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# Means Ensuring Protection of Taxpayers' Rights in Estonian Tax Law

This article provides an overview of the most important means ensuring protection of taxpayers' rights in Estonian tax law. The article begins with a review of constitutional requirements and restrictions on levying taxes, followed by an overview specifically concerning the protection of taxpayers' rights in the procedure of collection.

## Law Reservation Clause

Under § 113 of the Constitution, state taxes are provided by law in Estonia. The taxpayer's duty to pay a specific amount of tax is created upon the existence of the elements of an act fixed in law. All mandatory elements of a tax-law relationship must be fixed in law. The requirement provided in the Constitution has been further developed in § 8 of the Taxation Act, which states that "taxpayers are required to pay only such state and local taxes as are prescribed by law at the rates and pursuant to the procedure provided for in tax Acts and council regulations." Section 7 of the Taxation Act lists the circumstances that must be provided in a tax Act. In accordance with the definition of tax in § 2(1) of the Taxation Act, a tax is characterised, *inter alia*, by the fact that the obligation must be performed pursuant to the procedure, in the amount and during the terms prescribed in a tax Act or council regulation.

Section 157 of the Constitution entitles local governments to levy and collect taxes and to impose duties. Local taxes may be levied by rural municipality councils and city councils by tax regulations issued under the Local Taxes Act. In levying local taxes, the councils' freedom of decision is limited by the list of taxes (presently nine taxes) and the main characteristics set out in law.

The Decision of 23 March 1998 of the Constitutional Review Chamber of the Supreme Court (3-4-1-2-98 - RT<sup>1</sup> I 1998, 31/32, 432) holds that the requirement that "state taxes shall be provided by law", provided in § 113 of the Constitution, must be interpreted so that all mandatory elements of a tax-law relationship — taxpayer, object of tax, tax rate, tax recipient, the procedure for and due date of tax payment — must be fixed in law. The optional element of a tax-law relationship — allowances — must (if their application is wanted) also be provided by law.

Section 110 of the Constitution precludes the establishment of state taxes by decrees of the President. The adoption or amendment of tax Acts by a referendum is not permitted either (§ 106 of the Constitution). Therefore it can be asserted that in Estonia, the establishment of state taxes is the sovereign and unalienable right of the Parliament.

Before the Constitution entered into force, establishment of taxes (as well as solving other principal matters) by regulations of the Government was common in Estonia. This was permitted by § 3 of the Taxation Act passed on 28 December 1989 (ENSV ÜVT 1989, 41, 648; RT I 1994, 1, 5). In the rapidly changing life and unstable political and economic situation of those days, that was, without doubt, the only possible solution.

Unfortunately, it must be admitted that the law reservation clause has been violated in Estonia even after the entry into force of the Constitution. On 14 October 1997, the Riigikogu<sup>2</sup> passed the Customs Tariffs Act (RT I 1997, 78/79, 1321); § 15(3) of the Act entitled the Government to establish and abolish applicable customs tariff rates from

zero to maximum rates set out in the Appendix to the Act, if customs tariffs were established without a fixed limit or for a period exceeding six months. Under § 15(5) of that Act, the Government of the Republic was also entitled to establish and abrogate special customs tariff rates regardless of their period of applicability. The Legal Chancellor held the opinion that, under § 113 of the Constitution, such delegation was inadmissible and made a proposal to the Riigikogu to harmonise the Customs Tariffs Act with the Constitution. As the Riigikogu did not support the proposal, the Legal Chancellor initiated a constitutional review procedure in the Supreme Court. Under the Decision of 23 March 1998 of the Constitutional Review Chamber of the Supreme Court (3-4-1-2-98 - RT I 1998, 31/32, 432), §§ 15(3) and (5) of the Customs Tariffs Act were repealed.

The decision of the Supreme Court stated that establishment of a tax must result in a tax-law relationship between the taxpayer and the tax recipient (state or local government). Hence an Act establishing a tax must cover all important tax-law relationship conditions, without which the legal relationship cannot exist. These important conditions are the taxpayer, tax recipient, object of tax, tax rate and the procedure and due dates of tax payment.

