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Fundamental Principles in Tax Audit Procedures to Ensure Legal Security of Taxpayers

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Abstract:
The principle of legal security is a constitutional concept derived from the rule of law, which is especially significant in taxation, where public and private interests often conflict. This paper examines key principles ensuring taxpayers' legal security in tax audit procedures within the Slovenian legal system. It addresses the binding nature of the law on tax authorities, the principle of ex officio investigation, the duty and limits of cooperation, evidentiary restrictions under the principle of material truth, decision-making in cases of doubt (*in dubio pro reo*), the finality of administrative acts, and statutes of limitation. The analysis is based on the premise that legal security is a dynamic concept that has evolved over time and continues to develop, with increasing emphasis on its defining requirements.

Keywords:
rule of law, legal security, taxes, tax procedures, being bound by the law, duty to cooperate, evidentiary procedure, evidentiary limitations, finality, statute of limitations

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Introduction

The principle of legal security is a constitutional category and an important component of the rule of law. It provides taxpayers with confidence in the tax system, as legal security ensures (or at least should ensure) the predictability and transparency of taxation. For the legislator, it serves (or should serve) as a guideline when adopting substantive tax rules. Legal rules (especially tax rules) should not contain so-called general clauses, nor should they include elements that render them imprecise, unclear, incomprehensible or ambiguous. The principle of legal security plays a role in both substantive (tax) law and procedural tax law (everything that is legally relevant for determining tax liability must be decided lawfully and in accordance with pre-established procedures). The principle (of legal security) is not explicitly "independently formulated" or individually regulated by a separate article of the Constitution of the Republic of Slovenia (*Ustava Republike Slovenije*, hereinafter: URS)[1] but is derived from the principle of the rule of law and is thereby concretised through certain other constitutional principles. The Constitutional Court of the Republic of Slovenia case law has also "elevated" it to a constitutional level (for instance, Constitutional Court of the Republic of Slovenia decisions (*Odločba Ustavnega sodišča*, hereinafter: OdlUS): OdlUS No. U-I-13/94, OdlUS No. U-I-77/98, OdlUS No. U-I-32/02, OdlUS XII, 71, OdlUS No. U-I-227/06, OdlUS No. U-I-245/05, OdlUS No. U-I-28/2016, etc.).[2]

Tax procedure is a special administrative procedure regulated by the Tax Procedure Act (*Zakon o davčnem postopku*, hereinafter: ZDavP-2)[3], which is a special procedural regulation. However, the Tax Procedure Act is not the only legislation governing issues concerning tax supervision procedures. In addition to the provisions of the ZDavP-2, the provisions of the Financial Administration Act (*Zakon o finančni upravi*, hereinafter: ZFU)[4] and certain provisions of

[1] "Constitution of the Republic of Slovenia" (Ustava Republike Slovenije, URS), *Uradni list Republike Slovenije* (*Official Gazette of the Republic of Slovenia*), No. 33 (1991)-I (with subsequent amendments and supplements, last amended by the Constitutional Act 62a, *Uradni list Republike Slovenije* (*Official Gazette of the Republic of Slovenia*), No. 92 (2021)).

[2] "OdlUS No. U-I-13/94", *Uradni list Republike Slovenije* (*Official Gazette of the Republic of Slovenia*), No. 6 (1994); OdlUS No. U-I-77/98, *Uradni list Republike Slovenije* (*Official Gazette of the Republic of Slovenia*), No. 59 (1999); OdlUS No. U-I-32/02, *Uradni list Republike Slovenije* (*Official Gazette of the Republic of Slovenia*), No. 73 (2003); "OdlUS XII, 71", "OdlUS No. U-I-227/06", *Official Gazette of the Republic of Slovenia*, No. 131 (2006); OdlUS No. U-I-245/05, *Uradni list Republike Slovenije* (*Official Gazette of the Republic of Slovenia*), No. 15 (2007); OdlUS No. U-I-28/2016, *Uradni list Republike Slovenije (Official Gazette of the Republic of Slovenia)*, No. 42 (2016).

[3] "Zakon o davčnem postopku", *Uradni list Republike Slovenije* (*Official Gazette of the Republic of Slovenia*), No. 117 (2006) with subsequent amendments and supplements.

[4] "Zakon o finančni upravi", *Uradni list Republike Slovenije* (*Official Gazette of the Republic of Slovenia*), No. 25 (2014) with subsequent amendments and supplements.

the Inspection Act (*Zakon o inšpekcijskem nadzoru*, hereinafter: ZIN)[5] should be taken into account, as well as the provisions of the General Administrative Procedure Act (*Zakon o splošnem upravnem postopku*, hereinafter: ZUP)[6], which apply subsidiarily in tax matters.

The rights, obligations and legal interests that individuals hold in the field of taxation, which are generally stipulated under substantive regulations, are exercised through tax procedures, which naturally also include tax supervision procedures. Tax procedures, and thus tax supervision procedures, are so-called mass procedures,[7] as the financial administration has to decide on the rights and obligations of a large number of persons each year and issue the corresponding administrative acts, with the relevant facts potentially relating to numerous life events in a taxpayer's financial sphere. Any application of a legal rule presupposes that the factual situation is correctly ascertained. The facts of the case are established by selecting from a specific historical event those facts that are legally relevant and thus capable of being subsumed under the legal rule to be applied. The facts of the case, which constitute the "core" of adopting a legal decision in all types of tax supervision procedures, are determined within the so-called tax fact-finding procedure, in which the principle of legality (Article 4 of ZDavP-2); the principle of material truth (Article 5 of ZDavP-2), which contains a general prohibition of making decisions based on merely probable facts and mandates the duty to proceed *in dubio pro reo*; as well as the principle of protecting the rights of the parties and the public interest, as enshrined in the ZUP, which intervenes in the field of tax procedures by requiring the correct substantive and procedural conduct of proceedings, are particularly prominent.[8]

Establishing and proving facts in all types of tax procedures (and thus also in tax supervision procedures), therefore, necessarily takes place with due regard for the fundamental principles of tax procedure, whose primary purpose is to limit the power of authorities when performing official acts and thereby ensure the legal security of taxpayers. Complying with such principles is the official duty of the authority conducting the procedure and serves to ensure the legal security of persons liable for tax (the principle of the rule of law). The fundamental principles of administrative and especially tax procedure regulate the

5 "Zakon o inšpekcijskem nadzoru", *Uradni list Republike Slovenije* (*Official Gazette of the Republic of Slovenia*), No. 56 (2002).

6 "Zakon o splošnem upravnem postopku", *Uradni list Republike Slovenije* (*Official Gazette of the Republic of Slovenia*), No. 80 (1999).

7 Klaus Tipke and Heinrich Wilhelm, Kruse, *Abgabenordnung/Finanzgerichtsordnung* (Köln, 2010), commentary on Article 2.

8 Klaus Tipke, *Die Steuerrechtsordnung*, Band III (Köln, 1993), p. 1186 (hereinafter: Tipke, *Die Steuerrechtsordnung*).

delicate relationship between private and public interest and thus the conflict of interests, recognising that the public interest in tax collection is neither absolute nor unlimited. The principles hold a double significance. They constitute the minimum procedural standards that must be respected or implemented in every tax procedure, and they also function as interpretative rules in applying specific procedural concepts and provisions of tax legislation.

Development of procedural tax law in the Republic of Slovenia

As noted above, the tax procedure is a special administrative procedure regulated in the Republic of Slovenia by the Tax Procedure Act (ZDavP-2) as a special procedural regulation. Furthermore, the General Administrative Procedure Act (ZUP) provisions apply subsidiarily to issues not regulated by the special provisions of ZDavP-2. Certain issues relevant to the proper and lawful conduct of procedures are also governed by other legislation in the field of tax law.

Unlike the ZUP, which can be regarded as more or less a "legacy" of the former common state (even though 1999 is stated as the year of its publication in the *Official Gazette of the Republic of Slovenia*) and which has, at the same time, hardly undergone any changes in the past twenty years, the special regulation of procedural tax law constitutes a relatively young field of law in the Republic of Slovenia, and one that has also been subject to numerous and frequent changes.

The first General Administrative Procedure Act (*Zakon o občem upravnem postopku*) for the territory of the Kingdom of Yugoslavia was adopted as early as 1930. Even before, Austria was the first country to enact rules on general administrative procedure (in 1925).[9] After the end of World War II, the 1930 Act ceased to apply based on the Act on the annulment of legal regulations issued before 6 April 1941 and under enemy occupation (*Zakon o razveljavljenju pravnih predpisov, izdanih pred 6. aprilom 1941 in med sovražnikovo okupacijo*, 1946), although procedures continued to be conducted indirectly based on this act in practice. Somewhat later, certain principles of administrative procedure were enacted (the General Law on People's Committees – *Splošni zakon o ljudskih odborih*, 1946) that governed the conduct of the people's committees, which were supplemented or expanded in subsequent years.

[9] Vilko Androjna, *Splošni upravni postopek in upravni spor* (Ljubljana, 1971), p. 17. See also Vilko Androjna and Erik Kerševan, *Upravno procesno pravo. Upravni postopek in upravni spor* (Ljubljana, 2006), p. 36 (hereinafter: Androjna and Kerševan, *Upravno procesno pravo. Upravni postopek in upravni spor*); Truda Nemeš, *Osnove upravnega postopka in upravnega spora* (Ljubljana, 1990), p. 14 (hereinafter: Nemeš, *Osnove upravnega postopka in upravnega spora*).

The enacted principles of administrative procedure addressed only certain procedural issues. Some substantive regulations also included provisions on administrative procedure, which typically governed particular issues concerning special administrative procedures.[10] The needs that arose in practice dictated the enactment of rules of (administrative) procedure in which the authorities decide on the rights, obligations and legal interests of individuals. This codification took place in 1956 (becoming effective in 1957) with the adoption of the General Administrative Procedure Act, thus filling a gap in the field of administrative procedural legislation. The 1956 Act was subsequently amended several times (most recently in 1986)[11] and, in practical terms, continued to be applied in the Republic of Slovenia even after independence (based on Article 4 of the Constitutional Act Implementing the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia – *Ustavni zakon za izvedbo temeljne ustavne listine o samostojnosti in neodvisnosti Republike Slovenije*, 1991). It was not until 1999 that it was replaced by the (current) General Administrative Procedure Act, which substantively meant a continuation of the previous administrative procedural regime (although certain substantive changes were also introduced). Since then, the General Administrative Procedure Act has been amended only four times.[12]

In contrast to the rules of general administrative procedure, the rules of procedural tax law in the sense of their codification into a single legal act began to be formulated only after Slovenia's independence, specifically in 1996. That year saw the adoption of the first Tax Procedure Act (*Zakon o davčnem postopku*, ZDavP), as until then, tax procedures had been conducted based on the General Administrative Procedure Act and the Act on the Agency of the Republic of Slovenia for Payment Transactions, Supervision and Information (*Zakon o Agenciji RS za plačilni promet, nadziranje in informiranje*). The need to codify the procedural tax legislation arose following the adoption of the first Tax Administration Act (*Zakon o davčni službi*), which merged the two institutions responsible for tax services at that time (RUJP and APPNI) into a single tax administration.[13] Certain procedural provisions (exclusively those that allowed for the assessment and recovery of particular forms of taxes in practice rather than provisions intended to ensure the legal security of taxpayers) were contained in the substantive tax legislation in force at the time (Personal Income

[10] See Androjna and Kerševan, *Upravno procesno pravo. Upravni postopek in upravni spor*, p. 38.

[11] Nemeš, *Osnove upravnega postopka in upravnega spora*, p. 17.

[12] Androjna and Kerševan, *Upravno procesno pravo. Upravni postopek in upravni spor*, p. 40.

[13] See Marjan Špilar, *Posebni instituti davčnega postopka v razmerju do varstva javnega interesa in varstva pravic zavezancev*, doktorska disertacija, Univerza v Mariboru, Pravna fakulteta (Maribor, 2018), p. 29 (hereinafter: Špilar, *Posebni instituti davčnega postopka v razmerju do varstva javnega interesa in varstva pravic zavezancev*).

Tax Act – *Zakon o dohodnini*, Corporate Profit Tax Act – *Zakon o davku od dobička pravnih oseb*, Civil Tax Act – *Zakon o davkih občanov*, General Sales Tax Act – *Zakon o splošnem prometnem davku*).

