

Protection of Taxpayers' Rights in the Romanian Legislation

*Ioana Maria Costea*¹

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Abstract

Our study will analyse, in national and European context, the normative and administrative dimensions of the taxpayers' rights. Romanian legislation is generous in granting administrative rights to the taxpayer, especially in administrative procedures, such as communication with the administrative authority or tax control. The study will identify the legal regime of these rights and the legal consequences deriving from a possible breach. Romanian legislation also ensures a number of judicial rights, in accordance with the European Convention of Human Rights and the European Charter of Fundamental Rights. The judicial rights are at the centre of the study, especially in the cases when the procedure is mixed with criminal elements. However, a significant number of particularities of the tax procedure mutate the content of these rights, such as the object of the complaint, the access to a judge through a mandatory preliminary procedure. In this sense, taxpayers' rights have a different dynamic than the rights granted in common civil or criminal procedures. Through these lenses, our study will generate an inventory of rights underlining their enforcement regime and their particularities as to the common regulation.

Keywords

taxpayer; rights; charter; code; tax audit

1 Introduction

Our study tries to assure an analysis of the taxpayers' right in the national and pan-national legislation, with interrogations regarding the need for such a normative context, the content of these rights, the source and force of a unified regulation. The purpose

¹ PhD, Associate Professor, Department of Public Law, Faculty of Law, "Alexandru Ioan Cuza" University of Iași, Romania. The author specialises in finance law and tax law. She is the author of 8 books and more than 30 reviewed articles in prestigious journals. Contact email: ioana.costea@uaic.ro.

of the article is to observe some alive legal phenomena, where different levels of regulation are evolving and interacting simultaneously. These common elements and the continuous evolution has a set of common standards, but also leads to a variety of normative solutions. The study tries to identify the guideline of this process in evolution, with an accent on the minimum standards of action.

The study uses the comparative method of analysis of legal texts from different normative sources, both pan-national and national, and focuses on the particularities of the Romanian legislation in the contexts. Classical methods of legal analysis are used to identify and present normative, doctrinal and case law contents. The study continues a tradition in approaching this subject, in correlation with previous works (Costaş, 2008; Lazăr, 2015).

2 General Legal Framework of Taxpayers' Rights

All modern legislation has a particular interest in protecting the weakest party in a legal relation, especially within the frame of public law branches, such as administrative law, criminal law and fiscal law. Of course, the general groundwork is given by the instruments for protecting human rights, such as the European Charter, the European Convention and, traditionally, the national constitutions. These instruments have a variable efficiency in relation to the time frame of their intervention (for example, in a judicial procedure they are more preeminent than in administrative procedures) and to the intensity of the protection of the right (for example, criminal procedures tend to menace the right to life or freedom as tax procedures could affect the right to property or the right to a fair trial). As to specific domains of public activity, a certain necessity to regulate rights and procedures has been answered by national legislation. In the field of tax law, modern European legislation share a vastly spread formula of a Taxpayers Rights' Chart² or Code; a preoccupation for the subject has been shown at supranational level by bodies such as the International Monetary Fund, the Organisation for Economic Co-operation and Development, the European Union or the CFE Tax Advisers Europe (formerly known as Confédération Fiscale Européenne).³ The instruments in this field tend to meet at least two relevant questions: 1. Is a unique document a viable instrument for regulating these procedures and ensuring a standard of legal protection? 2. Which is the legal standard of protection and hence the enforceability of a certain regulation?

2.1 The national Charter or Code – An efficient unique document?

We have to underline that procedures in administrating taxes involve a significant quantity of rights and obligations for both sides of the legal relation, which define

² Catálogo de Derechos del Contribuyente, 2003.

