
THE ROLE OF COURT DURING CONDUCTING TAX CONTROL PROCEDURES ON THE EXAMPLE OF BULGARIAN AND GEORGIAN TAX LEGISLATION

Gvantsa Kharebava

Doctorate Educational Program of the Faculty of Law

Ivane Javakhishvili Tbilisi State University

Tel: +995598576056

Email: gvanca.kharebava@gmail.com

***Abstract:** This articles shows information about Georgian and Bulgarian tax legislation which establishes judicial control procedures over conducting tax audit/examination. there is quite difference between Georgian and Bulgarian regulations. In Georgia there is a type of audit – Emergency field audit which can't be carried out without judge's order, while Bulgarian tax legislation does not recognize such kind of audit at all. In contrary Bulgarian legal acts about taxation acknowledges courts big role during carrying out Steps to Perpetuate Evidences and getting written explanation from auditee, the person examined and even from third parties. The article shows in detail way how is regulated all of the topics in both countries. The article demonstrates judicial practice and legal doctrine of Georgia about this issues.*

***Keywords:** tax audit, examination, court, control, emergency field audit, evidence, appeal.*

Tax Control is considered as one of the forms of state governance activity, which is directed towards the protection of state property.¹²⁷ According to the prevailing view in international and local legal literature states are able to operate efficient tax systems, including tax control procedures. It is essential to enable the state to combat tax evasion and tax fraud better, but these measurements must provide protection of taxpayers' rights and legal interests. Only with the help of such approaches it will be possible to foster economic activity and growth in the country. Thus, in most cases tax legislation imposes some legal frameworks which should be obeyed while conducting tax control procedures. Such frameworks, in essence, are guarantees of rights of taxpayers, tax agents and others.¹²⁸ In addition, limitations of controlling function of administrative bodies retrain enterprises from abuse of power by public servants.¹²⁹

The main issues of the following article are to find out what kind of frameworks are defined by Georgian and Bulgarian legislation during conducting tax control procedures, what is the role of courts in performing such actions. With help of comparative research methods, we try to understand the advantages and disadvantages of both countries legal systems and we also try to find out ways how to improve them.

1. GEORGIAN LEGISLATION ABOUT PRELIMINARY CONTROL OF TAX AUDIT/EXAMINATION PROCEDURE BY THE COURTS

Before talking about the limitations for conducting tax control procedures by administrative bodies we should determine the definition of tax control itself. There is no legal definition of it, but in legal literature tax control is considered to be activities of the authorized bodies within legal regulations with combinations of interconnected elements.¹³⁰

¹²⁷ ზ. როგავა, საგადასახადო სამართალი, დამხმარე სახელმძღვანელო, წიგნი მეორე, 2017, p.10

¹²⁸ ავტ. კოლექტივი, საქართველოს საგადასახადო კოდექსის კომენტარი, წიგნი მეორე, 2012, p.465

¹²⁹ მ.ვაჩაძე, ინ.თოდრია, პ.ტურავა, ნ.წიკვლაძე, საქართველოს ადმინისტრაციული საპროცესო კოდექსის კომენტარი, 2005, p.79

¹³⁰ ზ. როგავა, საგადასახადო სამართალი, დამხმარე სახელმძღვანელო, წიგნი მეორე, 2017, p.28

Georgian Tax Code provides a number of provisions that effectively restrict the tax control bodies in the process of conducting tax control procedures and tax inspections/audits. Such kind of restrictions, in essence, is an additional guarantee of impartiality and objectivity of conducting tax control. They significantly support taxpayers' and other participants' legal protection during taxation proceeds.¹³¹

1.1 The grounds when tax authority has right to apply to court

Georgian Tax Code clearly indicates the circumstances when tax control procedures can't be conducted without judge's order. For example, Emergency field audit.

Emergency Field Audit is a type of Field Audit. But unlike ordinary field audit it shall be conducted without the prior written notice of a taxpayer.¹³² Before talking about the procedures how courts permission can be got, we should say few words about the basis of such audit. Georgian Tax code gives us Exhaustive List of the conditions when the authorized bodies can perform emergency field audit¹³³:

1. During the last tax audit have been discovered facts of significant violations of tax liabilities by a taxpayer.¹³⁴ According to the literal definition of this provision it should be highlighted that the above mentioned condition may only be indicated when it comes to violation of two or more tax obligations. Unfortunately, neither tax legislation nor Legal doctrine gives us definition what does significant violation mean. Whether it is connected to the amount charged for payment or it depends only on the quality of the violation.
2. There is reliable information which makes suspicious the origin of financial and material assets of a person.¹³⁵ There is no also the legal definition of reliable information, by whom it can be provided, does it need only oral announcement or there should be some documental information?!
3. There is reliable information about the increase of property or other taxable object of taxpayer which has not been proven through documents;¹³⁶
4. tax returns and other documents submitted to the tax authority do not prove the reality of the taxable objects and calculated taxes;¹³⁷
5. tax returns or the documents necessary for the calculation of tax and/or payment thereof have not been submitted to the authorized bodies;¹³⁸
6. Tax authority possesses information about an entity, which plans to avoid the fulfillment of tax liabilities by departing from Georgia, transferring the assets to another person, destruction, hiding, adjustment of the documents proving tax violation or by performing other activities.¹³⁹ There is not any description how the tax authority gets this information. How to determine the legality of this information, when the court is obliged to take into account such kind of information.

