

# ON SOME LEGAL ASPECTS OF SIMPLIFYING TAX ADMINISTRATION RULES DURING THE COVID-19 PANDEMIC PERIOD

**Ia Kharazi,**

Invited Professor of Master of Laws Program, Faculty of Business, Law and Social Sciences, Akaki Tsereteli State University.

**Mariam Saneblidze,**

MA Student, Master of Laws Program, Faculty of Business, Law and Social Sciences, Akaki Tsereteli State University

**Nino Mataradze,**

MA Student, Master of Laws Program, Faculty of Business, Law and Social Sciences, Akaki Tsereteli State University

**Kakha Kupatadze,**

Head of Administration,  
Invited Specialist of Department of Business, Administration, Akaki Tsereteli State University

## Abstract

**Objective:** To identify some of the legal aspects of tax administration simplification in tax law and the main features of the tax dispute settlement procedure during the Covid-19 pandemic period.

**Methods:** We used general scientific (dialectics, analysis and synthesis, abstraction and concretization) and private-scientific research methods (formal-legal, comparative-legal, technical-legal) while working on the research topic.

**Outcomes:** As a comparative-legal study has shown, certain benefits have been imposed on business operators in terms of tax payment, carrying out of tax liabilities have been deferred, but radical measures in terms of tax preferences should be taken; Also, during the pandemic period, there are still problems in administrative, criminal, and civil law disputes that need to be addressed and resolved.

**Key words:** Tax administration rules during the Covid-19 period; Tax dispute; Taxation mechanisms; Decriminalization of tax violations; Tax payment risks; Preferential policy in taxation; Tax morality.

## 1. Introduction

Modern orderly society, economic growth and development of countries cannot exist without taxes. It is so commonplace to pay taxes in our daily lives that a well-known US political figure – B. Franklin (1706-1790) said: „Everyone is obliged to pay the tax and then even die.“ Karl Marx also emphasized the special importance of taxes for bourgeois countries: „The tax is the breastfeeding mother of the government...“ Tax is the fifth God together with property, family and religion.“ Fiscal policy is impossible without flexible, simplified tax game rules, so as not to hinder business development, meet the growing needs of society and

reduce the risks of tax evasion. Article 1 of the First Additional Protocol to the European Convention on Human Rights directly provides the protection of the property rights of individuals and legal entities and does not restrict the High Contracting Parties from enforcing laws that control the use of property or even enforcing laws that provide for the collection of taxes and fines in the common interest.

Tax policy should provide mechanisms for taxation based on the principle of justice; Regulate the provisions in the tax legislation with vague and double interpretation; Simplify tax norms and resolve controversial ones in favor of the entrepreneur; Reduce the dominant role of the state in the settlement of tax disputes and create an optimal model for small business taxation with simple accounting rules and alternative taxation mechanisms; Decriminalize certain violations in the tax system; Reduce and bring to a reasonable extent the fines and interests in the field of taxation and administration, in case of imposing the sanctions; Regulate technical issues, etc. related to tax administration, by sub-legislative acts (orders, instructions)<sup>1</sup>.

It is an indisputable fact that the period of formation of the market economy is characterized by instability. It is clear from the daily practice that the existence of many normative acts in trade could not prevent the outflow of necessary funds for the country, concluding economically unfavorable contracts, violating tax and customs rules. We have also noticed that an important negative trend is the numerous changes in the tax legislation since its enactment to date, and thus the emergence of certain claims of entrepreneurs to some extent; Unfortunately, the frequent changes of the Code by the government in the recent past, the presence of the taxpayer in an ever-changing environment do nothing good for the taxpayer and naturally for the business environment. In fact, the economic interest of the country suffers, the fiscal policy of the country becomes unstable, and most importantly, all this negatively affects the main source of the country – the material well-being of the people. Frequent changes in process technology fail to provide stable conditions for the development of foreign trade, which has always been of great importance to the country's economy. „In fact, the taxpayer cannot plan every day, because he/she does not know what steps the government will take“<sup>2</sup>. It should not be understood as if changes in tax legislation are not necessary, but these changes should be for a long-term, solid and guaranteed business environment.

## 2. Is the Georgian Revenue Service ready for such cardinal changes during the period of Covid virus?

We raised this issue in the foreground of the article as a main problem together with the risks of paying taxes, which are very urgent and even more vital for the business sector in the event of the Covid virus.

Naturally, the main source of funding for the country's budget is business, which pays taxes directly or indirectly in favor of the state budget, and by which the state budget is formed. Economic failures have had some negative impacts primarily on businesses and, most importantly, on the state budget, the population is in severe economic situation (especially small businesses, which are the source of income for the country and have been hampered in their economic activities) and here the main, organizing role is played by the government, which must develop and implement an effective economic policy not only to save business, but also to supplement the budget. **Among these actions, we consider important the flexible role of tax administrations, which would provide for the alleviation of the tax burden for taxpayers and would help businesses and individuals who would not face problems and difficulties connected with cash flow and tax payments.**<sup>3</sup>

<sup>1</sup> These tasks are discussed in the government program: „For a Strong, Democratic, United Georgia „, see: <https://www.google.com/search?client=opera&q=სამთავრობო+პროგრამა+ძლიერი+საქართველოსაის&sourceid=opera&ie=UTF-8&oe=UTF-8>

<sup>2</sup> Kharazi Ia, Tax Law, Auxiliary Manual, Part One, Second Revised Edition, Tbilisi, 2020

<sup>3</sup> Forum of Tax Administrations, Tax Administration Response to COVID-19; Measures taken to facilitate taxpayers, March 26, 2020, 3,

Tax administrations have already started introducing various measures to help taxpayers or groups of taxpayers affected by Covid. As for individual taxpayers, their preferential measures are aimed at avoiding tax difficulties and reducing the burden. The measures implemented for legal entities and self-employed businesses are aimed at overcoming money turnover problems and helping to solve problems such as loss of workforce, inability to pay temporarily to suppliers and in the worst case to close or bankrupt a business.