The first ZDavP essentially incorporated the procedural provisions from the substantive tax legislation effective at the time and added certain new provisions dictated by the special nature of tax matters and the reorganisation of the tax service. It consisted of only two parts: a general part (applicable to all types of taxes) and a special part (applicable to the recovery of specific types of taxes). It did not contain any provisions aimed at ensuring legal security for taxpayers (specific fundamental principles), except for the statute of limitations. Thus, it can be stated that the first ZDavP did not provide adequate legal security to taxpayers in tax procedures, and the number of administrative disputes increased significantly as a result.[14]

Because of the unclear and incomplete provisions of the ZDavP, it became necessary to amend the rules of tax procedure, and a new piece of legislation on tax procedure, the Tax Procedure Act (ZDavP-1), was adopted in 2004 (as part of the comprehensive tax reform). Unlike its predecessor, the new act contained seven parts. Among other matters, the principle of material truth was substantively codified, while other (particularly some fundamental) principles were not explicitly enshrined in the law. Consequently, the ZDavP-1 was subjected to extensive criticisms by both the professional and the general public, primarily for being overly extensive, non-transparent, inconsistent and difficult to understand, all of which conflicted with the requirements of the principle of the rule of law and, therefore, with the requirement of legal security for taxpayers.[15] As early as 2005, the Slovenian government appointed an expert group with the task of preparing a reform of tax legislation and, naturally, also a reform of the rules of tax procedure.

The new legislation was adopted in 2006 and entered into force on 1 January 2007. In addition to the new substantive tax rules, an entirely new Tax Procedure Act (ZDavP-2) was introduced, which still remains in force today in its amended version (the act has been subject to numerous amendments and amending acts). The 2006 reform thus improved and simplified the tax legislation, making a significant step toward strengthening the legal security of tax-

[14] The same conclusions were drawn by Špilar, *Posebni instituti davčnega postopka v razmerju do varstva javnega interesa in varstva pravic zavezancev*, p. 31. See also Janez Šinkovec and Boštjan Tratar, *Zakon o davčnem postopku s komentarjem* (Ljubljana, 2002), p. 31.

[15] Tone Jerovšek, *Novi davčni postopek. Slovenska uprava po vstopu v EU* (Ljubljana, 2004), p. 9. Similarly Bojan Škof, "O nekaterih dilemah novega Zakona o davčnem postopku", *Davčno finančna praksa* 5, No. 11 (2004), p. 6.

payers in tax procedures.[16] The act was also structurally aligned with the ZUP, and it further and explicitly regulated certain fundamental legal principles relevant to tax procedures, as well as special principles of tax procedure, all with the aim of increasing the legal security of taxpayers in tax procedures (balancing public and private interests). Chapter II of the ZDavP-2 thus regulates the principles of tax procedure that have emerged from case law and theory but had not been normatively incorporated into legislation up to this point, except for certain principles that applied solely to specific procedural tax concepts or stages of the procedure). These principles are characterised by their application as special principles in tax procedures, together with the principles of the ZUP.[17]

Tax audit procedures in light of (certain) fundamental principles

When conducting tax procedures, state authorities (including the financial administration) act as bodies of public authority and exercise "the power that was entrusted to them", forming part of the executive branch of government. For this reason, certain general principles (some of which are even constitutionally guaranteed) are especially important in such procedures, their common denominator being that their observance and respect serve as a constraint on the power of state or administrative authorities, thereby supposedly ensuring the protection of the rights and freedoms of persons under the jurisdiction of those authorities (including, inter alia, taxpayers). The purpose of this section of the paper is to highlight those aspects of certain general principles that are particularly relevant for conducting tax supervision procedures to uphold the constitutional principle of the rule of law and its sub-principle of the right to legal security.[18]

Principles constitute a means of limiting the power of the state's administrative apparatus and thus ensuring the protection of the rights and freedoms of individuals and organisations. Their purpose is to primarily guarantee reasoned decision-making, rather than authoritarian or arbitrary decision-making in individual cases that might be supported by a range of repressive measures and tools, all aimed at realising the "public interest" as quickly and effectively

[16] See Tone Jerovšek, *Nekatere sugestije za drugačno ureditev davčnega postopka*, (Ljubljana, 2005), p. 286.

[17] Tone Jerovšek, Ivan Simič and Bojan Škof, *Zakon o davčnem postopku s komentarjem* (Maribor–Ljubljana, 2008), p. 15 (hereinafter: Jerovšek, Simič and Škof, *Zakon o davčnem postopku s komentarjem*).

[18] The tax supervision procedures are defined in Article 127 of the ZDavP-2 and are divided into four groups. The most complex of these are the tax audit and the financial investigation procedure.

as possible.[19] All (fundamental) principles, both those laid down in ZDavP-2 and those of the ZUP and ZIN, generally function to ensure legal security for taxpayers. The principle of legal security is particularly significant for tax law, which governs those areas of life that are very sensitive by nature - it regulates the interference of public authority into the private sphere or the property sphere of a taxpayer. It is under the sub-principles of the rule of law (which include the principle of legal security) that the limitations of such authoritative actions are defined.

The ZDavP-2 itself stipulates general principles, i.e. the principles provided in the general part of the act (Chapter II of the ZDavP-2), and also "separately" codifies the principles of tax supervision in Article 128. These, however, should not be equated with the "fundamental principles" serving as safeguards of legal security; rather, the principles of tax supervision serve as procedural principles or principles relating to how the tax supervision procedure is to be conducted. During all tax supervision procedures, state authorities (which should be constrained in practice by these principles when exercising the public powers entrusted to them) must, of course, adhere to all principles laid down in the ZDavP-2 as well as respect other principles stipulated under other regulations that also "govern" tax supervision procedures.

A reflection of the principle of legal security may also be observed in the fifth paragraph of Article 141 of the ZDavP-2, which explicitly lays down the prohibition of reconsideration of a matter already (finally) decided, i.e. the so-called principle of the prohibition of "ne bis in idem" in tax audit procedures (the audit cannot be repeated with regard to findings and actions that have already been finally decided in a tax audit procedure). However, it should be immediately added that such a prohibition of reconsidering the same matter applies in all finally concluded tax supervision procedures, not just in the context of tax audit procedures, as it is a reflection of the principle of the rule of law.

The principle of legality – tax authorities being bound by the law and subordinate to the law in tax audit procedures

Slovenia is a state governed by the rule of law, which means, among other things, that the actions of state authorities are subject to legal regulations, i.e. it is a state in which the law prevails rather than the arbitrary and capricious actions

[19] Cf. Polonca Kovač, "Davčni nadzor", in: *Splošno davčno pravo*, ed. Erik Kerševan and Jernej Podlipnik (Ljubljana, 2023), p. 275 and 276.

of the state authorities. This means that state authorities are bound by the law and subordinate to legislation.[20] The principle of legality is enshrined in Article 2 of the Constitution of the Republic of Slovenia. The rule of law requires that legal relations between the state and its citizens are governed by laws. These laws not only establish the framework and basis for the administrative operation of the executive branch but also make their activities known, transparent and predictable for citizens, all of which enhance their legal security.[21]

On the one hand, the principle of legality authorises the legislator to impose taxes (determine all essential elements for the formation of tax liability – the statutory factual basis and the legal consequence). On the other hand, it ensures the protection of taxpayers' rights by requiring that their legal position regarding tax liability is clearly and predictably evident from the law itself (thus leaving no room for regulation by legal instruments below the level of the statute in the area of substantive tax law).

A state governed by the rule of law demands that all state authorities adhere to valid legal regulations. Regarding the rules of tax law, the principle of legality is particularly emphasised in Articles 146 and 147 of the Constitution of the Republic of Slovenia. A tax liability arises only when all statutory conditions laid down by the substantive tax legislation have been met (*nullum tributum sine lege*).[22] The tax authority must likewise conduct the procedure in accordance with the Constitution, meaning it must respect fundamental human rights and freedoms, as well as the principles and rules of the ZDavP-2 and, subsidiarily, the ZIN and the ZUP.[23]

Concerning the principle of legality as defined in Article 4 of the ZDavP-2 and Article 6 of the ZUP, two specific concepts can be observed that deserve particular attention when addressing tax supervision procedures, namely the concept of "discretionary decision-making" (as explicitly stipulated in the second paragraph of Article 6 of the ZUP and the third paragraph of Article 4 of

[20] Rafael Cijan, *Upravni postopek in upravni spor* (Maribor, 2001), p. 31 (hereinafter: Cijan, *Upravni postopek in upravni spor*). For more details on the issues concerning this principle from the perspective of German tax law doctrine, see also Hans Bernhard Brockmeyer, "Steuerliche Verfahrensrecht ", in: Franz Klein (ed.), *Abgabenordnung* (München, 2022), p. 478 ff (hereinafter: Brockmeyer, "Steuerliche Verfahrensrecht ").

[21] See e.g. Alenka Dolinšek, "Načelo zakonitosti", in: *Splošno davčno pravo*, ed. Erik Kerševan and Jernej Podlipnik (Ljubljana, 2023), p. 63 (hereinafter: Dolinšek, "Načelo zakonitosti").

[22] See also Dolinšek, "*Načelo zakonitosti*", p. 64 ff.

[23] In tax procedures governed by the ZDavP-2, the provisions of the ZIN and the ZUP apply subsidiarily in accordance with the third paragraph of Article 2 of the ZDavP-2. Despite the subordinate application of the ZIN and particularly the ZUP, fundamental principles of administrative procedure are not subject to subsidiarity, as they represent minimum procedural standards for the parties' rights, regardless of the specific administrative area. See Polonca Kovač, "Postopkovna vprašanja davčnega inšpekcijskega nadzora – med učinkovitostjo in varstvom pravic zavezancev", *Javna uprava* 42, No. 2–3 (2006), p. 275 (hereinafter: Kovač, "Postopkovna vprašanja davčnega inšpekcijskega nadzora").

the ZDavP-2) and the concept of "impartiality" when treating taxpayers in tax supervision procedures (as specifically provided in the second paragraph of Article 4 of the ZDavP-2). The latter concept, which is referred to in the ZDavP-2 but not directly in the ZUP, should be understood primarily in the sense of objective decision-making, which shall not be "supported" by subjective "feelings" or "emotions" (either positive or negative) of the person deciding in a specific case.[24] Arbitrary application of tax regulations is prohibited.

The issue of discretionary decision-making is somewhat more complex. First, a precise distinction must be drawn (which is often not the case in practice) between discretionary decision-making on the one hand and the free assessment of evidence on the other, as these are naturally not the same concepts. The essence of discretionary decision-making lies in the "statutory authorisation" granted to the tax authority to choose, in the same factual situation, among several equally viable decisions the one that is the most appropriate, suitable or expedient in the circumstances of the particular case and in the public interest – it is thus a matter of a free choice among several permissible (lawful) decisions (the opportunity principle).[25] By contrast, the free assessment of evidence is part of the evidentiary assessment, the weighing of evidence taken during the evidentiary phase of the tax fact-finding procedure and the decision of the tax authority as to which facts are to be considered as proven and which are not (which facts are considered proven is decided by the official authorised to conduct the procedure or to decide in the administrative matter according to his or her own conviction and based on a careful and conscientious assessment of each piece of evidence separately and all evidence together, and based on the outcome of the procedure as a whole, as stipulated in Article 10 of the ZUP).

In the case of discretionary decision-making, the principle of legality is less strictly binding on the tax authority, but there are still limits to the discretion. The discretionary power must be expressly conferred on the authority by substantive regulations and can only pertain to the application of a substantive (and certainly not procedural) law. The discretionary decision-making is thus a feature of substantive law that determines the margin of manoeuvre for the tax

[24] Although the second paragraph of Article 4 of the ZDavP-2 indeed explicitly stipulates that the tax authority must act impartially in dealing with taxpayers, the ZUP does not contain any such explicit provision. Unlike the ZDavP-2, however, the first paragraph of Article 37 of the ZUP grants the party the right to request the exclusion of an official conducting the procedure from the said procedure if there is doubt as to that official's objectivity (the existence of circumstances that give rise to doubts about the official's impartiality).

[25] The official must assess which solution best corresponds to the legally protected public interest, while the public interest as the decision-making criterion must be defined in the law as precisely as possible. For more details, see Marijan Pavčnik, *Teorija prava: prispevek k razumevanju prava*, 6th revised and amended edition (Ljubljana, 2020), p. 111.

authority within which it must remain when deciding on the rights and obligations of persons liable for tax (i.e., a statutory mandate granted to the authority to apply substantive law in a manner that still aligns with the public interest).[26]

Apart from the already-mentioned general rule laid down in the third paragraph of Article 4 of the ZDavP-2, the ZDavP-2 does not specify other rules for discretionary decision-making. Unlike the ZDavP-2, the ZUP is far more specific regarding discretionary powers. Thus, under the provisions of the ZUP, a decision issued by the tax authority based on its discretionary power must be issued within the limits of the authority's mandate (as defined by substantive regulations or other legal norms or principles – for example, the principle of proportionality, which is also an important principle in the context of tax procedure); in accordance with the purpose for which the mandate was granted; the decision must clearly state the provision that authorised the authority to exercise its discretion; the decision must be reasoned and justified, especially in the part where discretion has been exercised (the reasons leading to the decision or showing why the authority made the decision must be specified – a mere reference to the discretionary power and an offhand recital of the facts and reasons are not sufficient).

