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SECURING ORDER *VLADIMÍR BALCAR* *

Abstract

A securing order is a very effective tool to fight tax frauds in the Czech Republic but it is also considered to be a rather drastic restrictive measure which may have a significant impact on tax subjects' property and - in some cases - their very existence. This article explores the mechanism of application of a securing order with the aim of informing readers of its advantages and disadvantages. It also focuses on importance of an independent judicial review of decisions made by administrative authorities. At the end of the article the author draws some conclusions and he tries to generalize them to be applicable to other instruments of the tax law as well - including foreign ones.

Key words: tax, securing order, VAT, MTIC fraud, fighting tax frauds, ultima ratio, Czech Republic, administrative justice, judicial review of decisions made by administrative authorities

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1. Introduction

Member States in the European Union are losing billions euro in value-added tax (VAT) revenues because of tax frauds and inadequate tax collection systems. Based on the VAT collection figures available, the total amount of VAT lost across the EU-27 in 2015 is estimated at 151.5 billion euro. This represents a loss of 12 % of the total expected VAT revenue [Study and Reports on the VAT Gap in the EU-28 Member States: 2017 Final Report].

Carousel frauds (also called missing trader Intra-community frauds or MTIC frauds) are considered to be the most complex tax frauds. As the name suggests, MTIC fraud contains two elements: a missing trader and an intra-community supply. It involves a tax subject obtaining an EU Member State VAT registration number, purchasing goods VAT free from another EU Member State, selling those goods with VAT to another VAT registered tax subject and then going missing or defaulting without paying the VAT due to a tax administrator [HMRC internal manual VAT Fraud]. Since no effective solution has been found at EU level to prevent carousel frauds, each EU Member has been trying to deal with them on its own.

This article explores a way to minimize consequences of a tax fraud which has already been committed. In the Czech Republic tax authorities may use several instruments to secure tax revenues. There are legal regulations of securing payments for undue or not yet assessed taxes (securing order), establishing a lien on the tax subject's property, guarantees of third parties for tax subject's arrears and also payment of advances in the Code of Tax Procedure. Each of these instruments may be used in a specific way. While fighting tax frauds especially securing orders should be used effectively.

The aims of the article are to introduce the instrument called "securing order", to analyse its legal regulations and its application by the Financial Administration of the Czech Republic and to draw some conclusions which may be generalized to be applicable to other instruments of the tax law as well. Author applies the analysis, synthesis and description method.

2. Mechanism of Securing Order

A securing order is a decision *sui generis* which may be issued by a tax administrator. Legal regulations of a securing order are contained within sections 167 to 169 of the Code of Tax Procedure and also within section 103 of the VAT Act. The key clause says: If there is a reasonable concern that a tax which has not yet been due or a tax which has not yet been assessed will be uncollectible at the time of its enforceability, or that the collection of the

tax will be connected with considerable difficulties at the time, the tax administrator may issue a securing order [Code of Tax Procedure, Section 167 subsection 1]. In such decision the tax administrator shall order the tax subject to pay the sum stated in the order. The payment is a security which shall be deposited into a special tax administrator's bank account where the future revenue of the tax at estimated value appears to be jeopardised. The sum represents an assumed value of the future tax or a value of the tax which already has been assessed but has not yet been due.

If a tax subject fails to perform the duty imposed by a securing order, the securing order shall become an execution title and the tax administrator may order a tax execution on the value of the unpaid security.

A securing order is rather specific tool because it does not secure the future tax payment itself. In case of issuing a securing order the position of the tax administrator as a creditor is not anyhow improved – it may still affect only property owned by a tax debtor and it may still do it only in the same order of satisfaction of claims as other creditors. The benefit of a securing order is that it facilitates almost immediate setting out the amount of security by the tax administrator in accordance with its aids and it makes the secured sum due and collectible (even in tax execution) at the time. The collected security shall be used to cover the tax assessed in the future. Therefore such procedure may prevent a future uncollectibility of unpaid tax.

Issuance of a securing order is particularly relevant if a tax administrator reasonably assumes that a tax payer will commit a tax fraud, while it has already started getting rid of its property. In such case the tax administrator has not enough time to assess the tax within standard assessing proceedings and collect it after that. A securing order may be used not only against a missing trader but also against any other subject of the fraudulent chain of tax payers.