Even if just one of the important characteristics is not provided for in an Act, the tax as such is not provided for by the Act. Thus the decision on the object of tax or tax rate may not be delegated to the executive power. Such an important state matter as the establishment of taxes may not be delegated to the executive, because that would be in conflict with the objective of regulation-making and violate the principle of separation and balance of powers. The establishment and modification of customs duties is related to very many persons' financial obligations to the state. The Riigikogu, without knowing the applicable customs duty rates, cannot adequately proceed with the state budget, which must reflect all state income and expenditure. The Supreme Court also noted that continuous modification of tax rates at short notice violates the principle of legal certainty, which is a fundamental underlying democratic rule of law.

The concept of tax is not defined in the Constitution but the absence of a definition does not imply that the concept may be interpreted in an arbitrary manner. The concept of tax, as used in the Constitution, may have only such meaning as is attributed thereto by the theory and practice of the branch of law concerned. The Constitution cannot be required to define concepts. [1, p. 43] Naturally, failure to conform to the provisions of the Taxation Act cannot automatically create a conflict with the Constitution. At the same time, it cannot be denied that the provisions of § 2(1) and §§ 3, 7 and 8 of the Taxation Act derive from the theoretical conception of the tax-law relationship and this can be regarded as the legislator's own interpretation of § 113 of the Constitution.

Section 113 of the Constitution does not *per se* require that tax rates should not be provided as maximum and minimum limits. However, the limits of the freedom of choice, the potential number of taxpayers, the amount of money collectable by taxation and the possible frequency of modifying tax rates must be observed in this respect. The higher the number of persons influenced by a modification in tax rates and the bigger are the changes brought about thereby, the more careful the legislator must be in granting a delegation.

The requirement that state taxes must be provided by law is today expressed in the constitutions of most European countries. In many states, this provision is even further specified and several requirements on tax Acts have been fixed constitutionally. Hence, for example, the constitutions of Italy (Article 53), Portugal (Article 107) and Spain (Article 133) even require that income tax be progressive. The Constitution of Spain provides, *inter alia*, one important tax-law principle — the ability-to-pay-principle. The constitutions of the states referred to list tax liability in the catalogue of the primary duties of citizens. The establishment of taxes is based on the law reservation clause even when this is not provided expressis verbis in the constitution. In Germany, for example, any legal provision is regarded as a law under the Taxation Act (*Abgabeordnung*) but, nevertheless, both in theory and in court practice, the opinion that taxes may be established only by formal Acts has been maintained. [2, pp 105, 107]

## The Principle of Supremacy of Law

The principle of legitimacy must also be followed in the implementation of tax Acts. In addition to the law reservation, **the supremacy of law** must also be taken into consideration. In collecting taxes, the text of the Act must be strictly adhered to; taxpayers' freedoms may not be restricted and the Act may not be construed in an arbitrary manner under any acts of the executive or under unwritten law. Tax liability may not be increased under any provision inferior to an Act. Tax liability is created immediately upon the existence of the elements of the act provided in the law.

The principle of legal certainty implies that a tax Act must be so specific as to result in the minimum number of possible different interpretations and choices. Any delegation of decisions and explanations to the executive power must be minimal. A tax Act must be of such intelligibility that the taxpayer can calculate his or her future taxes by reading the text of the Act. Regulations issued by ministers may serve only an auxiliary or explanatory function, offering examples, describing representative situations and providing precepts to tax officials for the purpose of harmonising their technical work.

The contents of regulations implementing tax Acts can be classified into three groups. Firstly, administrative reg-

ulations issued under the Act and intended for execution (e.g. the establishment of declaration forms or tax-free goods); secondly, instructions concerning the meaning of undefined legal concepts; and thirdly, instructions to the tax administrator for interpreting the Act and selection criteria for making discretionary decisions. Unfortunately, regulations of the Minister of Finance have become a source of law in Estonian practice, since in making decisions with a legal meaning, tax administrators use implementing regulations in parallel to or even instead of the Acts. The regulations often tend to interpret laws too extensively or restrictively with prejudice to the taxpayer and, in some cases, persons are put under obligations that are not at all provided in the law. In re-independent Estonia's tax-law practice, tens of examples may be pointed out in which the Minister of Finance has exceeded the limits of delegation established by the legislator and has begun to create a "new law". Another problem still prevalent in Estonia (and not only in tax law) is that administrative acts of a generally applicable nature are established by bodies which are not competent therefor (e.g. by means of directives of the Tax Board or the Director General of the Customs Board).