³ European Commission, 2016.

themselves mutually. For example, the Romanian and the French legal solutions have been created to regulate in a distinct normative act – a Charter – a set of rights and obligations. As to the legal force of these normative interventions, in the Romanian example, the Charter is a normative act of third level, a normative administrative act such as an Order of the President of the National Fiscal Administration Agency (NFAA). However, the enforceability of the stipulated rights and obligations does not depend on the force of this source, as the regulation has a summative function and inventories procedures of tax administration, collects rights and obligations and then establishes a procedure of communicating these elements to the taxpayer prior to a tax audit. This legal formula has at least two vulnerabilities; firstly, there will never be a sufficiently comprehensive and supple normative solution to identify all aspects of a complex procedure as the tax procedure is. At its best, such a Charter can be a brief, accessible statement needing to be detailed by further regulation when applied to specific procedures. Secondly, the “interaction” between the taxpayer and the tax administration is extremely various and continuously founded on a “strong party – weak party” dynamic. When examining the context of these rights and obligations, they all blend under the general frame of constant communication between the two parties, not only during audit or litigation, but especially under current administration procedures: registration, debt determination, declarative procedures, authorising procedures, payments, forced execution, etc. Of course, audit procedures and subsequent litigation are the most acute interaction, captivating at normative level, but the complexity of the tax procedures which are regulated through a significant set of normative acts – Fiscal Procedure Code, special regulation for different procedures ensure a complexity of desirable conducts, prescribed by law which requires a broader regulation. All these normative interventions tend to stipulate rights and obligations of the parties as they prescribe a certain conduct in order to achieve the fundamental goal of generating public revenue. And if we add the ingredient of public interest, we can easily assume that these rights and obligations need a significant legal force in order to ensure effectiveness.

2.2 Which is the legal standard of protection?

These rights can be categorised into two major groups; one is granted by law to the public authority in order to ensure its tax functions and have a significant legal force deriving from the public interest and proven by the vast and extremely intense regime of sanctions applicable in tax administration: penalties, fines and criminal sanctions. The second is granted by law to the taxpayer, the weaker part in the tax legal relation in counterbalance with the first category. By regulating the taxpayers' rights and the means to sanction possible violations, the tax law ensures a protection of the taxpayer. This legal protection is necessary throughout the procedure, but with different intensity, an intensity that varies proportionally with the intensity of the public entity's prerogatives.

To the purpose of an effective protection, we can understand the normative intervention at the supranational level, such as the OECD or the European Union. It is certain that these instruments are *soft law* instruments, guides, guidelines and that the only purpose of such an intervention is to progressively generate a common standard of protection. This common standard, of course, serves as a minimum standard for national legislations and have human rights' dynamic to encourage a certain level of protection. It also accommodates a taxpayer's mobility as a common standard that will eventually facilitate the shifting of the taxable base from a jurisdiction to another under the same minimal procedural guarantees.

A general guide has an even easier task as to the national regulation as it will draw some defining lines of action and have a certain degree of generality that is comfortable in regulating. For example, the European Taxpayers' Code indicates the functions of such regulation, as a set of goals: *equal treatment of all taxpayers*,⁴ *a higher level of legal certainty, transparency, reduce disputes, standardise compliance processes, be a benchmark for third countries, improve practices and predictable assessment of tax liability, specify principles, ensure a better understanding when communicating with the tax administration of another Member State*. As to the content of these rights, the EU model proposes a set of principles governing this legal relation non-binding for the EU member states: lawfulness and legal certainty; non-discrimination and equality of taxpayers; presumption of honesty; courtesy and consideration; respect of the law; impartiality and independence; fiscal secrecy and data protection; privacy; and representation.

The OECD model (Practice Note)⁵ also proposes a number of standards, non-binding as well: lawfulness and legal certainty; non-discrimination and equality of taxpayers; presumption of honesty; courtesy and consideration; respect of law; impartiality and independence; fiscal secrecy and data protection; privacy; and representation.

CFE (Confédération Fiscale Européenne)⁶ Tax Advisers Europe⁷ proposes the same working strategy, conglomerated in a set of standards: integrity and equality; certainty; efficiency and effectiveness; appeal and the right to dispute resolution; appropriate assistance; confidentiality and privacy; payment of the correct amount of tax; representation; proportionality; and honesty.