The consequence if the authority exceeded its mandate when making a discretionary decision or if discretion was used contrary to the purpose for which it was granted is the unlawfulness of such decision. In practice, cases of the arbitrary use of discretion, i.e. discretion stemming from legally unacceptable personal interests and motives (mobbing, vindictiveness, emotional involvement with a party or a case, careless decision-making, profiteering, etc.), are cited or regarded as clear examples of the abuse of discretion.

The principle of protecting the parties' rights and protecting the public interest in tax audit procedures

As indicated by the name of the principle – the principle of protecting the parties' rights and protecting the public interest – the task of the tax authority is twofold. In addition to being obliged to protect the rights of the parties, the tax authority must simultaneously protect the public interest, which places a heavier burden on tax authorities than it may at first appear.[27] Tax authorities thus find themselves "between a rock and a hard place" as the parties' interests

[26] More details in Jerovšek, Simič and Škof, *Zakon o davčnem postopku s komentarjem*, p. 23.

[27] For more details, see *Janez* Breznik et al., *Zakon o splošnem upravnem postopku s komentarjem* (Ljubljana, 2008), p. 77 (hereinafter: Breznik et al., *Zakon o splošnem upravnem postopku s komentarjem*).

and the public interests are (most often) diametrically opposed.[28] On the other hand, it is precisely in the area of tax law that the public interest, which the tax authority must serve, is particularly pronounced and (from the authority's perspective) the most important.

This principle has not been enshrined in the general part of the ZDavP-2 as a general principle, but the provision of Article 128 of the ZDavP-2, which stipulates that tax supervision is conducted both to the benefit and to the detriment of the taxpayer, can be viewed as a reflection of this principle.[29] Unlike the ZDavP-2, Article 5 of the ZIN explicitly provides that inspectors perform their inspection duties with the aim of protecting the public interest and the interests of legal and natural persons. At first glance, this principle does not appear to be directly related to tax audit procedures, but it is undoubtedly (at least indirectly) connected to the issue of taking evidence (ascertaining material truth in tax audit procedures). One way in which tax authorities comply with this principle is precisely by protecting the rights of the parties through the proper substantive conduct of procedures (tax supervision), as defined in Article 138 of the ZUP, and the proper procedural conduct of procedures (tax supervision), as defined in Article 146 of the ZUP. Naturally, both requirements, i.e., the requirement for the proper substantive conduct of procedures and the requirement for the proper procedural conduct of procedures, are a realisation of the principle of hearing the party, as set out in Article 9 of the ZUP. Through these rules, the party in an administrative procedure, and thus also the taxpayer in a tax supervision procedure, is ensured the possibility to protect their rights even before a decision is issued in a specific case.[30]

Both provisions of the ZUP mentioned in the previous paragraph play a more direct role in the evidentiary process and are directly aimed at protecting

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[28] See also Cijan, *Upravni postopek in upravni spor*, p. 32. Cijan also states that there are "confrontations" between public and private interests in an administrative relationship, and that the authority must not favour either if it wishes to perform well.

[29] This is also the conclusion by Mirko Pečarič, "Organizacija inšpekcijskega nadzora in inšpekcij", in: Polonca Kovač (ed.), *Inšpekcijski nadzor, razprave, sodna praksa in komentar* (Ljubljana, 2016), p. 98.

[30] Concerning the importance of the principle of equal protection of rights in administrative proceedings and the right to be heard, the Supreme Court of the Republic of Slovenia stated in point 8 of the reasoning of its judgment Ips 1/20 of 2 September 2020, inter alia: "The right to participate or the right to be heard is part of the constitutional provision on equal protection of rights (Article 22 of the Constitution). Equal protection of rights takes on particular importance in administrative proceedings due to the pre-existing supremacy of the public interest, and thus of the administrative authority, in relation to the individual party to the proceedings, making the party's participation even more crucial in administrative matters. Administrative procedure is an intersection between the private and the public interest, which should be balanced proportionately. Equal protection of rights in the administrative sphere is part of defensive rights against the excessive use of authority or its abuse (Article 6 of the ECHR). The most typical violations involve interferences with the principles relating to communication between the administrative authority and other participants in the procedure".

the parties' rights based on the request to establish material truth. This principle is particularly emphasised both in the general part of the ZUP and in the general part of the ZDavP-2, namely in the "form" of the fundamental principle of material truth, which is, or at least should be, the sole basis for rendering a lawful decision in a particular tax supervision procedure, as well as in the duty to ensure proper participation of the party in the fact-finding procedure and to respect their rights. The purpose of the tax fact-finding procedure does not need further explanations, but it is nonetheless worth reiterating it briefly: the purpose of the fact-finding procedure is to establish all the facts and circumstances relevant to the decision in the administrative (tax) case and to enable the parties to assert and protect their rights and legal interests. In this procedure, the principles of material truth, the hearing of the party, and protecting the parties' rights and protecting the public interest are particularly relevant.

The primary objective of all forms (types) of tax supervision procedures is to "discover" material truth to such an extent that a lawful decision can be rendered in a particular case on that basis (and on that basis alone).[31] An official conducting internal supervision at the tax authority (who may also be an inspector) or an inspector conducting external inspection must gather (establish, investigate) all the facts and all the circumstances affecting either an increase or reduction of tax liability – in other words, they must investigate facts that are either detrimental to the taxpayer or to his or her benefit.[32]

Proceeding from this maxim of procedural tax law – material truth as the highest value – it is perfectly clear that to satisfy this requirement of tax procedure, one cannot avoid the argument that material truth cannot be "discovered" or established if the tax authority does not conduct the procedure correctly from both a substantive and a procedural point of view.

Specifically on the proper substantive conduct of tax procedure – the principle of ex officio investigation and the duty to cooperate

Before a decision is issued, all facts and circumstances relevant to the decision must be established, and the parties must be given the opportunity to assert and protect their rights and legal interests (the first paragraph of Article 138 of the ZUP). This section of the paper will not address comprehensively the issue of the tax fact-finding procedure (tax evidentiary procedure and the taking of evidence) and compliance with the principle of material truth, as these topics

[31] See also Tipke, *Die Steuerrechtsordnung*, p. 1186.

[32] See also Jerovšek, Simič and Škof, *Zakon o davčnem postopku s komentarjem*, p. 303.

will be examined in more detail later; instead, the issues and concepts will be discussed below that cannot be bypassed when considering tax supervision or tax audit procedures.

A lawful decision cannot be rendered without establishing the facts and circumstances to which the law attaches certain legal consequences and without giving the parties the opportunity to assert and protect their rights or legal interests.[33] The requirement of the proper substantive conduct of the tax procedure is also laid down in the ZDavP-2, namely in the first paragraph of Article 73, which imposes identical requirements on the tax authority conducting the tax fact-finding procedure and grants taxpayers the same rights in pursuit of the principle of material truth.[34] All previously explained obligations of the tax authority are a consequence of the so-called "principle of ex officio investigation", which is, or should be, the fundamental guiding principle for the tax authority in ascertaining material truth as the only (acceptable) basis for issuing a lawful decision in tax supervision procedures.

Opposite the principle of ex officio investigation stands the so-called "duty to cooperate" on the side of the taxpayer, who is obliged to cooperate with the tax authority in establishing or, in particular, clarifying the facts of a specific case.[35] As a rule, there is always a conflict of interests between the taxpayer and the tax authority, which means that the tax authority is faced with a certain information deficit since the latter, unlike the taxpayer, generally does not know all the facts relevant to the correct assessment of the tax. For that reason, legal systems also impose additional obligations on taxpayers to ensure that all legally relevant facts may be fully and correctly established. This is referred to as the taxpayer's duty to cooperate. The taxpayer has a duty to participate actively in the tax procedure to establish all legally relevant facts, including those detrimental to the taxpayer. Thus, the taxpayer is no longer merely a party to the procedure but, in a certain sense, also becomes a means of proof. The informational gap between tax authorities on the one side and taxpayers (and third parties) on the other is the reason behind enacting the duty to cooperate in the area of tax law, which significantly exceeds the standards normally established under general administrative law. However, even a taxpayer's breach of the duty to cooperate does not release the tax authority from its obligation to ascertain legally relevant facts ex officio. Thus, it would be incorrect to deduce that the principle of ex officio inves-

33 See also Breznik et al., *Zakon o splošnem upravnem postopku s komentarjem*, p. 403.

34 Article 73 of the ZDavP-2 provides that "Before issuing an assessment decision, the tax authority shall, after careful and conscientious assessment of each piece of evidence separately and all evidence together, and based on the outcome of the procedure as a whole, establish all facts and circumstances that are relevant to the assessment decision and enable the parties to protect and exercise their rights and interests."

35 Brockmeyer, "Steuerliche Verfahrensrecht", p. 492. See also Tipke, *Die Steuerrechtsordnung*, p. 1186.

tigation is limited by the duty to cooperate; on the contrary, the duty to cooperate is a means of giving effect to the principle of ex officio investigation. [36]

On the other hand, the tax authority's request for the taxpayer's cooperation must be sufficiently specific, i.e., the substance of the request must be specified in detail, and it must be clear from the request exactly what is being asked of the taxpayer, or the administrative act (the tax authority's request) is not deemed sufficiently substantively determined. In the event of a breach of the duty to cooperate, the tax (administrative) authority may also apply coercive measures otherwise prescribed by law.[37] If the tax authority is unable to determine the tax base or ascertain the factual situation because of the breach of the duty to cooperate despite utilising its own sources of information, it must proceed to determine the tax base by means of appraisal, i.e. to determine the approximate tax base in an appraisal procedure – appraisal is thus a duty of the tax authority and not a matter of free choice.

The duty of taxpayers to cooperate is established (albeit clumsily) in the general part of the ZDavP-2; the second paragraph of Article 10 of the ZDavP-2 thus states in general terms: "In conducting tax procedure, taxpayers shall cooperate with the tax authority in establishing the facts to their detriment and to their benefit". This duty is especially emphasised and regulated for tax audit procedures in the first paragraph of Article 138 of the ZDavP-2, which prescribes a (special) duty of taxpayers to cooperate in tax audit procedures, as will be discussed in more detail later in this chapter.

The taxpayer's special duty to cooperate within the meaning of the first paragraph of Article 138 of the ZDavP-2, which places part of the responsibility (together with the tax authority) to correctly and completely establish the factual situation relevant for taxation (the taxpayer's duty to cooperate in the tax fact-finding or tax evidentiary procedure) on the taxpayer, should not be equated with the taxpayer's (general) right to participate in the tax audit procedure, as reflected in point 3 of the fourth paragraph of Article 135 of the ZDavP-2. Under that provision, the order initiating the tax audit must also include a mandatory notification regarding the taxpayer's right to participate in the tax audit procedure and the legal consequences of obstructing the tax

[36] See Roman Seer, "Rechtssicherheit im Steuerrecht", in: *Steuerrecht*, 15. völlig überarbeitete Auflage, ed. Tipke and Lang (Köln, 1996), p. 723 (hereinafter: Seer, "Rechtssicherheit im Steuerrecht"). See also Harald Schaumburg, *Internationales Steuerrecht* (Köln, 1998), p. 1291 (hereinafter: Schaumburg, *Internationales Steuerrecht*).

[37] For example, the ZUP regulates the enforcement procedure for non-monetary obligations, which can be carried out through other persons or through coercion. The objective of enforcement by coercion is to compel the party to the proceedings who fails to comply with the authority's request to perform the requested act by threatening and imposing fines in cases of non-compliance (cf. Article 298 of the ZUP).

audit. Furthermore, the official has the duty to inform the taxpayer of this right before commencing the tax audit (Article 139 of the ZDavP-2). This so-called general right of the taxpayer to participate in all tax audit procedures reflects the principle of hearing the party, as defined in Article 9 of the ZUP, and is not based so much on the principle of material truth (and on the inherently related issue of the burden of proof), as is typical of the special duty to cooperate within the meaning of the first paragraph of Article 138 of the ZDavP-2.

Proper procedural conduct of tax (fact-finding) procedure

As stipulated in the first paragraph of Article 146 of the ZUP, a party in tax supervision procedures has the right to participate in the fact-finding procedure and, to achieve the purpose of the procedure, to provide necessary information and defend their rights and legally protected interests. The party may also state facts that might contribute to resolving the case and challenge the accuracy of assertions that conflict with their own assertions. Up until the rendering of a decision, they have the right to supplement and clarify their arguments (the second paragraph of Article 146 of the ZUP). In addition to the rights granted to the party, the ZUP also imposes obligations on the authority conducting the procedure, which is thus obliged to enable the party to be heard on all circumstances and facts presented in the fact-finding procedure; to be heard on the proposals and evidence offered; to participate in evidence taking; to pose questions to other parties, witnesses and experts; to be informed of the success of evidence taking and to be heard thereon (the third paragraph of Article 146 of the ZUP). The authority conducting the procedure may not issue a decision before the party is given the opportunity to be heard on the facts and circumstances relevant to the decision (the fourth paragraph of Article 146 of the ZUP).

