

## **THE ROMANIAN FISCAL – ADMINISTRATIVE SOLICITOR'S OFFICE**

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### **Abstract**

The fiscal-administrative solicitor's office represents the activity of solving litigations between the contributor and the Fiscal Administration, litigations which have the purpose to cancel totally or partly a fiscal-administrative document, document through which the contributor considers himself-herself to be deprived of a right or legitimate lawful interest.

### **Key words**

Fiscal-administrative solicitor's office; fiscal-administrative document; litigations.

In the judicial literature from our count, the fiscal-administrative solicitor's office was defined as being „all the rules about the development of the litigations which are dealing with the documents and the effects of administrative documents of fiscal nature done by the public power”<sup>1</sup> or by a more recent definition, the fiscal-administrative solicitor's office represents „the assembly of the stages of appeal against the imposition documents through which it is requested the reduction or cancellation of duties, taxes, contributions to special funds, penalties for late payment penalties or fees or other sums of money established and put into effect by the central or local fiscal authorities, authorized by law, to fulfill control or imposition document, which are solved according to a special procedure by the administrative authorities or/and by trial courts”<sup>2</sup>. The fiscal-administrative solicitor's office also defined as being „the assembly of litigations between public administration and those who are administrated, generated by documents of imposition”<sup>3</sup> or by another definition, fiscal solicitor's office is seen as „a derived way of defense for human rights which represents procedurally, the assembly of actions and stages of appeal which solves through the judicial authority of the state with legal power of truth, all litigations which derive from the imposition process and which put face to face the contributor (physical or juridical person) and the fiscal

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<sup>1</sup> Teodor Al. Bălan, *Contenciosul fiscal*, București, 1935, p. 15

<sup>2</sup> Constantin D. Popa, *Noțiunea, natura juridică și importanța contenciosului fiscal*, în R. D. C. nr. 7-8/2001, p. 302.

<sup>3</sup> Emil Bălan, *Drept financiar*, Ediția a III-a, Editura All Beck, București, 2004, p. 237.

administrative institutions of the state”<sup>4</sup>. Materially, the fiscal-administrative solicitor’s office denotes the litigations between contributors and fiscal-administrative institutions, litigations came from breaking the legitimate rights and interests of contributors and which are governed by a judicial regime of public rights. Formally, the fiscal-administrative solicitor’s office could be defined as being three-dimensional such as: functional, procedural and organic-institutional. Thus functionally, the fiscal-administrative solicitor’s office represents the activity of solving with legal power of truth, all litigations between contributors and fiscal-administrative institutions. Procedurally, the fiscal-administrative solicitor’s office represents the assembly of judicial norms which controls the procedure of solving the litigations used between contributors and fiscal administrative institutions. For the present moment the judicial norms which controls the solving procedure of litigation issued between contributors and fiscal institutions is regulated by the Code of fiscal procedure, with its subsequent modifications and supplements and Law no. 554/2004 about administrative solicitor’s office with its subsequent modifications and supplements solicitor’s office. Institutionally, the fiscal-administrative solicitor’s office represents the assembly of the institutions competent to solve the litigations between contributors and the fiscal-administrative institutions. The fiscal solicitor’s office is viable only trough the means offered to the justice people, the state and private people who reveal their rights as it is affirmed in the French juridical literature solicitor’s office<sup>5</sup>. In our opinion, the fiscal-administrative solicitor’s office represents the activity of solving the litigations between contributors and fiscal administration, litigations which have the purpose to cancel totally or partially a fiscal-administrative document, document trough which the contributors considers himself to be harmed for a legitimate interest or law legally recognized. The fiscal-administrative solicitor’s office is a species of the administrative solicitor’s office. The special characteristic of fiscal administrative solicitor’s office is issued from its different regulations such as the regulation of administrative phase by G.O. no 92/2003 about the Code of fiscal procedure republished, as well as by the recognition of the fiscal administrative solicitor’s office as being part of the administrative solicitor’s office by Law no. 554/2004 about administrative solicitor’s office. As for the jurisdictional phase, both in the case of administrative solicitor’s office and fiscal administrative solicitor’s office, this is regulated by Law no. 544/2004 about the administrative solicitor’s office, with its subsequent modification and supplements. Also, the defendant in the fiscal-administrative solicitor’s office is a fiscal administrative institution which belongs to the public administration and petitioners are contributors who are citizen or those administrated. Only

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<sup>4</sup> Constantin D. Popa, op. cit., p. 302.