Such principles are transposed by a proactive set of measures enforced to the public administration, that present a degree of generality, such as: providing information and guidance to taxpayers; services to taxpayers; key service standards; interpretations of a general nature; and advance rulings.

These instruments are stating a group of fundamental, general and all comprehensive set of rights and obligations. As to the rights, they have a general content, for example: the right to be informed, assisted and heard (OECD, EU Charter, CFE); the right to

⁴ European Commission, 2018.

⁵ EOCD, 2018.

⁶ Cadesky et al., 2015.

⁷ Ibidem.

an appeal (OECD); the right to reasonable procedures (CFE), the right to impartiality and independence (EU Charter); transparency (CFE); the right to representation (EU Charter); the right to pay no more than the correct amount of tax (OECD, EU Charter, CFE); the right to certainty (OECD, EU Charter, CFE); the right to privacy (OECD, CFE); the right to confidentiality and secrecy (OECD, EU Charter); the right of non-discrimination (EU Charter, CFE); and presumption of honesty (CFE).⁸

3 Romanian Taxpayers' Rights – A Brief Overview

The regulation in the Romanian legislation of taxpayers' rights (and obligations) seems to be given by the Order of the President of the NFAA (OPNFAA) no. 713/2004.⁹ A set of preliminary observations is necessary: 1. the enumeration is detailed, but not all-including – the Charter regulates only rights within the tax audit; 2. these rights are also regulated in the Fiscal Procedure Code, with significant content as the Code details the content of a certain right and its procedural dimensions, e.g. *the right to be notified about the future audit* is regulated in Art. 1 of the OPNFAA and in Art. 122 of the Fiscal Procedure Code, that is more elaborate and contains procedural aspects, exceptions, etc. We can firmly state that the Charter ensures only a communication channel and it only underlines some perspectives for the taxpayer. In fact, in order to assert his/her rights, the taxpayer has to consult a significant amount of legislation and determine the content of these rights; 3. there are also other procedural limitations as to the tax administration prerogatives which are not stipulated *expressis verbis* as rights of the taxpayers, but have a protective dimension and could lead to legal consequences in case of breach, such as the tax authority's obligation to present identification papers and a mandate at the beginning of the audit.

3.1 Different regulation sources

In order to properly assert the rights of the taxpayer under Romanian regulation, one should browse through the entire Fiscal Procedure Code and identify a conglomerate of elements, which we would categorise in administrative rights and audit-judicial rights.

One should start a general analysis from the principles of the Fiscal Procedure Code, stipulated in Arts. 4 to 12, such as legality, unitary enforcement of legislation, exercising the right to appreciation within the limits of reasonability and equity, active role and other rules of conduct for the fiscal authority, official language in tax administration, the right to be heard, the obligation to cooperate, fiscal secrecy and good faith (the presumption of honesty). Other rights, such as the right to be represented, are given by scattered provisions, such as the articles of the Fiscal Procedure Code.

⁸ Cadesky et al., 2015.

⁹ Order of the President of the NFAA, 2004.

Another significant source of rights and obligations are the provision for collecting and administering evidence and for the burden of proof; this procedural stage is not an audit-litigation related procedure, but essentially a procedure of day-to-day communication between the two parties. But as these two parties have contradictory interests and as a certain premise in factual elements can determine further legal consequences, the procedural elements for hearing the taxpayer or sampling of documents or material evidence of fiscally relevant facts can generate significant legal effects. In fact, we consider that in the entire tax administration process, the question of the burden of proof is a relevant one. The fiscal debt is indeed determined unilaterally by one of the two parties with contradictory intentions; the debtor has a central, but censored role. The creditor has a forceful intervention through audit and taxation decisions. These decisions – as administrative acts – benefit from the specific force of public acts and thus the legal relation is potentially disproportionate and damaging to the debtor. All taxpayers' rights tend to ensure protection from an abusive intervention of the public authority. In this context, the burden of proof is distributed between the two parties, as to the claim of their volitional act; the debtor has all kinds of accounting obligations in order to ensure access to correct and relevant tax information. The creditor – through the tax authority – tends to deny or supplement this initial evidence context, when convinced that tax debt is eluded or evaded. This process of proving a different tax context, as it intervenes with public authority and under a presumption of legality has set, through regulation and jurisprudence,¹⁰ a set of standards. These standards objectively generate a right of the taxpayer.

