

TAX SECRET

Case Studies



Implementation of the Law on Free Access to Information
in Montenegro

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Tax secret

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+382 (0) 20 266 326
mans@t-com

Editor and author:

Vanja Čalović Marković

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INTRODUCTION

According to the Law on Free Access to Information, the authorities may declare secret information that represent a tax secret.

This provision was proposed and adopted by the MPs of the ruling party, who amended the Law on Free Access to Information in mid-2017 while the entire opposition boycotted the work of the Parliament of Montenegro.

The aim of this publication is to indicate how this amendment to the Law has affected the practice and what information is now available to the public.

First part of the publication provides a brief overview of the legal framework governing tax secret. Second part contains case studies related to access to information on calculation of tax liabilities, tax payment, tax arrears and reprogramming of tax debts of companies. Third part focuses on taxes of public officials and related persons, while the fourth one deals with inspection audit.

The case studies given in this publication are based on the administrative and judicial proceedings of MANS.

ABSTRACT

Following the amendments to the law, the practice of institutions changed, thus, many data of data of public interest were declared tax secrets.

It was only after years-long legal proceedings that the courts finally passed first court judgments, which to some extent removed the obstacles imposed by the amendments to the law.

According to those judgments, data on tax arrears, as well as reprogramming of tax debts of companies, should be available to the public. The courts have taken an encouraging, though not decisive position that data on paid taxes should be made public. At the same time, the courts assessed that the data on calculated taxes that companies are obliged to pay represent a tax secret.

Income tax returns submitted by public officials cannot be secret, and these data are public even for the related persons who live in the same household with public officials.

Following the amendments to the law, the practice changed, thus the data on taxpayer audit were hidden from the public.

1. LEGAL FRAMEWORK

The Law on Free Access to Information stipulates that public authorities may deny access to information that is a tax secret. [1] However, the Law does not stipulate the duration of this limitation, i.e. how long the data can remain hidden from the public.

The Law on Tax Administration stipulates that a tax secret shall mean any information or datum about the taxpayer at the disposal of the tax authority, except for information and data:

- 1) for which the taxpayer states in writing that they are not considered as tax secret;
- 2) that cannot be related to a particular taxpayer, and cannot be identified in any other manner;
- 3) pertaining to the existence of tax debt if the mortgage, or fiduciary right used as security is registered in the public books;
- 4) on registration of the taxpayer, TIN, name (firm) and principal place of business;
- 5) value of immovable property;
- 6) published by the Tax Administration on quarterly basis in the list of tax debtors. [2]

On the other hand, the Law on Prevention of Illegal Business states that all information or data on a taxpayer available to the tax authority shall be available to the public in accordance with the law governing free access to information. [3]

In case the authority refuses access to information referring to tax secret, the applicant has the right to file a complaint to the Agency for Free Access to Information (the Agency). A claim may be filed against the Agency's decision with the Administrative Court, followed by a request for extraordinary review with the Supreme Court. Since the right to access information is guaranteed by the Constitution of Montenegro, a constitutional appeal may be filed after the decision of the Supreme Court.

[1] Article 14 paragraph 1 item 6 of the Law on Free Access to Information - The public authority may restrict access to information or a part thereof if an information is a business or a tax secret in accordance with the law

[2] Article 16 of the Law on Tax Administration

[3] Article 3 of the Law on Prevention of Illegal Business

2. COMPANIES

2.1. Calculation of tax liabilities

Data on the calculation of tax liabilities of the state-owned companies, as well as information on income taxes are not available to the public.

The Tax Administration declared secret the analytical cards of several state-owned companies, where the reported liabilities and payments were recorded.

The Administrative Court briefly confirmed that this information constitutes a tax secret:

„In addition, based on the fact that the information under item 6 is a tax secret, the Court finds that the first and second instance authorities correctly concluded that there were no conditions to allow access to the requested information, in accordance with Article 13 of the Law on Free Access to Information.“ [4]

The Supreme Court acted the same, confirming the first-instance verdict. [5]

In the same way, the Agency and the courts denied access to reports on calculated and paid taxes and contributions on employees' salaries. [6]

informaciji ili njenom dijelu koji posjeduje, osim u slučajevima predviđenim naznačenim zakonom (čl.13 zakona) a shodno čl.14. st.1 tač.6 Zakona može se ograničiti pristup informaciji ili dijelu informacije od strane organa vlasti, ako je informacija poslovna ili poreska tajna u skladu sa zakonom.

Ocjenjujući zakonitost osporenog rješenja po ocjeni ovoga suda, pravilno je Upravni sud našao da je isto zakonito i da je na pravilno i potpuno utvrđeno činjenično stanje, pravilno primijenjeno materijalno pravo, i za takav zaključak daje dovoljne i jasne razloge, koji navodima podnijetog zahtjeva nijesu dovedeni u sumnju. Kod svega naprijed navedenog, a kako u konkretnom slučaju nije ispunjen ni jedan od uslova propisanih zakonom za pristup traženim informacijama, to je pravilno Upravni sud odbio tužbu kao neosnovanu nalazeći da je prvostepeni organ pravilno odbio zahtjev, a tuženi organ pravilno odbio žalbu tužilje kao neosnovanu.