A reasonable concern that a tax which has not yet been due or a tax which has not yet been assessed will be uncollectible may have grounds even in an intention of a tax administrator to question the tax payer's entitlement to VAT deduction because of tax payer's intentional participation on committing a tax fraud if - at the same time - the tax payer does not possess sufficient property to pay a future tax at not deducted value.

3. Reasonable Concern

The proceeding on the tax security is a preliminary procedure where a tax is not to be assessed but the tax subject is just ordered to pay a security at assumed value of the future tax. The important fact is that no evidence shall be examined by a tax administrator within

the proceedings. The tax administrator just assumes that certain facts are likely to occur in the future. The tax administrator anticipates its success in a future finding proceedings (where the evidence shall be examined). The tax administrator assumes not only that the tax will be assessed at a certain value in the future but also that the tax subject will not voluntarily pay the tax or even that the tax administrator will fail to exact the arrears through a tax execution. Such presumption often includes hypothetical considerations that the tax administrator will be able to prove tax payer's participation on committing a carousel fraud while at the same time the tax payer will not bear the burden of proof that his participation was not intentional.

From the point of view of a tax administrator a securing order is a very useful and effective tool. By using it, it may de facto make any tax due and collect it, no matter it has not been assessed yet. Moreover, there is no need of evidence in the proceedings so the tax subject actually cannot prevent this from happening.

4. Reasons of Concern

As previously mentioned, the existence of a reasonable concern is an indispensable prerequisite for issuance of a securing order. Although there is no evidence examined within the proceedings, there should be solid grounds for a tax administrator's concern that the tax will be uncollectible in the future. The tax administrator is obliged to state the reasons for its concern and its reasoning within the decision. Certain degree of quality of reasoning and certain degree of probability that tax administrator's assumptions are right is required.

There are no criteria specified for issuance of a securing order in the Code of Tax Procedure. The most important moment within the proceedings on the tax security is the interpretation of the undefined term "reasonable concern". The legislature has left tax authorities to interpret what is meant by this term, respectively to consider in each particular case if there is a risk that a tax which has not yet been due or a tax which has not yet been assessed will be uncollectible at the time of its enforceability, or that the collection of the tax will be connected with considerable difficulties at that time.

The General Financial Directorate has created a methodological manual in which tax offices are instructed about conditions under which a securing order should be issued [Methodical manual of the General Financial Directorate dated 16. 11. 2011]. In this material, the General Financial Directorate formulated certain clues for recognizing whether the concern is or is not reasonable in specific cases. According to this manual, tax offices should consider issuing a securing order for example in case of tax subject's unusual commercial transactions under noticeably unfavorable conditions, but also in more

controversial situations such as trading with risky commodities, use of third-party bank accounts, generally poor payment discipline of a tax subjects or theirs insufficient communication with tax authorities. The list of situations is just demonstrative and the reasonable concern may be found in other cases as well [Methodical manual of the General Financial Directorate dated 16. 11. 2011].

It is important to highlight that the manual has not been published in a form of a generally binding legal normative act. It binds only the Financial Administration of the Czech Republic itself (which involves tax offices, the Appellate Financial Directorate and the General Financial Directorate). Even its publication on the Financial Administration's website cannot change the fact that other authorities, including courts of administrative justice, may disagree with content of the manual. Courts, when considering whether the conditions of an undefined term "reasonable concern" have been fulfilled, shall decide independently of the manual.

The Supreme Administrative Court has recently decided that a reasonable concern within the meaning of the section 167 of the Code of Tax Procedure must be applied not only to the future uncollectibility of the tax, but to the full disposition of this section as well, thus to the value of future tax which has not yet been due or assessed as well.

Therefore an issue of a reasonable probability of a future tax assessment is also relevant, while tax administrator's considerations on this subject are also reviewable by courts of administrative justice. The Supreme Administrative Court has explained that there is not acceptable such an interpretation that a tax administrator may just set out a security at value too high for a tax subject to pay and regardless of other circumstances the conditions for issuance of a securing order are fulfilled. Such interpretation would grant unlimited discretion to tax administrators. According to the Supreme Administrative Court, a securing order may be issued only if there exist objective factors which cause the reasonable concern (reasonable probability) that the tax will be assessed at certain value and that the tax will be uncollectible at the time of its enforceability, or that the collection of the tax will be connected with considerable difficulties at the time. If the securing order does not meet these requirements it is unlawful [Supreme Administrative Court: 4 Afs 22/2015-104].