E.g. one of the purposes of such a preferential policy is when it is not possible to submit written and electronic documents to the taxpayer in accordance with the rules established by the Tax Code and, provided that the official document is made public on the website of the Revenue Service; Extra time has been given to taxpayers to resolve tax issues, including: Postponing the deadlines of declaration and payment; Removal of fines and sanctions; Easy access to long-term debt repayment plans and extension of term, suspension of debt relief; In the part of quick return of overpaid amounts to taxpayers, etc.

In the article we want to focus on Article 63-3 of the Tax Code: „Refund of overpaid amount“. This norm provides the return of overpaid amounts to businesses that have been paid to the state budget within the timeframe set by the same article. But, if we look at the practice of the Revenue Service, we will see that in many cases the refunds would be transferred to next month's payment account. We believe that this is an illegal action and the transfer of the refundable funds to the account for the fulfillment of future obligations should take place only in one case, if the taxpayer himself /herself voluntarily consents to it, which unfortunately does not always happen and it is good that nowadays as mentioned above, in the Covid period it is already an obligation to return the overpaid amount to the business, when they together with the government find a way out of this difficult situation.

Here: we think more attention and help should be performed to those entrepreneurs to come out of the crisis, who were particularly affected by the Covid virus and especially small businesses should be provided with financial assistance, which was further affected by the small turnover of money and the payment of taxes. **We believe that in this situation, the tax administrations should clarify the priorities and criteria for saving the business (if possible, by allocating long-term loans, I repeat, by reducing the tax burden, by lifting sanctions, etc.)**

As for the deferment of taxes, differences of opinion may arise from businessmen, in particular, tax deferrals may result in an aggravation of the tax burden. So for example, deferring of taxes will cause serious problems with funds in the future. It needs serious thought and judgment.

Government-initiated, urgently needed tax changes may be of interest to so-called „fraudsters“. E.g. to register a „fictitious company“ with „fictitious staff“ and demand a tax shelter from the government, but in reality, no company was registered that produced certain products and supplied them to the market. Therefore, control mechanisms should be tightened, more control levers should be applied to the newly established companies that emerged after the launch of the Covid virus, in order to prevent the illegal disposal of money from the state budget over them.

We welcome the announcement of forum of the tax administrations : „In many countries, outbreak of the Covid coincided with the period during which the income tax is being filed and paid. In addition, many taxpayers have to pay the employer busy tax (e.g., PAYE) and VAT or sales tax on a

<https://www.rs.ge/Media/Default/Legislation/Corona/FTA---Tax-Administrations-Response-Covid-19.pdf>

regular basis. These deadlines may be postponed for weeks or months to give Covid-affected individuals and businesses extra time to file tax returns and similar paperwork, as well as pay taxes. This process can be automated or in simple format on demand. (e.g., email, phone) This can be especially important for taxpayers who need the help of an intermediary or specialized staff and system to complete the return. Working remotely has made it impossible for some taxpayers, for reasons of system security and accessibility, key staff may not always be available due to illness or care responsibilities.<sup>1</sup> Also, at the same time, there may be a situation where the information on tax return is used to obtain other benefits provided by the state. In such situation, the tax administration may retain the deadline for filing the tax declaration (except in exceptional cases); However, extend the tax payment deadline, or allow the use of previous year tax return information in such cases. This will make it possible to process the refunds and give the taxpayer extra liquidity. In addition, tax return information can be used to better understand Covid's economic impact, to identify sectors that need additional assistance, and to be able to track economic improvements “.<sup>2</sup>

**Here, we express the view that for the economic stability of the country, those parts of the business that are active during the Covid virus should continue to pay taxes in order to maintain business activities; The tax authorities should seek and control the fulfillment of tax liabilities by entrepreneurs who continue their business activities.**

**Opinions on Covid Virus connected to the Article 218 of the Criminal Law.** One part of the crimes provided by the Criminal Code belongs to the category of tax crime. They may include Chapter XXVI – „Crimes against Entrepreneurial or Other Economic Activities“, Chapter XXVIII – „Crimes in the Field of Financial Activities“ and others.

Smuggling was attributed to state crimes and viewed as a breach of foreign trade monopoly. After the abolition of the state monopoly and the liberalization of foreign economic activities, the social essence of this crime also changed. The Criminal Code of Georgia, which is in force today, attributed this crime – „crime in the field of financial activities“ – to an economic crime and assigned the first place among the crimes committed in the field of financial activities. The social harm of this crime lies in the fact that it harms the economic interests of the state. This crime can also harm public safety when its subject matter is weapons, ammunition, drugs, radiation substance and other items removed from free circulation.<sup>3</sup>

If we look through the disposition of this article, we will see that the law enforcement role of the Revenue Service is quite limited. **We believe that here, perhaps, such restriction of their role is echoed by the time when they did not want the Revenue Service to recognize it as a law enforcement body, trying to leave it with only a fiscal function and turn it into a kind of tax service.**

“Experts explain the high level of protection of tax legislation by the existence of ‘tax morality’ in the society, which promotes the implementation of tax legislation (timely payment of taxes). Herewith, „tax morality“ is not easily formed, especially in countries where there are no „deep roots in culture and habits „ of paying taxes.“<sup>4</sup>

<sup>1</sup> Forum of Tax Administrations, Response of Tax Administrations to COVID-19; Measures taken to facilitate taxpayers, March 26, 2020, 3,  
<https://www.rs.ge/Media/Default/Legislation/Corona/FTA---Tax-Administrations-Response-Covid-19.pdf>

<sup>2</sup> Ibid

<sup>3</sup> Kharazi I; Tax Law of Georgia, Part Two, Tbilisi, 2014, 646

<sup>4</sup> Benno Torgler, Markus Schaffnera , and Alison Macintyre, Tax Compliance, Tax Morale, and Governance Quality, Australia, 2007, 6-7

Article 218 of the Criminal Law is blanket<sup>1</sup>, so in order to determine the types of taxes, taxpayers and taxable objects, we must refer to the current Tax Code, which defines the types of payments. The means of tax evasion can be various. Tax evasion is of wide importance, though not important for qualification, but can be taken into account when sentencing.

