

# Ne Bis in Idem in the Tax Process

*Damian Czudek*<sup>1</sup>

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## Abstract

The article deals with the institute of deadlines within the framework of the Tax Code, especially the possibilities and obligation of the tax administrator to extend the deadline on the request of a taxpayer. The article focuses in particular on the analysis of decisions of administrative courts and, on the basis of this, tries to define theoretical legal bases for the conditions that the tax administrator examines if the tax payer files the request for an extension of the deadline.

## Keywords

time; deadline; extension on request; tax

## 1 Introduction

Time and follow-up institutes are an important element of any, not just tax, process. Although they may appear to be of little importance at first glance, they enable to apply principles of tax administration (e.g. principle of economy) (Section 7 of the Tax Code) and aim at achieving the basic objective of tax administration, i.e. to assess and select tax [Section 1 (2) of the Tax Code]. They also help to increase the legal certainty of taxpayers, since tax proceedings and its individual institutes are properly circumscribed over time, and provide limits not of the tax administrator but also of the taxpayer (Section 148 and 160 of the Tax Code).

A meaningful definition of the purpose of deadlines in the Act no. 280/2009 Coll., Tax Code, as amended (hereinafter: Tax Code) has been brought by the Constitutional Court: *“The purpose of the institute of deadlines in general is to reduce the entropy (uncertainty) in the exercise of rights respectively the competence, the time limitation of*

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<sup>1</sup> Dr Mgr., PhD, Department of Financial Law and Economics, Faculty of Law, Masaryk University, the Czech Republic. The author specialises in tax law and control of public finances. Contact email: [damian.czudek@law.muni.cz](mailto:damian.czudek@law.muni.cz).

*the state of uncertainty in legal relations, the speeding up of the decision-making process in order to achieve real goals*" (The Constitutional Court, III ÚS 738/2000). The Supreme Administrative Court added: *"The deadlines are therefore mainly used to enhance legal certainty in legal relations. The deadlines strengthen legal certainty not only in private law relations, which should be designed in such a way as to ensure equally the legal certainty of all parties to a particular legal relationship, but also in the context of public-law relations. In the case of public-law relations, it is also necessary to take into account the principle according to which the state authority may be asserted only in cases, within the bounds, and in the manner provided for by law [Article 2 (3) of the Constitution and Article 2 (2) of the Charter of Fundamental Rights and Freedoms]"* (The Supreme Administrative Court, 2 Afs 144/2004-110).

This article deals with the taxpayer's request, respectively the request of any other person involved in the tax administration, for the deadline extension. Its purpose is to describe the basic conditions that must be fulfilled in order to extend the deadline. The article is based on the hypothesis that the only condition that the tax administrator examines if the tax payer files the request for an extension of the deadline which is set by the tax administrator, is a serious reason to justify the request.

## **2 Legislation**

With regard to the principles on which the Tax Code is based, the taxpayer has the right, in accordance with Section 115 (2), to acquaint himself with new facts and in particular to comment on the new facts which the tax authority (appellate body) has discovered in the course of the taking of evidence in the appeal proceedings and the evidence, which prove them. This corresponds to the duties of the tax administrator: a) to inform the taxpayer of the new facts and evidence that prove them; b) to allow the tax entity to comment on the new facts and evidence; and c) to set a deadline for the taxpayer. The deadline may be set for a maximum of 15 days by the tax administrator. The amendment to the Tax Code, which was implemented by Act no. 30/2001 Coll., allows the tax administrator to extend the deadline for comment on the request of the tax payer in accordance with the provisions of Section 36 of the Tax Code.

The institute of the request for the extension of the deadline under Section 36 of the Tax Code is intended to enable the taxpayer to prepare properly for the defence of his interests. In general, an extension of the deadline may be requested both within the deadline laid down by law (statutory deadlines) and within the deadlines set by the tax administrator (on the basis of specific or general competence of the tax administrator). In case of statutory deadlines, the Tax Code contains a limitation that the extension must be expressly permitted by the law. Paragraph 36 (5) of the Tax Code establishes another condition which must be investigated by the tax administrator when assessing the application for an extension of the deadline. The deadline cannot be extended if the law associates the expiration of the deadline with the termination of

the right. According to Šimek et al. (2011) the administrative deadline defined in Section 115 of the Tax Code for the comment on the new facts and evidence which proved them in the appeal proceedings, is the deadline with which the law associated the termination of the law. In this case, the right to propose further evidence terminates, respectively the tax administrator is not obliged to take the evidence into account (Nejvyšší správní soud, 1 Afs 321/2016 – 31).