<sup>5</sup> Bernard Hatoux, *Le contentieux fiscal judiciaire*, en *Revue française de finances publiques* no. 17/1987, L.G.D.J., Paris, 1987, p. 71

that, they are a special category and namely those who owe duties, taxes and others contributions to the budget.

In addition to all these, the document which is the object of litigations in the fiscal administrative solicitor's office is a fiscal-administrative document which is a species of the administrative document. Art. 10 from Law no. 554/2004 has introduced for the first provisions about the material competence of juridical instances regarding the litigations about duties, taxes, contribution, customs debts and their accessories. The fiscal administrative solicitor's office is performed in two phases: administrative phase (financial appeal) and jurisdictional phase. The Code of fiscal procedure reveals in the field of fiscal administrative solicitor's office in art. 205 align. 1 that „against the title of claim and against other fiscal-administrative documents it might be formulated an appeal according to law” and art. 218 „the decisions issue to solved the appeal can be the challenged by the contestant or other people introduced in the solving procedure of the challenge to the trial instance of administrative solicitor's office competent under the conditions of law.” As for the administrative phase, after a real long time it was managed in our country to publish a packet of norms for the fiscal-administrative procedure by adopting G.O. no. 92/2003 about the Code of fiscal procedure. The fiscal challenge is a preliminary administrative procedure which id differently regulated from the preliminary procedure regulated by Law no. 554/2004 about administrative solicitor's office. Having a different regulation from the preliminary procedure prevailed by the Law of administrative solicitor's office we consider this financial challenge as being a special preliminary procedure. The fiscal administrative documents cannot be challenged to the instance of administrative solicitor's office without fulfilling the preliminary administrative procedure. According to the disposals of art. 207 align. 1 from the Code of fiscal procedure, the deadline to submit a challenge is of 30 days from the date of communicating the fiscal administrative document under the penalty of decadence. This deadline is a line of decadence and not of recommendation. By exception, the fiscal-administrative document does not contains provisions about the possibility of being challenged, the challenged deadline or the institutions to which is submitted the challenge, the challenge deadline is of three months from the communication of the fiscal administrative document. The solving procedure of challenges involves documents and operations about checking the rightful reasons which were the source of issuing the challenged fiscal administrative document, demanding the point of view of Specialty Directions from the Ministry or of other institutions or authorities, the administration of new evidences. According to disposals from art 214, from the Code of fiscal procedure, the procedure of solving a challenge can be suspended if demanded by fiscal institutions or asked by the contestant. Thus, according to disposals of art 214 align. 1 is the first case the competent solving organ can suspend by motivated decision the solving of the cause in the following cases:

a) the organ which performed the control activity has modified the legal organs about the existence of evidence for committing a criminal offence whose conclusion would have a decisive relation to the solving which is going to be given to the administrative procedure;

b) the solving of the cause depends totally or partially on the existence or non-existence of the right which makes the object of another judgment.

The suspension of solving the challenge formulated against the fiscal-administrative document has no effect on the execution of the fiscal administrative document.

According to disposals of art 215 align. 1 from the Code of fiscal procedure, the instruction of the challenge on the administrative way of appeal does not suspend the execution of the fiscal administrative document.

The competent institution will solve the challenge by decision or disposal the decision will be issued by the competent solving institution of the National Agency of Financial Administration and it is final and conclusive in the system of the administrative ways of appeal. The decision of solving the appeal is issued under a written form and it must have three parts: the preamble, the accounts and the purview.

The solutions for a financial appeal could be appeal admission totally a partially or the refusal of the appeal.

The decisions taken to solve appeals can be challenge in the instance of administrative solicitor's office which is competent for 6 months from the date of receiving the answer to the preliminary complaint or from the expiring date of the legal term to solve the demand according to disposals of art 11 from Law no. 554/2004 about administrative solicitor's office, the jurisdictional phase.

As for the object of action in the fiscal administrative solicitor's office, this is represented by the decisions and disposals issued after solving the appeals against fiscal administrative-documents.