The ZDavP-2 contains no similar or similarly detailed provisions on procedural conduct, except perhaps the provision of the first paragraph of Article 73. This provision prohibits the tax authority from issuing a tax assessment decision before it has established all facts and circumstances relevant to the assessment decision (material truth) based on a careful and conscientious assessment of each piece of evidence separately and all evidence together, and based on the outcome of the procedure as a whole, and has enabled the parties to protect and exercise their rights and interests.

How the tax authority ensures that the taxpayer is afforded the opportunity to exercise the rights guaranteed by this provision is (except in cases where an oral hearing is mandatory) at the discretion of the tax authority conducting the procedure. It is essential that the official documents clearly demonstrate that the party has been given the opportunity to participate in these procedural

acts (for example, a concluding discussion or ongoing cooperation between the party and the tax authority).

Acting contrary to the rules cited under Article 146 of the ZUP or, naturally, the first paragraph of Article 73 of the ZDavP-2 constitutes an absolute substantial violation of procedural provision (point 3 of the second paragraph of Article 237 of the ZUP) and, as such, constitutes grounds for the annulment of a decision on the merits. The violation of the principle of hearing the party also constitutes a violation of the constitutional principle of equal protection of rights as defined in Article 22 of the Constitution of the Republic of Slovenia.[38]

Within the framework of the ZDaV-2, the provisions of Article 139 (the taxpayer's right to be informed) and Article 140 (the record) are worth highlighting, as they specify the obligations of the tax authority that otherwise derive from the general principle of protecting the parties' rights and protecting the public interest, and from the principle of the hearing the party. Therefore, these two articles constitute a concretisation of the general provision of the first paragraph of Article 73 of the ZDavP-2 in the field of tax supervision (audit), where it stipulates that the tax authority is obliged to allow the parties to protect and exercise their rights and interests in the evidentiary procedure.

One of the ways in which the tax authority ensures the taxpayer's "right to participate" in procedural acts in the context of tax supervision is, as mentioned above, the provision of Article 140 of the ZDavP-2. According to the cited provision, the tax authority must draw up a written record in the tax audit procedure (one of the forms of tax supervision) and serve it on the taxpayer.

The record includes the established factual situation, being drawn up as a compilation of all the findings from the tax audit, and is served on the taxpayer in person. The taxpayer may submit comments on the record within the statutory time limit, as stipulated in the first paragraph of Article 140 of the ZDavP-2.[39] Under the provisions of the ZUP, the record is a public document (presumption of the truth of what is recorded, see Article 80 of the ZUP), which is meant to prove the truthfulness of the events recorded and statements given, unless

[38] For more details, see Franc Testen and Peter Jambrek, "*Enako varstvo pravic*", in: *Komentar Ustave RS*, ed. L. Šturm (Ljubljana, 2002), pp. 238 ff. See also point 7 of the reasoning of the *Constitutional Court of the Republic of Slovenia decision* Up-171/00-16 of 12 July 2001 and point 9 of the reasoning of the *Constitutional Court of the Republic of Slovenia decision* Up-2/02 of 28 February 2002.

[39] The time limit for submitting comments on the record is by nature preclusive; however, the tax authority is bound by the principle of material truth, which imposes on it the duty to establish all facts and circumstances relevant for rendering a lawful and correct decision before issuing a decision in a particular case and to establish facts favourable to the taxpayer with the same diligence. In practice, this means that the tax authority must also address in its decision all statements (and evidence) submitted by the taxpayer in the comments on the record, even if those comments were submitted late (but still before the decision was issued). See also Kovač, "Postopkovna vprašanja davčnega inšpekcijskega nadzora", p. 285.

the contrary is proven. It is, therefore, permissible to prove that the record is incorrect (the second paragraph of Article 80 of the ZUP).

The provision of Article 140 of the ZDavP-2 is intended to ensure the protection of the taxpayer's rights in the period prior to the issuance of a decision in a specific case and, therefore, reflects the concretisation of the principle of protecting the parties' rights and protecting the public interest, as well as the principle of hearing the party. In this sense, it constitutes a concretisation of the general provision in the first paragraph of Article 73 of the ZDavP-2, where it stipulates that the tax authority is obliged to allow the parties to protect and exercise their rights and interests in the evidentiary procedure.

The taxpayer has the right to submit (timely) comments on the record and may, as provided in the second paragraph of Article 140 of the ZDavP-2, propose new facts and evidence in those comments, but must also explain why they failed to state them before the record was issued (new facts and evidence are taken into consideration only if they existed before the record was issued and the taxpayer had justified reasons for not being able to state and submit them before the record was issued; the so-called *ius novorum*). Nonetheless, the so-called evidentiary preclusion does not carry the same absolute force in the context of tax audit procedure (mainly because the tax authorities are bound by the requirements of material truth before issuing a decision in tax matters)[40] as it does in the appeals phase or in administrative dispute (where introducing new facts and evidence at a later stage may be more restricted due to the inadmissibility of novelties in appeal or litigation).

The principle of material truth (the principle of ex officio investigation and the duty to cooperate)

Both systemic procedural statutes, the ZDavP-2 and the ZUP, consider the principle of material truth, according to which all facts and circumstances relevant for rendering a lawful and correct decision must be established during the fact-

[40] The preclusion of evidence is a concept primarily known from civil procedure, and, as such, it generally does not conflict with constitutional principles and principles of administrative and tax procedure (in particular, the right of the party to be heard) in the context of tax procedure. However, the use of evidentiary preclusion must be conditioned exclusively on the "fault" of the taxpayer for the delay in submitting evidence. If the taxpayer was not yet aware of certain facts or evidence during the tax audit procedure, even though they already existed, such evidence must be admitted, and the official conducting the procedure must address it under the principle of material truth and the principle of hearing the party. Likewise, evidence that already existed before the report was issued but was (justifiably) not submitted by the taxpayer because the course of proceedings did not indicate that its submission would become necessary (for example, because the tax authority did not consider a certain fact or circumstance detrimental to the taxpayer before issuing the record itself), must also be admitted.

-finding procedure, as the fundamental principle in all tax supervision procedures.[41]

In this regard, the ZDavP-2 is somewhat more "specialised", which is also true in general when comparing its nature to that of the ZUP, but the essence and significance of the principle are nonetheless defined in the same way in both regulations. Under the ZDavP-2, the tax authority is thus explicitly obliged (within the framework of this principle) to also establish those facts that are favourable to the taxpayer. This duty of the tax authority is particularly highlighted in the first paragraph of Article 128 of the ZDavP-2: "Tax supervision shall be carried out both to the benefit and to the detriment of the person liable for tax." For tax supervision procedures, it is particularly important that the tax supervision is balanced in a way that considers both the taxpayer's benefit and detriment. The official in internal supervision at the tax authority or the inspector in an external inspection must gather all facts and all circumstances that have a bearing on the increase or reduction of tax liability – they must seek facts that are to the taxpayer's detriment (increasing tax liability) as well as facts that are to their benefit (reducing tax liability).[42]

The principle of material truth obliges the tax authority to establish legally relevant facts to a degree of certainty that excludes all doubt regarding the objective existence of the fact. The principle of material truth thus entails two requirements: the requirement to ascertain the true (factual) state of affairs in the matter and the requirement to establish all legally relevant facts and circumstances relevant for a lawful and correct decision. Material truth demands consistency between what is ascertained and what is factual.[43]

The authority conducting the procedure must objectively determine the "factual" situation, which is a necessary condition for the correct application of (substantive) law. An erroneously (incorrect, false) or incompletely established factual situation not only deviates from the principle of material truth but also results in the incorrect application of substantive regulations and, ultimately, in the adoption of an incorrect or unlawful decision.[44]

[41] The ZDavP-2 defines material truth as a principle in Article 5, and this principle is further specified in other provisions of the ZDavP-2, for example, in the first paragraph of Article 73 of the ZDavP-2, which falls under the chapter of the Act addressing the fact-finding procedure. On the other hand, the ZUP defines material truth as a principle in Article 8, and the principle is further specified in provisions of, for example, the first paragraph of Article 138, the first paragraph of Article 139, as well as the first paragraph of Article 145 of the ZUP.

[42] This is explicitly provided in the second paragraph of Article 128 of the ZDavP-2: "Tax supervision shall concern primarily those facts and circumstances which may contribute to the increase or reduction of tax liability or which effect the transfer of tax liability between tax periods".

[43] Brockmeyer, "Steuerliche Verfahrenrecht", p. 483.

[44] Cijan, *Upravni postopek in upravni spor*, p. 35.

Facts are established by means of evidence, whereby anything that is suitable for ascertaining the facts of the case and appropriate in a particular case may be used as evidence.[45] Because the task of the tax authority is to establish the material truth (*ex officio*), it must (through an official) order the taking of any piece of evidence (different kinds of evidence), regardless of whether it is to the taxpayer's benefit or detriment, if it deems it necessary to clarify the matter.

Specifically on systemic concerns regarding the taxpayer's duty to cooperate in the fact-finding procedure

As noted above, there is invariably a certain conflict of interest between the taxpayer and the tax authority in tax procedures, which means that the tax authority is faced with a certain information deficit since the latter, unlike the taxpayer, generally does not know all the facts relevant for the correct assessment of the tax. For that reason, legal systems also impose additional obligations on taxpayers to ensure that all legally relevant facts may be fully and correctly established (taxpayer's duty to cooperate).[46] The duty to cooperate compels the taxpayer to participate actively in the tax audit procedure, thereby interfering with the taxpayer's free will. The taxpayer is obliged to cooperate with the tax authority in establishing the facts (the ZDavP-2 prescribes sanctions for refusing to cooperate, considering it a tax offence, and the taxpayer may also be held criminally liable for a breach of the duty to cooperate).[47]

Notwithstanding the general duty of the taxpayer to cooperate in establishing the facts, certain systemic issues still arise. The first such question is whether the taxpayer may invoke certain constitutional procedural guarantees typical of criminal law (i.e. the presumption of innocence and the privilege against self-incrimination). According to the established case law, the tax procedure is not punitive in nature, and consequently, the procedural guarantees of criminal law cannot apply to tax procedures.[48] Secondly, the question arises whether a taxpayer may, in the context of their duty to cooperate, refuse cooperation by refusing to make a statement that is harmful to themselves (a state-

[45] See also Jerovšek, Simič and Škof, *Zakon o davčnem postopku s komentarjem*, p. 192.

[46] Cf. Bruna Žuber, "Temeljne pravice strank v davčnih postopkih", in: *Splošno davčno pravo*, ed. Erik Kerševan and Jernej Podlipnik (Ljubljana, 2023), p. 203 (hereinafter: Žuber, "Temeljne pravice strank v davčnih postopkih").

[47] Similarly Nika Hudej, "Dokazovanje v davčnih postopkih", in: *Davčno pravo med teorijo in prakso*, ed. P. Kovač (Ljubljana, 2021), p. 387 (hereinafter: Hudej, "Dokazovanje v davčnih postopkih").

[48] See e.g. the Constitutional Court of the Republic of Slovenia decision Up-360/16 of 18 June 2020 and the Supreme Court of the Republic of Slovenia decision X Ips 350/2015 of 11 October 2017. For more details, see also Žuber, "Temeljne pravice strank v davčnih postopkih", p. 204.

ment that would be detrimental to their own interests and objectives). There is no unanimous position on this issue in theory, but one might endorse the view that the taxpayer (even if under a duty to cooperate with the tax authorities in establishing the facts) is not obliged to make a statement to the tax authorities that would be detrimental to themselves or contrary to their objectives. However, the taxpayer must be aware that doing so may fulfil the elements of a tax offence or that the tax authority may render a decision unfavourable to the taxpayer based on the assessment of evidence or resort to the appraisal of the tax base (i.e., decision-making by the tax authority that is based on merely probable facts, which constitutes a legally permissible departure from the principle of material truth).[49] Therefore, a breach of the duty to cooperate on the part of the taxpayer may also result in relieving or limiting investigative activities on the part of the tax authority.[50] The more the principle of material truth is "diminished" by the taxpayer's breach of the duty to cooperate, the more the burden of failure to prove shall be attributed to the taxpayer's sphere of responsibility.[51]

The means of evidence in the tax fact-finding procedure

In relation to the principle of material truth, the question of the so-called means of evidence arises, which is also a very important issue in the context of the requirement to ensure the legal security of taxpayers in tax audit procedures. As stated above, before deciding on the taxpayer's right or obligation, the tax authority must comply with the requirements of the principle of material truth: in the fact-finding procedure, it is obliged to establish the correct and complete factual situation based on the taking of evidence (means of evidence) (Article 5 of the ZDavP-2).

The means of evidence are listed by way of example in Chapter XII of the ZUP (they are not specifically regulated by the ZDavP-2), which then regulates in more detail how each specific means of evidence is to be used. The principle of material truth dictates that the factual situation must be fully and accurately established and that a fact may be proven by any means of evidence (the principle of free assessment of evidence).