Section 36 (3) of the Tax Code provides for certain legal guarantees designed to protect the right of the taxpayer to properly defend his interests and, on the other hand, to exert pressure on tax administrators to economic decision making. The first guarantee is the legal fiction of the tax administrator's consent with an extension of the deadline if the decision to extend the application is not issued within 30 days of the date of the receipt of the taxpayer's request. The second guarantee responds to a situation where the tax administrator's decision to extend the deadline is delivered after the expiry of the deadline (and it must be added that the request has not been fully complied with). In this case the Tax Code states that the deadline is automatically extended by the time which remained at the time of filing the request until the original deadline expiration. If these conditions are fulfilled, the deadline is extended *ex lege*.

### 3 Case Law

The tax administrator has imposed the value added tax additionally. The tax administrator justified the decision by the fact that the taxpayer had failed to prove the actual realisation of the taxable transactions which had to consist in the delivery of the advertisements placed on the cars. The taxpayer filed an appeal against the payment order. In the course of the appeal proceedings, the tax administrator made evidence of witnessing. The record of the evaluation of the evidence was submitted to the tax subject at the oral hearing on 27 November 2014. The tax entity had the opportunity to comment on the tax administrator's conclusions within 10 days from delivery (until December 8, 2014 as Monday). The taxpayer on the second day (28 November 2014) submitted a request to extend the deadline for comment by 15 days (i.e. by December 22, 2014). The tax administrator complied with the request partially. By the decision of 2 December 2014, the tax administrator extended the deadline until 17 December 2014 (i.e. 9 days). The decision to extend the deadline was delivered to the taxpayer on December 12, 2014. The tax administrator issued a payment order on 19 December 2014. The taxpayer's statement was received by the tax administrator until December 22, 2014.

The taxpayer appealed to the Administrative Court on 19 December 2014, on the ground that the decision was unlawful because the proceedings that preceded it were affected by an inalienable procedural defect. According to the taxpayer opinion, the deadline for commenting the evaluation of evidence according to the provisions of Section 36 (3) of Act no. 280/2009 Coll., Tax Code expired on December 22, 2014,

when the tax administrator actually received a statement of the tax subject. The taxpayer also referred to the instruction in the decision of the tax administrator, which extended the deadline: “If the decision that does not fully comply with the request is notified (delivered) after the expiry of the deadline for which the extension is requested, the end of this period ends with the expiration of the number of days remaining after the date of notification of this decision, how many days remained at the time of application until the expiry of the time limit.”

The tax administrator disagreed with the taxpayer’s arguments. He considered that the provisions of Paragraph 36 (3) of the Tax Code provided that “the extension of the deadline due to the late notification of the decision only occurs when the decision to extend the deadline is notified only after the expiry of the new deadline.” In this case, it was not. The decision to extend the deadline was delivered to the taxpayer before the expiry of the deadline.

The Regional Court annulled the decision of the Appealing Financial Directorate and returned the case for further proceedings. The regional court agreed with the objection of the taxpayer and closed the case with the conclusion, that the expiration of deadline for comments was on 22 December 2014 and the tax administrator should issue a decision on the appeal only after it expires. By issuing a decision on the appeal on 19 December 2014, the tax administrator has breached the procedural right of the taxpayer to comment on the factual situation under Section 115 (2) of the Tax Code.

The Appealing Financial Directorate filed a cassation complaint against the decision of the regional court, in particular on the grounds that the provision of Section 115 (2) of the Tax Code cannot be extended by a request within the meaning of Section 36 (1) and (5) of the Tax Code because it is a statutory deadline (determined by law), not an administrative deadline (determined by the tax administrator), and the law associates it with the termination of the taxpayer’s rights.

The Supreme Administrative Court dismissed the cassation complaint for its unreasonableness. According to the Supreme Administrative Court, the deadline laid down in Section 115 (2) of the Tax Code is a typical example of an administrative deadline. Regarding the application of the provisions of Section 36 (5) of the Tax Code, the Supreme Administrative Court stated that the condition for the termination of the taxpayer’s rights relates only to the termination of material, not procedural rights. If the provisions of Section 36 (5) were to cover the termination of procedural rights, the provision would not be applicable. By the expiration of the procedural deadline, the procedural rights always terminate, i.e. the right to make a specific procedural act. Further, the Supreme Administrative Court referred to an amendment to the Tax Code, which came into force on March 1, 2011 and removed the part of sentence from Section 115 (3) of the Tax Code, which prevented the tax administrator from extending the deadline set by the tax administrator for the comments.