To take into consideration all above mentioned we can conclude that court have possibility to interpret these grounds widely.

1.2 How to apply to the court and what kind of evidences are necessary to get judge's order

Tax authority is obliged to apply to court within 48 hours from the commencement of an emergency field audit and obtain permission thereof about conducting it.¹⁴⁰ Prior to receiving a court permission, the tax authority has no right to start tax inspection but representatives of the tax

¹³¹ ზ. როგავა, საგადასახადო სამართალი, დამხმარე სახელმძღვანელო, წიგნი მეორე, 2017, p.40

¹³² ავტ. კოლექტივი, საქართველოს საგადასახადო კოდექსის კომენტარი, წიგნი მეორე, 2012, p.525

¹³³ Tax Code of Georgia, Article 265, <<https://matsne.gov.ge/ka/document/view/1043717>> [17.02.2018]

¹³⁴ Tax Code of Georgia, article 265 (1.a), <<https://matsne.gov.ge/ka/document/view/1043717>> [17.02.2018]

¹³⁵ Tax Code of Georgia, article 265 (1.b), <<https://matsne.gov.ge/ka/document/view/1043717>> [17.02.2018]

¹³⁶ Tax Code of Georgia, article 265 (1.c), <<https://matsne.gov.ge/ka/document/view/1043717>> [17.02.2018]

¹³⁷ Tax Code of Georgia, article 265 (1.d), <<https://matsne.gov.ge/ka/document/view/1043717>> [17.02.2018]

¹³⁸ Tax Code of Georgia, article 265 (1.e), <<https://matsne.gov.ge/ka/document/view/1043717>> [17.02.2018]

¹³⁹ Tax Code of Georgia, article 265 (1.f), <<https://matsne.gov.ge/ka/document/view/1043717>> [17.02.2018]

¹⁴⁰ Tax Code of Georgia, article 265 (2), <<https://matsne.gov.ge/ka/document/view/1043717>> [17.02.2018]

authority shall be entitled to seal only those tax documents and inventory holdings of a taxpayer that are necessary for the performance of field audit.¹⁴¹ Until the decision of Constitutional Court of Georgia, the tax authorities had also right to apply tax lien/mortgage on the taxpayer property, regardless of whether he/she has tax debt, but now this norm has declared unconstitutional.¹⁴²

Petition should be presented before district (city) court judge or a magistrate judge, according to the location of the inspecting entrepreneur¹⁴³ and Tax authority as a party of the proceeding has an obligation to determine the exact data about entrepreneur, including the information about location of this entrepreneur, which is the legal address of the enterprise according to the Law of Georgia on Entrepreneurs. In some cases, the tax authority has desire to audit only branch office or permanent establishment of the entrepreneur, that's why they submit the petition before the court not according to the location of the entrepreneur, but according to the place of the branch or other entity of this enterprise, while the law requires to present the petition according to location of entrepreneur. Thereby the court, in first instance, have to check whether it is the court that is authorized to review a petition. If the case does not belong to its jurisdiction, the judge is obliged to forward the petition to the court to be considered for review, according to the administrative procedural code of Georgia, article 26.¹⁴⁴

The petition of the tax authority is a procedural act which is the basis for initiating administrative proceedings related to inspection of the entrepreneur's activity.¹⁴⁵ In general, petition should be submitted before the court prior to the starting an inspection of entrepreneur.¹⁴⁶ However, the legislator defined exceptions from the general rule. Only in the strictly established cases it is permitted to inspect enterprise without a court permission, in particular, when it is possible to be threatened directly and immediately state security, human life or health, or evidence. This means that such kind of threat or the annihilation of the evidence, or the danger of hiding it should be authentic. In such cases the tax authority has power to suspend the activity/operation of the enterprise only in the subject of examination and immediately apply to a court for permission. the tax authority shall

¹⁴¹ ზ. როგავა, საგადასახადო სამართალი, დამხმარე სახელმძღვანელო, წიგნი მეორე, 2017, p.89

¹⁴² while starting urgent field audit tax authority had a right to apply tax lien/mortgage on the taxpayer's property regardless of whether he/she has tax debt. Which means, that there is not considered certain amount of money, which must be paid by taxpayer in favor of state budget. Urgent field audit is carried out in cases where there is a risk that the effectiveness of tax administration will be endangered and will not be paid the whole amount of tax debt/arrears. At this time tax lien/mortgage may be considered as risk insurance measurement even if there are not any declared tax arrears, but the tax authority considers that based on the information, which tax authority holds, there is a possibility to identify the circumstances under which the tax liability will be imposed on the taxpayer. Tax lien/mortgage significantly restricts the right of taxpayer without any legal burden to dispose his/her property without any hindrance. In certain cases, such regulation may not only lead to restriction of property management, but also impede the activity of a taxpayer, negatively impact on current manufacturing processes and create significant financial problems for taxpayers. According to the constitutional courts interpretation above mentioned regulation gives the tax authorities possibility to apply a lien/mortgage on the taxpayer's property without any limitation. Above mentioned article did not regulate the scope of the use of these measurement and does not determine the amount of property which should be pledged for securing a taxpayer's tax debt. Taking into account all above, Tax lien/mortgage may be extended to all the property of taxpayer, regardless the fact how much tax arrears is supposed by tax authorities. Furthermore, even if the tax authority has strong belief that the amount of alleged tax arrears is much more less than the price of property which has tax lien/mortgage, the tax authority does not have right to distribute tax lien/mortgage only to the part of the property (within the scope of the alleged tax liability). Unfortunately, even taxpayer does not have right to demand a reduction in the tax lien / mortgage in proportion to the alleged tax liability, even after the amount will be determined. Consequently, the Constitutional Court concluded that applying tax lien/mortgage on the taxpayer before determining the real tax debt restricts the taxpayer's property rights much more than it is required. So this legal norm was declared unconstitutional. (The 28.12.2017 years №2/8/73 decision of the Constitutional Court of Georgia <http://constcourt.ge/ge/legal-acts/judgments/2-8-734-aaip-frema-saqartvelos-parlamentis-winaagmdeg_page> [18.02.2018])