Procedural theory recognises the tax authority's discretion in the choice of evidentiary means, which is constrained by the principles of suitability (the evidence is capable of proving the given fact), proportionality (the burden on the taxpayer is proportionate to the outcome of the evidentiary process), fea-

[49] Similarly Žuber, "Temeljne pravice strank v davčnih postopkih", p. 204.
[50] See Schaumburg, *Internationales Steuerrecht*, p. 1292.
[51] See Seer, "Rechtssicherheit im Steuerrecht", p. 38.

sibility and imputability (evidence cannot be imputed if that would jeopardise an important legal value, e.g. disclosing a business secret, if the same result can be achieved by other means).

Article 77 of the ZDavP-2 provides that the taxpayer shall, as a rule, provide evidence for their statements made during the tax supervision procedure in the form of documentary (written) evidence but may also propose other evidence. It should be emphasised that this provision does not imply that the principle of material truth does not have to be applied in the Slovenian (tax) legal order.[52] The evidentiary process must not be restricted by limiting the taking of evidence exclusively to certain types of evidence. Arbitrary advancement of formal truth is unlawful.[53] A taxpayer must not be required to submit documentary evidence if they have none in their possession but may prove their statements by other means. In practice, insisting on documentary evidence while dismissing other evidentiary means is problematic.[54] The tax authority's right to choose from various evidentiary means the one it considers most suitable is not disputed. This is also in line with the principle of procedural economy. However, it is quite different if the taxpayer submits evidence and the tax authority chooses not to take it.

Evidentiary limitations and prohibitions

Certain limitations apply to using particular means of evidence in favour of the taxpayer. On the one hand, evidence may relate to the person's most private (intimate) sphere. It may also concern special protection of professional confidentiality for certain sensitive professions (religious confessor, attorney, doctor). In many countries, such protection extends to some other professions representing clients in tax proceedings. Data collection can also be disproportionate and, therefore, impermissible (so-called fishing expeditions). On the other hand, a particular piece of the already obtained evidence may be inadmissible due to a serious violation of the law (so-called exclusion).

[52] Similarly Hudej, "Dokazovanje v davčnem postopku", p. 399.

[53] Restricting the proof of legally relevant facts to written evidence alone constitutes a substantial violation of procedural rules. See the judgement of the Supreme Court of the Republic of Slovenia No. U 1465/93-4 of 28 June 1995; and the judgment of the Supreme Court of the Republic of Slovenia No. U 219/95 of 29 April 1999. In more recent practice by tax authorities, the opinions arguing for the exclusivity of documentary evidence as proof in tax procedures are almost non-existent, thanks to the legal theory and case law of the Supreme Court of the Republic of Slovenia. See Hudej, "Dokazovanje v davčnem postopku", p. 402.

[54] German legal theory and case law are unanimous regarding the means of proof used to substantiate alleged facts in the context of tax fact-finding procedure. Tax authorities are thus not free to choose between different types of evidence or to decide if and which evidence to admit but must use all means (within the limits of feasibility and proportionality) necessary to clarify the factual situation. See Tipke, *Die Steuerrechtsordnung*, p. 1190.

In its judgement, no. VIII R 78/05 of 28 October 2009, the German Federal Fiscal Court ruled that an attorney subject to a tax inspection may not refuse a request to hand over documents in a "neutralised form". Nor can they rely on the provision of par. 102 of the German Fiscal Code (*Abgabenordnung,* AO) if the requested documents (e.g., incoming and outgoing invoices, bank statements) do not contain any protected information or if the client's identity had already been disclosed to the tax authority for the purpose of representation in tax procedures. The tax authority may thus request the data to be provided in a neutralised form, with the method of neutralisation left to the attorney (e.g. by redacting clients' names and addresses). The Slovenian procedural tax law (ZDavP-2) does not contain a provision similar to par. 102 AO. However, certain limitations on the powers of the tax authorities under Slovenian law are imposed by the professional attorney-client confidentiality and the protection of personal data. In Slovenian tax practice, the tax authority occasionally inspects documents prepared for a client by tax advisors. Because the profession of tax advisers is not regulated by law, there is no statutory basis for their professional secrecy.

The issue of the so-called fishing expeditions is very controversial. This is a manner of gathering various types of information about a certain taxpayer or a certain category of information about a larger group of taxpayers that could lead the tax authorities to useful information, even if they were not initially convinced of the relevance of the collected data. Such "probing" may involve collecting information directly from the taxpayer or third parties. In most countries, this practice is prohibited.[55] However, the opposite tendencies have recently developed in some countries, interpreting these restrictions less strictly and taking a more "pragmatic" approach.

This way of collecting data, without any concurrent tax audit procedure in progress, should not be considered acceptable and should rather be strongly contested, even though such a manner of data collection is legal in the Republic of Slovenia. Taxpayers in the Republic of Slovenia may be subject to a particular kind of fishing expedition: bank fishing. The tax authority can "blindly" obtain information about taxpayers and their bank transactions (and transactions through similar financial institutions) without initiating any form of tax supervision, as this is directly allowed by the ZDavP-2, which imposes on banks a duty to provide information upon the tax authority's request (Article 39 of the ZDavP-2). This practice is referred to as data collection, although doubts have been raised regarding its legality. In the case of such generalised requests, the

[55] Mats Höglun, "Tredjemanrevision grundad på bankontons slutsiffra", *SkatteNytt* 2011, No. 7–8, pp. 552–565.

first question that arises is that of prior protection or whether a fishing expedition is admissible in a particular case. In countries that provide statutory protection for professional (e.g. banking) secrecy, such attempts are already resisted by the recipients of such requests, whereas in the Republic of Slovenia, the duty to provide such information is prescribed by law.[56]

Furthermore, the question arises of what happens if an impermissible fishing expedition or other serious violation has already taken place. Two approaches are possible. In France, unlawfully obtained evidence is strictly excluded based on Article L16 of the Code of Fiscal Procedures (*Livre de procédures fiscales*, LPF), similar to Slovenian criminal procedure. The German approach is different. In Germany, evidence is excluded when the law expressly provides so or when particularly justified reasons are present in a specific case.[57] In each case, the interests of the taxpayer are weighed against those of the fiscal authority. The fact that the scales have recently been tipping more and more in favour of the latter, even in criminal proceedings, is illustrated by a decision of the German Federal Constitutional Court (*Bundesverfassungsgericht*) concerning information purchased by the Federal Intelligence Service (BND) from a former employee of a Liechtenstein bank. There has never been a case of excluding evidence in tax procedure in Slovenian case law. As noted, even in foreign jurisdictions, such exclusion is usually an extremely rare measure, used only as an ultima ratio to protect the integrity of the legal order.[58]

Evidentiary preclusion does not carry the same weight in first-instance proceedings as in later stages of the procedure. Certain facts and evidence must be presented within specified time limits (e.g., the time limit for comments on the record in tax audit procedures). Presenting new facts and evidence may become more difficult at a later stage due to the inadmissibility of introducing novelties with an appeal or an action. Under the third paragraph of Article 238 of the ZUP, a party may introduce new facts and evidence in the appeal but must explain why they were not already presented during the first-instance proceedings. New facts and evidence are considered grounds for appeal only if they existed at the time the first instance decision was issued and if the party could not reasonably have submitted or identified them during the main hearing.

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[56] For more details on this issue, see Aleksander Pevec, "Primerjalnopravni pogled na aktualna vprašanja davčnega ugotovitvenega postopka", *Podjetje in delo : revija za gospodarsko, delovno in socialno pravo*, No. 3–4 (2012), p. 599 ff (hereinafter: Pevec, "Primerjalnopravni pogled na aktualna vprašanja davčnega ugotovitvenega postopka").

[57] Decision of the 2nd Senate of the German Federal Constitutional Court (BVerfG), Case no. 2 BvR 2101/09 of 9 November 2010, by which the constitutional complaint was not admitted for consideration, published in NJW 33/2011, pp. 2417–2420.

[58] See Pevec, "Primerjalnopravni pogled na aktualna vprašanja davčnega ugotovitvenega postopka", p. 602.

The third paragraph of Article 20 of the Administrative Dispute Act (*Zakon o upravnem sporu*; hereinafter: ZUS-1) is similarly restrictive, stipulating that in an administrative dispute, the parties may not state facts and propose evidence if they were given an opportunity to state these facts and propose evidence in the procedure prior to the issuing of the contested act. Although this is not stated explicitly, it is clear that this provision can apply only to 'new' facts and 'new' evidence; otherwise, judicial protection would be reduced solely to the assessment of the application of substantive and procedural law. It should also be noted that in Slovenian administrative litigation, there is a further restriction concerning the assertion of procedural violations in the tax procedure at the review stage. Under point 1 of the first paragraph of Article 85 of the ZUS-1, a request for review may be lodged on the grounds of a substantial violation of provisions governing administrative dispute procedure but not on the grounds of a violation of procedural provisions in tax procedure.

Specifically on the obligation to decide "in dubio pro reo – in dubio contra fiscum"

With regard to the principle of material truth, (another) distinctive feature of tax procedure is worth mentioning, as set forth in the second sentence of the second paragraph of Article 6 of the ZDavP-2, which is otherwise typically associated with criminal law.[59] This feature concerns the principle generally known as *in dubio pro reo* or "when in doubt, in favour of the defendant" (in the context of tax procedure: in favour of the taxpayer or the audited person – *in dubio contra fiscum*). Under this principle, the tax official must interpret tax regulations in favour of the taxpayer and, in cases of doubt, decide in favour of the taxpayer.[60]

In administrative procedure, the basis for decision-making lies exclusively in the factual situation consistent with the principle of material truth and the principle of free assessment of evidence, which is not so strictly the case in tax procedure as a special type of administrative procedure, where the said princi-

[59] See the judgement of the Supreme Court of the Republic of Slovenia U 35/93-7 of 7 April 1994. This is also noteworthy from the perspective of the nature of tax law, which, in principle, is not intended to be punitive, yet it explicitly employs concepts that are inherent exclusively to criminal law.

[60] See also Jerovšek, Simič and Škof, *Zakon o davčnem postopku s komentarjem*, p. 303. On the other hand, Nika Hudej, "Jasnost davčnih predpisov in premoženjska svoboda davčnih zavezancev – povzetek predavanja", in: *Gospodarski subjekti na trgu*, konferenčni zbornik, Univerza v Mariboru Pravna fakulteta, Inštitut za gospodarsko pravo (Maribor, 2019), p. 5, notes (and one can agree) that the interpretation of vague tax regulations in the direction of *in dubio contra fiscum* has so far not been mentioned in Slovenian case law as one of the recognised methods for interpreting tax regulations, which could be used to resolve ambiguities in tax regulation.

ple (when in doubt, in favour of the taxpayer) is explicitly enacted (although systematically classified somewhat erroneously under the so-called principle of proportionality, even though substantively and conceptually it should be subsumed under the principle of material truth, as it concerns the ascertainment and proof of facts rather than the selection of measures or the imposition of sanctions, which is otherwise the task of the principle of proportionality).

The principle of "when in doubt, in favour of the taxpayer" derives from a principle that is inherent to criminal law, namely the principle "*in dubio pro reo*" (when in doubt, in favour of the defendant), which itself constitutes an element of the so-called presumption of innocence (Article 27 of the Constitution of the Republic of Slovenia). By enshrining this principle in the ZDavP-2, the tax procedure was brought closer (in terms of rules applicable in the evidentiary process) to the typical criminal procedure as the most typical form of inquisitorial procedure. The principle in question is one of the procedural elements of the presumption of innocence and concerns the risk of failing to prove the case and the assessment of evidence – in inquisitorial proceedings, the burden of proof and thus the risk of failing to prove a fact lie with the prosecutor (the executive branch of government), which means (or should mean in practice)[61] that if the prosecutor is unsuccessful in meeting the evidentiary threshold, the presumption that the person is innocent prevails.[62]

By enacting the principle "when in doubt, in favour of the taxpayer", the same rule on the burden of proof is adopted in the context of tax procedures as is otherwise typical for criminal law; namely, that the burden of proof (as a rule) and thus the risk of failing to prove the case rests with the executive branch, i.e. the tax authority conducting the evidentiary process or the specific tax procedure. If the tax inspector fails in their evidentiary efforts (i.e. is unable to offer evidence sufficient to remove all doubt regarding the taxpayer's allegedly improper conduct), it is or should be presumed that the taxpayer has acted lawfully and that the state cannot accuse them of irregularities in complying with their tax obligations. In making its decision, the tax authority may consider only those facts which it is convinced, based on the evidence adduced, actually exist (or existed). The tax authority must be convinced of the existence or non-existence of a particular fact, otherwise there is doubt. Any such doubt regarding the existence or non-existence of a fact must be resolved according to the principle "*in dubio contra fiscum*" or when in doubt, in favour of the taxpayer.