The Supreme Administrative Court agreed with the Regional Court judgment. The tax administrator should apply the provisions of Section 36 (3) of the Tax Code which provide: "If a decision which does not fully comply with the request is notified after the expiry of the deadline for which the taxpayer requests, the deadline shall expire after such days after notification (delivery) of the decision as how many days remained until the expiry of the deadline on a day when the request was received by the tax administrator." As the decision on the deadline extension was delivered, i.e. on December 12, 2014 and 9 days of the original deadline was left, according to Section 36 (3) of the Tax Code, the deadline expired 9 days from the date of delivery of the decision (on December 22, 2014). The tax administrator should have decided after the expiry of this deadline (after December 22, 2014). The tax administrator, by this action, affected the rights of the taxpayer to comment on the evidence supplemented in the context of the appeal proceedings.

Fiction of decision, respectively of the consent to the extension of the deadline also appears in the Tax Code in the light of the principle of economy. The tax administrator must comply with the first application, which, in particular, in the case of request for a short extension or the request for a relatively short extension filed just before the deadline will lead to the factual impossibility of the tax administrator to decide otherwise than to actually agree with the extension, because he will not be technically and practically able to issue a decision within a short deadline, but mainly he will not to be able to announce it in this deadline. Therefore, the provision is in principle designed so that in the case of full consent to the application, de facto, there is no need to issue a decision because of the fiction of decision stated by the Tax Code. In the case of partial consent or disagreement with the tax administrator, with regard to the legal certainty of the taxpayer, the law provides, that on the day of delivery of the decision to extension of the deadline, the taxpayer will always have at least as many days to meet the obligations as he has in the moment of filing the request. That means that issuing consistent decisions, or even disapproval, as in our case, is unnecessary and ineffective.

In this case, the taxpayer used its procedural rights quite smartly. The tax administrator responded promptly on request and issued a decision on the second working day after the request was made. However, the taxpayer did not hurry to pick up the delivery (from December 3, 2014 to December 12, 2014) and the delivery occurred just before the delivery fiction stated by the Tax Code. And since he is aware of the legal regulation, he was aware that although the tax administrator's decision would be any, the deadline would not end before 9 days from the day of delivery of the new decision.

The question is, why the tax administrator reacted this way. If he did not respond at all and "saved" the action, the result would be the same. This should be assumed by a smart tax administrator. It would be clear from the whole situation that he was interested in resolving the appeal to reach the deadline stated for the tax assessment.

## 4 Conclusion

The essence of the analysed decisions of the administrative courts is the question whether it is possible to extend the deadline to comment on the new facts and evidence that prove them in the subsequent appeal proceedings established pursuant to Section 115 (2) of the Tax Code by the tax administrator.

The tax administrator based his argumentation on the interpretation that the deadline under Art. 115 (2) of the Tax Code is the statutory deadline, i.e. a time limit which may be extended by the tax administrator only if the law so provides. In this case, the Regional Court in Brno and the Supreme Administrative Court together with the commentaries on the Tax Code agree that the deadline under Section 115 (2) of the Tax Code is a typical administrative deadline, within the deadline set by the tax administrator, in this case, by explicit legal authorisation (Nejvyšší správní soud, 1 Afs 321/2016 – 31).

Furthermore, the tax administrator has inferred that the deadline defined in Section 115 (2) of the Tax Code is the deadline which is associated with the termination of the right, hence it is a deadline which cannot be extended under Paragraph 36 (5) of the Tax Code (Lichnovský et al., 2016).

In this case, the Supreme Administrative Court assumes that the limitation laid down in Section 36 (5) of the Tax Code applies only to the termination of material rights, because in case of procedural rights such a provision would be devoid of purpose and would not be applicable (Nejvyšší správní soud, 1 Afs 321/2016 – 31). It is necessary to agree with this interpretation. The procedural right of a taxpayer, which is associated with a certain deadline, must always be extinguished if it is not applied within the set deadline. It is the essence of the institute of deadlines in tax proceedings.

The objective is to achieve the maximum efficiency of tax administration, i.e. to temporarily limit it to fulfil the basic objective of tax administration (to impose and collect tax) [Section 1 (2) of the Tax Code], while protecting the rights and interests of the taxpayer to the maximum extent possible. Therefore, it is not possible to agree with Šimek et al. (2011) that according to Paragraph 36 (5) of the Tax Code, the deadline under Section 115 (2) of the Tax Code cannot be extended by reference to the fact that the law associates it with the termination of the right of the taxpayer to propose evidence. In addition, with regard to the principle of free evaluation of evidence, the tax administrator is not bound by the taxpayer's proposal (Nejvyšší správní soud, 1 Afs 321/2016 – 31). The right of the taxpayer to propose evidence therefore still exists, but is significantly weakened as a result of the expiry of the deadline.

The hypothesis set out in the introduction has been confirmed. The only condition that the tax administrator examines for the request for a procedural deadline extension set by the tax administrator is the serious reason which justifies the request. In case of procedural deadlines, the restriction according to Section 36 (5) of the Tax Code cannot be applied.

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