¹⁴³ Law of Georgia "Administrative Procedure Code of Georgia", article 21¹, <<https://matsne.gov.ge/ka/document/view/16492>> [17.02.2018]

¹⁴⁴ მ.ვაჩაძე, ინ.თოდრია, პ.ტურავა, ნ.წეკელაძე, ადმინისტრაციული საპროცესო კოდექსის კომენტარი, თბილისი, 2005, p.91-92

¹⁴⁵ მ.ვაჩაძე, ინ.თოდრია, პ.ტურავა, ნ.წეკელაძე, ადმინისტრაციული საპროცესო კოდექსის კომენტარი, თბილისი, 2005, p.93

¹⁴⁶ Law of Georgia "Administrative Procedure Code of Georgia", article 21²(1), <<https://matsne.gov.ge/ka/document/view/16492>> [17.02.2018]

be entitled to commence inspection of the entrepreneur in three cases: (1) If operation of an enterprise cannot be suspended; (2) The suspension will cause significant damage to the enterprise; (3) The entrepreneur requires to start checking.¹⁴⁷ At this time tax authority should submit an appropriate petition to a judge within 24 hours.¹⁴⁸ Upon submitting this petition the tax authority must justify the urgent necessity of the inspection.¹⁴⁹

In general, the petition should include sufficient grounds for issuing an order and there should be indicated the following information: (1) firstly, accurate data about the entrepreneur, which is considered to be inspected. In particular, the name and address of this entrepreneur, and the extract of the Entrepreneurial Registry; (2) secondly, the time, nature and scope of the inspection. According to the legislation tax authority has an obligation to determine the period of inspection up to 1-15 days. Tax authority have a duty to justify how much time is necessary to execute optimally control procedure. In the nature of the inspection should be explicated the types of measurement to be taken, such as counting of goods, analyzing product samples and so on. The scope of the inspection means to determine the scope of competence of tax authority, as well as the period of inspection of the enterprise. Above mentioned information is considered as formal requirements.¹⁵⁰

In the legal doctrine the sufficient grounds for issuing judge's order is considered Law of Georgia on control of entrepreneurial activity, article 3.3 – if a controlling body submits to judge appropriate information with well-grounded and reasonable suspicion that the entrepreneur has violated requirements of the legislation, only in this case judge can issue an order to inspect an entrepreneur's activity. This norm makes clear the aim and purpose of tax authority, that controlling function should be used only the following intention: to eliminate violations of legislation requirements in the activities of the entrepreneur; to take preventive measurements to some extent; to bring activities of the entrepreneur activities in compliance with legal standards; to take proper measures for identification and curbing of offence and etc.¹⁵¹

The policy of controlling bodies in relation to business activity should be based on the promotion of entrepreneurial activities, development of free competition and, most importantly, essential for the protection of consumers rights and interests. Under these principles, the controlling bodies, as the executive authorities, possess the relevant mechanisms for obtaining and receiving information containing substantive and reasonable doubt about the violation of the requirements of the law by the entrepreneur.¹⁵² That's why it should not be difficult for tax authority to submit well-grounded petition before the court.

The judge has 72 hours, after submitting the petition, to render a decision at his/her personal discretion. The legislator uses the term "presenting the application" within 72 hours from the moment the petition is submitted, it obliges the court administration to indicate the time of registration of the petition along with other requisites, to determine whether or not the decision is

¹⁴⁷ მ.ვაჩაძე, ინ.თოდრია, პ.ტურავა, ნ.წევლაძე, ადმინისტრაციული საპროცესო კოდექსის კომენტარი, თბილისი, 2005, p.93

¹⁴⁸ After verifying the justification of the petition, the judge issues a reasoned order regarding the inspection of an entrepreneur's activity. If the inspection of the entrepreneur has already been commenced, and the court refuses to inspect the entrepreneur's activity, the order shall indicate the information on termination of the inspection and on the payment of damages incurred by the entrepreneur, provided the damage was caused by a guilty act (actus reus) of the tax authority. (Law of Georgia "Administrative Procedure Code of Georgia", article 21²(6), <<https://matsne.gov.ge/ka/document/view/16492>> [17.02.2018])

¹⁴⁹ Law of Georgia "Administrative Procedure Code of Georgia", article 21²(2), <<https://matsne.gov.ge/ka/document/view/16492>> [17.02.2018]

¹⁵⁰ ნ.წევლაძე „ადმინისტრაციული ორგანოების მაკონტროლებელი ფუნქციის რეალიზების, მეწარმის საქმიანობის სამართლებრივი გარანტიების საკანონმდებლო მექანიზმები და სასამართლოს /ხელისუფლების როლი, ჟურნალი ქართული სამართლის მიმოხილვა 7/2004-2/3, p.332

