminated an obligation. In the case of matters for which the proceedings are not conducted ex officio, or which are conducted on request, then the request of the party is a *conditio sine qua non* and for initiating and conducting tax proceedings. The LGAP explicitly stipulates that the procedure cannot be initiated ex officio in those administrative matters in which, according to the law or the nature of the matter, the procedure can be initiated only at the request of the party, otherwise such a decision would be null and void.

However, it is possible that the tax authority, at the request of the party, finds that there are no conditions for initiating a tax procedure. Then, according to the explicit provision of Article 33, paragraph 3 of the ZPPPA, the tax authority will make an order. The appeal is always allowed against this order.¹⁴ Pursuant to the

¹³ Milkov finds a terminological difference between the “new” LGAP, according to which the procedure is “initiated by the party’s request”, and the provisions of the previous LGAP, and which corresponds to the provision of Article 33 of the ZPPPA, according to which the procedure was initiated “at the request of the party”. Milkov further argues that the consequence of the fact that according to the previous LGAP (which is valid for the current ZPPPA) was the body that initiated the procedure, while the party only submitted a request, and according to the rule from the “new” LGAP, the procedure is initiated by the very submission of the party’s request (Milkov, 2017, p. 170). Although this observation of prof. Milkova is completely correct, we do not think that this terminological distinction has significant practical consequences. Sometimes it seems acceptable that the procedure started with the submission of the request, because if an activity of the body is requested upon the submitted request, in order to consider the procedure initiated, then we would have a situation that in the period from the request the procedure was neither initiated nor initiated, but the procedure would be in vacuum.

¹⁴ It should be noted that there was no need for the legislator to add the words “against which an appeal is allowed.” This is because, unlike the rules of general administrative procedure, in tax proceedings an appeal against a conclusion is always allowed, unless explicitly excluded by law. Therefore, nomotechnically, it is unnecessary to state everywhere that an appeal is allowed, but only when it is not allowed. This way, the already burdened text of the ZPPPA is unnecessarily burdened.

provisions of the ZPPPA, the tax authority will make the following order when: 1) the applicant does not have party capacity, 2) the applicant is not actively legitimized in a particular tax matter, because it is not about protecting his rights or legal interests, 3) the case is not about the tax matter, 4) when a specific tax matter has already been legally resolved, except in the case of repeating the procedure and when the request is submitted to an incompetent authority.¹⁵

After initiating the procedure, the party may withdraw the request, during the entire procedure in which case the tax authority issues a order suspending the procedure (Kulić, 2012, p. 151).¹⁶ However, after giving a statement on the withdrawal of the request, and until the tax authority makes a decision on the suspension of the procedure, the party may revoke its withdrawal from the request.¹⁷

3.3. Initiation of Tax procedure

The regulation of the moment and manner of initiating the tax procedure is regulated somewhat differently than provided for in the LGAP.

Namely, Article 90, paragraph 3 of the LGAP stipulates that *“before initiating proceedings ex officio which is not in the interest of the party, the body obtains information and takes actions to determine whether the conditions for initiating proceedings are met and, if so, issues an act initiating proceedings*

¹⁵ However, it could be argued that in case the request is submitted to a really incompetent body, the rule should be applied according to which the administrative body, if it is not competent to decide on an administrative matter, will forward the request to the really competent body. Such an interpretation would be in the spirit of Article 143, paragraph 2 and Article 153, paragraph 2 of the ZPPPA, as well as the general principle of the LGAP on assistance to foreigners.

¹⁶ An appeal against this order is also allowed. Kulić, on the other hand, believes that, exceptionally, and by applying the rules of the LGAP, tax proceedings can be conducted even after the party's request is waived, if further proceedings are necessary in the public interest (Kulić, 2012, p. 151). This is difficult to reconcile with the rule that tax proceedings cannot be initiated without the request of a party, unless it is a matter of which the proceedings are conducted ex officio. In addition, it is difficult to imagine a situation in which there are public interests in conducting tax proceedings, which are otherwise conducted at the request of the party. This is also in accordance with Article 90, paragraph 5 of the LGAP.