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[61] In this respect, Zupančič characterises this principle (in terms of its implementation in practice) as merely a "lukewarm recommendation" to judicial authorities. For more details, see Boštjan Marija Zupančič, "Načelo zakonitosti v kazenskem pravu", in: *Komentar Ustave Republike Slovenije*, ed. Lovro Šturm (Ljubljana, 2002), p. 302 ff (hereinafter: Zupančič, "Načelo zakonitosti v kazenskem pravu").

[62] Zupančič, "Načelo zakonitosti v kazenskem pravu", p. 303.

The issue of legal security after the tax audit procedures have concluded

As discussed earlier in this contribution, there are several types of tax supervision procedures. The most complex form of tax supervision is undoubtedly the tax audit procedure. Tax audit is a special administrative procedure that is distinctive in multiple respects, as its objective is not to decide only on the rights, obligations and legal interests of individuals in a particular administrative case but also, and above all, on the tax liability of taxpayers. For that reason, this procedure is intended to be more flexible, faster and more efficient, although this should not be to the detriment of the taxpayer, i.e., it should not result in infringements of taxpayers' rights or fundamental principles of tax supervision procedures and tax procedure as such.[63] In these procedures, the principle of protecting the parties' rights and protecting the public interest is especially prominent. The conflict between the public and private interest, which is particularly pronounced or expressed in the tax supervision procedure, obliges tax authorities to exercise special care in seeking a balance between the public and private interest, regardless of the fact that, by the very nature of things, the primary task of the tax authorities in tax supervision procedures is to pursue the public interest.

The tax fact-finding phase (which includes the process of issuing and serving a report on the taxpayer and the procedure for submitting comments on the findings in the report) is followed by the phase in which the tax audit procedure is concluded. Tax supervision is finalised by issuing the relevant administrative act, i.e., a decision or an order. A decision is issued in all cases where, in the course of the tax supervision procedure, the tax authority discovers irregularities on the part of the taxpayer that either affect the amount of the tax liability (an assessment decision) or do not affect the amount of the tax liability itself but reveal other irregularities (a declaratory decision aimed at rectifying other irregularities).[64] In all cases where the tax authority has found no irregularities in the course of the procedure, the tax audit procedure concludes with

[63] Decision of the Constitutional Court of the Republic of Slovenia U-I-252/0 of 8 October 2003, point 9 of the reasoning.

[64] Decisions establishing irregularities are not decisions that merely seek to establish that the taxpayer's conduct (act or omission) constitutes an infringement of regulations; such conclusion should be followed by the restoration of lawful conditions, either by a prohibitory or a regulatory decision. For more details on the subject of a decision on establishing irregularities that have no influence on the amount of tax liabilities, see also Jernej Podlipnik, "Odločba o ugotovitvi nepravilnosti, ki ne vplivajo na višino davčne obveznosti", *TFL Glasnik* – tedenski e-bilten z novostmi iz zakonodaje, sodne prakse in stroke, No. 25 (2016), available at: https://www.tax-fin-lex.si/Dokument/Podrobnosti?rootEntityId=817078ff-f571-450e-9eee-60f57dba2778&qh=Odlo%C4%8Dba,o,ugotovitvi,nepravilnosti,,ki,ne,vplivajo,na,vi%C5%A1ino,dav%C4%8Dne,obveznosti, accessed: 20.1. 2025.

an order to discontinue the procedure (the termination of the procedure for substantive reasons under the fourth paragraph of Article 135 of the ZUP).[65]

The decision issued by the inspector at the conclusion of the tax audit procedure establishes a new tax liability relationship between the tax authority and the taxpayer, both in situations where irregularities are established during the tax audit procedure that result in the additional assessment of tax liability and in situations where it is established, based on the findings of the tax audit procedure, that the taxpayer is entitled to a refund of overpaid tax. Once the assessment decision is enforced, the specific tax liability relationship as such ceases to exist, and the substantive res judicata effect occurs (binding both the taxpayer and the tax authorities to the content of the tax decision – *res iudicata ius facita inter partes*), which means that re-examining a case that has already become final is prohibited (*ne bis in idem*). The prohibition against reconsidering the same case is a direct reflection of the principle of legal security.

In legal theory, it is somewhat controversial whether, in the case of tax supervision procedure, it is reasonable or justified to apply the solution according to which tax supervision procedures or tax audit procedures in cases where no irregularities in the taxpayer's conduct have been established conclude with an order on termination of the procedure, as this manner of terminating the tax audit procedure does not result in the substantive finality (only the so-called formal finality) and does not produce the effect of res judicata or the prohibition of ne bis in idem.[66]

The termination (conclusion) of the tax audit procedure in which no irregularities were established by issuing an order on termination of the procedure rather than, for example, by issuing a decision establishing that no irregularities have been identified,[67] is typically justified by referring to the provision of Article 28 of the ZIN, which explicitly stipulates that procedures in such cases

[65] The other two tax supervision procedures regulated by the ZDavP-2, tax supervision over self-assessment tax returns and tax supervision over individual fields of operations, might not conclude with a decision or an order on termination of the procedure. Under the seventh paragraph of Article 129 of the ZDavP-2 (if it is established in the course of these two tax supervision procedures that further investigation of the factual situation is necessary), the tax supervision over self-assessment tax returns may conclude either by issuing an order on initiating tax supervision over individual fields of operations or by issuing an order on initiating tax audit. Similarly, tax supervision over individual fields of operations may conclude by issuing an order on initiating tax audit (the sixth paragraph of Article 130 of the ZDavP-2). For more on the subject of switching between different types of (tax) supervision procedures, see Polonca Kovač, "Prehajanje med (davčnimi) postopki: inovativnost ali erozija pravne varnosti?", *Pravna praksa – časopis za pravna vprašanja*, No. 37 (2019), p. 6–7.

[66] Cf. Jerovšek, Simič and Škof, *Zakon o davčnem postopku s komentarjem*, p. 345 ff; Kovač, "Postopkovna vprašanja davčnega inšpekcijskega nadzora", p. 287.

[67] The termination of the tax audit procedure initiated ex officio (exclusively) by issuing a decision on the merits, regardless of whether or not irregularities have been detected, is considered by Kovač as the only systemically proper way of terminating the tax audit procedure. See Kovač, "Postopkovna vprašanja davčnega inšpekcijskega nadzora", p. 287. Such an opinion is perfectly acceptable from the perspective of ensuring legal security.

are terminated by issuing an appropriate order on termination of the procedure rather than by issuing a decision on the merits. Rendering a decision is required only when irregularities have been identified that pose a risk to the public interest (and thus, a decision on the merits must be issued to protect the public interest and to restore lawful conditions), which, however, does not need safeguarding if the taxpayer had not violated any regulations, and it is thus sufficient to issue an order on termination of the procedure, which does not require the special reasoning that is typical of a decision.[68]

Insofar as we proceed from the above interpretation or argumentation on the issue of concluding (terminating) the tax audit procedure and consider the question of whether a decision or an order should be issued as an administrative act concluding the tax audit procedure strictly from the perspective of whether the taxpayer has violated regulations or not, i.e. whether protecting the public interest requires action and rectification of the unlawfulness or not, one can agree with such a position or argumentation. However, the fact remains that such a position is, in principle, based only on the requirement to protect the public interest and does not take into account the protection of taxpayers' rights (the protection of the parties' rights) nor the requirement of legal security for taxpayers, which is not guaranteed when the order on termination of the procedure is issued (except in the case of an order on termination of the procedure issued under the fourth paragraph of Article 140.a of the ZDavP-2, which will be discussed below).[69]

As follows from the fifth paragraph of Article 141 of the ZDavP-2, the audit cannot be revisited with regard to findings and actions conducted during the tax audit that have already been finally decided (substantive finality), whereby this effect can only apply to the cases of tax audit procedures that concluded with the issuance of a decision on the merits, and thus does not extend to procedures that concluded with the issuance of an order on termination of the procedure. Therefore, the tax audit procedure may be initiated anew, even without any specific new reasons, against the same taxpayer, for the same period, for the same type of tax, at any time, and the commencement of the new procedure is not conditional upon using a particular legal remedy (in principle, no remedies are even available against orders), such as, for example, the reopening of the procedure, etc. The only safeguard of the taxpayer's legal security in such cases is the statute of limitations on the right to tax assessment as stipulated in the first paragraph of Article 125 of the ZDavP-2.

[68] Cf. Matjaž Remic, "Izhodišča za ureditev inšpekcijskega nadzora de lege ferenda", in: Polonca Kovač (ed.), *Inšpekcijski nadzor, razprave, sodna praksa in komentar* (Ljubljana, 2016), p. 226 ff (hereinafter: Remic, "Izhodišča za ureditev inšpekcijskega nadzora de lege ferenda").

[69] Jerovšek, Simič and Škof, *Zakon o davčnem postopku s komentarjem*, p. 346.

Notwithstanding the above-cited provision of the ZIN, which stipulates that an inspection procedure in the course of which no irregularities have been found (i.e. the taxpayer has not infringed any law or other regulation) shall be terminated by an order, one can concur with the position that, from a systemic point of view, any procedure initiated *ex officio* (to ensure the equal protection of rights and not only the public interest) should conclude with the issuance of a decision on the merits, including those cases in which no irregularities have been detected in the course of the tax audit procedure.[70] While this position has not yet been established in legislation or case law, and although concluding the tax audit procedure with an order on termination of the procedure does not confer substantive finality, it would be necessary to define the requirement of justifying the need for (subsequently repeated) protection of the public interest and the primacy of the public interest over the protection of taxpayer's rights – the taxpayer's rights to legal security and the protection of acquired rights – in the specific case as a special procedural prerequisite for the admissibility of initiating a (new) tax audit procedure (following the conclusion of a prior audit procedure) in all cases where the tax audit procedure is initiated anew against the same taxpayer, for the same period, for the same type of tax, in order to consistently adhere to the principle of legal security.[71]

Regardless of what was already stated concerning the (various) possible ways of concluding the tax audit procedure and the problem with substantive finality when the tax audit procedure concludes with an order on termination of the procedure, Article 140.a of the ZDavP-2 lays down additional circumstances in which the tax audit procedure concludes with the issuance of the order on termination of the procedure (the fourth paragraph of Article 140.a of the ZDavP-2). The tax audit procedure may also conclude with an order on termination of the procedure if, although the tax authority has identified irregularities during the tax audit procedure that affect the amount of the taxpayer's tax liability, the taxpayer does not object to the tax authority's findings as recorded in the report and corrects the identified irregularities him- or herself (before the time limit for submitting comments on the report expires).

With regard to the above-mentioned possibility of concluding the tax audit procedure under Article 140.a of the ZDavP-2, it should be emphasised that the taxpayer is afforded a higher degree of legal security when the tax audit procedure concludes with the issuance of an order on termination of the procedure under the first sentence of the fourth paragraph of Article 140.a than is otherwise typical of all other instances in which the tax audit procedure concludes

[70] See Kovač, "Postopkovna vprašanja davčnega inšpekcijskega nadzora", p. 287.

[71] Cf. also Remic, "Izhodišča za ureditev inšpekcijskega nadzora de lege ferenda", p. 228.

with an order to terminate the procedure. The ZDavP-2 thus explicitly provides that in such cases (the fourth paragraph of Article 140.a), the tax supervision over the field of operations or taxes for the tax period that has already been subject to tax audit shall not be repeated (unless, after the issuance of the order, the tax authority learns of new facts or finds or obtains the possibility to use new evidence, which might, on its own or in conjunction with the evidence previously taken and used, result in a different tax assessment if these facts or evidence had been presented and used in the tax audit).

If during the tax audit procedure the tax authority determines that the taxpayer has breached a law or other regulation in complying with tax obligations, and the taxpayer agrees with the tax authority's findings and acts in accordance with the first paragraph of Article 140.a of the ZDavP-2 by submitting a corrected tax return and simultaneously paying the tax with the corresponding interest (i.e. submission of self-assessment tax return on the basis of voluntary disclosure in the phase following the service of the order on initiation of tax audit), the tax audit procedure as such cannot be concluded by the issuance of a decision, because the taxpayer has voluntarily remedied all the irregularities identified by the tax authority during the tax audit procedure (since a decision may be issued only for the purpose of assessing additional tax liability, or for the purpose of reimbursing an overpaid tax, or in other cases where no additional tax is assessed and no overpaid tax is reimbursed but the decision imposes correction of other irregularities that have been identified during tax audit and that do not affect the amount of the tax liability). Instead, it can only conclude (as the only option) by issuing an order on termination of the procedure, as the irregularities resulting from the incorrect fulfilment of tax liability no longer exist. As regards the question of the possible manner of concluding the tax audit procedure, the situation in such a case is practically identical to the situation where the tax authority detects no irregularities in the course of the tax audit procedure and can conclude the tax audit procedure by issuing an order on termination of the procedure in accordance with Article 28 of the ZIN. Therefore, insofar as these are substantively comparable (similar) legal situations, there is also no factual (justified) reason for different legal effects (consequences) of the order on termination of the procedure. A different interpretation would effectively result in unequal treatment of taxpayers.