The most famous set of rights and obligations for the taxpayers derive from the procedure of tax audit; these rights tend to limit a forceful intervention of the public entity. The Romanian Charter provides for a set of rights,¹¹ which are characterised by

¹⁰ Court of Justice of the European Union, 2015, request for a preliminary ruling from the Naczelny Sąd Administracyjny, reference for a preliminary ruling – Taxation – Value Added Tax – Sixth Directive – Right of Deduction – Refusal – Sale by an entity regarded as non-existent, par. 50: *“It is for the tax authorities, having found fraud or irregularities committed by the issuer of the invoice, to establish, on the basis of objective factors and without requiring the recipient of the invoice to carry out checks which are not his responsibility, that that recipient knew, or should have known, that the transaction on which the right to deduct is based was connected with VAT fraud, this being a matter for the referring court to determine (see, to that effect, judgments in Bonik, C-285/11, EU:C:2012:774, par. 45, and in LVK — 56, C-643/11, EU:C:2013:55, par. 64).”*

¹¹ 1. The right to be informed about the fiscal inspection (as confirmed by the tax inspection procedure through the approval phase); 2. the right to be audited only for taxes and social contributions within the limitation period (as enshrined in the statute of limitation in tax law and in the provisions of Art. 117 of the Tax Procedure Code); 3. the right to request the change of the starting date of the tax inspection (as established by Art. 122 par. 5, Fiscal Procedure Code); 4. the right to be verified once for each tax or social contribution and for each period subject to verification/taxation (as established by Art. 118 par. 3, Fiscal Procedure Code); 5. the right to request the legitimating of the tax inspection bodies (the correlation obligation is imposed by Art. 118 par. 4, Fiscal Procedure Code); 6. the right that the activity of the taxpayer/payer be affected as little as possible during the audit (Art. 118 par. 6, Fiscal Procedure Code); 7. the right to be informed (Art. 118 par. 6, Fiscal Procedure Code); 8. the right to be first requested to provide information (no longer has the normative support under the Fiscal Procedure Code); 9. the right to refuse to provide information (Art. 66, Fiscal Procedure

normative doubling, as these rights are also regulated by the Fiscal Procedure Code. This double regulation diminishes the legal context and we assume that the Charter, as a normative act with minor legal force, is reduced to a communication tool, a form of leaflet to caution the taxpayer on the importance of the moment and the existence of these rights. The Charter content is “supplemented” (in fact, it is effectively regulated) by the provisions of the Fiscal Procedure Code and even other normative acts. A consistent legal advice would be complete only in correlation with these texts. For example, *the right to be audited only for taxes and social contributions within the limitation period* can be determined as to its content only in correlation with the provisions regulating the statute of limitations in the Fiscal Procedure Code, Civil Code and Civil Procedure Code. The mechanism of determining the viability of a tax creditor’s right through the filter of the statute of limitations is rather complex and implies an analysis of the generating moment, of the possible interruptions/extensions in the course of the term; *the right to be audited only once* is also a complex legal construct, as it has a complex filter for application and a number of exemptions that are regulated by the Fiscal Procedure Code.