The disproportionately large role of administrative acts in comparison with Acts is characteristic of an authoritarian state. By passing laws that consist mostly of delegation provisions, the Riigikogu is gradually abandoning its legislative power for the benefit of the executive branch. This will result finally in divergence from the principle of the separation of powers set out in § 4 of the Constitution. In this respect, it can be asserted that the transition period in Estonia is far from over and, at least in the field of tax law, the proper proportion between Acts and inferior provisions has not yet been reached.

The large volume of administrative acts has also resulted in another distressing problem. Namely, a significant number of references to Government or ministerial regulations are inserted into Acts while such regulations are completed months or even years after the Act has entered into force.

The implementation of many Acts has been postponed because of the very absence of implementing provisions. The Supreme Court has also called attention to that problem. The Decision of 17 June 1998 of the Constitutional Review Chamber of the Supreme Court (3-4-1-5-98 - RT I 1998, 58, 939) stated that it is inadmissible to prevent an Act from realising itself because of the Government's inactivity. A delegation provision contained in an Act constitutes not only an authorisation to issue regulations for its enforcement but also orders the executive to issue the regulation needed for implementation of the Act. Regulations arising out of delegation provisions must be issued during *vacatio legis* in order that the law can be implemented immediately upon its entry into force. The major trend in

the development of tax legislation in re-independent Estonia has been a reduction in the meaning of implementing provisions and gradual transposition of their contents into the text of the tax Acts. While the tax Acts of the early 1990s were rather declarative and taxes were virtually provided for by instructions for their implementation, we have now reached the situation in which it can be declared that all the important elements of a tax-law relationship are provided in detail in the Acts. The situation is rather different, though, with regard to various tax categories.

In respect of regulation-making, it is worth noting that the Government or a minister may issue a regulation only if the relevant delegation provision exists in law. Law theory differentiates between delegation and the sanctioning of legislation issued earlier. The issue of a delegation provision does not, per se, legalise any earlier regulations that have been issued without a legal basis. Such a position has been expressed in the Decision of 17 June 1998 of the Constitutional Review Chamber of the Supreme Court (3-4-1-5-98 - RT I 1998, 58, 939). That decision repealed clauses 3.5, 3.6 and 7 of the Regulations for Transportation of Timber, which had been confirmed by Government of the Republic Regulation No. 95 of 7 March 1995. Clause 7 of the Regulations, pursuant to which a purchaser of forest materials was not permitted to deduct, from its taxable income, the costs of transactions completed without a record of acceptance, was one of the provisions repealed.

The case described was problematic also because taxpayers' tax liability was specified (the taxable base was extended) by a regulation not based on a tax Act. The Supreme Court held that, as the Forest Act was not a tax Act, no Government Regulation issued under the Forest Act could influence taxpayers' tax liability. The requirement provided for in § 8 of the Taxation Act, pursuant to which a taxpayer is required to pay only such state taxes as are prescribed by law at the rates and pursuant to the procedure provided for in tax Acts, gives the taxpayer a reason to believe that the duty to pay state taxes arises out of a tax Act and it may be specified by regulations issued pursuant to the tax Act. Maybe the taxpayer cannot even search the individual provision influencing its tax liability from beyond the bounds fixed in the tax Act.

## The Examination Principle

The tax administrator is required to collect taxes and it may not refuse to do so or assign tax claims to anybody else (§ 14(2) of the Taxation Act). The tax administrator may not conclude with a taxpayer any agreement on allowances or non-payment of taxes; similarly, a taxpayer cannot voluntarily pay additional taxes or choose the recipient or category of the tax. Tax claims are created under law, regardless of the tax administrator's activities. As long as the claim has not expired, it may be enforced at any time. A waiver of a tax claim, i.e. forgiveness of tax arrears,

or an extension of the time limit for tax payment (tax timing) is permitted only in cases provided by law. In no event can this constitute a contract, being rather a unilateral expression of will by the competent state body in the form of an administrative act.

In collecting taxes, the administration must apply the law in a non-discriminatory manner and ensure the lawfulness of the entire procedure. Doing so, the tax administrator itself must decide which legitimate means to use. In discovering the characteristics of offence, the tax administrator must determine the person at fault and apply the sanctions provided by law.