5. Judicial review of decisions made by administrative authorities

I refer a lot to decisions of the Supreme Administrative Court in this article, so I consider appropriate to briefly explain how essential the role of courts of administrative justice is for the legality of decisions made by administrative authorities.

In general the judicial review is considered to be a guaranty of the rule of law. In the field of public administration the judicial review is implemented mainly through the administrative justice, which holds an exceptional place within the system of guaranties of rule of law [Průcha 2012: 331-334]. The judicial review of decisions made by administrative authorities has grounds in the division of government into the executive, judicial and legislative branches. The important fact is that judges are bound only by laws and international treaties [Harvánek 2013: 379-380].

In the Czech Republic the legislation of administrative justice is contained in the Code of Administrative Justice. Among others a decision of an administrative authority may be contested by administrative complaint. The complaint is inadmissible if the complainant has not exhausted ordinary remedies in the procedure before. The defendant (respondent) is an administrative authority which has made the last instance decision. Regional courts have subject-matter competence in the proceedings. The contested decision shall be reviewed and may be revoked as unlawful or for procedural faults. The court shall revoke the contested decision for procedural faults on grounds of non-reviewability consisting in incomprehensibility or for absence of reasons for the decision, because the facts of the matter which the administrative authority took as the grounds for the contested decision are contrary to the documents or are not supported by them or require extensive or essential supplementing, for substantial breach of the regulations on proceedings before an administrative authority if it could result in an unlawful decision on the matter itself. There is an extraordinary remedy called “cassation complaint” against the final decision of a regional court in administrative justice. Any party to the proceedings from which contested decision arose, or a person participating in the proceedings, may file a cassation complaint. The Supreme Administrative Court rules on cassation complaints. If the Supreme Administrative Court arrives at the conclusion that the cassation complaint is justified, it shall vacate the decision of the regional court by means of a judgement and refer the matter back to the regional court for further proceedings. In some cases it may also revoke the contested decision of an administrative authority [Hendrych 2016: 374-410].

Besides ruling on cassation complaints in individual cases, the Supreme Administrative Court, as the highest judicial authority in matters within the jurisdiction of courts of administrative justice, guarantees the unity and legality of decision-making. Therefore all administrative authorities including tax administrators are bound by the legal positions adopted by the Supreme Administrative Court. And even in posterior cases where they are not formally bound to follow the previous decisions made by the Supreme Administrative Court, they are obliged to respect them and they may decide in deviation from them only if they explain why they do so.

6. Duration of a Securing Order

Another essential aspect of a securing order is its duration. A tax execution may be ordered only if a securing order has become enforceable. A securing order is a decision with a preliminary enforceability. It means that, regardless of its legal force, the securing order becomes an execution title at the moment when a tax subject fails to pay the security within the time of performance, which is usually three business days. However, if there is a risk of delay, the securing order shall be enforceable at the moment of notifying the tax subject of it. It basically means that a tax subject is not given any time to perform and it shall instantly become a tax debtor. Furthermore, relating to fighting tax frauds, in 2012 a special rule of enforceability of the VAT securing order was enacted. If there is a risk of delay such decision shall become effective and enforceable at the moment of its issue. In such case the tax subject shall be in default even before it is ordered to pay the security.

The term “risk of delay” is also an undefined term and its interpretation is frequently disputed between tax subjects and tax administrators. In fact, the risk of delay is most often found in cases where a substantial part of the tax subject's assets exists only in the form of funds in a bank account. Since funds may be effectively converted from the account, it is likely that such property will be transferred into an account of a third party which means the tax administrator will be incompetent to get these funds, while the remaining assets of the tax subject is not sufficient to meet the imposed obligation. The circumstances suggesting that there is a risk of delay must be properly documented before issuing a securing order and then also stated in the grounds of the decision [Balcar 2017: 42-43].

On the day of the tax assessment, effect of the securing order shall expire, and the secured sum shall be transferred to pay such a tax. If a refundable overpayment arose as a result, the tax administrator shall refund it without a request within 15 days from the day when such an overpayment arose. If the exaction ordered on the basis of a securing order did not result in payment of the secured sum by the time when the effect of the securing order expired because the secured tax has become due, the tax administrator shall decide that the enforceable tax assessment decision becomes an execution title instead of the securing order. The effects of the execution acts that have been carried out shall continue to apply to the extent specified by the new execution title.

