

# The Scope of Discretionary Authority of the Administrative Body While Proceeding Tax Dispute

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## Abstract

Tax dispute is one of the types of administrative proceedings which has its peculiarities. Tax dispute takes place in the Ministry of Finance of Georgia and in the Court. Proceeding of Legal regulation of tax dispute and determining the scope of the discretionary powers of the administrative body is carried out according to the tax code of legal procedures, as well as the General Administrative Code of Georgia, the Administrative Code, the Administrative Procedure Code, the Civil and Civil Procedure Code, Criminal Code, the Law on “Entrepreneurs” and other acts. While resolving tax disputes, it is important to define the scope of the discretionary powers of the administrative body.

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**Keywords:** Tax dispute; the scope of the discretionary powers of the administrative body

## Material and Formal Grounds for Raising a Tax Dispute

Proceeding tax disputes gives a real opportunity to taxpayers to protect their rights and legal interests. The material basis for raising the tax dispute is the violation of obligations, determined by the Code, by tax authority or taxpayer / tax agent or other responsible person. The formal basis for raising the tax dispute is submission a "tax demand" to the taxpayer / tax agent or other responsible person by a tax authority, or submission of administrative act issued according to the Code to the taxpayer / tax agent or other responsible person.

Tax dispute resolution forms are: a dispute resolution within the system of the Ministry of Finance; Dispute resolution in the court.

Dispute resolution in the system of the Ministry of Finance consists of 2 stages:

- Dispute resolution in the Revenue Service of the Ministry of Finance;
- Dispute resolution in the board of appeals at the Ministry of Finance

During tax dispute proceedings, the scope of discretionary powers of the administrative body considering the complaint starts with a discussion of

the act issued by the subordinated body. This excludes impartiality. Consequently, we think that tax dispute should be led by not subordinated, neutral, separate administrative body. Dispute resolution Administrative body should be guided by principles of fairness, objectivity, impartiality and equality. Worsening taxpayer's tax debt provisions is inadmissible in the system of Ministry of Finance. There are guiding principles, such as the principle of justice, which implies a fair treatment and respect to a person. The principles of fairness provide equal access to justice for the complainant and defendant. These principles complete and develop the principle of equality before the law. Tax Dispute trial examining body must be guided by the principle of objectivity, which means investigating all the circumstances of the case completely and impartially. Tax dispute resolution body should evaluate the evidences based on inner conviction, which should be based on the merits of a comprehensive, full and objective examination of the case. According to the principle of equality, tax dispute parties should be on equal footing. Parties of the dispute should enjoy equal opportunities to protect the subjective rights and legal interests. To follow the principle of equality during a tax dispute resolution means the constitutional equality before the law. During tax dispute examining the administrative authority should be strongly adhered to the principle of impartiality. Subjective factors should not influence the process. Examining a particular tax dispute the administrative body should stay far from officials', mass media and social influence. Dispute resolution body should meet the standards of impartiality while hearing of any tax dispute.

According to General Administrative Code of Georgia, Article 2, paragraph 1, subparagraph „ L’’, the discretionary power grants an administrative body or an official freedom to select the most appropriate decision that is in compliance with the law, considering public and private interests. Seeking for justice in every particular case is considered to be the scope of discretionary powers. The result can be achieved by means of juxtaposition of public and private interests. Administrative authority benefits with freedom in determining the legal outcome. The Administrative Legislation of Georgia determines the discretionary power and establishes a proper rule of its provision. According to the Article 6 of the Administrative Code of Georgia, the administrative body is obliged to exercise the discretionary power within the legal framework and only for achievement of the purpose that the administrative body was assigned and the discretionary power was granted.

Consequently, according to both Georgian and German legislation, violation of the scope of law and ignoring its objective will cause inaccuracy in implementation of discretion authority and unlawfulness of the made decision.

In the system of the Ministry of Finance tax dispute is carried out within the legal terms. In addition, a tax payer is not required to pay any costs, fees or taxes for tax dispute. There are three stages of tax dispute resolution in all three instances of the court where proceeding of tax dispute requires payment of the state taxes. Tax dispute on the trial stage, administrative body is exempt from state taxes. Thus, if the tax dispute takes place in the court, the taxpayer has to pay large sums of money – at the first instance court 3% of the object of dispute, at the second instance court 4% and at the third instance court 5%, 12% totally. This violates the principle of equality.