In the event of an application or complaint filed by a taxpayer, the tax administrator is not bound by the scope of the application but must thoroughly examine all the circumstances of the case. Therefore, the adoption of decisions which are more adverse to the taxpayer than the initial one is not precluded in tax dispute proceedings. On the other hand, the tax administrator must correct all errors made by the taxpayer that are unfavourable to the taxpayer, and do so even without the taxpayer's application to that effect. The competition principle, whereby the gathering of evidence or conduct of procedures is strictly related to the interested party's application, may never be applied in tax proceedings.

Nevertheless, the law provides for the taxpayer's duty to participate actively in the tax proceedings and provide the tax administrator with various information even without the tax administrator's specific request. As the correct levying of taxes is, in most cases, possible on the basis of data at the taxpayer's disposal, a range of duties have been imposed on the taxpayer by law to ensure the efficiency of the tax administrator's work and the equitable payment of taxes. Such duties include, for example, the registration duty, the accounting duty, the declaration duty, the duty to notify in individual cases, and the duty not to obstruct the tax administrator's activities.

The examination principle does not preclude the right of discretion. Tax law knows of many cases in which an administrative body has been vested with the right of decision or the right of discretion. In this respect, all principles of exercising discretion that are known in the administrative law theory must be followed: purposefulness, equal treatment, respect of fundamental rights and freedoms, limits of freedom of decision provided in law, principle of proportionality, etc. [2, pp. 171-173] Any administrative act (precept) issued by the tax administrator which violates the principles of exercising discretion is unlawful.

Examples of discretionary decisions in tax law include the timing of tax arrears (§§ 342-344 of the Taxation Act), forgiveness of tax arrears (§ 43 of the Taxation Act), suspension of the refund of overpaid taxes (§ 10(4) of the Taxation Act), permission to change the financial year (§ 6(1) of the Income Tax Act), deletion of a value-added tax

payer from the register pursuant to §§ 11(1), (2) or (3) of the Value Added Tax Act, permission to deduct value added tax provided for in § 23 of the Value Added Tax Act, permission to import goods temporarily into the customs territory without payment of import taxes (§ 38(2) of the Customs Act), demanding security from a declarant (§ 49 of the Customs Act), and permission for simplified customs clearance (§ 42(6) of the Customs Act). Discretionary decisions naturally include all decisions concerning administrative enforcement (e.g. the exercise of procedures provided for in §§ 16-20, 24, 26 and 32 of the Taxation Act).

## Interpretation of Acts and Application of Analogy in Tax Law

As a rule in tax law, laws may not be interpreted or analogy may not be applied against the taxpayer, i.e. so as to increase the tax burden. Unfortunately, this rule is often violated in Estonia. In regulations issued by the Minister of Finance for implementing various tax Acts, the Acts have often been interpreted extensively; even exhaustive lists have been complemented. The violations are amplified by intra-departmental instructions and traditions developed in administrative practice. As tax Acts have often been amended, even cases in which the Tax Boards have applied an invalid Act, a new Act retroactively or even one Act within the scope of application of another are not rare.

Interpretation is aimed at ensuring the uniform application of the Act and maintaining harmony with other Acts and general principles, objectives and values. Should doubts be interpreted in tax law for the benefit of the taxpayer? Under the idea that a state arises out of people, the position can be taken that the rights of state power must always be interpreted restrictively but the citizen's rights must be interpreted extensively (*in dubio pro libertate*). [1, p. 149] That principle is, however, not absolute. The position that in interpretation, preference must be given to the taxpayer is supported by the civil law principle whereby, in the event of doubt, transactions are interpreted for the benefit of the party under obligation (§ 64 (3) of the General Part of the Civil Code Act).

All interpretation methods are permitted in tax law. No conception exists whereby one method must be preferred to another in the event of different interpretation methods giving different results. Four different methods can always be used in interpretation: interpretation based on the text of the law (grammatical interpretation), interpretation based on the process of passing the law (historical interpretation), interpretation based on the system of the law (systematic interpretation) and interpretation based on the objective of the law (teleological interpretation).