According to Part 2 of Article 61 of the Tax Code of Georgia, the main basis for tax accrual is the tax return and the tax audit act. Accordingly, the taxpayer's obligation towards the budget arises on these two grounds. Thus, the debt to the budget may exist both by non-payment of the amounts accrued on the basis of the declaration submitted by the taxpayer, as well as non-payment of the tax audit report issued by the Audit Department of the Revenue Service and the tax claim issued on its basis. The Criminal Code of Georgia applies only to liabilities identified on the basis of a tax audit conducted by the Audit Department, if the taxpayer's intention has been established<sup>2</sup>

Criminal liability under Article 218 of the Criminal Code shall be imposed on the entrepreneur in the following cases: If there is a large amount of tax evasion (if the amount to be paid exceeds 100,000 GEL and especially a large amount of tax evasion if the amount to be paid exceeds 150,000 GEL. Article 218 clearly shows the intention of the taxpayer to avoid<sup>3</sup> paying taxes in favor of the state budget. Therefore, the prosecuting party bears the burden of proving that the tax evasion was intentional and that there was no ignorance of the norm and / or a mechanical error.

According to the current legislation, tax evasion is considered if the taxpayer does not pay the amount provided by the Tax / Criminal Code to the budget. The line between an administrative offense and a crime is precisely the amount of money and the intent of the person and the criminal / non-criminal method does not matter in terms of prosecuting the person.

We have pointed out in numerous scientific articles that **we believe „Article 218 should be liberalized and it should be transferred to the Code of Administrative Offenses. As this article does not constitute a norm for the qualification of human life, health and other serious crimes, it provides here, as mentioned above, the norm establishing criminal liability for non-payment of large amounts of tax. Isn't it better to fine a person with a solid amount when avoiding paying any amount of tax, to apply a tax lien / mortgage on his/her property , in case of non-payment of the amount, to sell the encumbered property and fill the state budget(Compulsory fulfillment of financial obligation) with the proceeds. Giving a person criminal liability for non-payment of taxes (when the legislature does not specify that the**

<sup>1</sup> Note that the criminal sanction provided in Article 218 may also be imposed in the case provided in Article 275 of the Tax Code; When a person has artificially reduced the amount in the tax return and if it is caused by the change of the moment (period) of the tax liability of the person performed by the body exercising tax control.

<sup>2</sup> Kharazi Ia, Tax Law, Auxiliary Manual, Book Three, Third Revised Edition, Tbilisi, 2020

<sup>3</sup> According to criminal and non-criminal means, different countries (including the USA) distinguish between tax avoidance and tax evasion. which are not differentiated by the criminal and tax in force in Georgia today and both actions constitute a crime. Tax evasion takes place in the legal context of the tax system, when an organization or individual, taking advantage of "tax law deficiencies", implements measures that are contrary to tax law, although not strictly illegal. It is believed that tax evasion usually involves special actions and measures with the only purpose of reducing tax liability. Tax evasion is usually an illegal practice of paying taxes. In this case, taxable income, profits or activities subject to taxation are hidden, the quantity and source of income are distorted. Thus, there is a fundamental difference between tax evasion and hiding from taxes. Avoidance is mainly in the area of legal relations (using financial reporting and accounting methods) to avoid paying the full amount of the tax, while concealment is often attributed to relatively criminal forms of tax evasion. Thus, the difference between tax evasion and hiding from taxes depends on the legality of the taxpayer's action. From a moral point of view, tax evasion is considered an undesirable event, as in such cases, deficiencies in tax legislation are used to reduce the tax burden. The tax revenues of the state are illegally reduced as a result of tax evasion. Fanny Otto, Franz Michael, Gerhartinger Philipp, Lunzer Gertraud, Neuwirth Martina, Saringer Martin, Tax avoidance, tax evasion and tax havens, Germany, 2015, 1 13 Source: Devdariani T.work 28

person could not / did not pay the tax – filling the main budget is principal for him / her), there would be no justification for prosecuting a person. Probably no one will be the winner: neither the state nor the taxpayer, because the person, whose enterprise would cease to function and the worker would suffer (lose his/her job). And by suspending (liquidating) the enterprise, another taxpayer would be deducted from the budget. The budget will not really have the luxury of this. Naturally, the question arises: is imprisonment of a taxpayer an effective way of forced collecting of taxes? Maybe it is desirable to give the person time and opportunity to pay taxes from the efficient operation of the enterprise and from the generated profit. Maybe I am wrong, but I have a right to my opinion.<sup>1</sup> Moreover, today, during Covid, when the vast majority of businesses are „stopped“, they do not work and the budget lacks large sums of money, which could be used for the benefit of the country and for a slight but somewhat improvement in the social conditions of the population.

But this view of the liberalization of Article 218 of the Criminal Code should not apply to the deliberate concealment of taxes by the taxpayers during a pandemic (pandemics) to the state, and in large amounts. When it is so difficult for the country at the time of Covid and, especially then, if any enterprise works properly and makes a profit. **First of all: 1. They should not be tax deductible and, 2. If there is a large amount of money hidden from the budget (tax evasion) during such a difficult economic situation, they should be firmly prosecuted.**

**Also, the measures provided by customs formalities on the goods, imported by the importers during the pandemic period in the customs control zones ,should be simplified.**

**Tax Dispute Resolution Procedure.** Here, we have to talk in a few words about the tax dispute resolution procedure during the Covid period.