The Supreme Court's Administrative Chamber made an important explanation on the discretionary right of the administrative body (Case 1655-1627 (3-11). While imposing sanctions using discretionary power the Cassation Court did not rule out obligation of the administrative body to consider its proportionality, mitigating circumstances, gravity of the offense, offender's personality what ultimately determined the adequacy of the sanction imposed.

Within the scope of discretionary powers, on the basis of protecting public and private interests the administrative body was obliged to select the most appropriate decision in accordance to the legislation. The Cassation Court stated that while proceeding an administrative complaint, the administrative body was checking not only the legality of the issue, but also its expediency.

The discretionary power of the administrative body does not mean feasibility of neglecting the principle of proportionality and legality. According to the Supreme Court, the use of discretionary powers requires special attention in order to avoid procedural violations, staying beyond the scope of the law, which could lead to violation of property and individual rights of a person.

Exercise of discretion by the administrative body and the reference on the use of law provisions do not constitute sufficient grounds to make a negative decision against a person in a tax dispute. Alongside with this, the Supreme Court examines the legality of activities of administrative bodies and is not limited by discretion of administrative bodies. The Supreme Court explained that as a result of issuing an administrative act by the administrative authority, the damage caused to lawful rights and interests of a person should not substantially exceed the benefits for which the act was issued. Administrative and legal measures prescribed by the legal act within the discretionary powers shall not cause unreasonable restriction of a person's legal rights and interests. Obligation of justification is conditioned by providing control over activities of the administrative body. Justification should imply the views, opinions and circumstances on which the

administrative body relied while making a decision. Ignoring justification by the administrative body is the basis for revocation of the act and impossibility of determining errors while exercise of discretion.

The European Court of Human Rights during a tax dispute ‘Perazini vs. Italy’ explained that an individual may have the financial obligations to the state which clearly falls within the sphere of public law; a fair trial for the purposes of protection of the Convention does not apply. The Court considers that despite the changes carried out in the field of taxation since adoption of the European Convention, the tax liability and the fundamental nature have not changed. Tax issues still remain in the sphere of state authority. In addition, the court explains convention articles in conjunction with additional protocols and indicates to the first article of the additional protocol according to which the government retains the right to enact laws to ensure the tax levy and which is not the part of the Article 6 of the European Convention. Thus, it is the part of public sphere.

Thus, European Human Rights Court Case Law underlines the importance of the scope of discretionary powers of the administrative body, particularly, indicates the large discretion of the administrative body, but points out that mechanisms of tax levy used by the administrative body are not unlimited. Authority of the administrative body is restricted by setting a fair balance between public and private interests and proportionality of the means used.

Importance of effective tax collection is clearly understandable for the administrative authority; however, it does not exclude that abuse of power will take place. Imposing tax liability to a person is unacceptable if the offense does not contain a big risk for the public.

As Convention and the enclosed protocols have binding character, they are subject to be reflected in the legislation and practically used by the Member States.

### **Conclusion and recommendations**

The scope of discretionary powers of the administrative body while proceeding tax dispute is based on:

- Justice, fairness, equality, impartiality, setting fair balance of private and public interests.
- Provision of moderate exercise of discretion by the administrative body while justified restriction of the lawful rights and interests of a person.
- During the validity of the obligation to use discretion.
- Substantiation of the obligation while applying discretion.

If the act against a taxpayer issued by the subordinate body of the administrative authority is claimed, the principle of impartiality

cannot be used. Since the complaint is handled by the higher administrative body who issued the contested administrative act, it is necessary that the independent structure carry out a tax dispute. While proceeding tax disputes the principle of equality is violated as obligation of paying the state tax is imposed to one party – taxpayer. The principle of objectivity is also violated, as the tax dispute can be handled for a long period (3 years).

It is very important to follow and exercise the aforementioned principles while proceeding tax disputes.

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