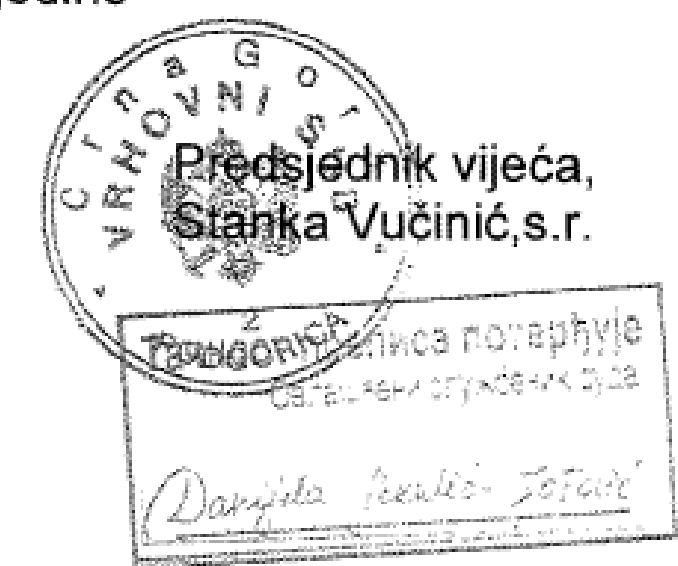
Stoga su neprihvatljivi navodi zahtjeva kojim se ukazuje na kršenje odredbe čl.6 Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda, kojim se ukazuje na pravo na obrazloženu presudu, sa razloga, a kako je to naprijed navedeno, što je Upravni sud odgovorio na sve bitne navode podnesene tužbe, naročito u odnosu na odlučne činjenice, od kojih je zavisila pravilna primjena materijalnog prava.

Sud je cijenio i druge navode iz podnijetog zahtjeva, ali je našao da su isti bez uticaja na drugačije presudjenje.

Sa iznijetih razloga i navedenih zakonskih odredbi, a s pozivom na čl.41 st.1 Zakona o upravnom sporu odlučeno je kao u izreci.

VRHOVNI SUD CRNE GORE
Podgorica, 31.05.2018.godine

Zapisničar,
Indira Muratović, s.r.



Excerpt from the judgment of the Supreme Court
Uvp. No. 501/18 of 31.05.2018

[4] U.No.1601/17 of 26.02.2018

[5] Uvp. No.501/18 of 31.05.2018

[6] TSo-called IOPPD forms, No. UPII 07-30-1389-2/18 of 17.05.2018, U.No.3309/18 of 24.01.2019, Uvp.No.167/20 of 23.04.2020

2. COMPANIES

2.2. Tax payment

Data on taxes paid by private companies are not available to the public. After the amendments to the Law, the practice of the Agency and the courts changed, thus, this information was declared tax secret. The Administrative Court has taken an encouraging, though not decisive position that it should be reconsidered that it is indeed classified information.

In a number of cases, the Tax Administration declared **information on all types of taxes paid by private companies tax secret**. They referred to the Law on Tax Administration and claimed that the harm test showed that disclosing this information "would be a violation of positive regulations, which would lead to distrust of taxpayers towards state administration bodies, i.e. the Tax Administration." [7]

Prior to the amendments to the Law on Free Access to Information, the Council of the Agency annulled such decisions, stating that

"There is a public interest in disclosing the information in order to strengthen trust in the tax system of Montenegro", and "there is also prevailing public interest in disclosing the requested information ... because it is documentation that testifies to the legality of operations of the first instance body, while at the same time, tax payment to the state is a legal obligation of all natural and legal persons." [8]

In some cases, the Agency even found that **non-disclosing of tax data paid by a private company would lead to distrust towards the Tax Administration**. [9] Following such decisions of the Agency, the Tax Administration began disclosing information on tax payments.

After the amendments to the Law that introduced tax secret, the Agency changed its practice and in identical cases began to adopt completely opposite decisions. [10] Even in those cases that started before the amendment of the Law, the Agency stated that it was lawful to deny access to information under the new provision. Such decisions of the Agency were confirmed by both the Administrative and Supreme Court. [11]

Mid-2020, the Administrative Court took a turn in the current practice when it stated:

"For now, the court cannot accept as a well-founded conclusion of the administrative bodies that this is a tax secret, which, given its importance, is an obstacle to the exercise of the prosecutor's right to free access to the requested information. This is bearing in mind the fact that the Tax Administration, in addition to the list of tax debtors, also publishes the White List - a list of the most regular taxpayers..."

The court explains that the criteria for taxpayers to be on that list are the regular tax calculation and filing of tax returns, regular settling tax liabilities, as well as that no significant irregularities were found in the inspection procedures, which would indicate any kind of irregular business.