The right to appeal is the most complex right in the tax procedure; this right is extremely regulated under the Romanian Fiscal Procedure Code, with the heavily accentuated role of the preliminary procedure. This regulation in the Fiscal Procedure Code is contextualised by the regulation in the Law regarding administrative procedure and the Civil Procedure Code. The first line of regulation from the Fiscal Procedure Code puts an accent on the role and content of the preliminary procedure. This accent on the administrative source of the conflict leads to a filtered access to the court through a preliminary appeal submitted and defended under strict procedural regulations in front of the tax authority. The filter is extremely formal as it tends to postpone the hearing before a judge to after the preliminary procedure is closed by the grace of the tax authority. Only in case of failure to respond to the administrative appeal within a six months’ delay, the taxpayer can address the Court. This limitation is enhanced in comparison to other administrative procedures and it is criticised within the national doctrine¹² as an obstruction of the right to a fair trial by delaying the right to appear before a judge.

As to the sanction guaranteeing the implementation of these rights, we also underline a mitigated regime. The intervention of the judge in order to protect such a right is done under two forms. One is a direct intervention, where the law stipulates certain sanctions. For example, it is the case of infringement of the norm regulating the duration of the tax audit, where the law stipulates the sanction of closing all procedures and thus the judge will confirm the nullity of the tax decision issued after

Code); 10. the right to receive specialised assistance (expressly referred to in Art. 124 par. 3, Fiscal Procedure Code); 11. the right to be protected by the fiscal secret (enshrined in Art. 11, Fiscal Procedure Code); 12. the right to receive written proof in the case of retaining documents by the tax inspection bodies; 13. the right to know the results of the tax inspection (Art. 130 par. 2, Fiscal Procedure Code); 14. the right to challenge the tax assessment decision issued after the tax inspection (Art. 281, Fiscal Procedure Code).

¹² Lazăr, 2015: 118.

this period. The other one is an indirect intervention (vaguer and more general), when the taxpayer should prove a relative nullity under the condition of a patrimonial prejudice. For example, if the right to be heard was not respected, the nullity is conditioned by a supplement of evidence, showing not only the infringement of the right, but also patrimonial consequences of such an infringement (which are difficult to prove).

3.2 New rights on the horizon?

As to the evolution of this regulatory mechanism, we can observe the fact that this regulation is rather static. The national sources date back from 2004 and are rather stable as to their content. The supranational instruments are more dynamic, but tend to evolve in large periods of time, even decades. So the practical dimension has an important role in pushing boundaries and promoting new ideas.

One example is the protection of natural persons with regards to processing of personal data and on the free movement of such data. Even if at a general level this preoccupation for the protection of secrecy in tax procedures is confirmed, a new dimension of the problem is given by the arising issue of protecting personal data. The context is confirmed by the CJUE jurisprudence in case C-201/14 originating from Romania, the Bara case. The Court established that: *“Articles 10, 11 and 13 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data, must be interpreted as precluding national measures, such as those at issue in the main proceedings, which allow a public administrative body of a Member State to transfer personal data to another public administrative body and their subsequent processing, without the data subjects having been informed of that transfer or processing.”* In this context, a new light on the taxpayers’ right is cast, as a non-fiscal regulation generates a fiscal effect.

Another example is the constant communication of the tax authorities in the European framework. In the light of the cooperation instruments used by tax authorities and of the mobility in the internal market, a new right is emerging in order to protect the taxpayer against unnecessary expenses in order to communicate with different tax administrations. One of the purposes of the European Charter is the *availability of information in several languages and promotion of a commonly used language*. This instrument is more than necessary, but still, it involves supplementary costs for the taxpayer. New and simplified communication schema is needed in order to reduce translation procedures and costs in tax procedures.

4 Conclusions

Our study has identified a series of difficulties in granting a solid and effective context of administrative and judicial rights to the taxpayer. The taxpayer has a number of rights that vary in intensity and utility, as to the content of the regulation and the moment in the procedural agenda. The perspective of further evolution at a national and supranational level is a direction worth investing in and would probably influence the quality of the dialogue between taxpayers and the tax authority.

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