¹⁷ The party may withdraw the request even after the first instance decision, and before the expiration of the deadline for appeal, when the tax authority will make a decision to suspend the procedure, with annulment of the first instance decision, if the party's request was positively or partially positively resolved (Kulić, 2012, p. 151). On the other hand, according to the rules of general administrative procedure, according to the provisions of Article 98, paragraph 1 of the LGAP, the party may withdraw the request until it is notified of the decision of the second instance body. Therefore, it seems that the LGAP in this respect provides for a lower degree of protection of rights than the rules of the LGAP.

(conclusion, order, etc.). *The act on initiating the procedure is not passed if the body makes an oral order*” and Article 91, paragraph 3 of the LGAP stipulates that a “*procedure initiated ex officio and not in the interest of the party is considered initiated when the party is notified of the act initiating the procedure.*” On the other hand, according to paragraph 1 of the same article, when it comes to proceedings at the request of a party, the proceedings are considered initiated by submitting a request.

Therefore, when it comes to initiating the procedure *ex officio* (which is not in favor of the party), the LGAP envisages that an act on initiating the procedure should be adopted¹⁸ and delivered to¹⁹ the party, and the procedure is then considered initiated.

On the other hand, according to the explicit provision of Article 33, paragraph 2 of the ZPPPA, it stipulates that “*the tax procedure is initiated when the Tax Administration performs any action in order to conduct the procedure.*” First of all, ZPPPA does not make a difference when and how the tax procedure is initiated against who initiated it - whether at the request of the party or *ex officio*. Secondly, while the LGAP binds the initiation of the procedure for the adoption of the “act on the initiation of the procedure”, the ZPPPA considers the procedure initiated when any action is taken in order to conduct the procedure. From that, it can be concluded that in the LGAP the emphasis is on the formal-legal element, while in the LGAP the emphasis is on the factual element - taking any action in order to conduct the procedure. This procedure reduces the protection of the rights and legal interests of the party in the procedure, and the deviation of the ZPPPA from the rule that it is necessary to adopt a formal act initiating the procedure could be considered inconsistent with Article 3 of the LGAP.

4. Legal nature of Tax act and Tax administrative act

The tax procedure is also characterized by specific acts, at least in the name, if not in essence, issued by the tax authority. Thus, the explicit provision of Article 34 of the ZPPPA regulates the issue of tax act and tax administrative act. According to that provision, “a tax act is a tax decision, order, order for tax control, invitation for tax control, record on tax control and other act which initiates, supplements, changes or completes an action

¹⁸ On the critique of this solution, see: Milkov, 2017, p. 171-172.

¹⁹ According to the LGAP, this is a notification that is made according to the rules of delivery. On the critique of the construction of information, see: Milkov, 2017.

in tax procedure.”The provision stipulates that the tax administrative act, by which the Tax Administration decides on individual rights and obligations of the tax debtor from the tax law relationship, is a tax decision and an order. Thus, all tax administrative acts are, at the same time, tax acts, but not all tax acts are, at the same time, tax administrative acts.

Starting from such defined positive legal definitions, Kulić (2012, p. 174) defines a tax act as an act of a tax authority which, by applying tax regulations, determines the rights and obligations of a tax debtor or other natural or legal person, or takes some action in tax proceedings. At the same time, it should be pointed out that another act which initiates, supplements, changes or completes an action in the tax procedure is also considered a tax act. In that sense, it is possible that the tax administration during the procedure, for the implementation of certain actions, can, for example, make orders and decisions that can be characterized as the so-called “Procedural decisions.” Thus, today the decision are used to decides on tax-administrative matters, but it also enters the domain of matters previously exclusively reserved for orders - and that is deciding on procedural issues (similar to Vučetić, 2021, p. 75). The concept of procedural decision and their nature is controversial in our theory, although in practice, in essence, no major problems are encountered.