[7] Decision of the Tax Administration Number: 03/11256/2-15 Podgorica, February 19, 2015

[8] Decision of the Agency for Personal Data Protection and Free Access to Information No. UPII 1003/15-1 of 19 May 2015

[9] No. UP II 1000/15-1 of 18 June 2015

[10] For example, the amounts of all types of taxes paid by the company "Adriatic Marinas" paid from 2005 to 2014 (76753)

[11] Uvp. no. 1314/19 of 19 September 2019, judges Dr. Vesna Vučković, Vesna Jočić and Stanka Vučinić

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The Court finds that it cannot determine whether the Tax Administration and the Agency have taken these conditions into account and therefore upholds the claim:

"Bearing in mind that from the reasons given by the first instance and the defendant body it cannot be concluded that they had this circumstance in mind, this contested decision does not contain reasons to confirm the correctness of resolving this administrative matter, which is a violation of the rules of procedure..."

prava na tužioca na slobodan pristup traženim informacijama. Ovo imajući u vidu činjenicu da Poreska uprava pored liste poreskih dužnika, objavljuje i Bijelu listu - spisak najurednijih poreskih obveznika, što je sud utvrdio uvidom u web sajt prvostepenog organa na adresi <http://www.poreskauprava.gov.me/vijesti/127914/SAOPsTENJE-OBJAVLJENA-BIJELA-LISTA-SPISAK-NAJUREDNIJIH-PORESKIH-OBVEZNIKA.html>.

Prema informacijama sa označene web adrese, kriterijumi da se nađe određeni obveznik na toj listi su urednost obračunavanja poreza i podnošenja poreskih prijava, redovnost izmirivanja poreskih obaveza, kao i da u postupcima inspeksijskog nadzora nijesu utvrđivane značajnije nepravilnosti, koje bi ukazivale na bilo kakav vid neregularnog poslovanja. Kako se iz razloga koji su dali prvostepeni i tuženi organ ne može zaključiti da su ovu okolnost imali u vidu, to osporeno rješenje nema razloge kojim bi se potvrdilo pravilnost rješavanja ove upravne stvari, što predstavlja povredu pravila postupka iz člana 22 stav 7 Zakona o upravnom postupku ("Sl.list CG", br.56/14, 20/15, 40/16, 37/17), pri čemu je sud imao u vidu stanovište Vrhovnog suda Crne Gore iz presude Uvp.br.730/19 od 04.07.2019. godine.

Zbog pomenutih povreda pravila koja su mogla biti od uticaja na pravilno rješavanje ove upravne stvari, osporeno rješenje je trebalo poništiti.

U ponovnom postupku tuženi organ će otkoloniti nedostatke na koje je ukazano ovom presudom, i nakon toga, shodno obavezi iz člana 56 Zakona o upravnom sporu ("Sl.list CG", br. 54/16), donijeti novo, zakonito rješenje.

Odluka o troškovima spora, zasnovana je na odredbi člana 152 Zakona o parničnom postupku, u vezi člana 39 stav 2 Zakona o upravnom sporu („Sl.list CG”, br.54/16), a isti se odnose na sastav tužbe uz uvećanje za 21% na ime PDV-a, podneska od 12.05.2020.godine i prisustva punomoćnika usmenoj raspravi, u iznosu od po 200,00€ po AT.

Iz iznijetih razloga, a na osnovu člana 35 stav 1 Zakona o upravnom sporu, odlučeno je kao u dispozitivu presude.

UPRAVNI SUD CRNE GORE
Podgorica, 05.06.2020. godine

Zapisničarka,
Danijela Dedić, s.r.



*Excerpt from the judgment of the Administrative Court
U. no. 7606/18 of 05.05.2020*

2. COMPANIES

2.3. Tax arrears

Following the amendments to the law, the data on tax arrears were declared tax secret, which was confirmed by the practice of the Agency and the courts. However, the Supreme Court subsequently ruled that this information should be made available to the public. The Agency does not respect the position of the court, but finds that some data on real estate tax debts should be available to the public.

Prior to the amendments to the Law, the Agency annulled the decisions of the Tax Administration and state-owned companies that declared the data on tax arrears secret. For example, in the case of tax arrears of Electric Power Company of Montenegro (EPCG), the Agency found that:

"In this case, pursuant to Article 17 (2) of the Law on Free Access to Information, there is a prevailing public interest in knowing in what way other taxpayers are settling their tax obligations." [12]

The Agency found that there was a prevailing public interest in disclosing data on deferred payment of tax liabilities.

"... because it is information that testifies to the legality of the first instance body's operations, while at the same time, taxpayers' paying of tax liabilities to the state is a legal obligation, so contrary to the first instance body's claims, it is non-disclosing of this information that would lead to distrust of taxpayers towards the Tax Administration". [13]

Following the amendments to the Law, the practice of the Agency changes, declaring lawful the identical decisions of the Tax Administration by which the information on debts was declared secret. [14] **This practice is confirmed by the Administrative and Supreme Court**, which confirmed that the established tax liabilities of several state-owned companies are a business secret. [15]

However, in mid-2019, the Supreme Court ruled that the conclusion of the Administrative Court that the data on individual tax debt are secret, while the Tax Administration periodically publishes the List of tax debtors, was premature:

"... in the opinion of this court, in the contested judgment, the conclusion that it is a tax secret is premature, in the sense of Article 16, Paragraph 1, Item 2 of the Law on Tax Administration, i.e. that it is information whose disclosure would violate positive regulations, which would lead to distrust of taxpayers towards state administration bodies, specifically the Tax Administration. This is especially bearing in mind the fact that the Tax Administration periodically publishes lists of tax debtors on its website." [16]

[12] No. UP II-230 / 15-1 dated 23.02.2015

[13] No. UP II 07-30-1308-2/17 Podgorica, 09.12.2017

[14] For example No. UPII 07-30-3876-2/18 Podgorica, June 11, 2019

[15] For example U.no.1601/17 from 26.02.2018 and Uvp. No. 501/18 of 31.05.2018

[16] Uvp.No.730/19 of 04.07.2019

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U odgovoru na podnijeti zahtjev tužena je isti ocijenila neosnovanim i predložila da kao takav bude odbijen.