The problem is that after issuing a securing order there are no time limitations for a tax administrator to act, except that the tax may not be assessed after the expiry of the term for assessing the tax which lasts 3 years but it may be extended.

Tax administrators are obliged to decide to terminate the effect of the securing order without undue delay, if the reasons for which the tax was secured cease to exist prior to the tax assessment or prior to the due date of the tax. If prior to the tax assessment or prior to the due date of the tax, the tax administrator finds reasons for reducing the original

amount of the security, it shall decide on the change of the secured sum by issuing a decision changing the sum stated in the securing order although in that case it is not obliged to do so without undue delay. The reasons may be for example that the tax administrator finds out that the tax payer has not intentionally participated on committing a tax fraud, which means that the original reasonable concern has been (at least partially) refuted. However, it seems that tax administrators have been often failing to fulfill this obligation. According to the General Financial Directorate about one thousand securing orders were issued in 2014 and only nine of them were terminated this way. There are no data available about how many of them were reduced [Balcar 2017: 54].

In a recent judgment the Supreme Administrative Court has decided that, if a tax administrator fails to fulfill its obligation to terminate the effect of a securing order, despite the conditions are met, it proceeds unlawfully. The Supreme Administrative Court has also stated that tax administrators are obliged to regularly review the continuance of conditions for a securing order over the entire duration of a securing order and to note the results of such reviews in their files. In other words, a tax administrator is obliged to continuously review whether the statutory conditions for the existence of the securing order are still being met. If such conditions no longer exist, the tax administrator has to terminate the effect of the securing order [Supreme Administrative Court: 1 Afs 88/2017-39].

I believe it could be simply detected whether tax administrators have been fulfilling this obligation. It would be sufficient to compare the number of decisions on termination of the effect of a securing order together with number of decisions on reducing the security against the number of cases where the value of assessed tax is lower than the value of set out security. Ideally, both numbers would be equal. However, if the second number is higher, it means that tax administrators do not fulfill their duties properly.

7. Securing Orders from a Tax Subject's Point of View

Now I would like to illustrate how significant the impact of a securing order is for a tax subject. Imagine a tax subject who has never failed to pay taxes. Suddenly it gets its bank accounts blocked and all property confiscated. It finds out that the tax execution has been ordered because of tax administrator's "reasonable" concern, which it doesn't find reasonable at all. The tax subject is unable to pay its other debts because of the securing order and gets insolvent. It may even fail to pay wages to its employees. A securing order usually paralyzes or even terminates the tax subject's business activities. Moreover the tax subject often cannot even afford to hire a tax consultant or an attorney to help him facing the securing order and disprove tax administrator's arguments [Rambousek 2014: 1-2].

There are two remedial instruments available for a tax subject – an appeal against the securing order and eventually also a complaint against a decision of the appellate authority (Appellate Financial Directorate). Neither the appeal nor the complaint has a suspensory effect, although at the complainant's request, the court may award suspensory effect to the complaint. Moreover the appeal success rate is only about 0.05%. A real chance to achieve a revocation of a securing order as unlawful exists only before a court of administrative justice. However the court does not have a statutory time limit for the review of a decision of an administrative authority. Securing orders agenda does not belong among the preferential petitions, which means the court disposes the petition within a chronological order in which the complaint reaches it. That is why the judicial review may take a very long time and there is no way to revoke securing order and terminate related tax execution within a reasonable time [Balcar 2018: 97 101].

8. Scope of Judicial Review

The practice of courts of administrative justice on the admissibility of judicial review of securing orders has been evolving. Until 2009, the courts did not allow a judicial review of securing orders at all. Therefore tax authorities could not lose any case. Since 2009 the Supreme Administrative Court has accepted the review of securing orders [Supreme Administrative Court: 9 Afs 13/2008-90] but the scope of review remained very limited, as the courts still refused to consider objections against facts related to an assessing proceeding, within the review of securing orders (issued within proceedings on the tax security). These two procedures are to be strictly distinguished. The problem of such limited review was that there was often not available any argumentation which a tax subject could successfully use against an unlawful securing order. The thing is that a reasonable concern, within the meaning of the section 167 of The Code of Tax Procedure, is de facto nothing more than just evaluation of assessing proceedings which has not yet been finished. Therefore tax subjects did not have reasonable chance to achieve revocation of an unlawful securing order neither within this period. This established practice has started to change slowly since 2014. However, not even today a full judicial review is allowed. For example a tax administrator's conclusion that a tax payer intentionally participated on committing a tax fraud cannot be disproved in proceedings on the tax security. Another problem is that assessing proceedings where this fact can be disproved may take several years and throughout this period the securing order is still effective and related tax execution is being performed [Balcar 2017: 84].