According to the current legislation, tax disputes are considered in the system of the Ministry of Finance and in the General courts.<sup>2</sup>The tax dispute is considered in the Ministry of Finance of Georgia in accordance with two stages. Disputes are handled by the Revenue Service – through the Mediation Board and the Dispute Resolution Board under the Ministry of Finance.<sup>3</sup> The review of the tax audit act in the Mediation Board of the Revenue Service was introduced in 2011, it is actively used by taxpayers.<sup>4</sup>Due to the administrative nature of tax disputes, the precondition for hearing in court is the possibility for the plaintiff to submit a one-time administrative complaint.<sup>5</sup>Based on the above, the acts issued by the tax authority can be appealed by the person to the Revenue Service, as well as to the Dispute Resolution Board. Even appealing to only one body already means using the opportunity to file a one-time complaint.<sup>6</sup> The taxpayer has the right to file his / her own written inspection report with the Revenue Service Audit Department in

<sup>1</sup> Kharazi Ia, Tax Law, Auxiliary Manual, Part Three, Second Revised Edition, Tbilisi, 2020

<sup>2</sup> Small and Medium Enterprises Association of Georgia, Effective Institutions for Tax Dispute Resolution 2012, p.6. Available:[http://ewmiprolog.org/images/files/9145Effective\\_Tax\\_dispute\\_resolution\\_GEO\\_GSMEA.pdf?fbclid=IwAR0bS09ApTI81ONf4COUJHNyy7Weds\\_9wPxVxGc1nkzjxlvC3pSWP-XCQQ](http://ewmiprolog.org/images/files/9145Effective_Tax_dispute_resolution_GEO_GSMEA.pdf?fbclid=IwAR0bS09ApTI81ONf4COUJHNyy7Weds_9wPxVxGc1nkzjxlvC3pSWP-XCQQ)(Last verified: 23.05.2021).

<sup>3</sup> Tsiklauri I., Comparative Analysis of the Tax Dispute Resolution Model in the System of the Ministry of Finance of Georgia, TSU Faculty of Law Journal, Tbilisi, 2016, N1, p.381.

<sup>4</sup> Ibid

<sup>5</sup> See. General Administrative Code of Georgia. Available here: <https://matsne.gov.ge/ka/document/view/16270?publication=37>(Last verified: 23.05.2021).

<sup>6</sup> Tsiklauri I., Problems of the Georgian Model of Tax Dispute Resolution and the Main Aspects of its Reform, Tbilisi, 2021, p. 13. Available here: [https://www.tsu.ge/assets/media/files/48/disertaciebi5/Ilia\\_Tsiklauri.pdf](https://www.tsu.ge/assets/media/files/48/disertaciebi5/Ilia_Tsiklauri.pdf)(Last verified: 23.05.2021).

connection with the project before the tax is accrued,<sup>1</sup> and the protocol on the results of the review of the draft act in the Mediation Board.<sup>2</sup> If the tax accrual order is approved, the appellant has the right to use the post-appeal (second stage) and appeal the order to the Dispute Resolution Board of the Ministry of Finance or directly to court.<sup>3</sup> For the purposes of this article, **we consider it necessary to highlight similar and different approaches to tax disputes between the Ministry of Finance and the courts. Based on the practice of the Supreme Court of Georgia and the statistical data of the Dispute Resolution Board of the Ministry of Finance, we would like to touch upon the legitimacy of the exercise of discretionary powers by the tax authority. Due to urgency, we want to touch in a few words on the legitimacy in the exercise of discretionary powers by the tax authority. When discussing this issue, first of all,** it should be emphasized that the Tax Code empowers the tax authority to act within its discretion in making decisions. For example, Article 289 of the Tax Code defines the cases when the relevant services apply several sanctions cumulatively when committing an offense by a customs border crossing of Georgia.<sup>4</sup> Regarding the principle of discretion, it should be noted that the dispute resolution bodies in the system of the Ministry of Finance do not appeal to the legitimacy of the exercise of discretion by the tax authority, Although the party uses this as an argument to support its position, for example, the tax authority has reduced the 30-day period prescribed by law to 20 days for rectifying the deficiency, without substantiating the circumstances on which it based its decision.<sup>5</sup> Also interesting is the position of the Ministry of Finance, when the dispute concerns the assessment of the scope of exercise of discretion, even in this case the Dispute Resolution Board is limited to quoting legislation and appealing to the Revenue Service to re-evaluate the possibility of alternative, lighter, sanction.<sup>6</sup> In this regard, the practice of the Supreme Court is also interesting, the Supreme Court, in order to assess the exercise of discretionary powers, has developed the so-called the general test, the court focuses on the legality and justification of the tax authority's choice, not on the expediency of the choice.<sup>7</sup> The Supreme Court clarifies that several questions need to be asked in order to assess legitimacy: whether the most acceptable means are used to resolve the issue and whether it is justified accordingly.<sup>8</sup> It should be noted that the court finds it inadmissible to interfere with

<sup>1</sup> Kharazi I., Tax Law, Third Part, 2020, p. 294. Available here: [https://elibrary.atsu.edu.ge/lms/upload/e\\_books/viewer.html?file=1606236932.pdf&fbclid=IwAR3i-RbdSgBDGrOTuHG8d\\_YYE82HwSRqjlq1gySXP5KRRU-ZyX2DL1V1Oo0](https://elibrary.atsu.edu.ge/lms/upload/e_books/viewer.html?file=1606236932.pdf&fbclid=IwAR3i-RbdSgBDGrOTuHG8d_YYE82HwSRqjlq1gySXP5KRRU-ZyX2DL1V1Oo0) (Last verified: 23.05.2021).

<sup>2</sup> House of Law, Tax Dispute Resolution, 2017. Available here: <https://hol.ge/news-info/sagadasaxado-davebis-gankhilva/> (Last verified: 23.05.2021).

<sup>3</sup> Small and Medium Enterprises Association of Georgia, Effective Institutions for Tax Dispute Resolution, 2012, p.9. Available here: [http://ewmi-prolog.org/images/files/9145Effective\\_Tax\\_dispute\\_resolution\\_GEO\\_GSMEA.pdf?fbclid=IwAR0bS09ApTI81ONf4C0UJHNyy7Weds\\_9wPxVxGc1nkzjxlvC3pSWP-XCQQ](http://ewmi-prolog.org/images/files/9145Effective_Tax_dispute_resolution_GEO_GSMEA.pdf?fbclid=IwAR0bS09ApTI81ONf4C0UJHNyy7Weds_9wPxVxGc1nkzjxlvC3pSWP-XCQQ) (Last verified: 23.05.2021).