The tax administrative act, on the other hand, is an act by which the tax authority in the tax procedure applies tax and other regulations to a specific case in order to determine the rights and obligations of the tax debtor. Tax administrative acts are, therefore, a tax decision and an orderd. The tax administrative act is a unilateral statement of the will of the tax authority in cases provided by tax laws, which authoritatively decides on individual tax matters. A tax administrative act is, therefore, a specific legal act that refers to a specific case and to a specific tax debtor, who was a party in the tax procedure in which the act was passed (similarly to Kulić, 2012, p. 174).

The condition for the act of the tax authority to have the character of a tax administrative act is that it, by direct application of tax regulations, creates, changes or abolishes tax relations, ie that it creates, changes or abolishes the rights and obligations of tax debtors The tax administrative act is also binding on the tax debtor to whom the tax authority that issued the act refers. The tax administrative act is passed in writing, while other tax acts are passed in writing when it is prescribed by law or at the request of the tax debtor.

Tax decision is the most important tax act. It is the main tax act, and it is an act which decides on the subject of the tax procedure, ie it resolves a

specific tax matter, and which the tax authority adopts on the basis of decisive facts determined in the tax procedure. The adoption of the tax decision is the most important phase of the tax procedure by which the tax authority seeks to satisfy both the public interest and the interests of the party that participated in the tax procedure by applying applicable tax regulations (Kulić, 2012, p. 174). From the above, it can be concluded that, apart from the title of the act itself, there are no special essential differences between the tax and the “ordinary” administrative decision.

The order is, as a rule, a preliminary, auxiliary, secondary and accessory decision (Milkov, 2017, p. 180). The conclusion reached in the tax procedure is a tax administrative act which decides on certain issues related to the tax procedure, as well as on issues that appear as secondary in connection with the implementation of the procedure, and which are not decided by a decision (Kulić, 2012, p. 177). Therefore, the nature, ie the purpose of the conclusion itself, mostly corresponds to the regulations of the LGAP. However, the key difference is the ability to appeal the order. Namely, the provision of Article 146, paragraph 4 of the LGAP stipulates that the conclusion cannot be challenged by a special appeal or a lawsuit in an administrative dispute, but only by an appeal and a lawsuit against the decision. In this respect, the LGAP leaves no room for the opposite. However, according to the explicit provision of Article 34, paragraph 4 of the ZPPPA, an appeal against the order is always allowed, unless specifically excluded by law. Therefore, it can be said that the provision of ZPPPA is inconsistent with the provision of the LGAP. However, the fact is that in the tax procedure it is possible to decide, with an order, on important issues for the party in the procedure, the legislator acted reasonably when he enabled the appeal against the order as a tax act. We are also of the opinion that the provision of the ZPPPA is not in conflict with the provision of the LGAP. Both because such a provision of the ZPPPA gives greater and broader rights than those provided by the LGAP, which is in accordance with Article 3 of the LGAP. Previous notwithstanding, it's true that allowing an appeal against almost every individual action of the tax authority, in practice, can be burdensome for the tax authority.

5. Appeal in Tax procedure

As the embodiment of the right to a legal remedy guaranteed by the European Convention on Human Rights and the Constitution of the Republic of Serbia, the right to appeal is recognized to every taxpayer who considers that the adoption of a tax administrative act deprived him of a right (similar to

Kulić, 2012, p. 229). Unlike the general rules contained in the „new” LGAP, which provides for the possibility of filing both written objection and appeals, in tax proceedings an appeal is the only regular remedy.

The state, which through the tax authority appears as one of the subjects in the tax-legal relationship, independently determines the content and scope of mutual rights and obligations with the taxpayer, as the other subject of that relationship. Due to this unequal position of participants in the tax-legal relationship, it is necessary to provide legal protection to the weaker participant - the taxpayer, especially because his economic strength may be unjustifiably or even illegally reduced (Ivanović Knežević, 2013, p. 83).