In practice for many times action is introduced in the fiscal administrative solicitor's office against the decisions of imposition and not against the decision issued to solve fiscal appeals. The Supreme Instance pronounced that the decision of imposition as a fiscal administrative document as well as the documents which were its basis they can and would be challenged in the procedure of administrative appeal regulate at art. 205 and the following ones from the Code of fiscal procedure, and that at the instance of administrative solicitor's office it can be challenged according to art. 218 from the Code of fiscal procedure only the decision given by the fiscal competent institution in solving the appeal against the fiscal administrative

document of imposition<sup>6</sup>, being impossible to challenge the fiscal administrative document directly in front of the competent instance of judgment<sup>7</sup>.

On the other hand, The Supreme Court of Justice and Cassation established that according to art. 118 align. 2, from the Code of fiscal procedure (present art. 218 align. 2 after republishing) united to art. 8 from the Law of administrative solicitor's office can form the object of action in administrative court, the decision passed in solving the appeal against the financial administrative document but not directly, the fiscal administrative document<sup>8</sup>.

We consider that the object of action in the fiscal administrative solicitor's office is the decision or disposal of solving the fiscal appeal and indirectly the fiscal administrative document which was the object of fiscal appeal.

According to disposals of art 2 align. 1 lit. g from Law no. 554/2004 the law term „instance of administrative solicitor's office means ” section of fiscal and administrative solicitor's office of the Supreme Court of Justice and Cassation, sections of fiscal and administrative solicitor's office of the courts of appeals and fiscal-administrative court houses.

The judicial procedure in terms of administrative solicitor's office is regularly submitted to the double degree of jurisdiction, fond and appeal trees representing an exception to the rule of triple level of jurisdiction which characterizes most of the litigations belonging to common civil procedure<sup>9</sup>. Also, in the field of fiscal administrative solicitor's office the judicial procedure is submitted to 2 levels of jurisdiction: the fond and the appeal.

The material competent of the trial courts is established by the disposals of art. 10 from Law no. 554/2004 such as:

- the fiscal administrative court houses judge mainly the litigation about the administrative documents issued or completed by the local and county

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<sup>6</sup> Decision no. 1077 of 26<sup>th</sup> of February 2009 of the Supreme Court of Justice and Cassation Section of financial and administrative solicitor's office, [www.scj.ro](http://www.scj.ro)

<sup>7</sup> Decision no. 782 of 13<sup>th</sup> of February 2009 of the Supreme Court of Justice and Cassation Section of financial and administrative solicitor's office, [www.scj.ro](http://www.scj.ro)

<sup>8</sup> Decision no. 3986 of 15<sup>th</sup> of November 2006 of the Supreme Court of Justice and Cassation Section of financial and administrative solicitor's office în *Jurisprudența Secției de contencios administrativ și fiscal, sem II, 2007*, Editura Hamangiu, București, 2008, p. 291-296

<sup>9</sup> Verginia Verdinaș, *Drept administrativ*, Ediția a – II- a revăzută și adăugită, Editura Universul Juridic, București, 2006, p. 166.

public authorities as well as those about taxes and duties, contributions, customs debts as well as their accessories no more than 500.000 lei. Till these will be set up their competence is given to the financial administrative court sections from the court- houses.

- the sections of fiscal-administrative solicitor's office from the courts of appeals judge after all the litigations about administrative documents issued or completed by central public authorities as well as those regarding the taxes and duties, contributions, customs, duties as well as their accessories no more than 500.000 lei.

As revealed in disposals of art. 10 from Law no. 554/2004 the underlying material competence of the instances of fiscal-administrative solicitor's office established according to two criteria such as the place occurred by the issuing public authority inside the public administration and the sum of taxes, duties, contributions, customs debts and also accessories.

In this direction, the Supreme Instance passed itself when in an action in has been demanded to cancel an administrative document issued by a central administrative authority for customs debts no more than 5 billion lei (Rol), The Supreme Court of Justice and Cassation enacting that, art. 10 (align. 1 ) from Law no. 554/2004 establishing the material competence of the trial court both related to the criterion of the issued institution of the challenged document, as well as related to the criterion the amount of litigation. In this case we must take into consideration the criterion of value having no importance if the document is issued by a central authority.