<sup>4</sup> Tomadze D., Tsertsvadze T., Tax Dispute Analysis, 2016, p. 20. Available here: [https://pdf.usaid.gov/pdf\\_docs/PA00T2SC.pdf?fbclid=IwAR3\\_fCLYcnKaJn7cude2YuARQzGQQxp7NY5wLwyZRaqnTV7zRTUA8mw97f4](https://pdf.usaid.gov/pdf_docs/PA00T2SC.pdf?fbclid=IwAR3_fCLYcnKaJn7cude2YuARQzGQQxp7NY5wLwyZRaqnTV7zRTUA8mw97f4) (Last verified: 23.05.2021).

<sup>5</sup> See. Decision of the Dispute Resolution Board of the Ministry of Finance of Georgia of February 6, 2015 on the complaint №8704 / 2/14; See. Also: Decision of the Dispute Resolution Board under the Ministry of Finance of Georgia of March 3, 2015.

<sup>6</sup> Decision of the Dispute Resolution Board of the Ministry of Finance of Georgia of January 31, 2014 on the complaint №6615 / 2/13.

<sup>7</sup> Tomadze D., Tsertsvadze T., Analysis of Tax Disputes, 2016, p. 21. Available here: [https://pdf.usaid.gov/pdf\\_docs/PA00T2SC.pdf?fbclid=IwAR3\\_fCLYcnKaJn7cude2YuARQzGQQxp7NY5wLwyZRaqnTV7zRTUA8mw97f4](https://pdf.usaid.gov/pdf_docs/PA00T2SC.pdf?fbclid=IwAR3_fCLYcnKaJn7cude2YuARQzGQQxp7NY5wLwyZRaqnTV7zRTUA8mw97f4) . (Last verified: 22.05, 2021)

<sup>8</sup> Case №BS-44-43 (K-14), Judgment of the Administrative Chamber of the Supreme Court of Georgia of 17 June 2014; Case №Bs-137-134 (K-14), Decision of the Administrative Chamber of the Supreme Court of Georgia of 29 July 2014; Case №BS-612-590 (K-13), Decision of the Administrative Chamber of the Supreme Court of Georgia of 1 April 2014

the powers of the tax authority and to indicate a certain decision-making framework.<sup>1</sup> In terms of determining the taxable amount of the tax rate, the practice of the Constitutional Court should be taken into account, since it is obvious that the discretion in this regard is quite wide.

The Constitutional Court clarifies that it is difficult and arguably impossible to verify within the framework of constitutional control how correctly and lawfully the amount of funds required for the budget is determined,<sup>2</sup> therefore, it is difficult to accurately verify the legitimacy of the exercise of discretion.

“Administrative responsibility is one of the types of legal responsibility, which is manifested in the process of implementation of state governance activities. Administrative liability is also manifested in **positive liability** (meaning that the legal entity recognizes the wrongful nature of the behavior, it will behave as required by administrative-legal norms) and in **negative forms (retrospective or negative administrative liability** includes the assessment of irresponsible behavior; That is, when a legal entity commits an administrative offense, it is punished and suffers from personal and property restrictions).“<sup>3</sup>

It is interesting to consider the exercise of this right in the discretion of the tax authorities in imposing liability on the offender.

„Attributive features of discretion in tax law include: the existence of legal grounds; Exercising discretionary powers within the framework of strict competence and handling cases; An elective alternative where every possible alternative is legally considered to be valid; Free action in making discretionary decisions; Free action in making discretionary decisions; Creative nature; Making discretionary decisions under the influence of both objective and subjective factors; Discretion is defined by legal and extra-judicial frameworks; The result of exercising discretion is to make an optimal decision on the case.“<sup>4</sup>

Contemporary Georgian authors continue the domestic and foreign traditions by defining discretion, using the terms „voluntary action“, „authority“, „choice“, „decision“, „scope“, „alternative“ and thus a unified essence of discretion has been created in legal science as a whole and in this way a unified understanding of the essence of discretion as a general legal phenomenon has been established in the legal science as a whole. Its purpose is to enable the legislator to choose the optimal solution from a number of legal alternatives in the total or relative uncertainty of the situation by law, which will enable him to more effectively and fairly realize the legislator’s intention.<sup>5</sup>

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<sup>1</sup> There

<sup>2</sup> See. Decision N2 / 7/667 of the Second Panel of the Constitutional Court of Georgia of December 28, 2017. Available: <file:///C:/Users/Zver/Desktop/%E1%83%A1%E1%83%90%E1%83%92%E1%83%90%E1%83%93%E1%83%90%E1%83%A1%E1%83%90%E1%83%AE%E1%83%90%E1%83%93%E1%83%9D%20%E1%83%93%E1%83%90%E1%83%95%E1%83%94%E1%83%91%E1%83%98/sakonst.%20sagadasaxadoze.pdf> Last checked:23,05,2021).

<sup>3</sup> I. Kharazi; On Some Aspects of Administrative Liability for Violation of Tax Rules, Davit Agmashenebeli University Academic Journal „Law“, Series 1, Tbilisi, 2017

<sup>4</sup> Kharazi Ia, „Discretionary Powers of Tax Authorities, with Special Variety of Disposal (Theoretical and Practical Aspects)“, „Justice and Law“, # 3 (59), 2018

<sup>5</sup> There



*Judicial Practice: The Administrative Cases Chamber of the Supreme Court of Georgia has made an important clarification regarding discretionary powers. This referred to Z.T.'s claim and it requested the annulment of the decision of the Revenue Service of the Rustavi Regional Center, the order of the Revenue Service and the decision of the Dispute Resolution Board with the Ministry of Finance on 14.03.11. The plaintiff was found with undeclared cargo in the car hiding place at the customs checkpoint „Sadakhlo“, as a result of which he was deprived of a vehicle owned by someone else as a sanction. The plaintiff stated that he was retired, unemployed and he could not buy another car for the car owner and demanded a 100% fine on the customs value of the goods in exchange for the confiscation of the car.*

*The Court of Cassation explained that the imposition of a sanction on a customs offense committed by an administrative body against a plaintiff violated the balance of public and private interests, and did not specify why the offense could not be achieved without imposing another sanction on the cassator.*