The so-called economic interpretation method (*wirtschaftliche Betrachtungsweise* in German) is an important peculiarity which may in no event be left out of



consideration in interpreting tax laws. The method allows the civil-law form of transaction to be disregarded in assessing the taxable base and assessment to be founded on the nature of the transaction and its economic consequences for the parties. This method of interpretation originates from Germany, where the *Reichsabgabeordnung* (RAO), adopted in 1919, provided that the objectives of the law, the economic significance of such objectives and the development of circumstances must be taken into consideration in interpreting a tax law. In the interpretation of civil-law concepts used in tax law, the meaning attributed to these concepts in civil law is not binding; instead, the concept may be defined in quite another manner under the meaning and objective of the tax law. Hence, for example, the court of cassation has interpreted tax Acts even contrary to their text. [1, p. 150; 2, pp. 7-8]

The economic interpretation method results from the special position of tax law in the legal system. On the one hand, tax law is public law (administrative law), but on the other hand it is also closely related to civil law and trade law. As objects of taxation usually result from economic activity, tax law is founded to a large extent on non-legal concepts. World practice has developed so that it is mostly non-lawyers who engage in tax law. There has been a growing tendency towards tax laws using an independent machinery of concepts which is moving, little by little, farther away from terminology used in other branches of law.

Undefined legal concepts are often used in tax laws. In such events, decisions of administrative bodies may always be disputed and final interpretation may be requested from the courts, given the specific situation and related circumstances.

Analogy means fulfilment of gaps in the law. In the absence of a provision regulating the legal relationship in question, assistance is sought from other provisions that regulate similar relationships. The aforementioned principle of certainty and requirements for the accurate formulation of legal provisions must ensure a situation in which the text of a tax Act allows an exhaustive overview of the nature of tax liability in its entirety to be provided. However, this is not always feasible and therefore the problem with regard to analogy arises.

Under § 8 of the Taxation Act, taxpayers are required to pay only such state and local taxes as are prescribed by law at the rates and pursuant to the procedure provided for in tax Acts and council regulations. This formulation implies the conclusion that in material tax law, analogy is prohibited in Estonia. In tax proceedings, the application of analogy is permitted and even indispensable, given the deficiencies of the Estonian Taxation Act. As a whole range of questions pertaining to the general part of tax law are unregulated in Estonia at the level of the Taxation Act, it is impossible to solve problems relating to, for example, the calculation of time-limits, representation, procedural and

legal capacity, presentation of documentation, etc., without applying analogy.

This leads to the question of which Act regulating relationships similar to tax proceedings should be applied. Presumably, it would be the Code of Administrative Court Procedure which, in many questions, refers to the Code of Civil Procedure. The application of the General Part of the Civil Code Act to tax proceedings would hardly be imaginable, as subordination exists between the parties to tax-law relationships and civil-law principles are inappropriate for regulating relationships of such kind. With no better solutions available, the General Part of the Civil Code Act must currently still be applied to many questions under tax law. The final solution for properly regulating tax proceedings can only be achieved by supplementing the Taxation Act with regard to currently non-existent institutes.

## General Principles of Tax Proceedings

The tax administrator's conduct in collecting taxes is a specific category of administrative proceeding. As administrative proceedings always involve inequality between the parties, the legislator must pay particular attention to protecting the rights of the weaker party (in this case, the taxpayer). Since the tax administrator's conduct results in the imposition of monetary obligations upon citizens, unlawful decisions and procedures in this field may, besides everything else, also cause direct material damage. Almost everyone has something to do with paying taxes. Therefore, any maladministration or lawlessness in this area is particularly notable.

Tax proceedings may include the determination of circumstances necessary for assessment, the assessment, made either by declaration or by an administrative act issued by the tax administrator, as well as the compulsory collection of a tax claim. The compulsory enforcement of a tax claim may be carried out by the tax administrator or enforcement agency. In the latter event, this can be regarded as a separate category of administrative proceeding: the enforcement procedure, which remains beyond the scope of application of tax Acts.