¹⁵¹ მ.ვაჩაძე, ინ.თოდრია, პ.ტურავა, ნ.წევლაძე, ადმინისტრაციული საპროცესო კოდექსის კომენტარი, თბილისი, 2005, p.95-96

¹⁵² ნ.წევლაძე „ადმინისტრაციული ორგანოების მაკონტროლებელი ფუნქციის რეალიზების, მეწარმის საქმიანობის სამართლებრივი გარანტიების საკანონმდებლო მექანიზმები და სასამართლოს /ხელისუფლების როლი, ჟურნალი ქართული სამართლის მიმოხილვა 7/2004-2/3, p.334

made within the law (72 hours).¹⁵³ Judge has the authority to consider the petition without an oral hearing, regarding which he/she has to notify the entrepreneur or his/her representative, whose inspection has been required by the tax authority and provide this entrepreneur with respective materials not later than 24 hours after submitting the petition. But if the judge concludes that the circumstances indicated in the petition must be investigated, he/she is entitled to review the petition in an open session of the court.¹⁵⁴ At this time the parties must be notified regarding the hearing not later than 48 hours after submitting the petition to the court. An entrepreneur or his/her representative shall be entitled to present his/her opinion in writing to the court within 24 hours after receiving the notification of the inspection and the case materials.¹⁵⁵ It should be mentioned that courts have really very short time to carry out proper measurements and to take decision. According, to Administrative Procedure Code of Georgia, article 21³ (4) A hearing on a petition shall not be postponed due to the absence of the parties, otherwise, it would be impossible to preserve the time limit for taking a decision by judge. However, despite the fact that the absence of the parties is not a hindrance, the parties are entitled to receive a summons, which is extremely problematic in such short time.¹⁵⁶ According to this procedure, it is also difficult to realize the procedural rights of the entrepreneur. This entrepreneur does not have the opportunity to prepare for a court hearing, get acquainted with motivation of petition, take advantage of the lawyer's service, and therefore the entrepreneur is in an unequally position as a procedural side. However, as it is noted above, being within the court jurisdiction the controlling function of the administrative body creates more guarantees for the protection of the rights of the entrepreneur than its non-existence at all.¹⁵⁷

For a thorough examination of the case a judge has the power to summon and interrogate a person whose testimony (information) justifies the petition, as well as to suggest the author of the petition and the entrepreneur submit documents and material evidence necessary to verify the justification of the petition.¹⁵⁸ Thus indicates that peculiarities of administrative proceedings - the court's authority to collect evidence based on its initiative is maintained in the process of inspection of the entrepreneurial activity. The Court must investigate whether the petition contains reasonable and substantial doubt about the violations of the law by the entrepreneur, which should be based on relevant evidence. In case of failure to do so, the Court is authorized to obtain them by its initiative, On the basis of Administrative Procedure Code, articles 4th, 19th and 21.33.¹⁵⁹

It is very interesting to determine the circumstances when the judge takes decision to permit the inspection or reject it. The court should always consider and take into account two confronted principles: Public Interest - Compliance with the legislation of the entrepreneur's activity, protection

¹⁵³ მ.ვაჩაძე, ინ.თოდრია, პ.ტურავა, ნ.წეკებლაძე, ადმინისტრაციული საპროცესო კოდექსის კომენტარი, თბილისი, 2005, p.100

¹⁵⁴ If it is decided to conduct oral hearing the judge opens the trial with speech stating what kind of petition is being considered, after which the judge hears justified arguments of the representative of tax authority regarding the inspection and ask him/her questions. The entrepreneur or his/her representative may give explanations and state contradicting opinions. Also based on the judge's permission, the entrepreneur or his/her legal representative may ask questions to the opposite party, who shall be obliged to answer the judge's and the entrepreneur's or his/her legal representative's questions. A hearing on a petition may not be postponed due to the absence of the parties. (Law of Georgia "Administrative Procedure Code of Georgia", article 21³(4), <<https://matsne.gov.ge/ka/document/view/16492>> [17.02.2018])

¹⁵⁵ Law of Georgia "Administrative Procedure Code of Georgia", article 21³(1,2), <<https://matsne.gov.ge/ka/document/view/16492>> [17.02.2018]

¹⁵⁶ In the Court of Appeal, non-delivery of summons is frequently one of the motives of the complaint, However, this was not the basis for the cancellation of the appealed judge's order (As it would happen in other administrative cases) because the law itself provokes such a limited term. (მ. ვაჩაძე, ინ.თოდრია, პ.ტურავა, ნ.წეკებლაძე, ადმინისტრაციული საპროცესო კოდექსის კომენტარი, თბილისი, 2005, p.100)

¹⁵⁷ მ.ვაჩაძე, ინ.თოდრია, პ.ტურავა, ნ.წეკებლაძე, ადმინისტრაციული საპროცესო კოდექსის კომენტარი, თბილისი, 2005, p.100

¹⁵⁸ Law of Georgia "Administrative Procedure Code of Georgia", article 21³(3), <<https://matsne.gov.ge/ka/document/view/16492>> [17.02.2018]