*In the opinion of the Supreme Court, given the amount (value) of undeclared property in the present case, the seizure of a vehicle was punishable, repressive in nature, contrary to the requirements of justice. Given that the public sanction was linked to a restriction on the constitutional right to property, the sanction applied must in all cases meet the principle of proportionality. The circumstance that the customs authority acted within the discretion of the sanction, in the opinion of the Court of Cassation, did not exclude the obligation of the administrative body to take into account the rules of discretion when imposing the sentence, taking into account its proportionality and modesty, the mitigating circumstances of the liability, the gravity of the offense, the person committing the offense, which ultimately determined the adequacy of the sanction applied.*

*Decision-making within the discretion obliged the administrative body to select the most acceptable from several decisions based on the protection of public and private interests.. The discretion of the administrative body of the lower instance could be replaced by the discretion of the superior body. In examining the legality of the exercise of discretionary powers, the superior administrative body itself used the discretionary powers, discretionary powers did not mean the possibility of neglecting the principle of proportionality and legality. In the opinion of the Supreme Court, the use of discretionary powers required special attention in order to avoid procedural violations, breaches of the law, which could result in violation of property, legality, rights of the subject. On the other hand, the existence of a discretionary sphere was determined by objective factors. The law could not fully regulate all public relations, which differ in factual composition, forms and methods of legal regulation. The Court of Cassation also noted that: the law gives the court, as the norm-setting body, the power to choose the legal result for the offense committed. The judiciary verifies the legality of the normative activities of the executive branch and administrative bodies and is not limited to the discretion of the administrative body. .. The measures provided for in the administrative-legal act issued within the discretion shall not lead to unjustified restriction of the legal rights and interests of the person. The obligation to substantiate is conditioned by the exercise of control over the activities of the administrative body.*

*The justification should state the views, opinions and circumstances on which the administrative body relied in making the decision. Ignorance of the justification by the administrative body as an obligation to protect against arbitrariness was the basis for establishing an error in the exercise of discretion and*

## *repealing the act.*<sup>1 30</sup>

If a definite decision was made against one taxpayer, and against another taxpayer who belongs to the same category of entity and is in similar conditions, a completely different decision was rendered and such „differentiations“ in tax administration are explained by the exercise of discretion, then in the absence of reasonable justification such a decision violates the principle of equal treatment, which stems from a constitutional requirement that everyone before the law and the court be equal.

An important feature of discretion is the ability to make alternative choices when making decisions based on source data. We can argue that „freedom“ and „choice“ are „relative“ categories in terms of discretion. In addition, a choice can be made between action and inaction, as well as between two or more actions: If the first situation allows the tax authority to refrain from active action (for example, to change the seizure of property with a mortgage or to refrain from such a change; it may invite a specialist to carry out tax control or not invite (Article 255, Part 7 of the Tax Code of Georgia, according to which, „if necessary, a specialist / expert may be invited to carry out a specific action of tax control“); To prosecute or not to prosecute (for example, according to Article 218 of the Criminal Code, „evasion of a large amount of tax is punishable by criminal liability, and a person shall not be criminally liable under Article 218 if the principal amount is paid, deferred or adjusted within 45 working days from the receipt of the „tax claim“ on the results of the tax audit or the obligation to pay it is suspended by law); The second excludes such a possibility (e.g. choosing one of several transfer pricing methods).<sup>2</sup>

In the article presented by us we should mention the use of **presumptive methods** in tax law regulation in relation to violations of tax rules and since we will not be able to address this issue extensively in the light of the format of the report presented, we will address at least one specific issue.

In the main case, presumptions, like the norms of law, are special rules of legislative policy and not an assumption as it is considered. However, a number of lawyers generally exclude from the legal presumption the general rules that constitute the general principles of the work of judges. E.g. Provision that a person is presumed in good faith and to be honored until proven otherwise. A number of lawyers generally reject the need to introduce legal presumptions because of their „formal“ content.

According to the presumptive conclusion, one fact or event is considered to be existing, established on the basis of repeated similar facts or events.<sup>3</sup>

***The case law (presumption of validity of a business decision) is also interesting in this regard. An example of case law can be considered from tax law, in particular, according to the decision of the Supreme Court of Georgia,<sup>4</sup> the director of a limited liability company (respectively other legal entities) and a partner involved in management activities can be directly and indirectly liable for the tax debt of the company (including tax for tax liabilities accrued by the audit act) if all of the following prerequisites are met: In the case of a public partner: 1. The company has a tax debt (including tax liabilities accrued by the tax audit act) and is not able to repay the debt with its property; 2. The mentioned tax debt is caused by***

<sup>1</sup> Case # bs-1655-1627 (k-11) April 11, 2012, <http://www.supremecourt.ge/news/id/262>, {2021, 29/05}

<sup>2</sup> Ia Kharazi, Discretionary Powers of Tax Authorities, with Special Variety of Disposal (Theoretical and Practical Aspects), „Justice and Law“, # 3 (59), 2018

<sup>3</sup> Business and Legislation – [Ed. Yuri Papasqua], November, 2009. Business and Legislation – [Ed. Yuri Papasqua], November, 2009; See also I.Kharazi; On the Use of Presumptive Methods in Tax Legal Regulation, International Scientific Journal „Diplomacy and Law“, # 1 (4), 2018

<sup>4</sup> (06.05.2015 Nsb-1307-1245-2014 Decision of the Supreme Court of Georgia)

*misuse of the limited liability form by the partner (knowing that the legal entity is liable to the creditors only with its own property – Law on Entrepreneurs, Art. 44) (Law on Entrepreneurs, Art.3.6.) ,which takes place when it actually governs the society and its activities are directed towards the creation of tax evasion schemes, i.e. when the company is used as an „instrument“ for evading tax liabilities (the burden of proving the misuse of the limited liability form by the partner falls on the tax authority).<sup>1</sup>*

With this decision, Georgia has joined the number of countries in which the partner and the director of the enterprise are liable with all their property for the deliberate evasion of tax liability (and in case of relevant preconditions) if the enterprise's property is insufficient to cover the tax liability.