An appeal in a tax procedure is a legal remedy by which an authorized person disputes the legality or regularity of a first-instance tax administrative act passed in a tax procedure (Kulić, 2012, pp. 229–230). Therefore, an appeal can be filed only by those tax acts that are tax administrative acts, ie against the tax decision and orders. Similar to the rules of general administrative procedure, pursuant to the provisions of Article 140 of the ZPPPA, an appeal against a tax administrative act may be lodged against a first-instance tax administrative act, unless otherwise provided by law, but an appeal may also be filed if the decision on the party’s request is not reached within time limit. This is about the so-called “Silence of the administration”, which implies the inactivity of administrative bodies at the request of the party, and which entails numerous consequences (Torbica, 2021, p. 143).

An appeal, unless otherwise prescribed by law, may be filed within 15 days from the day of receipt of the tax decision. Appeals against first-instance tax administrative acts are decided by the Minister in charge of finance, or a person authorized by him. However, the ZPPPA provides for certain specific rules regarding the appeal in the tax procedure, which, it can be said, significantly deviates from the rules contained in the LGAP, by providing for less favorable provisions per party, thus ignoring the framework set by Article 3 ZPPPA. These rules, above all, refer to the suspensive effect of the appeal and the possibility of filing an appeal against the conclusion.

Thus, by the explicit provision of Article 147, paragraph 1 of the ZPPPA, the appeal, as a rule, does not delay the execution of the tax administrative act, ie the tax decision, against which it was filed. Thus, the first-instance tax decision is enforceable, ie it has to be enforced, even though the appeal is allowed and timely filed. Having in mind the fact that, according to the provision of Article 154 of the LGAP, the appeal has a suspensive effect, except exceptionally, it can be clearly concluded that prescribing the rule that the appeal has no

suspensive effect reduces the level of protection of rights and legal interests of the party. Article 3 of the LGAP (similar to Lončar, 2016, p. 1237). This is just another indicator in a series that indicates the inability of the legislator to create a coherent and complete system of rules of administrative procedures. Strictly speaking, if we take into account the position of the Constitutional Court on the so-called “Systemic laws”, in the dispute the provisions of the systemic law which is more favorable for the party, and the provisions of the special law which contains, for the party, less favorable provision, this conflict would have to be resolved in favor of the systemic law.

Article 147, paragraph 3 of the ZPPPA stipulates that the second instance body must decide on the appeal itself within 60 days from the day of submitting the appeal. If the second-instance body, acting on the appeal, annuls the first-instance tax decision and returns the case to the first-instance body for reconsideration, the first-instance procedure is obliged to act on the order of the second-instance tax authority within 40 days of receiving the second-instance decision (in the LGAP the deadline is to decide within 30 days). An administrative suit may be initiated against the final tax administrative act, unless otherwise provided by law. The lawsuit has no suspensive effect.

When it comes to the possibility of filing an appeal against the order, in the tax procedure against the order, as a tax administrative act, as a rule, an appeal can be filed, under the same conditions and in the same way as against the tax decision. As it has already been pointed out, an appeal against the order is always allowed, unless it is explicitly excluded by law. Also, as it has already been pointed out, the provisions on the admissibility of an appeal against an order are not incompatible with the provisions of the LGAP, given the fact that the level of protection of the party's interest is higher than the one provided by the LGAP. An appeal against the order shall be filed within the same time limit, in the same manner and to the same body as the appeal against the tax decision, unless otherwise prescribed by law. However, the Law on Tax Procedure and Tax Administration prescribes in which cases an appeal against an order is not allowed (for example: against an order by which the tax authority competent according to the place where the tax return is filed decides on the request to extend the deadline for filing a tax return, against the Order deciding on the request for restitution, except when the request for restitution was filed due to missed deadline for appeal against the tax decision, against the order on the complaint on the assessment of the listed items in the procedure of forced collection). In cases when a special appeal is not allowed against the conclusion, the party in the tax

procedure and other persons who have a legal interest in it have not been left without legal protection, because these conclusions can be challenged by an appeal against the main tax decision. Like any other, this complaint has no suspensive effect.