The taxpayer's duties in proceedings can be of either active nature (e.g. presentation of declarations) or passive nature (e.g. submission to tax audit or collection of tax arrears). The proceedings of a tax case may, in addition to the taxpayer, also involve third parties (e.g. tax withholding agents, credit institutions), who are required to provide additional information about the taxpayer. The rights and duties of all participants in the proceedings need to be regulated. The rights of the Tax Board in inspecting the taxpayer may not be unlimited: they must be in accordance with constitutional freedoms and must not excessively obstruct the taxpayer's activities or otherwise create excessive inconvenience for the taxpayer. Naturally, in the event

of tax proceedings as a special form of administrative proceedings, all constitutional rights and freedoms must be respected and the rule of law principles must be taken into account. In tax law, these are primarily expressed in the following fundamental principles of procedure [2, pp. 786-800]:

(1) Non-discriminatory application of legal provisions. If any circumstances causing a tax increase or deduction are applied to or recognised with regard to one taxpayer, they must also be applied, in similar situations, to all other taxpayers. The application of sanctions must also extend equally to all persons who have violated tax Acts.

(2) The examination principle. In the proceedings, the tax administrator must determine all circumstances pertaining to taxation (including circumstances alleviating the tax burden). The tax administrator determines all necessary procedures and decides which kind of evidence is gathered and considered. All this is done by the tax administrator on its own initiative without the request of the taxpayer or a third party.

(3) Hearing of the person concerned. Generally, the taxpayer must be provided with the opportunity to present comments and explanations about the question under examination, before a decision is made. The persons involved in the proceedings must know what is wanted of them and, if they so wish, they must be given the opportunity to assist the Tax Board. Only when it becomes evident that such person cannot or does not want to do so, may an *ex parte* examination be initiated.

(4) Pertinence of the procedure to the specific case. The tax administrator may not request documentation from the taxpayer or enter the taxpayer's property in order to discover unknown circumstances. These procedures are only permitted in order to check the correctness of data and statements presented by the taxpayer and relate only to the ascertainment of specific facts. Otherwise, this would constitute a search, which is a criminal procedure and may only be conducted by police officers in the investigation of a criminal case which has already been initiated.

(5) The principle of proportionality. The means chosen in an administrative procedure must be in conformity with the desired objective. The conduct of a procedure may not lay excessive burdens or inconveniences on the taxpayer or the tax administrator itself. The state may not exercise enforcement to a larger extent than is required under the circumstances that have caused such enforcement to be exercised. For example, if it becomes evident during an enforcement procedure that the enforcement procedure will yield no results or that the costs of the procedure are excessively high in relation to the collectable amount, the procedure must be closed immediately.

The principle of proportionality also requires a specific successive order of procedures. For example, presentation of documentation may be required only when other

information presented by the taxpayer is insufficient or has given rise to doubts. Information about the taxpayer may be requested from third persons only after such a request has been made to the taxpayer and if the taxpayer fails to provide all the necessary data.

(6) The principle of legal certainty and protection of trust is expressed by the binding nature of information and documentation issued by the tax administrator. The taxpayer has the right to assume that any information or interpretation of law given by the Tax Board is correct. That principle restricts retroactive amendment of administrative acts, prohibits repeated audits, etc.

Unfortunately, the Estonian Taxation Act fails to reflect the aforementioned principles. The examination principle can be derived from § 14 of the Taxation Act, whereby the tax administrator is required to verify the correctness of tax payments. The tax administrator must provide taxpayers with information concerning the taxes to be paid (§ 9 of the Taxation Act), refund tax overpaid by the taxpayer (§ 10 of the Taxation Act), maintain the confidentiality of information concerning a taxpayer (§ 11 of the Taxation Act), remove any implemented preventive measure immediately after the reason for the implementation of the preventive measure ceases to exist and compensate a taxpayer for any unjustified damage caused as a consequence of the implementation of such preventive measure (§ 27 of the Taxation Act), and review taxpayers' appeals for invalidation of precepts (§ 36 of the Taxation Act).

## Protection of Taxpayers' Rights in Tax Proceedings

The general principles of tax proceedings have been described above. The following overview discusses the more substantial means which ensure the protection of taxpayers' rights and which are presently unregulated or inadequately regulated by law. The deficient normative basis is favourable for maladministration by the tax administrator, allowing it to base its decisions on subjective factors, to abuse its powers, to use unlawfully gathered evidence, etc. A large number of institutes to ensure taxpayers' rights are unfamiliar to Estonia or have a limited use. Often, taxpayers cannot protect their rights because of the lack of necessary information. Therefore, firm guarantees need be fixed in Estonian laws to protect taxpayers' rights.