However, it should be emphasized that in all these countries, such a right of the tax authority to require the director of the enterprise and / or a partner (with personal property) to fulfill the tax obligations of the enterprise, if there are relevant preconditions, is directly defined by the tax legislation and private law norms (in this case – the Law of Georgia on Entrepreneurs), the establishment of this kind of practice is practically unprecedented (such an attempt by administrative bodies in different countries failed).<sup>2</sup>

A presumption in tax law is a qualitatively direct or indirect recognition of the existence or absence of a presumed object (fact, event, legal relationship) established in the norms of tax law, on the factual basis related to it. The use of legal presumptions is determined by the tasks and purposes of legal regulation. As a general rule, it is used in non-standard situations when the use of other means is impossible or ineffective.

To denote such tax regimes, the term „**presumptiv taxation**“<sup>3</sup> is used in Western science, or in Georgian, „conditional taxation“. We assume that the term „presumptive taxation“ more adequately reflects the essence of such tax regimes.

As noted by V. Turon<sup>4</sup> The term „presumptiv taxation“ implies the use of indirect methods of determining tax liabilities, which differ from the usual rules, based on the financial (tax, accounting) payment of the taxpayer.

The term „**presumptive taxation**“ – say E. Akhmadi and N. Stern, – includes a series of procedures according to which the tax base is not measured, but is derived from some simple data, which are easier to calculate as the base itself.<sup>5</sup> Today such methods are actively used all over the world. Even in the United States, where presumptive taxes have not become widespread, there have been discussions in recent years about the possible inclusion of some presumptive regimes in the American tax system.

There is a well-known expression in the tax case: „**Only taxes and death are inevitable**“. The imperative requirement of the Tax Code is that: „A person is obliged to pay the state and local<sup>2</sup> taxes imposed by the Tax Code“, while Article 6 of the Tax Code further strengthens the provision of Article 5 stating that „tax is a mandatory, unconditional monetary contribution to the state budget according to the Tax Code, which is paid by the taxpayer due to the necessary, non-equivalent and gratuitous nature of the payments.“<sup>6</sup> Sanc-

<sup>1</sup> I.Kharazi; On the Use of Presumptive Methods in Tax Legal Regulation, International Scientific Journal „Diplomacy and Law“, # 1 (4), 2018

<sup>2</sup> [http://taxinfo.ge/index.php?option=com\\_content&task=view&id=8903&Itemid=104](http://taxinfo.ge/index.php?option=com_content&task=view&id=8903&Itemid=104)

<sup>3</sup> Thuronyi V. Presumptive taxation // Tax Law design and Drafting. Vol. L; Washington: international Monetary Fund, 1996-1998.

<sup>4</sup> Thuronyi V. Named work

<sup>5</sup> Ahmad E; Stern N. The Theory and Practice of Tax Reform in Developing Countries. Cambridge: Cambridge University Press, 1991.

<sup>6</sup> Tax Code of Georgia §. 5, 6.1.

tions are imposed for non-payment of taxes, which are often cumulative. The above-mentioned norms of the Tax Code are literally echoed by the Code of Administrative Offenses of Georgia 1651, which deals with incorrect payment of taxes and other obligatory payments and causes damage<sup>1</sup> to taxpayers and imposes certain monetary sanctions.

Article 238 of the Tax Code (p. 8) proposes to the taxpayer (in case of a positive decision of the head of the tax) to defer the payment of the tax debt for not more than one year. This is only the case if a suretyship agreement has been concluded to secure the taxpayer for tax purposes, a bank guarantee has been submitted, or an insurance policy issued by a person designated by a resolution of the Government of Georgia. **We would also like to note that the postponement of tax arrears does not stop the accrual of interest, which we consider to be an undemocratic norm.**

**If we draw a parallel, we will see a substantial difference between the Civil Code and the Tax Code, namely: If the credit institution postpones the fulfillment of the civil obligation to the liable person on the basis of an application (In case of pledge / mortgage or other collateral), naturally, in accordance with the principles of civil law, no interest will accrue, the direct norm that a credit institution deferring the payment of interest in civil law is not found. We believe that if the tax authority delays the payment of tax arrears (and it is understandable why: the taxpayer has difficulty paying the main debt – the tax and, of course, the overdue interest), then it is illogical to consider the law that “deferral of tax debt payment does not stop accruing interest“!**

**So, what is the point of deferring if it does not bring relief to the taxpayer, if the law stipulates that the taxpayer has been given a deduction, the tax liability has been deferred, and this is a panacea for the taxpayer, there would be no positive explanation of the article of the law and if we take into account that interest is not a basic obligation, it is an accessory. According to the direct definition of the norm, the accessory obligation follows the main obligation (payment of the tax), but you will agree, this is not a solution for an insolvent entrepreneur, especially if a bankruptcy case is initiated against him. This is our private opinion, we may be wrong, but we believe that if a person liable to pay interest is not forgiven for insolvency (and naturally this is unlikely in the case of tax legislation, because taxes are one of the main sources of budget replenishment in the country), the payment should be postponed for a reasonable period of time. The definition of the law directly stipulates that a person has been delayed in paying his tax debt, but the accrual of interest continues. It would be good if the last sentence of Article 238, Part 8, received the following wording: „Deferment of tax arrears also defer interest“.**

As we have already mentioned, tax disputes are characterized by complexity in the common courts of Georgia and are therefore considered with caution, tax disputes are regulated differently by different countries in the judiciary.

In some countries, disputes are dealt with in a common court system, while in some countries, tax disputes are handled by specialized tax and fiscal courts<sup>2</sup> and tribunals. For a better analysis of the issue, we consider examples from both continental European law and case law. For example, in the United States, tax disputes are dealt with by the tax court, which is a public body, the Tax Court was established by Congress under

<sup>1</sup> As in other areas of law, the legislature often misuses the terms „damage“ and „loss“, a well-known axiom is: „damage is done and the loss is compensated.“

<sup>2</sup> I.Kharazi, Tax Law, Third Part, 2020, p. 293. Available here:[https://elibrary.atu.edu.ge/lms/upload/e\\_books/viewer.html?file=1606236932.pdf&fbclid=IwAR3i-RbdSgBDGrOTuHG8d\\_YYE82HwSRqjlq1gySXp5KRRU-ZyX2DL1V1Oo0](https://elibrary.atu.edu.ge/lms/upload/e_books/viewer.html?file=1606236932.pdf&fbclid=IwAR3i-RbdSgBDGrOTuHG8d_YYE82HwSRqjlq1gySXp5KRRU-ZyX2DL1V1Oo0) ( Last checked:23,05,2021w).