It would have priority the criterion of establishing the competence according to the public authority which has issued the challenged document (central or local) only in the case in which the litigation would not be about taxes, duties, contributions, customs debts and their accessories<sup>10</sup>.

Also, on the other hand, it has been established and truly that the action formulate don the basis of art. 1 regarding art. 2 align. 11 letter h<sup>11</sup> „from the Law of administrative solicitor's office which demands the General Direction of Administration of Main Contributors to issue the centralized fiscal certificate it is under the competence of the Court of Appeal according to art. 10 align. 1 second thesis from the same law because that direction is central public authority related to the stipulations of G.D. no. 208/2005 about the organization and working of the Ministry of Public Finances and

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<sup>10</sup> Decision no. 3903 of 9<sup>th</sup> of November 2006 of the Supreme Court of Justice and Cassation Section of financial and administrative solicitor's office în *Jurisprudența Secției de contencios administrativ și fiscal, sem II, 2006*, Editura Hamangiu, București, 2007, p. 73-74.

<sup>11</sup> Letter h became letter i after the modification of the Law of administrative solicitor's office bz Law no. 262/2007.

The Agency of Financial Administration<sup>12</sup>, and the object of the litigation is not to be estimated in money to establish the competence related to the criterion of value stipulated by art. 10 align. 1 from the law<sup>13</sup>.

The appeal can be solved as following:

- the appeal against sentences passed by fiscal administration court houses is judged by the fiscal and administrative solicitor's office of the courts of appeals.

- the appeal against sentences passed by the sections of fiscal and administrative solicitor's office of the court of appeal is judged by the sections of fiscal and administrative solicitor's office of the Supreme Court of Justice and Cassation if the social organic law does not stipulate something else.

As for the territorial competence, according to disposals of art 10 align. 3 from the law of administrative solicitor's office the petitioner can address to the instance from his residence or from the respondent's residence if the petitioner choose the instance from the respondent's residence it cannot be invoked the exception of territorial incompetence.

The legislator wanted to express the fact that once the petitioner expressed his /her option regarding the choice for the competent territorial instance, this choice is decisive (*electa una via non datur recursus ad alteram*)<sup>14</sup>.

This competence has an alternative<sup>15</sup> feature the petitioner has the possibility to choose the instance from his residence or form the respondent's residence.

Legal disposals about administration solicitor's office in the field of the competence for the judging territorial instance departs from the rule of

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<sup>12</sup> G.D. no. 208/2005 by G.D. no. 495/2009 annuled on its turm by G.D. no 109/2009 about the organisation and functioning of the National Agency of Financial Administration published în the Official Monitor of Romania Part 1 no. 126 from 02.03.2009

<sup>13</sup> Decision no. 1272 of 9<sup>th</sup> of February 2007 of the Supreme Court of Justice and Cassation Section of financial and administrative solicitor's office în *Jurisprudența Secției de contencios administrativ și fiscal, sem I, 2007*, Editura Hamangiu, București, 2007, p. 20-24

<sup>14</sup> Adria Fanu Moca, *Acțiunea în contencios administrativ împotriva deciziei de soluționare a contestației împotriva actelor administrative fiscale*, în *Curierul fiscal* nr. 3/2006, p. 26.

<sup>15</sup> Verginia Vedinaș, *Drept administrativ*, Ediția a – II- a revăzută și adăugită, Editura Universul Juridic, București, 2006, p. 172.

common right in this field, whereas the judging competence belong to the instance of the respondent's residence<sup>16</sup>.

By establishing this rule with departing feature from the common rule of territorial competence established by the Code of civil procedure they tried to protect the petitioner<sup>17</sup>.

The deadline to notify the instance of administrative solicitor's office is of 6 months which starts to flow from the date of communicating the answer to the fiscal appeal, the date of communicating the unjustified refusal for solving the petition, the expiring date of the solving, term for the financial appeal, respectively the expiring date for the legal term of solving the appeal, the expiring term of 30 days since the sent of the administrative document issued to solve favorably the petition or, if it's the case, of the fiscal appeal. The term of 6 month is a term of prescription.

For solid reasons, in the case of individual administrative document, the demand can be introduced after the term of 6 months, but no later than one year after communicating the document or information, the date of introducing the demand, by case, if the expiring term is of one year.