U sjednici vijeća razmotreni su cjelokupni spisi predmeta, ispitana pobijana presuda u granicama propisanim članom 46 ZUS-a, ocijenjeni navodi podnijetog zahtjeva i odgovora na isti, pa je vijeće našlo da je:

- zahtjev osnovan.

U postupku donošenja osporene presude tužena je utvrdila da je prvostepeni organ odbio navedeni zahtjev za dostavljanje naznačenih informacija iz razloga što tražena informacija predstavlja poresku tajnu u skladu sa čl.16 st.1 tač.2 Zakona o poreskoj administraciji („Službeni list RCG“ br.65/01, 80/04 i „Službeni list CG“ br.20/11, 28/12, 8/15 i 47/17).

Ocjenjajući zakonitost osporene presude Upravni sud našao da je ista zakonita.

Nasuprot stanovištu Upravnog suda, ovaj sud nalazi da pobijana presuda sadrži nedostatke zbog kojih se ne može ispitati iz čl.367 st.2 tač.15 ZPP u vezi čl.4 ZUS-a.

Odredbom čl.16 st.1 Zakona o poreskoj administraciji, između ostalog propisano je da je poreska tajna svaka informacija ili podatak o poreskom obvezniku kojim raspolaže poreski organ, osim informacija i podataka vezanih za postojanje poreskog duga, koji poreski organ objavljuje kvartalno o listi poreskih dužnika.

Imajući u vidu navedeno, po stanovištu ovog suda, preuranjen je zaključak u pobijanoj presudi, da se radi o poreskoj tajni, u smislu čl.16 st.1 tač.2 Zakona o poreskoj administraciji, odnosno, da se radi o podacima čijim bi se objelodanjivanjem kršili pozitivni propisi, da bi se time dovelo do nepovjerenja poreskih obveznika prema organima državne uprave, konkretno Poreskoj upravi. Ovo posebno kod činjenice, da Poreska uprava objavljuje liste poreskih dužnika na sajtu, periodično. Sa navedenih razloga, sud je zahtjev za ispitivanje sudske odluke usvojio i presudu ukinuo.

U ponovnom postupku Upravni sud će cijeliti navode iz presude i donijeti novu i zakonitu odluku.

Sa iznijetih razloga i navedenih zakonskih odredbi, a s pozivom na čl.47 st.2 Zakona o upravnom sporu odlučeno je kao u izreci.

VRHOVNI SUD CRNE GORE
Podgorica, 04.07.2019. godine

Zapisničarka,
Mara Djokaj,s.r.



*Excerpt from the judgment of the Supreme Court
Uvp.no.730/19 of 04.07.2019*

The Agency recently annulled the decision of the Tax Administration to declare secret the list of all debtors of real estate tax, because it lacked an explanation as to whether those debts were mortgaged or subject to fiduciary.

"...the first instance body in the contested decision failed to provide appropriate reasons on the basis of which it could be unequivocally determined whether the requested list can be classified as a tax secret, bearing in mind that information and data related to the existence of a tax debt are not considered a tax secret, if the mortgage, i.e. fiduciary as a method of securing is entered in the public books." [17]

"...it is concluded that the information is not a tax secret if two conditions are cumulatively met - if the information is related to the existence of a tax debt and that the mortgage is registered on the debt, i.e. fiduciary as a way of securing in public books." [18]

[17] No. UPII 07-30-2047-2/20 of 13.08.2020

[18] Ibid.

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poreska tajna svaka informacija ili podatak o poreskom obvezniku kojim raspolaže poreski organ, osim informacija i podataka za koje poreski obveznik pisano izjavi da se ne smatraju poreskom tajnom; informacija i podatak koji se ne mogu povezati sa konkretnim poreskim obveznikom niti se na drugi način mogu identifikovati; informacija i podataka vezanih za postojanje poreskog duga, ukoliko je hipoteka, odnosno fiducija kao način obezbjeđenja upisana u javne knjige; informacije i podaci o registraciji poreskog obveznika, PIB, nazivu (ime) i glavnom mjestu poslovanja; informacije i podaci o vrijednosti nepokretne imovine; informacije koje Poreska uprava objavljuje kvartalno o listi poreskih dužnika.

Savjet Agencije je u postupku preispitivanja zakonitosti osporenog rješenja utvrdio da prvostepeni organ nije pravilno primijenio odredbu člana 30 stav 5 Zakona o slobodnom pristupu informacijama kojom se propisuje da rješenje kojim se odbija zahtjev za pristup informaciji sadrži detaljno obrazloženje razloga zbog kojih se ne dozvoljava pristup traženoj informaciji, odnosno ponovna upotreba informacija.