9. Securing Order – the Tool of Ultima Ratio

According to the principle of proportionality, a tax administrator is obliged to respect the rights and legally protected interests of tax subjects in accordance with legal regulations and, when demanding fulfillment of their obligations, it shall only use such means that burden them to the least extent and still make it possible to achieve the objective of tax administration - ascertainment and assessment of taxes and securing their payment. Courts of administrative justice have consistently stated that a securing order is the ultimate instrument of tax administration. However, it is the only effective tool, which, in a case of committing tax fraud, may be used by tax authorities to prevent the future tax uncollectibility. Whenever a tax administrator issues a securing order, it must pay close attention to whether it is possible to achieve the objective of proper tax collection by other means [Regional Court in Ostrava: 22 Af 8/2015-69]. A securing order is the tool ultima ratio and tax administrators must always consider the principle of proportionality. On the other hand there is no discretion - if the reasonable concern actually exists (and other - less distractive - tools are not sufficient) the tax administrator has no option but to issue a securing order [Regional Court in Brno: 62 Af 75/2014-230].

10. Compensations

If a securing order is reversed or changed due to the unlawfulness or incorrectness of the official procedure of the tax administrator, the sum that was paid by the tax subject under or in connection with such decision shall be refunded and the tax subject shall be entitled to the interest on the sum. The interest on the wrongful conduct of the tax administrator shall correspond, per annum, to the amount of the repo rate set out by the Czech National Bank (currently 2 % per annum), increased by 14 percentage points, and effective for the first day of the concerned calendar half-year, from the day following the due date of the incorrectly assessed tax, or if the incorrectly assessed tax was paid later, from the day of its payment. Where anything was exacted from the tax subject wrongfully, the tax subject shall be entitled to twice the interest – which currently means 32 % per annum.

If the damage caused by the unlawful securing order exceeds the value of such interest, the tax subject is also entitled to claim compensation for damage caused by the unlawful decision or incorrect official procedure of the tax administrator. In such case the interest shall be credited towards the granted compensation for damage.

A tax subject may also claim compensation for damages in a case of proving that a tax administrator has failed to decide on the termination of the effect of the securing order without undue delay or it has failed to decide on the change of the secured sum where conditions were met.

However, a problem arises in a situation where a tax administrator has issued a securing order (and has been performing a tax execution) but assessing proceedings will take a long time while the value of the assessed tax will be in the end much lower than the value of the security. In such situation the securing order will not be revoked because of its unlawfulness but “only” its effect will be terminated. Therefore a tax subject will be entitled neither to the interest on the wrongful conduct of the tax administrator nor to the compensation for damage caused by the unlawful decision of the tax administrator. I believe the position of a tax subject is completely unsatisfying in such situation and a special compensation needs to be enacted.

11. Is the Financial Administration Overusing Security Orders?

Securing orders have become a highly medialized topic in the Czech Republic. Using this tool by tax administrators is being criticized by tax subjects, by media and even by a part of professional public [Rambousek, 2014: 1-2]. Although tax authorities usually try to justify the high frequency of issuing securing orders by their fight against tax frauds, the fact is that a lot of securing orders were already revoked by courts of administrative justice.

Table 1: The number of securing orders issued

Year	2010	2011	2012	2013	2014	2015	2016	2017	2018
Number of decisions	100	109	269	467	1 032	1 605	1 561	1 420	1 174
Total value of security (in millions CZK)	2 578	1 877	2 848	6 118	4 172	3 633	3 329	1 594	1 472
Average value of security per decision (in millions CZK)	25,78	17,22	10,59	13,10	4,04	2,26	2,13	1,12	1,25

Source: The Analysis of the General Financial Directorate dated 31. 8. 2017, and the statistics on securing orders by the General Financial Directorate dated 30. 6. 2019.