In domain of suspension for the fiscal administrative document, the judicial suspension is operated. We can appreciate that the judicial suspension has an optional feature because the instance of judgment decides whether it will grant or not the suspension demanded by the contributor.

Art. 215 align. 2 from the Code of fiscal procedure stipulate the contributor's right to demand the suspension of the fiscal-administrative document on the basis of the Law of the administrative solicitor's office no. 554/2004.

The competent instance can suspend the execution, if it is handed in a bail of no more than 20 years from the amount of the contested sum, and in the case of the demands whose object is not to be evaluated in money, a bail no more than 2000 lei.

The legal text establishes only the maximum limit of the sum of money owed with bail title, without establishing a minimum limit for the harmed person to exercise his/her right to ask the suspension of the fiscal administrative document.

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<sup>16</sup> Art. 5 from the Code of civile procedure stipulates: The demand is made to the instance of the repondent's residence. If the repondent has residence abroad or the from his country's residence and if he does not have a known residence, to the residence's instance or the repredent's residence.

<sup>17</sup> Rodica Narcisa Petresu, *Drept administrativ*, Editura Hamangiu, București, 2009, p. 489-490.

Law no. 554/2004 about administrative solicitor's office stipulates the possibility to suspend the administrative document also before the notification of the judgment instance, with action in canceling action of the administrative document.

By corroborating the disposals of the two normative documents, it results that the fiscal administrative document can be suspended if the contributor demand, either before notifying the judgment instance with canceling the fiscal administrative document, or together with the action of canceling the fiscal administrative document the instance being able to suspend the execution of the document if a bail is laid down the demand addressed to the instance are judged urgently and mainly in public meeting, in the panel established by law.

The decision are written and motivated in no more than 30 days after passing the sentence.

By admitting the action in the fiscal administrative solicitor's office the judging instance can cancel totally or partially the decision given to solve the fiscal appeal and implicitly the fiscal administrative document contested by fiscal appeal.

The action in the fiscal administrative solicitor's office has a general rule at least two demanding heads: one which aims to cancel the solving decision of the appeal and another, which aims to cancel the fiscal administrative document in which the fiscal obligations were established<sup>18</sup>. Also, according to disposals of art 18 align. 3 from Law no. 554/2004 about administrative solicitor's office, in the case of compensations for the moral<sup>19</sup> and material damaged, if the petitions has notified it.

Asking for compensations can also be made by a separate action, subsequent to the action of cancelled the fiscal administrative document, because the harmed person in his/her legitimate right or interest did not know the extent of the compensations on the date of intending action in cancellation.

The competent instance, to solve these demand of compensation are the instance of administrative solicitor's office, as it is stipulated by art. 19 align. 2 from Law of administrative solicitor's office.

According to disposals of art 20 align. 1 from Law no. 554/2004 about administrative solicitor's office, the decision pronounced in first instance

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<sup>18</sup> Adrian Fanu Moca, *Contenciosul fiscal*, Editura C. H. Beck, București, 2006, p. 265.

<sup>19</sup> Law no 29/1990 about administrative solicitor's office was the first law of the administrative solicitor's office which regulated deliberately the responsibility of the denounced administrative for moral damages too.

can be challenged with appeal, in terms of 15 days from the communication. The appeal in this case is not limited to the cassation reasons stipulated in art. 304 from the Code of civil procedure the instance being able to examine the cause under all the aspects<sup>20</sup>.

According to disposals of art 21 align. 1 from Law no. 554/2004, against decisive and irrevocable solutions pronounced by the instances of administrative solicitor's office can be exercised by the ways of appeal stipulated in the Code of civil procedure and namely the canceling appeal and revision.

The fiscal administrative solicitor's office installed by the Code of fiscal procedure is a solicitor's office of full jurisdiction, meaning that the petitioner can demand, and the instance can ask the cancellation totally or partially of a fiscal administrative document, the issuing of the document by the denouncing authority when it establishes that the law offers the contributor this right and the repairing of the damages by granting material and/or moral compensations.

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<sup>20</sup> Adrian Fanu Moca, *Acțiunea în contencios administrativ împotriva deciziei de soluționare a contestației împotriva actelor administrative fiscale*, în Curierul fiscal nr. 3/2006, p. 28.

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