Do prethodno navednog zaključka Savjet Agencije je došao, budući da je prvostepeni organ u osporenom rješenju propustio da odgovarajuće razloge na osnovu kojih bi se na nedvosmislen način moglo utvrditi da li se traženi spisak može podvesti pod pojam poreske tajne, imajući u vidu da se poreskom tajnom ne smatra informacija i podatak vezan za postojanje poreskog duga, ukoliko je hipoteka, odnosno fiducija kao način obezbjeđenja upisana u javne knjige.

Tumačenjem prethodno navedenog zaključuje se da informacija nije poreska tajna ukoliko su kumulativno ispunjena dva uslova i to, ukoliko je informacija vezana za postojanje poreskog duga i da je na dug upisana hipoteka, odnosno fiducija kao način obezbjeđenja u javne knjige. Imajući u vidu da je predmetnim zahtjevom tražen spisak dužnika po osnovu poreza na promet nepokretnosti od 2006. godine do dana podnošenja zahtjeva, nedvojbeno je da je tražena informacija koja je vezana za postojanje poreskog duga.

Postavlja se pitanje da li su na dugove po osnovu poreza na promet nepokretnosti upisivane hipoteke, odnosno fiducije kao način obezbjeđenja u javne knjige. Ovo pitanje je od krucijalnog značaja, budući da od njega direktno zavisi da li se predmetna informacija može podvesti pod pojam poreske tajne. S tim u vezi, prvostepeni organ je propustio da utvrdi činjenicu da li su na dugove po osnovu poreza na promet nepokretnosti upisivane hipoteke, odnosno fiducije kao način obezbjeđenja u javne knjige, zbog čega je Savjet Agencije onemogućen da na pouzdan način ispita njegovu zakonitost, te zbog pomenutih povreda pravila koja su od uticaja na pravilno rješavanje ove upravne stvari, osporeno rješenje treba poništiti.

Prvostepeni organ je dužan da u ponovnom postupku u roku od 20 dana od prijema rješenja na osnovu pravilno utvrđenog činjeničnog stanja donese novo rješenje u kojem će otkloniti nepravilnosti na koje mu je ukazano ovim rješenjem.

AGENCIJA ZA ZAŠTITU LIČNIH PODATAKA I SLOBODAN PRISTUP INFORMACIJAMA, adresa: Bulevar Svetog Petra Cetinjskog br. 147
tel/fax: +382 020 634 883 (Savjet), +382 020 634 884 (direktor), e-mail: azlp@t-com.me, web site: www.azlp.me

*Excerpt from the decision of the Agency
No. UPII 07-30-2047-2/20 of 13.08.2020*

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2.4. Reprogramming of tax debt

Information on reprogramming of tax debts was declared secret, but the Administrative Court determined that this information must be available to the public.

The Tax Administration declared the information on reprogramming of tax debt secret, and the Agency confirmed such decisions. [19]

At the beginning of last year, the Administrative Court passed an important judgement which determined that the information on reprogramming of tax debt cannot be a tax secret.

„Reprogramming of tax debt is regulated by the Law on Reprogramming of Tax Debt ("Official Gazette of Montenegro", No. 83/16), which determines conditions for the application of the said institute... Therefore, the procedure is conducted on the basis of a public invitation, which means that tax debtors who publicly apply are not anonymous, which is why the decision to choose a particular tax debtor cannot be a tax secret. That there is no protection of the privacy of the names of tax debtors also stems from the Decree on the conditions and criteria for publishing the list of tax debtors ("Official Gazette of Montenegro", No. 56/12 and 53/13), which determines the manner of publishing the list of 200 tax debtors with the largest tax debt according to the records of the Tax Administration, who did not settle the due tax liabilities for a period longer than 12 months. Considering the meaning of the mentioned regulations, the position of administrative bodies that, when it comes to decisions made following a public call for debt reprogramming represent a tax secret that is subject to limitations on access to data from Article 16 of the Law on Tax Administration, cannot be accepted". [20]

CG", br. 83/16), koji utvrđuje uslove za primjenu navedenog instituta. Prema članu 6 tog zakona, reprogram poreskog potraživanja podrazumijeva: odlaganje plaćanja poreskog potraživanja; otpis kamate i jednokratnu uplatu od 10% od ukupnog iznosa poreskog potraživanja. Reprogramu duga pristupa se na osnovu javnog poziva iz člana 9 pomenutog zakona. Dakle, postupak se provodi na osnovu javnog poziva, što znači da poreski dužnici koji se javno prijavljuju nijesu anonimni, zbog čega ni rješenje kojim se izaberi određeni poreski dužnik ne može predstavljati poresku tajnu. Da ne postoji zaštita privatnosti imena poreskih dužnika proizilazi i iz Uredbe o uslovima i kriterijumima objavljivanja liste poreskih dužnika („Sl.list CG", br. 56/12 i 53/13), kojom je određen način objavljivanja liste 200 poreskih dužnika sa najvećim poreskim dugom prema evidenciji Poreske uprave, koji dospjele poreske obaveze nijesu izmirili u periodu dužem od 12 mjeseci. Cijeneći smisao navedenih propisa ne može se prihvatiti stanovište upravnih organa da kada su u pitanju rješenja donijeta po javnom pozivu za reprogram duga ista predstavljaju poresku tajnu koja podliježe ograničenjima za pristup podacima iz člana 16 Zakona o poreskoj administraciji. Imajući u vidu navedeno pravilno se tužbom ukazuje na povrede pravila postupka zbog kojih se dovodi u pitanje činjenično i pravno utvrđenje na kojem je zasnovano rješenje tuženog organa, a zbog čega je tužbu trebalo usvojiti i osporeno rješenje poništiti.