6. Conclusion

As can be clearly seen, of all the special administrative procedures, the tax procedure is the most comprehensively regulated, ie it contains many special rules that deviate from the rules of general administrative procedure. Starting from the principles, but also the types of administrative acts that are passed during the tax procedure, the manner in which the procedure is initiated, the effect and possibilities of filing an appeal, the peculiarities of the tax procedure, its purpose and significance for the state permeate most special provisions.

What appears to be a key problem is the relationship between the rules of general administrative procedure and special - tax procedure. In the first place, the main reason for this problem is the ambitious desire of the legislator who passed the „new” LGAP from 2016 to establish a minimum protection of the rights and legal interests of the parties in the procedure, and not to allow derogations from the protections it provides. In such a state of affairs, within the tax procedure, we come across numerous provisions that regulate certain issues significantly differently. Due to the specific position in which the position of the Constitutional Court puts us in relation to the so-called „Systemic laws”, a way must be found in which the conflicting provisions of different laws could be applied simultaneously. This authors, guided by the *ratio legis* legislator of Article 3 of the LGAP, propose that, as a starting principle for resolving this issue, all conflicts of norms of different provisions of the general and special administrative procedure shall be interpreted and applied in the way that is most favorable for the party.

De lege ferenda the legislature should make every effort to harmonize the rules of special administrative procedures, and especially the tax procedure, with the basic principles and other rules of the general administrative procedure, which should have been done on June 1, 2018. It is possible that some future legislators will be wiser and more consistent.

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O ODREĐENIM SPECIFIČNOSTIMA PORESKOG POSTUPKA KAO VRSTE UPRAVNOG POSTUPKA

REZIME: Zbog brojnih osobenosti, ali i značaja za redovno funkcionisanje Republike Srbije, u smislu finansiranja javnih rashoda, posebnu pažnju naš zakonodavac poklanja poreskom sistemu, poreskoj administraciji i poreskom postupku. Aktivnost našeg zakonodavca u ovoj oblasti je izrazito intenzivna, te su promene poreskih propisa učestale, a javna vlast, bilo u formi zakona ili kakvog podzakonskog akta, često interveniše u oblasti poreskog sistema. S druge strane, pravila poreskog zakonodavstva, kako materijalnog – u pogledu samih osnova poreskih obaveza, tako i procesnog moraju biti jasna kako bi građani svoje poreske obaveze mogli opredeliti i izmiriti. Pored toga, u interesu pravne sigurnosti, zakonodavac ne bi trebao često menjati materijalne i procesne poreske propise, te bi se morao kretati u okviru određenih granica. Imajući to u vidu, zakonodavac je ograničio samog sebe tako što je poreski postupak opredelio kao poseban upravni postupak, koji je uređen posebnim zakonom, pri čemu se moraju imati u vidu zaštitne odredbe predviđene Zakonom o opštem upravnom postupku. Odstupanja od pravila opšteg upravnog postupka su, svakako, neophodna i opravdana, ali samo u izvesnoj meri, koja je određena osobenošću i značajem poreskog sistema, što rezultira posebnim pravilima utvrđivanja, opredeljivanja visine i izvršenja poreske obaveze. Vodeći se osobenostima poreskog zakonodavstva, autori ukazuju na odstupanja poreskog postupka od opšteg upravnog postupka u pogledu načela, pokretanja, prirode pravnih akata i drugih osobenih pitanja.

Ključne reči: *poreski postupak, upravni postupak, posebni upravni postupak, načela poreskog postupka, upravni akt, poreski upravni akt.*

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