



BANKING SECRECY IN RELATION TO TAX ADMINISTRATORS

JUDr. Soňa Kubincová

Faculty of Law of the Matej Bel University, Banská Bystrica

A report on matters concerning a client that are subject to banking secrecy will be submitted by a bank and a branch office of a foreign bank (hereinafter the “bank”) without the client’s consent only upon a written request from a tax authority or a customs authority in the matter of tax proceedings or customs proceedings, to which the bank’s client is a party under a separate regulation (there is a reference made in the Banking Act to the Act on Tax Authorities¹ and the Customs Act²), including the execution of a decision or enforcement proceedings. The written request must contain the data according to which the bank is able to identify the matter in question, especially an accurate designation of the person whose data is requested, and the definition of the scope of the requested data.

Such is the quote from the Banking Act³. The said provisions need to be interpreted in connection with several legal regulations, and therefore this article aims to just as point to certain, not quite clearly codified, or disputable issues which may occur, and also do occur when the data is requested by tax administrators.

The Act on Administration of Taxes and Imposts⁴ defines who is a tax administrator. It is a tax office, a municipality and a customs office, if assigned the tax administration function by substantive tax statutes⁵ and the Act on Local Rates⁶. Under the Act on Administration of Taxes and Imposts, a tax consists of the tax, including

penalties, interest and tax surcharges, as well as fines and imposts stipulated by law, which are administered by the tax administrator. From the stated provisions it can be concluded that a person authorised to request information from a bank is a tax office, a municipality and a customs office, in the event that there are proceedings conducted in the matter of penalties, interest, tax surcharge under the Act on Administration of Taxes and Imposts, or fines and charges. A bank is therefore obligated to also provide the information to municipalities in the matter of local rates.

It is indisputable that a bank is not allowed to provide information without a written request. In practical terms, already at this point disputes may arise in respect of the date of delivery of the written request. That is why tax administrators send their written requests as registered mail, usually together with a return slip. Banks cannot be required to give the exact time of delivery in their motion. In the event that it is in the interest of a tax administrator to state the time of delivery, it should serve the written request to the bank in person and demand that also the delivery time be confirmed on the record of delivery. I believe that a bank may not refuse such a request.

From the Banking Act⁷ it follows that banking secrecy covers all information and documents on the matters relating to the bank’s client that are not publicly available, especially information on deals, account and deposit balances. The Act has only listed examples of areas about which a bank may inform. An authorised person therefore could also demand the provision of other information available to the bank as a result of its

¹ Act No. 150/2001 Z.z. on Tax Authorities.

² the Customs Act No. 238/2001 Z.z.

³ Act No. 483/2001 Z.z. on Banks and on the Modification and Amendment of Certain Laws.

⁴ Act No. 511/1992 Zb. on the Administration of Taxes and Imposts and on the Changes in the System of Territorial Fiscal Authorities.

⁵ Act No. 366/1999 Z.z. on Income Taxes, as amended by subsequent legislation.

Act No. 289/1995 Z.z. on Value Added Tax, as amended by subsequent legislation.

Act No. 229/1995 Z.z. on Excise Duty on Spirits, as amended by subsequent legislation.

Act No. 309/1993 Z.z. on Excise Duty on Wines, as amended by subsequent legislation.

Act No. 310/1993 Z.z. on Excise Duty on Beer, as amended by subsequent legislation.

Act No. 312/1993 Z.z. on Excise Duty on Tobacco and Tobacco Products, as amended by subsequent legislation.

Act No. 87/1994 Z.z. on Road Tax, as amended by subsequent legislation.

Act No. 317/1992 Zb. on Real Estate Tax, as amended by subsequent legislation.

Act No. 318/1992 Zb. on Inheritance Tax, Donation Tax and Real Estate Transfer Tax, as amended by subsequent legislation.

⁶ Act No. 544/1990 Zb. on Local Rates.

⁷ § 91 of the Banking Act No. 483/2001 Z.z.



dealing with the client. Nevertheless, under the Tax Administration Act⁸, the scope of information that can be requested by a tax administrator has been precisely set, namely through the provision under which banks and other financial institutions are under an obligation to report, at a written request from a tax administrator, the numbers of bank accounts, their holders, account balances and changes thereof, the details of advances, loans and saving deposits. Hence a tax administrator, acting in accordance with the generally applicable rules of law in tax proceedings, may not require a bank to provide information beyond the scope of the Act on Administration of Taxes and Imposts.