**Prohibition on using unlawfully gathered evidence.** Data received from persons with immunity (lawyers, notaries) or gathered by fraud or coercion or by violating the rules of procedure may not be used as evidence. Evidence may not be gathered on the territory of foreign states (except data received within the framework of an international exchange of information) and may not be purchased from anonymous persons for monetary considerations.

**Invalidity of inadequate or deficient administrative acts.** In Estonia, no provision exists which would invali-

date administrative acts containing material inadequacies (i.e. which would provide that such acts need not be disputed in the court). Material inadequacy is constituted, for example, by the issue of an administrative act by an incompetent person, by the absence of a date or signature, or by addressing an administrative act to the wrong person. However, an opportunity must be provided to correct clerical and computational errors in administrative acts under a simplified procedure.

**Prohibition on repeated modification of tax orders (precepts).** The number of cases in which an effective tax order may be changed must be kept to a minimum. As a general rule, orders may be modified for the taxpayer's benefit without any restrictions; orders adverse to the taxpayer may only be made when certain information has not been presented due to the taxpayer's fault. The prohibition on modification of precepts results in a prohibition on repeated audits. In the implementation of amendments to laws and in the modification of interpretations, the principle of lawful expectation must be followed, i.e. circumstances impairing the taxpayer's situation may not be applied retroactively.

**Removal of biased officials from proceedings.** The option to challenge participants in the proceedings is provided, for example, with regard to judges, registry secretaries, bailiffs and other officials of the court but this is also necessary in administrative proceedings (including tax proceedings). In tax disputes, where sums amounting to millions are often involved, a biased official may cause very serious consequences (bankruptcy of the undertaking, redundancies, etc.). The principle of fair procedure and equal treatment of participants must also be followed in extrajudicial proceedings. Moreover, as administrative proceedings involve one party who is also the body settling the dispute, more attention must be paid to the protection of the taxpayer's rights.

**Compensation by the state for damage caused to the taxpayer.** Such obligation should be expressed in the Taxation Act and it should cover all cases in which material damage has been caused by the unlawful conduct of an official. At present, the law provides for the obligation to compensate the taxpayer for any direct damage caused by incorrect implementation of preventive measures or delay in their removal (§ 27(2); clauses 18 2)-3) of the Taxation Act). The Code of Administrative Court Procedure, which will enter into force in the year 2000, will provide the opportunity to apply for damages concurrently with the proceedings of a dispute over the lawfulness of an administrative act or procedure, and it will no longer be necessary to file an additional civil action after the adjudication of the administrative court has become effective.

Provisions regulating the issue of, amendments to and cancellation of administrative acts are absent in the current law. Even the designations of documentation issued by the

tax administrator often lack clarity. The Taxation Act refers to e.g. precepts, decisions, tax notices. In the event of many decisions, the tax administrator is not required to issue a written administrative act. Such absence of regulation has led to a situation where, in practice, rather important decisions are issued in an arbitrary form (even via telephone), which renders it extremely difficult to dispute them. In addition to this, significant discrepancies can be observed in the form and contents of precepts and decisions issued by different tax authorities.

The issue of a written administrative act is unnecessary if the taxpayer's right or duty arises directly from law (payment of the tax amount, payment of interest, presentation of the declaration). In such events, the person under obligation may be sent a reminder which is of an informative nature and is, therefore, not an administrative act. Administrative acts are also unnecessary in the event of real procedures (e.g. forgiveness of debts, submission of bankruptcy petitions or claims, dispatch of letters or applications to another state agency).

The Taxation Act presently regulates only modification or cancellation of the tax administrator's precepts when a taxpayer has filed an appeal to that effect. The modification of administrative acts on the tax administrator's initiative is not regulated. In this regard, the following situations must be distinguished: [2, pp. 887-890]

(1) modification of an administrative act before the time limit for appeal has lapsed, or thereafter;

(2) modification of a lawful or unlawful administrative act;

(3) modification of an administrative act by the agency which has issued it or by a superior authority or court;

(4) modification of an administrative act for the taxpayer's benefit or adversely to the taxpayer;

(5) modification, cancellation or repeal of an administrative act, correction of a deficient act, replacement of an invalid act with a new act;

(6) modification of an administrative act on the initiative of either the taxpayer or the tax administrator, or under circumstances beyond the parties' control (retroactive amendment of an Act; international treaty; modification of another administrative act which underlies the administrative act in question, etc.).