The chart above shows that the number of issued securing orders was continuously increasing from 2010 to 2015 and since then it has been slowly decreasing and in 2018 it decreased rapidly. This has been caused by recent judgements of the Supreme Administrative Court. In long term, the average value of security per decision has been decreasing since 2010 (except years 2012 and 2018). I believe it is because tax administrators have started to use it not only in cases of significant tax frauds but also in “standard” situations.

The General Financial Directorate has made an analysis of the usage of securing orders which states that only a small group of VAT payers (less than 0.1 % of all VAT payers) has been affected by these decisions [The Analysis of the General Financial Directorate dated 31. 8. 2017]. The General Financial Directorate argues that tax administrators have been using securing orders extremely sensitively, under very strict conditions, as the last of the available tools and with the highest possible level of certainty of defending them before courts. The General Financial Directorate says that almost two thirds of tax subjects who had been affected by securing orders did not appeal and thus accepted the decision as legit [The Analysis of the General Financial Directorate dated 31. 8. 2017]. According to the analysis a proportion of the value of the set out security and the sum actually paid has been increasing dramatically in the last few years. The General Financial Directorate considers this fact to be proving an increasing quality of securing orders.

I find the statements mentioned in the previous paragraph misleading. In my opinion, the fact that the two thirds of tax subjects who have been affected by securing orders did not appeal does not mean that they accepted the decision as legit. If, by the end of 2016, the appeal success rate was about 0.05%, from the point of view of a tax subject affected by a securing order, there was no point in investing funds in filing such a useless legal remedy. Also such a low appeal success rate does not necessarily mean that the securing orders are legit. It can also be caused by a poor quality of the General Financial Directorate’s methodological manual which is binding not just for tax offices but for the Appellate Financial Directorate as well.

The statistics of tax subjects’ success in court proceedings concerning complaints against a securing order (against a decision of the Appellate Financial Directorate) are more misleading the longer period to the past is being considered. Till 2009 the judicial review was not allowed and therefore tax authorities could not lose any case. The chart below shows that in 2010-2016 the Tax Administration successfully defended 55 out of 74 securing orders (74.32 %) while 19 out of 74 (25.68 %) were revoked by courts of administrative justice. I do not find this ratio satisfactory at all, and moreover it should be considered that until 2014 the courts were completely refusing to consider objections against facts related to an assessing proceeding within the review of securing orders and therefore it was almost impossible for a tax subject to succeed in such court proceedings.

That is why the data from years 2015-2016 seem most relevant to me. In this period 10 out of 22 securing orders (45,45 %) were defended by the Tax Administration and 12 out of 22 (54,55 %) were revoked by courts of administrative justice. Although most of court proceedings have not yet been finished by the date of the analysis, I believe this ratio will not change dramatically.

Table 2: The success rate before courts of administrative justice

Year	Number of complaints against securing orders	Complaints dismissed	Securing orders revoked	Complaints rejected (procedural reasons)	Yet not decided (by the date of the analysis)
2010	4	2	1	1	0
2011	0	0	0	0	0
2012	17	15	0	1	1
2013	19	15	1	0	3
2014	20	11	5	0	4
2015	39	7	10	1	21
2016	52	1	2	1	48
Total	151	51	19	4	77

Source: The Analysis of the General Financial Directorate dated 31. 8. 2017.

I find also interesting the overall success rate statistics of complaints against decisions made by tax offices. The chart below shows the success of the Financial Administration versus the success of tax subjects before courts of administrative justice expressed in money. Although the data does not involve just securing orders but it is related to all kinds of decisions, it is obvious that the success rate of tax offices has been declining continuously.

Table 3: Success rate before courts of administrative justice expressed in money:

Year	Success of the Financial Administration (in billions of CZK)	Success of tax subjects (in billions of CZK)
2016	4,6	3,0
2017	2,4	2,0
2018	3,4	3,2

Source: The Financial Administration responds to misleading information about the increasing number of lost cases before courts, dated 11. 7. 2019.

Finally, the fact that a proportion of the value of the set out security and the sum actually paid has been increasing dramatically in the last few years is, in my experience, related to recent issues securing orders against not just “empty vessel companies” but also against common and prospering tax subjects which, according to tax authorities, intentionally participated on committing a tax fraud and which, at the same time, possess enough assets (to be confiscated in a tax execution).