Based on the above reasoning, it can be concluded that to ensure legal security, it would be justified in all cases where the tax audit procedure concludes with an order on termination of the procedure (regardless of the legal basis for issuing the order on termination of the procedure) to proceed from a uniform and general prohibition of deciding the same matter twice.

The statute of limitations as a "guardian" of legal security

A tax liability arises once the statutory prerequisites are met, and once it is fulfilled in the manner prescribed by law, the tax liability ceases. However, the tax liability also ceases upon the expiry of a statutorily specified period running from the date on which it was incurred or from another statutorily defined moment, which is a reflection of the requirement of legal security for taxpayers and, of course, the protection of the public interest (i.e., the tax liability is time-barred).

The significance of the statute of limitations (in tax law)

The statute of limitations is one of the cornerstones of the principle of legal security. Its significance lies in the legal protection of participants in the tax relationship (both taxpayers and tax authorities) by ensuring that, after a certain period of time, the active tax subject (the state) can no longer "claim" the tax liability, while the passive tax subject (the taxpayer) can no longer "claim" the reimbursement of a tax liability that has already been fulfilled.[72] The purpose of the statute of limitations lies in ensuring that the parties to the tax-law relationship can be certain whether they remain subject to compulsory enforcement of their obligations or not. From the perspective of legal security, the statute of limitations is essential both in the absence of evidence due to the passage of time and in the case of certain claims (where the question of their provability due to the passage of time is not relevant), because it is necessary for taxpayers to no longer feel liable after a certain time has passed, even with regard to the most certain claims by the fiscal authority, as this allows them tax-oriented planning and managing of their affairs. Legal security requires that both certain and uncertain claims are subject to a time limit by which they must be asserted at the latest (both for procedural reasons of evidentiary weight decreasing over time and for reasons of the stability of the legal system).[73] The right acquired through the statute of limitations is the right to object that the obligation no longer exists or needs no longer be performed. [74]

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[72] Bojan Škof, "Absolutno zastaranje z vidika začetka teka", *Davčno finančna praksa* 16, No. 7–8 (2010), p. 21 ff; Jerovšek, Simič and Škof, *Zakon o davčnem postopku s komentarjem*, p. 297 ff.

[73] Thilo Haug, *Die Verjährung im steuerrecht: Eine Neuregelung unter Berücksichtigung des Gegenwartsprinzip* (Ludwigsburg, 2012), p. 81, 87 (hereinafter: Haug, *Die Verjährung im steuerrecht*); Mojca Muha, *Zastaranje v davčnem pravu*, magistrska naloga, Univerza v Mariboru, Pravna fakulteta (Maribor, 2016), p. 30 (hereinafter: Muha, *Zastaranje v davčnem pravu*).

[74] Muha, *Zastaranje v davčnem pravu*, p. 7. See also Janez Čebulj, "Neustavna razlaga in uporaba 68.a člena ZDavP-2, ter določb o zastaranju v finančnih preiskavah", *Pravna praksa – časopis za pravna vprašanja*, No. 19 (2015), pp. 8–10.

The statute of limitations is not a procedural- but rather a substantive-law concept, which is regulated in the ZDavP-2, and the expiration of which results not only in the extinguished right to claim the payment of tax but also in the termination of the tax liability "*per se*", which the tax authorities (both in the fact-finding procedure and procedure involving legal remedies) are (generally) obliged to take into account ex officio (rather than only upon the taxpayer's objection).[75]

Overview of the historical development of the statute of limitations

The statute of limitations is one of the oldest legal concepts, with its roots going back roughly 2000 years. Legal theory has shown only moderate interest in this legal concept precisely because of its uncontroversial nature. The origins of the statute of limitations thus date to a period (time) before there was any distinction between public and private law. Roman law was decisive in shaping modern law (although there were also cases in antiquity where the passage of time had legal consequences).[76]

In Roman law, the effects of the passage of time were first manifested in the acquisition of rights, which were initially limited solely to rights in rem. The objection developed later but again applied only to rights in rem. The statute of limitations for actions was regulated as early as 424 by the law of Honorius and Theodosius II;[77] therefore, this concept was indeed already known from Roman law.[78] This limitation did not apply to the claims by the fiscus, which were exempt. The later rules introduced by Anastasios I in 491 had already established the 40-year limitation period for public law, though this may not have been intentional. Nonetheless, public levies were still explicitly exempted from the statute of limitations.[79]

No legal sources concerning the statute of limitations are known from the period when the territory of what is now Slovenia was settled in the 6th century and later formed into the independent Principality of Carantania. In the 9th century, the territory of present-day Slovenia became part of the Frankish Empire, and the 30-year limitation period known to the Franks presumably applied here

75 Reinhild Ruban, "Festsetzungverjährung", in: *AO FGO Kommentar*, 10. Auflage, ed. Walter Hübschmann, Ernst Hepp und Armin Spitaler (Köln, 1995–), Vorbemerkung zur par. 169, rz. 26.

76 Haug, *Die Verjährung im steuerrecht*, p. 2.

77 Viktor Korošec, *Rimsko pravo*, I. del (Ljubljana, 2002), p. 83.

78 Muha, *Zastaranje v davčnem pravu*, p. 13.

79 Ibid.

as well.[80] When all Slovenian territory (apart from the coastal towns) later fell under Habsburg rule (by the 15th century), securing permanent state revenues through direct taxes was paramount for establishing the military system. The tax on persons (former *per capita taxes*) gradually evolved towards increasingly prominent income taxes, while the most important measures in terms of legal history were those concerning the regulation of the land tax.[81] There was no statute of limitations on fiscal obligations at that time. It was only with the Austrian *Verjährungsgesetz* of 1878 that a comprehensive statute of limitations for public levies was introduced (which already recognised the distinction between the limitation of assessment and recovery, as is also known today).[82]

After the collapse of the Austro-Hungarian monarchy (1918), the State of Slovenes, Croats and Serbs was briefly formed, eventually merging into the Kingdom of Serbs, Croats and Slovenes. The question of taxation was an important and sensitive issue, complicated by the fact that the new state encompassed regions that had previously been subject to different legal and tax regimes. Legal and tax reforms aimed at unification took time and could not happen overnight. For that reason, the rules that had been valid at the time continued to apply until unification, especially concerning direct taxes, while indirect taxes (customs duties, excise duties, but not sales tax, which was then considered a direct tax) were unified almost immediately.[83] The legal regime in the Slovenian part of the Kingdom was thus a continuation of the earlier Austrian law, and Austrian tax laws continued to apply during this transitional period.[84] The Austrian system for direct taxation was the most advanced compared to the other four regimes in force at the time and did not differ in any significant way from the systems of Western European countries, which were based on the latest developments in tax science.[85] The Direct Taxes Act was enacted in 1928, which also contained provisions on the statute of limitations in its final part. It stipulated that the right of the state to assess a tax would become time-barred within five years from the first January of the year in which the tax liability arose. The limitation period was interrupted by any official act brought to the attention of the taxpayer or the person liable for payment.[86]

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[80] Cf. Haug, *Die Verjährung im steuerrecht*, p. 6.

[81] Summarised after Sergij Vilfan, *Pravna zgodovina Slovencev* (Ljubljana, 1961), p. 370. On the historical development of particular forms of taxation in the territory of present-day Slovenia, see also Aleš Kobal, *Dohodnina po novem* (Maribor, 2004), p. 13 ff.

[82] Muha, *Zastaranje v davčnem pravu*, p. 16; Haug, *Die Verjährung im steuerrecht*, p. 115.

[83] Božidar Jelčić and Predrag Bejaković, *Razvoj i perspektive oporezivanja u Hrvatskoj* (Zagreb, 2012), p. 18 and 19 (hereinafter: Jelčić and Bejaković, *Razvoj i perspektive oporezivanja u Hrvatskoj*).

[84] For more details on this period, see Muha, *Zastaranje v davčnem pravu*, p. 15 ff.

[85] Jelčić and Bejaković, *Razvoj i perspektive oporezivanja u Hrvatskoj*, p. 26.

[86] Ibid., p. 70.

During the post-World War II period (from 1945 onwards – during the period of the People's Republic and later the Socialist Federal Republic of Yugoslavia), the area of procedural tax law, and, by extension, the statute of limitations, was not the subject of independent procedural rules; instead, relevant provisions were contained within specific substantive laws (e.g., legislation regulating personal income tax, citizens' tax, etc.). Nonetheless, the concept of the statute of limitations was always present (known), but it could also vary from one statute to another.[87]

With Slovenia's declaration of independence, developments concerning the statute of limitations became more evident, as did the general developments of the separate, independent procedural legislation, although this separate development had not begun immediately after the independence (as was typically the case for the adoption of substantive tax legislation), when the provisions on the statute of limitation were initially still stipulated in substantive tax legislation, but only in 1996 when the Tax Procedure Act (ZDavP) was first adopted. A comparison between the 1996 ZDavP, its successor ZDavP-1 of 2004, and the currently valid ZDavP-2 (2006) shows that statutory provisions governing the statute of limitations are multiplying and becoming increasingly more extensive.

Regulation of the statute of limitations in the ZDavP-2

The subject of the statute of limitations in tax matters is governed by a separate subchapter V of the ZDavP-2, which is systemised within the general part of the ZDavP-2, where the statute of limitations is regulated uniformly in one place for all types of taxes (within the meaning of the definition of tax under the third paragraph of Article 3 of the ZDavP-2).

In this section, the ZDavP-2 regulates two "forms" of the statute of limitations, i.e. two different limitation periods, namely the so-called relative limitation period (relative statute of limitations – Article 125) and the so-called absolute limitation period (absolute statute of limitations – the sixth paragraph of Article 126). Other provisions of the ZDavP-2 do not regulate this concept any differently, nor do they include rules that would require a different approach to issues related to the statute of limitations than what is otherwise provided under subchapter V of the ZDavP-2.

[87] For more details on the particularities of the statute of limitations for individual tax forms of this period, see Muha, *Zastaranje v davčnem pravu*, p. 16 and 17.

Positive law regulating the subject of the (relative) statute of limitations stems from the basic division into the limitation on the right to tax assessment (the first and second paragraphs of Article 125 of the ZDavP-2) and the limitation on the right to recover (collect) tax (the third paragraph of Article 125 of the ZDavP-2). On the other hand, if a claim arising from a tax-liability relationship has "arisen" (i.e., is ascertainable), it is necessary to provide a mechanism for its "repayment" or recovery (collection).

Notwithstanding the general limitation period for the right to tax assessment as laid down in the first paragraph of Article 125 of the ZDavP-2, special mention should also be made of the first sentence of the sixth paragraph of Article 126 of the ZDavP-2 in the context of the limitation period.

The sixth paragraph of Article 126 of the ZDavP-2 provides in its first sentence that notwithstanding the provisions on the statute of limitations regarding the right of assessment and recovery (i.e., notwithstanding the general provision of Article 125 of the ZDavP-2), the tax liability shall cease upon the expiry of ten years from the date on which the statute of limitation initially started to run (unless the statute of limitations regarding the right of recovery has been suspended). The provision of the sixth paragraph of Article 126 of the ZDavP-2 regulates the so-called absolute statute of limitations for the assessment and recovery of tax debt (although the ZDavP-2 uses the expression cessation of the tax liability rather than the term absolute statute of limitations, which is rather a direct consequence of the absolute statute of limitation), which thus becomes absolutely time-barred ten years from the time when the limitation period first started to run (in the case of tax assessment, this is tied to the day on which the tax had to be declared, calculated, withheld or assessed, and the same applies mutatis mutandis to compulsory contribution). The effect of the absolute statute of limitations is the cessation of the tax liability "*per se*" (both the right and the claim are extinguished at the expiry of the time limit).[88]

Specifically on the commencement of the limitation period

In the context of the statute of limitations, which takes effect upon the passage of a certain period of time counted from the "moment when the statute of limitations (the limitation period) first began to run", it is therefore particularly important to highlight the question of the point in time when the tax liability arises, i.e. the moment from which both the relative and absolute limitation periods begin to run.

[88] Muha, *Zastaranje v davčnem pravu*, p. 41.

A tax liability is the obligation on the part of the taxpayer to pay the amount of tax determined by law – the tax liability "*per se*" arises immediately (the second paragraph of Article 44 of the ZDavP-2) once the statutory prerequisites for taxation (conditions under substantive law) are met. The emergence of the tax liability is thus independent of the issuance of an administrative act (e.g., a tax decision), which is, therefore, purely "declaratory" in nature. The assessment decision merely presents the basis for the taxpayer to fulfil (settle) the already-incurred tax liability, i.e. to pay the tax. [89]

The limitation on the right to tax assessment is tied to the procedure for recovering individual types of taxes (claims by the tax authority under a tax-liability relationship are primarily subject to the limitation on the "assessment of tax"), which in the Republic of Slovenia varies depending on the tax in question (i.e., on the specific type of tax).