The obscurity may be due to the collocation “and other financial institutions”. Who may be a bank is precisely determined by the Banking Act. The term financial institution is unclear, since there is no definition of a financial institution available in the legislation in force. As of 31 August 2003, there were 18 banks and 3 branch offices of foreign banks⁹ operating within the territory of the Slovak Republic. Exportná a importná banka SR¹⁰ (the Slovak Eximbank) is not a bank under the Banking Act, and hence tax administrators may request from it information as from any other legal person, but not to the extent stipulated by the Banking Act. The operation of home savings banks is regulated by a separate law¹¹, whilst in the introductory provisions it is stated that home savings may only be pursued by a bank whose line of business includes home savings on the basis of a banking authorisation granted under the Banking Act.

A bank is under an obligation to provide information in the matter of tax proceedings, to which the bank's client is a party under a separate statute, including the execution of a decision or enforcement procedure.

Under the Tax Administration Act, tax proceedings are proceedings to decide on the rights and obligations of a tax subject. A tax subject is a taxable person, a taxpayer, a tax debtor, a ratepayer and a legal successor of a natural person or a legal entity, who is defined as such by separate statutes. A taxable person is a person whose income, property and activities are directly taxable. A taxpayer is a person who transfers to the tax administrator taxes collected or withheld from a taxable person and is liable for them by its assets. The Tax Administration Act contains a provision¹² on the com-

mencement of proceedings whereby proceedings commence on the day when a motion filed by a tax subject reaches the competent tax administrator or on the day when the tax administrator or other persons appointed thereto by law, take the first action under the tax proceedings against the tax subject. Furthermore, the Act comprises provisions on the cessation of tax proceedings and on the suspension of tax proceedings¹³. A doubt may arise in respect of what are proceedings¹⁴ and whether they are the same as tax proceedings.

According to Professor JUDr. Vladimír Babčák, CSc., tax proceedings are relatively separate, distinctive and equal type of legal process governed by the rules of procedure falling under the tax law¹⁵. From its inception to the extinction of a tax liability, it progresses along a precisely defined sequence of steps in terms of its timing and contents, and it is divided into the following stages:

- an exploratory procedure,
- a levying procedure,
- a review procedure (a remedy procedure),
- a collection procedure.

As is further mentioned by Professor Babčák, tax proceedings and tax execution proceedings constitute two relatively separate and equal types of legal process. The inconsistency in the conceptual apparatus is evident. The Banking Act charges banks with an obligation to provide information in the matter of tax proceedings (i.e. exploratory, levying, review and collection procedures – see the text hereinbefore), including the execution of a decision (i.e. tax execution proceedings – see the text above, and where municipalities are concerned, also another method of executing the decision under the Code of Civil Procedure, or the Code of Execution Procedure) or enforcement proceedings.

The execution of a decision can be defined in legal terms. What constitutes enforcement proceedings is not defined by law or theory, despite the fact that this term can be found in the Act on Administration of Taxes and Imposts¹⁶. Under § 73 of the Tax Administration Act, tax execution proceedings are proceedings pursued by a tax administrator in order to enforce the collection of tax arrears and the payment of execution costs. Enforcement proceedings, however, is a term broader than tax execution proceedings and it relates to all the activities of a tax administrator aiming to enforce its claims.

⁸ § 32(6) of Act No. 511/1992 Zb. on the Administration of Taxes and Imposts.

⁹ Source: BIATEC, banking journal, September 2003, Volume XI.

¹⁰ Act No. 80/1997 Z.z. on Exportná a importná banka Slovenskej republiky.

¹¹ Act No. 310/1992 Zb. on Home Savings Banks.

¹² § 20 of Act No. 511/1992 Zb. on the Administration of Taxes and Imposts.

¹³ § 25 of Act No. 511/1992 Zb. on the Administration of Taxes and Imposts.

¹⁴ § 25a of Act No. 511/1992 Zb. on the Administration of Taxes and Imposts.

¹⁵ BABČÁK, V.: Daňové právo procesné (Tax Procedure Law). Košice, ATOM computeres, 2000.

¹⁶ § 6(3d) of Act No. 511/1992 Zb. on the Administration of Taxes and Imposts.



From the above it follows that an imperfect definition of terms in the Tax Administration Act and the Banking Act introduces uncertainty as to the rights and obligations of the entities concerned. In interpreting these terms, one has therefore to seek the help of the theoretical views of reputed theoreticians of finance and tax law, or in the rulings of the Supreme Court of the Slovak Republic.

According to the judicial act R 75/98: "under the provisions of § 20(1) of the Act on Administration of Taxes and Imposts, tax proceedings commence on the day when a motion...". From that one can conclude that tax proceedings and the proceedings referred to in the Act are interchangeable terms.

On the other hand, according to the current theory, tax proceedings do not include a tax search (audit).