¹⁵⁹ მ.ვაჩაძე, ინ.თოდრია, პ.ტურავა, ნ.წეკებლაძე, ადმინისტრაციული საპროცესო კოდექსის კომენტარი, თბილისი, 2005, p.105

of consumers rights, the controlling function of the administrative organs and Private Interest - freedom of entrepreneurial activity, unlimited competition, inviolability and so on. The Court must give an objective assessment to the circumstances of the case on the basis of internal belief to conclude which interest, public or private, is superior for realization. If the court finds that there is formal and material basis for conducting inspection, the Court issues the order. But if such prerequisites do not exist the court disagree to inspect the entrepreneur's activity.¹⁶⁰

Administrative Procedure Code defines precisely the requisites of the court order, which should be issued in three copies. A judge's order on the inspection of an entrepreneur's activity shall indicate: the date and place of drawing up the order; the surname of the judge; the controlling body that submitted the petition to the judge; the decree on inspection of an entrepreneur's activity, its essence, and the entrepreneur who is being inspected; the period of validity of the order and time for inspection of the entrepreneur's activity, which must not exceed 15 days; the official or the body, authorized to execute the order; the signature of the judge and the seal of the court.¹⁶¹

It is interesting to note that the mandatory requirement of the court order is to indicate the timeframe for inspection of the entrepreneur's activity and it was determined that it can not exceed 15 days.¹⁶² It is noteworthy that, as a rule, the controlling body requests the maximum period of

¹⁶⁰ ნ.წვეკლაძე „ადმინისტრაციული ორგანოების მაკონტროლებელი ფუნქციის რეალიზების, მეწარმის საქმიანობის სამართლებრივი გარანტიების საკანონმდებლო მექანიზმები და სასამართლოს /ხელისუფლების როლი, ჟურნალი ქართული სამართლის მიმოხილვა 7/2004-2/3, p.357-358

¹⁶¹ Law of Georgia “Administrative Procedure Code of Georgia”, article 21³(7,9), <<https://matsne.gov.ge/ka/document/view/16492>> [17.02.2018]

¹⁶² About above mentioned topic there was taken interesting decision by the supreme court of Georgia. Tax authority submitted a petition about emergency field audit before the court. The inspection period of taxpayer was the 2007-2012 years. The court issued order about inspection of the entrepreneur and the timeframe for inspection was 15 days. The tax authority again submitted petition for the extension of this inspection time, which was granted by the court. This decision was appealed by the entrepreneur, where the request of applicant was partly granted and prolonged the time for 7 working-days instead of 15 days. After all of this the tax authority took decision about suspension of emergency field audit, but after 5 days from taking this decision the tax authority resumed audit and at the same time took decision about invalidation of his decision to start emergency field audit. Simultaneously, tax authority assigned field audit of this entrepreneur, to check the same accounting period and send a notification about this to the entrepreneur. The taxpayer submitted a claim, to annul this decision of tax authority, before the Tbilisi city court, which refused to grant the claim. Taxpayer appealed this decision to the Tbilisi appeal court, which granted the appeal and declare the decision of tax authority invalid. But this decision was appealed to the supreme court of Georgia by tax authority, which refused to grant the cassation appeal. The Supreme Court of Georgia assessed the legality of actions of the tax authority, namely the issuance of a decision on the commencement of emergency field audit and the commencement of the field audit. The Court has noted that it is mandatory to draw up tax examination report which generates legal consequences for the taxpayer. The Court also referred to Article 255 (6) of the Tax Code and noted that without a judge's order it is not allowed to re-examine the inspected period. The Supreme Court clarified that in order to protect the interests of a taxpayer, the legislator prohibits repeated examination of the taxpayer's activities if there is no objective necessity which the tax authority must prove in the process of obtaining a court permit. In addition, the Supreme Court clarified that for the purposes of this norm it is necessary that the first inspection should be completed. Generally, field audit (no matter ordinary or emergency) is concluded with drawing up the tax examination report. Drawing up this report is the obligation of tax authority. *The Supreme court notes that non-fulfillment of this obligation, naturally, does not give the tax authority the right to revoke its own decision on the starting tax audit and start a new inspection.* The Supreme court agreed with the interpretation of the Court of Appeal that if the tax authority fails to fulfill its obligation this does not give it right to commence tax inspection of the same period on its own initiative. As an ordinary emergency field audit is a voluminous process and involves some interference in the day-to-day work of the taxpayer. The inspection process includes a set of measures including procedural once to be defined by the Tax Code of Georgia. For this reason, the tax code establishes quite strict legal restrictions and timelines for conducting a tax audit. The emergency field audit may include sealing of taxpayer documentation and / or inventory items, using tax lien / mortgage on taxpayer's property and seizure of documents. Moreover, the supreme court emphasizes that in case the tax authority right has a right to apply the measures envisaged by the law, but the process of conducting the tax audit does not end in accordance with the procedure prescribed by law, the taxpayer is entitled to claim compensation for the damage caused by his activities. Simultaneously, in this case, it is more important to determine whether or not the tax authority carried out the proper, lawful measures during conducting field audit and not only the fact that tax authority does not draw up tax examination report. Thus, it is decisive, that the inspection must be conducted. In this case, the tax authority is deprived of the legal authority to issue a new order on commencement of a tax inspection to the same subject, without getting the court order. Otherwise it is meaningless to establish judicial control over tax audits. (№ბს-649-641(3-15) decision of the Supreme Court of Georgia, [01.03.2016], <<http://prg.supremecourt.ge/DetailViewAdmin.aspx>> [21.02.2018])