Article 1 of the Constitution.<sup>1</sup> There are numerous disputes in the tax court, including disputes over federal income fines and taxes. A party can appeal the imposition of a tax. A party who has appealed the matter may file a lawsuit in the U.S. District Court or the Federal Appellate Court.<sup>2</sup> However, neither court can exempt him from paying the tax and the plaintiff is obliged to pay the tax before filing a lawsuit. It facilitates the smooth operation of the tax system.<sup>3</sup>

For disputes costing less than \$ 50,000, a taxpayer may request that the case be heard in an expedited manner, however, the decision made in such a manner is not appealed and is not precedent.<sup>4</sup> Which promotes effective and timely justice, however, at the same time contains risks for the plaintiff. The trial is conducted by a single judge, jurors do not participate in such disputes. The taxpayer has the right to protect his own interests during the trial. Most disputes are settled.

The decision of the tax court can be appealed to the relevant territorial appellate court.<sup>5</sup> Based on the above, we can assume that the United States court is focused on concluding the case by mutual agreement.

As for Germany, as a member of the family of continental European law, under Article 95 of the Constitution, five supreme judicial bodies and one of the fiscal courts of the Federal Republic of Germany (hereinafter Germany) are established in Germany, it is the highest instance for tax and customs disputes. Its main functions include tax reporting and enforcement. The functions of the German Fiscal Court include both the interpretation and definition of tax norms, as well as the development of legislation through the introduction of a common practice.<sup>6</sup> Such a wide range of functions demonstrates the broad powers of the German Fiscal Court. If we look at the lawsuits of the German Fiscal Court, we find that the plaintiffs often raise the issue of the constitutionality of the disputed norm and the court also considers such lawsuits, and in case of such opposition it is obliged to suspend the case and refer it to the Constitutional Court.<sup>7</sup> Which is uniquely convenient for the plaintiff. It is true that the German Fiscal Court considers only the norm disputed by the plaintiff and it does not go beyond the scope of the claim, although its decision sets a precedent and it is reflected in both the legislation and the practice of applying tax norms.

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<sup>1</sup> The Annenberg Guide to the United States Constitution Article I, Section 8 Available here: <https://www.annenbergclassroom.org/article-i-section-8/> (Last checked: 20.05.2021)

<sup>2</sup> „Effective Institutions for Tax Dispute Resolution “2012.

Available:[http://ewmiprolog.org/images/files/9145Effective\\_Tax\\_dispute\\_resolution\\_GEO\\_GSMEA.pdf?fbclid=IwAR1lyhs9zDxbGMHGioGGuGQ8m4JHMAql3jF0ZxkPGetd9mDsjcBwFvrtqfA](http://ewmiprolog.org/images/files/9145Effective_Tax_dispute_resolution_GEO_GSMEA.pdf?fbclid=IwAR1lyhs9zDxbGMHGioGGuGQ8m4JHMAql3jF0ZxkPGetd9mDsjcBwFvrtqfA)

(Last checked: 20.05.2021)

<sup>3</sup> Flora v. United States, 362 U.S. 145 (1960), Available: <https://supreme.justia.com/cases/federal/us/362/145/> (Last checked: 20.05.2021)

<sup>4</sup> „Effective Institutions for Resolving Tax Disputes „2012.

Available: [http://ewmiprolog.org/images/files/9145Effective\\_Tax\\_dispute\\_resolution\\_GEO\\_GSMEA.pdf?fbclid=IwAR1lyhs9zDxbGMHGioGGuGQ8m4JHMAql3jF0ZxkPGetd9mDsjcBwFvrtqfA](http://ewmiprolog.org/images/files/9145Effective_Tax_dispute_resolution_GEO_GSMEA.pdf?fbclid=IwAR1lyhs9zDxbGMHGioGGuGQ8m4JHMAql3jF0ZxkPGetd9mDsjcBwFvrtqfA) (Last checked: 20.05.2021)

<sup>5</sup> Effective Institutions for Resolving Tax Disputes“2012.

Available: [http://ewmiprolog.org/images/files/9145Effective\\_Tax\\_dispute\\_resolution\\_GEO\\_GSMEA.pdf?fbclid=IwAR1lyhs9zDxbGMHGioGGuGQ8m4JHMAql3jF0ZxkPGetd9mDsjcBwFvrtqfA](http://ewmiprolog.org/images/files/9145Effective_Tax_dispute_resolution_GEO_GSMEA.pdf?fbclid=IwAR1lyhs9zDxbGMHGioGGuGQ8m4JHMAql3jF0ZxkPGetd9mDsjcBwFvrtqfA) (Last visit: 20.05.2021)

<sup>6</sup> Finanzgerichtsordnung (FGO) Available: <https://www.gesetze-im-internet.de/fgo/BJNR014770965.html> (Last visit: 20.05.2021)

<sup>7</sup> Basic Law for the Federal Republic of Germany. Available: <https://www.btg-bestellservice.de/pdf/80201000.pdf> (Last visit: 20.05.2021)

### **Conclusion**

Among the actions of the tax authorities, we consider important the flexible role of tax administrations, which would take into account the tax burden on taxpayers and would support businesses and individuals who would not have problems and difficulties in paying taxes;

We believe that during the pandemic period, the tax burden should be reduced for taxpayers by granting tax preferences; To create a favorable tax environment for foreign investors;

During the Covid period, tax administrations have to specify priorities and criteria for saving businesses (if possible, by providing long-term loans as much as possible, reducing the tax burden, lifting sanctions, etc.);

Tax authorities to find, detect and control the fulfillment of tax obligations by entrepreneurs who continue their business activities.

We believe that strict tax sanctions are effective against those entrepreneurs who actively pursue business activities and avoid paying taxes;

Particular attention should be paid to promoting small businesses as the main business area of the country's population, and so on.