In procedural terms, the expiry of the (limitation) period for tax assessment means that tax assessment is no longer possible or legally permissible. Consequently, the taxpayer's tax liability itself ceases to exist, whereas the tax liability arises in all cases independently of whether the tax authority actually conducts (or does not conduct) the tax assessment procedure. If the tax authority still issues a tax assessment decision or amends a previously issued decision despite the expiry of the limitation period, such decision or amendment of the decision (e.g. a replacement decision) is unlawful and thus voidable.[90]

The moment at which the limitation period for the right to tax assessment begins is thus different from the moment at which the tax liability itself arises, with the latter always preceding the moment at which the limitation period starts to run. Under the ZDavP-2, the moment at which the limitation period begins to run varies according to the procedure provided for collecting the type of tax in question. Furthermore, the start of the limitation period for the right to tax assessment is completely independent of the 'will or action' of the tax authority (on the other hand, the expiry of the limitation period or the occurrence of the statute of limitations on the right to assessment or the right to recovery is almost always the result of the tax authority's inaction). The provisions on the interruption and suspension of the limitation period (Article 126 of the ZDavP-2) thus ensure that the public interest is adequately protected. Upon expiry of the time limit for filing the tax return, the statutory limitation period for the right to tax assessment begins to run, i.e. the time limit within which the tax authority must perform the tax assessment (i.e., specify the already-incurred tax liability). According to the first paragraph of Article 125 of

[89] See also Nataša Jeromel Fišer, "Postopki za odmerjanje davčne obveznosti", in: *Splošno davčno pravo*, ed. Erik Kerševan and Jernej Podlipnik (Ljubljana, 2023), p. 209.

[90] See also Muha, *Zastaranje v davčnem pravu*, p. 38.

the ZDavP-2, it has five years to do so (to mail the decision by post). It may even extend this time limit through its own activity (interrupt the limitation period).

The provision of the first and second paragraphs of Article 125 of the ZDavP-2 contains a so-called subjective limitation period (regulating the relative statute of limitations), whereby the starting points of the limitation period for all forms of "assessing" tax liability are clearly stipulated.

In this context, the term "assessment" should be understood in a broader sense, meaning the various forms of "collection" (or assessment) of specific types of tax. The moment when the subjective limitation period for the right to tax assessment is triggered is thus determined or determinable (solely and exclusively) based on the first and second paragraphs of Article 125 of the ZDavP-2.

The time limit available to the tax authority to issue a decision under the first paragraph of Article 330 of the ZDavP-2 cannot affect the commencement of the limitation period for the right to tax assessment. A contrary view – according to which the limitation period for the right to tax assessment would (generally) start to run only when the instructive time limit imposed upon the tax authority for issuing the assessment decision has also expired after the statutory time limit for filing the tax return – would effectively mean that the limitation period for the right to tax assessment does not begin to run from the moment the tax collection procedure commences, but only at the moment considered to be the end of that procedure (since issuing the tax assessment decision signifies the conclusion of the tax assessment procedure). Such a position is, of course, inconsistent with the fundamental rules on the commencement of the tax procedure as defined in Article 72 of the ZDavP-2, as well as with the consequences triggered by the commencement of a tax procedure.[91] The beginning of the limitation period for the right to tax assessment is thus tied to the moment when the tax procedure commences and cannot, under any circumstance, be tied to the conclusion of the tax procedure, which ends in a substantive sense with the issuance of a decision on the merits. The moment at which the procedure concludes can, therefore, be relevant only as the starting point for the limitation period on the right to recover the tax, never for the limitation period on the right to assess tax. Any other understanding would also contradict the principle of the determinacy of tax regulations (and constitute an interpretation detrimental to the taxpayer). Particularly in areas where the state acts *ex iure imperii*, i.e. as an entity superior to the subjects of legal rules while simultaneously being a creditor in legal relationships and the authority

[91] See Polonca Kovač, "Stvarna pristojnost in začetek davčnega postopka", in: *Davčno pravo med teorijo in prakso s komentarjem 70.–90. člena ZDavP-2* (Ljubljana, 2021) p. 327.

rendering decisions, guaranteeing legal security for the subjects is essential. In particular, the principle of "*lex certa*" must be complied with, or there is no legal security but rather a legal peril.[92]

Conclusions

A characteristic feature of tax law (both substantive and procedural) is the conflicting interests of the state (the public interest) and taxpayers (private interests). The state pursues the public interest in taxation through numerous tax procedures, which run into millions of cases each year (taking into account both first- and second-instance administrative procedures). There is no doubt that tax procedures are mass procedures, the subject of which is verifying taxpayers' conduct in the sense of (correctly) complying with tax liability. Each year, the tax authorities have to decide on the rights and obligations of numerous individuals and issue corresponding administrative acts where relevant facts may relate to many life events in the taxpayer's financial sphere. Such procedures are characterised by a (heightened) conflict of interests, given that, on one side, there is a (strongly expressed and emphasised) public interest and, on the other, the interest of the taxpayer, who must tolerate (allow) interference into their financial sphere. The state operates *iure imperii* in relation to the taxpayer, which in turn gives rise to the need to protect the taxpayers' rights to ensure their legal security.

Tax procedure is an umbrella term for all forms of procedures involving the tax authorities on one side and taxpayers on the other. Tax audit procedures are only one form (type) of tax procedures. Tax audit procedures serve to verify those facts and circumstances that can primarily influence an increase or decrease in tax liability (verifying compliance with tax legislation). In all types of tax supervision procedures, complying with requirements of the fundamental principles of the so-called procedural tax law is especially significant, particularly the principles of material truth, hearing the parties, and protecting the parties' rights and the public interest.

Legal security is a constitutional category and an important component of the rule of law. It provides taxpayers with confidence in the tax system, as legal security ensures the predictability and transparency of taxation. For the legislature, it serves as a guiding principle when adopting substantive tax rules. Legal rules must not contain so-called general clauses nor include elements that would render them imprecise, vague, incomprehensible, or ambiguous and

[92] See Muha, *Zastaranje v davčnem pravu*, p. 71.

thus require special interpretation to be applied. In the Republic of Slovenia, legal security is ensured through the interplay of requirements or fundamental principles set out in both procedural and substantive tax law. Certain procedural and substantive law concepts (e.g., the statute of limitations) also aim to safeguard legal security.

It is thus the role of fundamental principles to ensure rational decision-making in tax audit procedures rather than authoritarian or arbitrary decision-making in individual cases, which is reinforced with a range of repressive measures and means intended to protect the public interest as swiftly and effectively as possible, yet often at the expense of excessive interference with the taxpayers' financial sphere (the private interest).

Tax audit procedures are so-called fact-finding procedures. The establishment and proof of facts in all types of tax procedures necessarily take place with due regard for the fundamental principles of the tax procedure, whose primary purpose is to limit the authority's power in carrying out official acts and thereby ensure the legal security of taxpayers. Compliance with these principles is the official duty of the authority conducting the procedure and serves to safeguard the taxpayers' legal security (the rule of law principle). The fundamental principles of administrative and, in particular, tax procedure regulate the delicate relationship between private and public interest and, therefore, the conflict of interests, whereby the public interest in tax collection is neither absolute nor unrestricted. On the one hand, these principles constitute minimum procedural standards that must be respected and implemented in every tax procedure, while on the other hand, they serve as interpretative rules when applying particular procedural concepts and the provisions of the tax laws.

In Slovenia, separate procedural tax legislation was adopted only after independence, initially in the form of specific procedural provisions within substantive regulations. It was only later (in 1996) that procedural tax rules were "codified" in a standalone legal act, which did not initially pay special attention to the fundamental principles of conducting tax procedures. The legal security of taxpayers during that period was thus questionable. It was ten years later, with the adoption of new procedural tax legislation (2006), that an independent system of procedural tax principles was established that, subsidiary to the provisions of the ZUP, forms the framework for ensuring the legal security of taxpayers. This system of principles remains in force today and is significantly complemented by extensive and varied case law, primarily of the Supreme Court of the Republic of Slovenia.

Aleš Kobal

TEMELJNI INSTITUTI V POSTOPKIH DAVČNIH NADZOROV ZA ZAGOTAVLJANJE PRAVNE VARNOSTI ZAVEZANCEV ZA DAVEK

POVZETEK

Davčno pravo, tako v materialnem kot v procesnem segmentu, je sistemsko zaznamovano z izrazitim in trajnim nasprotjem interesov med državo kot nosilko javne oblasti ter davčnimi zavezanci kot subjekti, katerih premoženjska sfera je neposredno obremenjena z obveznostjo plačevanja davkov. Država v postopkih obdavčitve zasleduje javni interes zagotavljanja stabilnih in zadostnih javnofinančnih prihodkov, pri čemer v razmerju do davčnih zavezancev nastopa z oblastnimi pooblastili (*iure imperii*), kar povzroča strukturno neenakost procesnih položajev udeležencev davčnega razmerja.

Davčni postopki so po svoji naravi množični in kontinuirani, saj se njihovo število na letni ravni meri v milijonih odločitev, tako na prvi kot tudi na drugi stopnji upravnega odločanja. Davčni organi v teh postopkih odločajo o pravicah in obveznostih velikega števila subjektov, pri čemer se relevantna dejstva pogosto nanašajo na kompleksne in raznolike življenjske ter premoženjske okoliščine davčnih zavezancev. Takšna narava davčnih postopkov še dodatno zaostruje konflikt med javnim interesom učinkovitega pobiranja davkov in zasebnim interesom zavezancev po varstvu njihove premoženjske sfere ter pravni predvidljivosti.

Davčni postopek kot krovni pojem obsega vse oblike procesnega delovanja davčnih organov v razmerju do davčnih zavezancev, med katerimi imajo postopki davčnega nadzora osrednje in posebej občutljivo mesto. Ti postopki so po svoji naravi ugotovitveni postopki, katerih temeljni namen je preverjanje pravilnosti ugotavljanja davčne osnove, zakonitosti obračuna davčnih obveznosti ter spoštovanja materialne davčne zakonodaje. Zaradi njihove intruzivne narave in izrazitega posega v premoženjsko sfero zavezancev je v teh postopkih vprašanje procesnih jamstev še posebej izrazito.

V vseh vrstah davčnih postopkov, zlasti pa v postopkih davčnega nadzora, ima spoštovanje temeljnih načel davčnega procesnega prava konstitutivni pomen. Načela materialne resnice, zaslišanja stranke ter varstva pravic strank in javnih koristi delujejo kot normativna omejitev izvrševanja oblastnih pooblastil davčnih organov in kot prepreka arbitrarnemu ter pretirano represivnemu odločanju. Njihova funkcija ni zgolj formalna, temveč vsebinska, saj predstavljajo temeljne procesne standarde, ki jih mora organ upoštevati po uradni dolžnosti.

Pravna varnost kot ustavna kategorija in bistvena sestavina načela pravne države ima v davčnem pravu poseben pomen. Davčnim zavezancem zagotavlja zaupanje v davčni sistem ter omogoča predvidljivost in transparentnost davčnih obremenitev, zakonodajalcu pa nalaga dolžnost oblikovanja jasnih, določenih in nedvoumnih pravnih norm. Davčne norme ne smejo vsebovati splošnih klavzul ali nedoločenih pravnih standardov, ki bi omogočali pretirano diskrecijo davčnih organov in s tem ogrozili načelo zakonitosti ter pravno varnost.

Zagotavljanje pravne varnosti v davčnem pravu se uresničuje skozi kompleksen preplet temeljnih procesnih načel ter posameznih materialnopravnih in procesnopravnih institutov, med katerimi ima pomembno mesto institut zastaranja. Temeljna načela davčnega postopka hkrati opravljajo razlagalno funkcijo pri uporabi konkretnih zakonskih določb in uravnavajo razmerje med javno koristjo pobiranja davkov in varstvom zasebnih interesov davčnih zavezancev, pri čemer javna korist v davčnem pravu ne more biti razumljena kot absolutna in neomejena.

Razvoj samostojne davčne procesne zakonodaje v Republiki Sloveniji je po osamosvojitvi potekal postopno in neenakomerno. Sprva so bila procesna pravila fragmentarno vključena v materialne davčne predpise, kasneje pa so bila leta 1996 kodificirana v samostojnem zakonu, ki ni vzpostavil celovitega sistema temeljnih procesnih načel. Šele z uveljavitvijo nove davčne procesne zakonodaje leta 2006 je bil oblikovan koherenten sistem davčnih procesnih načel, ki v povezavi s subsidiarno uporabo določb ZUP ter bogato in raznoliko sodno prakso, zlasti Vrhovnega sodišča Republike Slovenije, danes predstavlja temeljni normativni okvir za zagotavljanje pravne varnosti davčnih zavezancev.

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