time for inspection of the entrepreneur - 15 days. However, in many cases it does not prove what is the need for 15 days of inspection of the enterprise. The court is obliged to determine the validity period of the order; this obliges the entrepreneur to facilitate the controlling body during the inspection period. Without indicating validity period, the controlling body should have possibility to inspect the entrepreneur at any time. Thus should create bigger problem for entrepreneur.¹⁶³ According to the procedural code it is permissible to apply for the extension of the period of inspection established by the court. Of course, there should be objective grounds for continuing this term, for example, a large volume of documents, an entrepreneur's intervention and etc. Changes like the following: replacement of the head of controlling body, the sickness of the employee and other such subjective factors should not be the reason for extension of the period of inspection.¹⁶⁴ The above mentioned time may be extended by not more than 15 days by the court. At the same time, if the entrepreneur's annual turnover exceeds GEL 1 million, the above-mentioned 30-day time may be extended by not more than 40 days.¹⁶⁵ The Court issues the same kind of judicial act – an order, which should also contain the justification for what is the exception of the case, what is the legal prerequisite for extension of the term of inspection. This petition shall be considered by the same procedure as a petition to inspect the activity of the entrepreneur. Accordingly, the same rules apply to the invitation of the parties, the judicial review, the right to appeal and etc.¹⁶⁶

According to Administrative Procedure Code of Georgia tax authority has to withdraw the petition to inspect entrepreneur within 24 hours after submission or during the hearing on the petition, before the judge enters the deliberation room. The repeated submission of a petition to the court on the same grounds shall be inadmissible.¹⁶⁷ Withdrawing the petition by a legal outcome is equal to the procedural outcome of the withdrawal of the claim. With this right, the legislator has given a chance to the controlling body in case of ungrounded petition to terminate proceedings. It should be noted that the legislator does not specify what decision should take the court if the controlling body withdraws petition. The court practice filled this gap. According to Civil Procedure Code of Georgia, article 272 (g) - If the plaintiff renounces the claim the judge shall deliver a ruling to terminate the proceedings. Correspondingly, on the basis of Administrative Procedure Code, article 1.2 - in view of the specificity of the legal proceedings related to the control of entrepreneurial activities, the Court must take a decision on termination of the case proceedings. The term not to make admissible the repeated petition at one hand ensures using of the procedural right – to submit a petition – in reasonable and objective way by the controlling body. And on the other hand guarantees protection of entrepreneurs rights. For the submitting petition to inspect the same entrepreneur on the other time the controlling body has to find out and submit evidences on the other grounds about violation of legislation by the entrepreneur.¹⁶⁸

In general, a judge's order shall enter into force after the expiry of the time determined for appealing the order. Appealing an order shall suspend the order. Judge's order may be appealed at the court of the appellate instance within 48 hours.¹⁶⁹ It is noteworthy that the judge's order can be appealed only once to the appeal court, an order of the court of the appellate instance is final and not subject to appeal. An appeal shall be heard at the court of the appellate instance collegially, on

¹⁶³ მ.ვაჩაძე, ინ.თოდრია, პ.ტურავა, ნ.წიკეპლაძე, ადმინისტრაციული საპროცესო კოდექსის კომენტარი, თბილისი, 2005, p.106-107

¹⁶⁴ მ.ვაჩაძე, ინ.თოდრია, პ.ტურავა, ნ.წიკეპლაძე, ადმინისტრაციული საპროცესო კოდექსის კომენტარი, თბილისი, 2005, p.111

¹⁶⁵ Law of Georgia “Administrative Procedure Code of Georgia”, article 21³(12), <<https://matsne.gov.ge/ka/document/view/16492>> [17.02.2018]

¹⁶⁶ მ.ვაჩაძე, ინ.თოდრია, პ.ტურავა, ნ.წიკეპლაძე, ადმინისტრაციული საპროცესო კოდექსის კომენტარი, თბილისი, 2005, p.111-112

¹⁶⁷ Law of Georgia “Administrative Procedure Code of Georgia”, article 21³(13), <<https://matsne.gov.ge/ka/document/view/16492>> [17.02.2018]

¹⁶⁸ მ.ვაჩაძე, ინ.თოდრია, პ.ტურავა, ნ.წიკეპლაძე, ადმინისტრაციული საპროცესო კოდექსის კომენტარი, თბილისი, 2005, p.112

¹⁶⁹ Law of Georgia “Administrative Procedure Code of Georgia”, article 21³(14), <<https://matsne.gov.ge/ka/document/view/16492>> [17.02.2018]

the merits. This provides essential consideration of the case by two instance courts. The supreme court of Georgia does not have jurisdiction over such cases. The timeframe for appealing the District Court Act is also specific, which puts the complaining party in a difficult situation.¹⁷⁰ As it is mentioned above the appeal causes the suspension of Execution of the order. Which means suspension of following conduct - inspection of entrepreneur's activity before the issuing order by the court of appeal. The court of appeal has 72 hours to review the appeal. This time is too few, taking into consideration that it is more difficult for the court of appeal to serve judicial summons to plaintiff than for the district (city) court. However, these extremely closely-timed dates of judicial proceedings arise from the effective and operational nature of the proceedings. The court of appeal reviews the case within the scope of an appeal on fact and law. The case is heard by a panel of three judges according to the procedure established for hearing at the court of the first instance.¹⁷¹