Professor Babčák unambiguously includes a tax search under the meaning of the term tax administration, and under the Act a tax search is not deemed to be a part of tax proceedings. Only the conclusions or results of a tax search contained in the tax search protocol are taken to constitute evidence in the tax proceedings.

Since a bank is supposed to disclose information only in the matters of tax proceedings and tax proceedings are proceedings whereby decisions are taken in respect of the rights and obligations of tax subjects, a tax administrator should in fact also prove the fulfilment of this condition, i.e. that it is in the process of deciding on the right or obligation of a tax subject who is the bank's client. Under tax proceedings¹⁷, a tax liability may be imposed or entitlements may be awarded only by way of a decision. On the other hand, the information about the tax administrator's decision constitutes a tax secret¹⁸ and a tax administrator is not allowed to inform a bank about matters referred to in the decision, not even about the proceedings reference number or the payment assessment number.

Under the Banking Act¹⁹ a tax administrator may demand the disclosure of details of the parties, that is, not only of tax subjects, but also third parties as ensues from the Act on Administration of Taxes and Imposts²⁰. The third parties are witnesses, persons holding deeds and other items needed in the tax proceedings, appraisers, auditors and interpreters, sureties, debtor's debtors and payers involved in security and enforcement proceedings, bankrupt's trustees, assi-

stant administrators, deputy administrators or settlement administrators, government authorities and municipalities and other persons obligated to provide concurrence in tax proceedings within the scope and in the manner stipulated by the Act.

From that it follows that a bank is obligated to disclose information on the basis of a written request from a tax authority, which under the Act on Tax Authorities includes the Tax Central Office of the SR, tax offices and the Tax Auditing Office. A tax office administers taxes and, as follows from what was said above, under substantive tax laws also a municipality and a customs office are deemed to be tax administrators. For the purposes of the Act on Administration of Taxes and Imposts, a tax also includes charges, and so a municipality, in its capacity of a tax administrator, may also request information in the matter of local rates. This is also supported by the conclusions from a decision of the Regional Court in Košice published under R 33/1996. These entities may however request information on the numbers of bank accounts, their holders, balances on these accounts and changes thereof, the details of advances, loans and saving deposits not only in respect of tax subjects, but also parties to the proceedings, including third parties. A bank may not request from a tax administrator further information relating to tax proceedings, tax execution proceedings and enforcement proceedings, since these involve tax secrecy. It must be satisfied with the statement that it involves information relating to tax proceedings, the execution of a decision or enforcement proceedings, that is, it must respect the institute of a legal presumption. In my opinion, this is a refutable legal presumption.

Since under the Banking Act there is no time limit set within which the information has to be delivered upon a written request, a bank is obligated to supply the information forthwith. In determining a time limit for action, a tax administrator may, however, apply the provisions of the Tax Administration Act²¹. If a time limit for a certain act to be carried out under tax proceedings is not set by a generally applicable statute, an appropriate time limit will be determined by a tax administrator. It will concurrently warn of legal consequences of a failure to comply with this time limit. A time limit of less than 8 days may only be fixed quite exceptionally for simple or especially urgent acts. In the event that a bank fails to meet this obligation, a tax administrator²² may repeatedly impose a fine of up to the amount of SKK 1 million (see the aforementioned R 33/1996), whereas such

¹⁷ § 30 of Act No. 511/1992 Zb. on the Administration of Taxes and Imposts.

¹⁸ § 23 of Act No. 511/1992 Zb. on the Administration of Taxes and Imposts.

¹⁹ § 91(4c) of Act No. 483/2001 Z.z. on Banks.

²⁰ § 6 of Act No. 511/1992 Zb. on the Administration of Taxes and Imposts

²¹ § 13 of Act No. 511/1992 Zb. on the Administration of Taxes and Imposts.

²² § 35 of Act No. 511/1992 Zb. on the Administration of Taxes and Imposts.



a decision on the imposition of a fine may be appealed against. Such an appeal has a dilatory effect.

An obligation of a bank to notify a tax office, which is competent according to the registered office or permanent residence of a business person who is their client, in writing of the number of each established or cancelled current or deposit account of the business person who was or still is their client within 10 days of the lapse of a calendar month during which such an account was established or cancelled, also goes beyond the scope of obligations of banks vis-à-vis the fiscal authorities. A tax office must treat such information as a tax secret.

Compared to the situation in the Czech Republic, where Act No. 21/1992 Sb, as amended by later modifications and amendments, is still in force, the provision on this issue is more unequivocal. Under § 38(3c), a report on matters relating to a client that are subject to banking secrecy will be submitted by a bank without the client's consent upon a written request from a tax administrator under the conditions prescribed by a separate law on the administration of taxes and imposts.