U ponovnom postupku tuženi organ će, vodeći računa o primjedbama suda iz ove presude (član 56 ZUS-a), donijeti novo, zakonito rješenje.

Odluka o troškovima spora zasnovana je na odredbama člana 152 Zakona o parničnom postupku u vezi sa članom 39 stav 2 Zakona o upravnom sporu, a dosuđeni troškovi se odnose na sastav tužbe i pristup punomoćnice na raspravi, u iznosu od po 200,00€, u skladu sa odredbama Advokatske tarife.

Iz iznijetih razloga, a na osnovu odredbe člana 35 stav 1 Zakona o upravnom sporu, odlučeno je kao u izreci.

UPRAVNI SUD CRNE GORE
Podgorica, 05.02.2019 godine

Zapisničarka,
Snežana Popov, s.r.



PREDSJEDNIK VIJEĆA,
Muzafer Hadžajlić, s.r.
Tačnost prepisa potvrđuje
Ovlašteni službenik suda
M. Kanyepobuk

Excerpt from the judgment of the Administrative Court
U. No. 11001/17 of 5 February 2019

[19] For example No. UPII 07-30-3122-2/19 of 21 February 2020
[20] U. No. 11001/17 of 5 February 2019

3. TAXES OF PUBLIC OFFICIALS AND RELATED PERSONS

After a five-year proceeding, the Supreme Court ruled that income tax returns filed by public officials cannot be a tax secret. These data are also public for those related persons who live in the same household with a public official.

MANS requested that the Tax Administration publish annual income tax returns of public officials and persons related to them. [21] Data on the income of officials and persons living with them in the household are already public, since according to the Law on Prevention of Corruption, public officials are obliged to submit reports on income and assets.

The Tax Administration declared this information a tax secret without taking into account the fact that they were public officials.

Back in August 2015, MANS filed a complaint with the Agency, but there was no response. We filed a lawsuit due to the Agency's silence, so at the end of 2016, the court ordered that institution to issue a decision.

Two and a half years later, in June 2018, the Agency finally annulled the decision of the Tax Administration, but in its decision, it indicates that the institution is obliged to apply the new provision of the Law, which was adopted only in mid-2017. [22]

The Tax Administration then acts according to the instructions of the Agency, and issues a new decision declaring the data a tax secret, but referring to a new provision of the law.

MANS filed an appeal, which was rejected by the Agency, and in March 2020, the court rejected our lawsuit, assessing that the requested information is a tax secret, without taking into account the fact that it is information on public officials and persons related to them. [23]

However, the Supreme Court annulled the judgment of the Administrative Court and found:

"... the conclusion of the Administrative Court that the requested information is a tax secret, that access to information is limited in terms of Article 16 paragraph 2 of the Law on Tax Administration, and that disclosure of that information would violate the Law on Tax Administration, is not clear, given that the named persons at the time of requesting information had the status of public officials, thus the stated reasons are contrary to Article 14 Paragraph 1 Item 1 Indent 1 of the Law on Free Access to Information". [24]

[21] MANS requested copies of annual income tax returns submitted by Đukanović Blažo, Ivanović Petar, Bošković Predrag, Žugić Radoje, Žugić Milanka, Lazović Vujica for the periods specified in the request (78989-78994)

[22] No. UP II 2018/15-1 of 08.10.2018

[23] U. No. 8879/2018 of 11.03.2020

[24] Uvp. no. 329/20 of 02.07.2020

3. TAXES OF PUBLIC OFFICIALS AND RELATED PERSONS

The same judgment states that access to information of related persons depends on whether they live in a joint household with a public official:

"Also, regarding the requested information for Blažo Đukanović, it is necessary to determine that this is a person who lives in a joint household with a public official in the sense of Article 14 Paragraph 1 Item 1 Indent 1 of the Law on Free Access to Information, on which the decision at the request of the prosecutor depends." [25]

U odgovoru na podnijeti zahtjev tužena je isti ocijenila neosnovanim i predložila da kao takav bude odbijen.

U sjednici vijeća razmotreni su cjelokupni spisi predmeta, ispitana pobijana presuda, ocijenjeni navodi podnijetog zahtjeva i odgovora na isti, pa je vijeće našlo da je:

- zahtjev za ispitivanje sudske odluke osnovan.

Pobijanom presudom počinjena je povreda pravila postupka iz člana 367 st. 2 tač. 15 ZPP-a u vezi člana 4 ZUS-a, jer ista nema razloga o odlučnim navodima tužbe.