All of the situations listed above give rise to different volumes, restrictions, time limits and other conditions. On the one hand, the principle of legal certainty must be taken into consideration, whereby retroactive modification of an administrative act towards an increase in the taxpayer's obligation must be precluded after a certain period has lapsed. On the other hand, the principle of non-discriminatory taxation and equal treatment of subjects, whereby all discovered errors must be removed, must also be taken into account.

The currently applicable law does not restrict the **extent and successive order of applying coercive measures**. Under the principle of proportionality, such restrictions must be established in any event. It must be kept in mind that the means chosen must be proportional to the desired objective; no excessive coercion or unjustified inconveniences may be caused to the taxpayer. In conducting inspection procedures, the person concerned (the taxpayer) must be consulted for assistance first of all. Third parties may be consulted only after it has become evident that the procedure has failed to yield any results. The third party has the right to know which person's tax case information is being requested from it. Taxpayers must always be given an opportunity to express their position. No information may be gathered *ex parte*, without the knowledge of the person concerned (tracking is not permitted in verifying the correctness of a tax payment).

The same applies to procedures related to one and the same person. In the beginning, less inconvenient means (correspondence, telephone conversations) must be employed and if they prove insufficient, more stringent measures must be applied (order to appear before the tax administrator, on-the-spot inspection of the undertaking). Exceptions are only permitted if there is a justified reason (e.g. when it is obvious that the taxpayer has committed an offence). The tax administrator must be able to justify the necessity of each administrative procedure; nobody may be forced to provide information "just in case". Each procedure must be related to specific circumstances. No procedure except tax audits and searches may be aimed at discovering circumstances yet unknown. During tax audits, circumstances which only concern only the taxpayer, not third parties, may be inspected. The taxpayer has the right to request that any evidence received in violation of the rules of procedure should not be used in deciding the case.

The distribution of the burden of proof or the evaluation of evidence are unregulated in Estonian tax law. Tax Acts provide for only some specific conditions concerning certificates which are mandatory for making certain tax allowances or deductions. Not much attention has been paid to the Tax Board's burden of proof. The law should regulate the admissibility of all categories of evidence (statements from witnesses, taxpayer's explanations, expert opinions, observations) in tax proceedings.

Tax Acts may contain special provisions which in certain cases preclude the use of some evidence categories or require only evidence of one certain category (for example, deduction of business expenses is permitted only upon the existence of written expense documentation).

The procedure of carrying out a tax audit as a specific act in proceedings must be regulated in detail. The procedure must contain the following items: [2, pp. 848-854]

(1) prior notice of the audit (and the cases in which prior notice is not necessary),

- (2) procedure for challenging the auditor,
- (3) postponement of the audit at the taxpayer's request,
- (4) duration of the audit and the extent of circumstances to be inspected,
- (5) the taxpayer's duty to provide working conditions and other assistance to the auditor at the taxpayer's own expense,
- (6) the successive order of audit procedures and interrogation of the taxpayer's employees,
- (7) procedure for conduct and registration of observations and inspection assessments,
- (8) the time of conducting audit procedures, and the attending persons,
- (9) documentation of the audit and the taxpayer's right to present applications and enter different opinions,
- (10) notification of the taxpayer of the legal consequences of the audit results,
- (11) registration of the final audit results and notification of the taxpayer.

It is important to emphasise that audit is a procedure providing the tax administrator with a rare opportunity to ascertain all possible circumstances which are related to taxation and were not known before. This opportunity must be used only once and to the maximum extent. The taxpayer must remain confident that, after the audit has been completed and the necessary corrections have been made to earlier decisions (if needed), the tax question will ultimately be solved and there will be no follow-up audits or modifications of the decision. Therefore, it is important to insert into the law a prohibition on repeated inspection of one and the same tax category or tax period. The state must ensure that its officials are competent to complete an audit once and for all. Any contrary presumption would legalise anarchy and maladministration. In addition, a prohibition must be established on auditing a taxpayer in the presence of a third party.

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## Notes:

<sup>1</sup> RT = Riigi Teataja = the State Gazette

<sup>2</sup> Riigikogu = the parliament of Estonia