It is remarkable that legislator allowed revising of final judgement based on recently found or revealed circumstances. This possibility can only be realized by the entrepreneur¹⁷² in the form of a procedural application for the court – petition. This norm does not provide the legal definition of recently found or revealed circumstances. The Civil Procedure Code of Georgia, article 423¹⁷³ gives us legal definition of “recently found circumstances”, but there is no any legal definition what does mean “recently revealed circumstances”. Thus it is crucial to be determined by the administrative procedure legislation the legal definition of both recently found and revealed¹⁷⁴ circumstances, in order to understand when is the entrepreneur entitled to realize this right, as well as to give the courts possibility to review the admissibility of petition.¹⁷⁵ In addition, entrepreneur or his/her representative shall be entitled to submit a petition, on cancelling the judge's order regarding inspection of the entrepreneur's activity, to the court, whose judge issued an order regarding inspection of the entrepreneur's activity, within three days after the above circumstances became known to him/her.¹⁷⁶ The legislation does not give any specific ruling for the controlling body to realize such right, also there is no any time-frame defined for controlling body to apply to the court with such kind of request. But in the law practice the court has applied the deadline for the entrepreneur - 3 day to controlling body too. Which is, in essence, incorrect because the court does not have the competence of lawmaking activities.¹⁷⁷

2. BULGARIAN LEGISLATION ABOUT PRELIMINARY CONTROL OF TAX AUDIT/EXAMINATION PROCEDURE BY THE COURTS

Bulgarian tax legislation is a bit different when determining regulations about tax control procedures. Before discussing the role of court during conducting tax control procedures, it should

¹⁷⁰ ნ.წევლაძე „ადმინისტრაციული ორგანოების მაკონტროლებელი ფუნქციის რეალიზების, მეწარმის საქმიანობის სამართლებრივი გარანტიების საკანონმდებლო მექანიზმები და სასამართლოს /ხელისუფლების როლი, ჟურნალი ქართული სამართლის მიმოხილვა 7/2004-2/3, p.356

¹⁷¹ მ.ვაჩაძე, ინ.თოდრია, პ.ტურავა, ნ.წევლაძე, ადმინისტრაციული საპროცესო კოდექსის კომენტარი, თბილისი, 2005, p.112-114

¹⁷² The entrepreneur is the only party of the proceeding who has such right – to submit a petition about revising the case. Such difference between the procedure rights of parties is due to the grounds of maximizing the interests of the entrepreneur. (მ. ვაჩაძე, ინ.თოდრია, პ.ტურავა, ნ.წევლაძე, ადმინისტრაციული საპროცესო კოდექსის კომენტარი, თბილისი, 2005, p.111)

¹⁷³ This norm can be used in administrative proceeding based on the Administrative Procedure Code of Georgia, article 1.2 – “The provisions of the Civil Procedure Code of Georgia apply to administrative legal proceedings unless otherwise specified by this Code”

¹⁷⁴ Without defining the revealed circumstances, the possibility of using it is unclear (მ. ვაჩაძე, ინ.თოდრია, პ.ტურავა, ნ.წევლაძე, ადმინისტრაციული საპროცესო კოდექსის კომენტარი, თბილისი, 2005, p.111)

¹⁷⁵ მ.ვაჩაძე, ინ.თოდრია, პ.ტურავა, ნ.წევლაძე, ადმინისტრაციული საპროცესო კოდექსის კომენტარი, თბილისი, 2005, p.110

¹⁷⁶ Law of Georgia “Administrative Procedure Code of Georgia”, article 21³(10), <<https://matsne.gov.ge/ka/document/view/16492>> [17.02.2018]

¹⁷⁷ მ.ვაჩაძე, ინ.თოდრია, პ.ტურავა, ნ.წევლაძე, ადმინისტრაციული საპროცესო კოდექსის კომენტარი, თბილისი, 2005, p.110

be defined the legal definition of tax audit and examination which are regulated by Tax and Social Insurance Procedure Code of Bulgaria.

According to Tax and Social Insurance Procedure Code of Bulgaria, article 110 - Audit and examination are means of tax control procedures conducting by the revenue authorities. An *audit* is a totality of steps by the revenue authorities intended to ascertain obligations for taxes¹⁷⁸ and an *examination*¹⁷⁹ is a totality of steps by the revenue authorities regarding the observance of tax legislation¹⁷⁹. One more difference between audit and examination is that examination shall be conducted by the revenue authorities without the need of an express written assignment¹⁸⁰, while for initiating audit proceeding is necessary to issue an audit assignment order.¹⁸¹

Generally, the revenue authority is entitled to take evidence in an administrative proceeding *ex officio*, which is subject to objective assessment and analysis.¹⁸² Moreover the revenue authority has a right, upon conducting an audit or an examination, to undertake steps to perpetuate evidence such as: (1) making an inventory of, or (2) seizure with an inventory of any securities, items of property, documents, papers and other data mediums, (3) copying the information from and onto machine-readable data mediums making the said information retrievable, while taking all necessary technical precautions to preserve the authenticity of the said information. If the above mentioned measurements can't be taken promptly for the purposes of the audit or examination the Revenue Authority can seal the facility or a part thereof, only where the evidence subject to securing is located, for a period that may not exceed forty-eight hours.¹⁸³ Before the expiry of this time limit the revenue authority may motion the regional court exercising jurisdiction over the location of the facility for an extension of the period of the sealing. The court, sitting in camera, shall pronounce on the day of receipt of the request by a ruling, specifying a period for the sealing. This ruling can't be appealed. After expiry of these time limits sealing shall be considered terminated.¹⁸⁴