Iz spisa predmeta proizilazi da je tužilac Poreskoj upravi Crne Gore podnio zahtjev za dostavljanje informacija bliže navedenih u dispozitivu prvostepenog Poreskoj upravi. U odnosu na navedenu informaciju, u skladu sa članom 16 stav 1 Zakona o slobodnom pristupu informacijama, proveden je test štetnosti objelodanjivanja informacija, na osnovu čega je utvrđeno da bi objelodanjivanje te informacije predstavljalo kršenje Zakona o poreskoj administraciji. Tuženi organ i Upravni sud su prihvatili razloge iznijete u obrazloženju prvostepenog rješenja, zaključujući da je prvostepeni organ dao jasne i valjane razloge zbog kojih je odbio zahtjev tužioca.

Odredbom člana 14 stav 1 tačka 1 alineja 1 Zakona o slobodnom pristupu informacijama propisano je da organ vlasti može ograničiti pristup informaciji ili dijelu informacije, ako je to u interesu zaštite privatnosti od objelodanjivanja podataka predviđenih zakonom kojim se uređuje zaštita podataka o ličnosti, osim podataka koji se odnose na javne funkcionere u vezi sa vršenjem javne funkcije, kao i prihode, imovinu i sukob interesa tih lica i njihovih srodnika koji su obuhvaćeni Zakonom kojim se uređuje sprečavanje sukoba interesa.

Iz spisa predmeta proizilazi da se u konkretnom slučaju radi o javnim funkcionerima u vrijeme podnošenja zahtjeva tužioca za pristup informaciji i to Petru Ivanoviću, Predragu Boškoviću, Vujicu Lazoviću, Radoju Žugiću i njegovoj supruzi Milanki Žugić, u smislu Zakona o sprečavanju korupcije, pa su nerazumljivi razlozi pobijane presude da je ograničen pristup traženim informacijama.

Podacima mimo onih navedenih u navedenoj odredbi Zakona o slobodnom pristupu informacijama (matični broj), jeste ograničen pristup, ali tu situaciju reguliše odredba čl. 24 navedenog zakona.

Takodje, u pogledu tražene informacije za Blaža Đukanovića, potrebno je utvrditi da li se radi o licu koje živi u zajedničkom domaćinstvu sa javnim funkcionerom u smislu čl. 14 st.1. tač 1 alineja 1 Zakona o slobodnom pristupu informacijama, od čega zavisi odluka po zahtjevu tužioca.

Imajući u vidu citirane zakonske odredbe nije jasan zaključak Upravnog suda da tražena informacija predstavljaju poresku tajnu, da je pristup informacijama ograničen u smislu člana 16 stav 2 Zakona o poreskoj administraciji, te da bi objelodanjivanje te informacije predstavljalo kršenje Zakona o poreskoj administraciji, kod činjenice da su imenovana lica u vrijeme traženja informacije imala status javnih funkcionera, pa su dati razlozi u suprotni sa čl. 14 st.1. tač. 1 alineja 1 Zakona o slobodnom pristupu informacijama.

Sa navedenih razloga, sud je zahtjev za ispitivanje sudske odluke usvojio i pobijanu presudu ukinuo.

*Excerpt from the judgment of the Supreme Court
Uvp. no. 329/20 of 02.07.2020*

4. INSPECTION AUDIT

After the amendments to the law, the practice also changed, thus the data on taxpayer control were hidden from the public.

The Tax Administration persistently declares secret the information on the audit it conducts over taxpayers. Until the amendments to the law, the Agency annulled such decisions, stating that the minutes of the Tax Administration were public documents:

“Namely, in the specific case, an inspection of the financial operations of the Public Preschool "Dragan Kovačević" from Nikšić was conducted, which is a public institution and not a private entity, and which is finished, thus the minutes are a public document, and to affirm the principle of transparency of its work pursuant to Article 4 of the Law on Free Access to Information, it is obliged to submit them to the applicant.” [26]

In cases where the minutes contained information indicating violation of the law, the Agency concluded that there was a prevailing public interest in disclosing this information:

"In this particular case, there is a prevailing public interest in disclosing the requested information - all measures (decisions) of findings recorded during the inspection in the employment agency "Lomi" from Pljevlja, from 2004 to the date of the decision; Minutes on inspection audit number 03/17-24 from 19.01.2009 on the basis of which the Tax Administration filed a criminal complaint with the Basic State Prosecutor's Office of Pljevlja on 13.11.2009, because it is information that testifies to the legality of business, primarily of the subject of supervision, the employment agency "Lomi" Pljevlja, as well as of the first instance body, especially when it comes to the lawful conduct of taxpayers and taxpayers' settlement of tax liabilities to the state, which is a legal obligation, thus, contrary to the claims of the first instance body, failure to publish this information would lead to the taxpayers' distrust towards the Tax Administration". [27]

However, after the amendments to the law, the Agency confirms the decisions of the Tax Administration that the data on inspection audit are a tax secret, and such decisions are also confirmed by the Administrative Court. [28]

The Supreme Court also finds that data on taxpayer control should be hidden from the public, even in cases where there is a suspicion that a criminal offense has been committed:

„Article 74 Paragraph 1 of the Law on Tax Administration prescribes that the inspection audit shall include the verification of all or specific facts relevant for taxation, while the provision of Article 73 of the same law prescribes that the inspection audit shall mean a procedure of verification and establishment of facts important for taxation of the taxpayer and other persons, conducted by the tax authority in accordance with authorizations prescribed by laws regulating specific types of taxes.