I believe the problem is not that there are too many securing orders in total, but that there has been quite a lot of securing orders issued which are not legit. When demanding fulfillment of tax subjects’ obligations tax administrators may only use such means that burden tax subjects to the least extent and still make it possible to achieve the objective of tax administration. It must always be remembered that a securing order can often cause an “economic death” to a tax subject - unexpected and immediate. A securing order may be issued only if there is no other option to secure and collect tax properly.

12. Conclusions

A securing order is an effective tool to fight tax frauds but also a rather drastic restrictive measure which may have a significant impact on tax subjects’ property and - in some cases - their very existence. Issuing a securing order is appropriate if a tax subject has most likely committed a tax fraud. On the other hand I find not appropriate to use it as a common tax-securing instrument in situations where such suspicion does not exist.

The problem is the attitude of the Tax Administration to using securing orders. Despite the fact that in many cases the Appellate Financial Directorate did not find securing orders unlawful, the courts of administrative justice did. The independent review of decisions made by administrative authorities (including tax authorities) is the most important with such powerful instruments as a securing order. Courts are not bound by any guidelines or methodological manuals, but only by law and they do respect basic principles of tax administration such as principle of proportionality. Unfortunately such principles are not always respected by tax administrators. They often disregard such principles in due to achieve maximizing tax revenue. Therefore, judicial review of decisions made by tax administrators and in particular case law of the Supreme Administrative Court has an irreplaceable role in the system. Only the case law of the Supreme Administrative Court may compel the Financial Administration to withdraw from unlawful practices and to use securing orders within the limits of law. However, this process takes a long time, usually years, before the case law is settled. The concerned tax subjects may even not exist long enough to see that. So in my opinion it is worth considering some legislation changes.

I believe the conclusions regarding to an inadequate legal regulation, interpretation and application of securing orders may be generalized to be applicable not only to securing orders but also to other (even foreign) tax law institutes which have similar purpose.

Although the most serious problems have been already solved by the Supreme Administrative Court, there are still some to be dealt with. A question has arisen if it is appropriate to use undefined terms (such as reasonable concern, serious breach of the law, etc.) in legal regulation of such exceptional institutes. It has turned out that if the interpretation of the undefined terms is left to tax authorities, they tend to interpret it very widely with a purpose of maximizing tax revenue but not yet so much with respect to tax subjects' rights. Although this problem is being addressed by courts of administrative justice, it could take a long time till the practice of courts will be established. Until that, it is a tax subject, who bears the consequences of legal uncertainty.

Considering the fatal consequences these tools may have, I have come to the conclusion that it is absolutely necessary to grant an effective legal remedy to tax subjects in situations where the ultima ratio tools are used and particularly where the application of these institutes depends on an interpretation of undefined terms. In general there should be a proportion - the greater impact on tax subject's rights a tool represents the timelier and more effective legal remedy should be available.

I believe currently such legal remedy is not granted in the Czech Republic. It is important to find a way to grant to tax subject a revocation of an unlawful securing order and a discontinuation of a tax execution and adequate compensations – all in reasonable time.

In my opinion it is essential to accelerate the remedial procedures, for example by focusing on a full judicial review of securing orders. Courts should consider examination of evidence from the assessing proceedings which has not yet been finished and evaluate whether the concern is truly reasonable. The consideration of credibility and probability level of tax administrator's claims should also be involved in the review. Furthermore a complaint against a securing order should be preferentially disposed regardless of the chronological order in which petitions reach the court. The complaint should also be free of court fees.

More attention should be paid to controlling the tax administrators' duties fulfillment (for example to terminate the effect of a securing order without undue delay if reasons for its issuance ceased to exist) as well. In general there should be a proportion - the greater impact on tax subjects' rights a tool represents the more consistent the control of tax authorities should be.

And last but not least the problem is the absence of a legal instrument for a tax subject to claim compensation for damage caused by issuing of a securing order whose effect has been terminated long time after the securing order was issued. I believe a special compensation for such situations needs to be enacted. In general there should be a proportion - the greater impact on tax subjects' rights a tool represents the more reasonably the tax subject should be compensated in case of misuse of such tool by a tax administrator.

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