

Adverse consequences of widening State Revenue Service's powers (3/37/19)

At various stages of their control measures, the State Revenue Service (SRS) has the power to apply means of securing enforcement of their potential decisions. The SRS's powers were expanded on this matter a year ago, and this expansion is affecting any entities and individuals that are being scrutinised by the SRS. However, those newly acquired powers appear to be exercised in a formal manner improperly restricting taxpayers' rights.

Grounds for applying means of securing enforcement

The rules governing the application of means of securing enforcement imply that the SRS mainly decides whether it is necessary to secure enforcement when expecting the results of a control measure.

In special circumstances where the SRS finds that a taxpayer carries out unlawful actions which help avoid paying overdue taxes (e.g. the taxpayer removes, disposes of or hides assets) or which could make it impossible to enforce the final decision and collect the overdue taxes on a no-dispute basis, the SRS may also apply means of security before deciding on the results of the review. The Supreme Court has stated that SRS officers may decide to secure a claim before making their audit decision only if all of the following interrelated statutory preconditions exist at the same time:

1. the SRS has obtained relevant evidence;
2. the evidence confirms the taxpayer's wilful and deliberate actions suggesting dishonesty; and
3. those actions could make it impossible to collect tax debts.

On 28 July 2018 the lawmaker amended the Taxes and Duties Act to add subsection 3.3 to section 26.1. This step was taken because in practice it was difficult for the SRS to apply means of securing enforcement before deciding on the results of an audit, i.e. taxpayers used to dispose of their assets after learning of a pending tax audit. The new rules provide that if the SRS is preparing a personal data evaluation in terms of tax revenue risks and finds facts suggesting that the taxpayer is hiding a taxable item or evading taxation, the SRS will have the power to apply means of securing enforcement simultaneously with, say, making the decision to start an audit. To help the SRS proactively respond to a taxpayer's potential unlawful actions, the lawmaker has expanded the SRS's power to apply means of securing enforcement. However, the amendments do not mean that those powers should be exercised in an unreasonable or formal manner.

The realities of practice

Unfortunately, practice suggests that the SRS tends to apply means of security without any special necessity or good reason.

The rules governing the application of means of securing enforcement authorise the SRS to apply means of security, rather than requiring that this should be done in any case. This means that the SRS needs a good reason for deciding to restrict a taxpayer's rights. The SRS should find relevant facts showing that the taxpayer is hiding a taxable item or evading taxation (once the law provides that such facts must be found). And the decision to apply means of securing enforcement should be described in an evaluation of those facts. Of course, at a stage when SRS auditors have just started their investigations, it is not

reasonable to expect that their evaluation of facts will be an extensive one.

Yet the bottom line is that this rule aims to ensure enforcement of the SRS's future decision, so the decision to apply means of securing enforcement should contain convincing arguments about how facts could affect enforcement of the SRS's decision. The lack of such arguments is a key weakness of such SRS decisions. For example, if a taxpayer's assets substantially exceed the amount of a provisional tax assessment even if the review leads to extra tax being assessed for payment, then enforcing the SRS's decision (without finding special circumstances) will not be at risk. We note that the SRS has wrongly claimed that the lawmaker's evaluation has already found that the existence of preconditions laid down by section 26.1(3.3) of the Taxes and Duties Act (facts proving that the taxpayer is hiding a taxable item or evading taxation) per se suggests that there are grounds for believing that the taxpayer is likely to carry out actions that would create obstacles to tax collection. This claim is contrary to the purpose and rationale of means of securing enforcement.