In the case of the above-mentioned legal provisions and the provisions of Article 16 Paragraph 1 of the Law on Tax Administration, which prescribes that tax secret shall mean any information or datum about the taxpayer at the disposal of the tax authority, except for information and data listed there, which do not include the data contained in the inspection audit report, the Administrative Court concluded that the contested decision was lawful, and provided sufficient and clear reasons for such conclusion, which were not questioned by the allegations of the submitted request.

[26] No.UPII 1083/15-1 of 19.05.2015

[27] No. UP II 07-30-2591-2/16 of 05.11.2017

[28] U.no.753/2018 of 11.07.2019

4. INSPECTION AUDIT

Referring of the applicant to the Law on Inspection Supervision is without relevance for different decision, because Article 2 Paragraph 2 of that law prescribes that the Law shall relate to all administrative areas except when its application is excluded by a special law, and in this case the inspection of taxpayers is performed according to the Law on Tax Administration and in accordance with the powers of the tax authority governing special types of taxes, as stated above.

The allegations of the submitted request on suspicion that a criminal offense was committed are without relevance for different decision. This is due to the fact that Article 91 a of the Law on Tax Administration prescribes that in order to detect tax-related criminal offences and perpetrators thereof, the authorised officer of the tax authority shall carry out investigative actions upon order of the prosecutor." [29]

U upravnom postupku, koji je prethodio donošenju pobijane presude, nijesu počinjene povrede pravila postupka koje bi bile od uticaja na zakonito i pravilno rješavanje stvari na čije postojanje ovaj sud pazi po službenoj dužnosti saglasno članu 46 ZUS-a.

Pobijanom presudom ocijenjeni su svi odlučni navodi podnijete tužbe i za sva zaključivanja dati jasni i valjani razlozi u skladu sa stanjem u spisima predmeta, pa se neosnovano ista pobija zbog povrede pravila postupka u upravnom sporu, te povrede člana 6 Evropske konvencije o zaštiti ljudskih prava i osnovnih sloboda, koju povredu tužilja vidi u neobrazloženosti pobijane presude.

Članom 74 st. 1 Zakona o poreskoj administraciji je propisano da inspekcijски nadzor obuhvata provjeru svih ili pojedinih činjenica bitnih za oporezivanje, dok je odredbom člana 73 istog zakona propisano da je inspekcijски nadzor postupak provjere i utvrđivanja činjenica bitnih za oporezivanje obveznika koji provodi poreski organ u skladu sa ovlaštenjima kojima se utvrđuju pojedine vrste poreza.

Kod navedenih zakonskih odredbi i odredbe člana 16 st. 1 Zakona o poreskoj administraciji, kojom je propisano da je poreska tajna svaka informacija ili podatak o poreskom obvezniku kojim raspolaže poreski organ osim onih tamo pobrojanih, a medju koje ne spadaju podaci sadržani u zapisniku o inspekcijskom nadzoru, osnovano Upravni sud pobijanom presudom zaključuje da je osporeno rješenje zakonito i za takav zaključak daje dovoljne i jasne razloge, koji navodima podnijetog zahtjeva nijesu dovedeni u sumnju.

Pozivanje podnosioca zahtjeva na Zakon o inspekcijskom nadzoru je bez značaja za drugačiju odluku, jer je članom 2 stav 2 tog zakona propisano da se odredbe istog primjenjuju na sve upravne oblasti osim kada je njegova primjena isključena posebnim zakonom, a u konkretnom slučaju inspekcijски nadzor poreskih obveznika vrši se po Zakonu o poreskoj administraciji i u skladu sa ovlaštenjima poreskog organa kojima se uređuju posebne vrste poreza, kako je to naprijed navedeno.

Navodi podnijetog zahtjeva o sumnji da je izvršeno krivično djelo su bez značaja za drugačiju odluku. Ovo sa razloga što je članom 91a Zakona o poreskoj administraciji propisano da radi otkrivanja poreskih krivičnih djela i njihovih izvršilaca ovlašćeno lice poreskog organa preduzima istražne radnje po nalogu tužioca.

Test štetnosti saglasno članu 16 Zakona o slobodnom pristupu informacijama znači dovesti u vezu štetu po zaštićene interese koja bi nastala objavljivanjem informacije, sa jedne strane, i interes javnosti da tu informaciju zna, sa druge strane, te dati ocjenu što je pretežnije.

U konkretnom slučaju razlozi o prednjem dati su u obrazloženju pobijanog rješenja, pa ne stoje navodi podnijetog zahtjeva da test štetnosti nije izvršen. Bez značaja su pri tom navodi podnijetog zahtjeva da test štetnosti nije sastavni dio spisa iz čega bi proizilazio stav podnosioca zahtjeva da test štetnosti treba da bude neki posebni akt.

Nalazeći sa iznijetih razloga da pobijanom presudom na štetu tužilje nije povrijedjeno materijalno pravo, ovaj sud je s pozivom na član 47 st. 1 ZUS-a odlučio kao u izreci.

VRHOVNI SUD CRNE GORE
Podgorica, 19. 09. 2019. godine

Zapisničar,
Marina Bogdanović, s.r.



*Excerpt from the judgment of the Supreme Court
Uvp. no. 1325/19 of 19 September 2019*