It is noteworthy that any step to perpetuate evidence shall be contestable, contestant has fourteen days after the performance of the said action before the territorial director exercising competence over the location of the facility. Who has only one day for taking decision to grant the contestation and order cessation of the acts appealed or reject it. The contestant should be notified of the decision on the same day. the revenue authority has to execute decision about cessation within the time limit specified in the decision. If territorial director does not take decision within the established time limit or he/she reject the appeal the steps to perpetuate evidence shall be appealable as to the legal conformity thereof before the administrative court exercising jurisdiction over the location of the territorial directorate within seven days after expiry of the time limit of taking decision by territorial directorate. The court has seven days to pronounce the ruling and it can't be appealed anymore. It should be noted that appeal does not stay the steps to perpetuate evidence.¹⁸⁵

In contrast to the Georgian tax legislation in Bulgarian once if the auditee or an examined person refuses to afford the revenue authority access to a facility subject to control or refuses to present papers or other data mediums the revenue authorities is entitled to request cooperation from the authorities of the Ministry of Interior, including for conduct a search or seizure¹⁸⁶ according to the procedure established in the Criminal Procedure Code. Seized items: property, papers or other

¹⁷⁸ Tax and Social Insurance Procedure Code of Bulgaria, article 110 (1) [30.09.2017]

¹⁷⁹ Certain facts and circumstances of relevance to the ascertainment of obligations for taxes may be established by means of an examination. Obligations for taxes may not be established by means of an examination. (Tax and Social Insurance Procedure Code of Bulgaria, article 110 (2-3) [30.09.2017])

¹⁸⁰ Tax and Social Insurance Procedure Code of Bulgaria, article 110 (4) [30.09.2017]

¹⁸¹ Tax and Social Insurance Procedure Code of Bulgaria, article 112 (1) [30.09.2017]

¹⁸² Tax and Social Insurance Procedure Code of Bulgaria, article 37 (1) [30.09.2017]

¹⁸³ after carrying on these measurements a memorandum should be drawn up and one copy of it should be given to the person. (Tax and Social Insurance Procedure Code of Bulgaria, article 40 (3) [30.09.2017])

¹⁸⁴ Tax and Social Insurance Procedure Code of Bulgaria, article 40 [30.09.2017]

¹⁸⁵ Tax and Social Insurance Procedure Code of Bulgaria, article 41 [30.09.2017]

¹⁸⁶ "Search and seizure by the police authorities shall be admissible if during the conduct of an audit or examination data are available that any items of property, papers or other data mediums are located in a facility subject to control and where there are data that any facts and circumstances are concealed in relation to: (1) obligations and liabilities for taxes and compulsory social-insurance contributions; (2) violations of the tax and social-insurance legislation; (3) goods of unidentified origin". (Tax and Social Insurance Procedure Code of Bulgaria, article 43 [30.09.2017])

data mediums shall be delivered to the revenue authorities accompanied by a memorandum and an inventory.¹⁸⁷

It is also quite interesting and different from Georgian model that court can be participant of getting explanation from taxpayer. Revenue authority may request a written explanation, regarding facts and circumstances of relevance to the relevant proceeding, from the auditee or the person examined¹⁸⁸. In case of not submitting this explanation within the prescribed time limit, these persons may be summoned before the court under the terms established by Code of Civil Procedure. The revenue authority has also a power to assume that the facts and circumstances on which written explanations have not been provided are proven or not proven, as the case may be.¹⁸⁹

CONCLUSION

To take into account all above mentioned we can conclude that Georgian and Bulgarian Tax legislation regulated tax control procedures quite differently, but both of the systems acknowledges the important role of the court during conducting tax audit or examination. However, it should be mentioned that these regulations need to be improved and to become much more strong tool for protecting taxpayers' rights, support health competition atmosphere for business, as well as to provide properly working of the executive authorities.

It is true that establishment of preliminary judicial control over the activities of controlling bodies has undoubtedly a positive role in ensuring the freedom and promotion of entrepreneurial activities. However, despite the stated positive, it has negative aspects too. Establishing the preliminary judicial control limits the executive authority of administrative bodies, significantly restricts the nature of its functionality and efficiency of it. As a result of the future reforms - governmental vertical and parliamentary control over the executive bodies can become a deterrent factor of unlawful actions by the controlling authorities themselves.¹⁹⁰

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¹⁸⁷ Tax and Social Insurance Procedure Code of Bulgaria, article 42 [30.09.2017]

¹⁸⁸ Third parties who may have or know facts of relevance to an audit may also be summoned to testify before the court. (see for more details Tax and Social Insurance Procedure Code of Bulgaria, article 57)

¹⁸⁹ Tax and Social Insurance Procedure Code of Bulgaria, article 56 [30.09.2017]

¹⁹⁰ ნ.წკეპლაძე „ადმინისტრაციული ორგანოების მაკონტროლებელი ფუნქციის რეალიზების, მეწარმის საქმიანობის სამართლებრივი გარანტიების საკანონმდებლო მექანიზმები და სასამართლოს /ხელისუფლების როლი, ყურნალი ქართული სამართლის მიმოხილვა 7/2004-2/3, p.364

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