

Thesis Summary

The penalty means a legal or contractual property sanction in case that a contractual obligation is not duly and timely fulfilled. The notion of penalty appears in many legal regulations of the Czech Republic. Probably the most known provision containing this notion is the article 544 of the Civil Code, where there is a paragraph 3 stipulating that *„The provisions on conventional fine shall apply also to a fine stipulated by a legal regulation for breach of a contractual duty (penalty).“*

The due functioning of tax collection in every state supposes that the taxpayers fulfil their duties towards the state in a regular manner and in due time. In order to ensure that it really will be the case, there exist certain sanctions included in every system of law for the event that the payment is not settled at all or on schedule. Doubts concerning legality of the sanction system in the Czech Republic till 31 December 2006 lead to the modification of the legislation with effect from 1 January 2007. After the accession of the Czech Republic to the European Union, the whole Czech system of sanctions must be subject of examination also from the point of view of its compliance with the EC law. Therefore, this doctoral thesis deals with the compatibility of the Czech tax sanction system with the right to own property and especially with the principle of proportionality.

In the modern history, the penalty was regulated in the article 63 of the Tax and Fees Administration Act (hereinafter referred to as "TFAA") and since 1 January 2007, we can find the penalty enactment in the article 37b of the TFAA and the provisions concerning the interest on late payment in the article 63 of the TFAA. The TFAA was adopted by the Czech National Council at that time and came into force on 1 January 1993. This Act among others annulled the decree of the Ministry of Finance № 16/1962 Coll. of the Tax and Fee Proceedings. For reasons of necessity to adopt a new process law in the sphere of taxes, the TFAA was "created" practically within several days. At present, the Chamber of Deputies discusses completely new tax administration rules.

A tax subject very often meets the juridical institute of the penalty in relation to the tax control. At the present time, the tax control is a very frequent subject-matter and not only in the professional literature. The course of tax control and defence possibilities against it or more precisely against a supplementary tax assessment should be examined by a separate publication and therefore, in this work, only basic information and principals covering fees and tax controls.

In connection with penalty, interest on late payment and tax control, it would be suitable to mention at least briefly the relevant provisions of tax criminal law and together with administrative or tax sanctions, for reasons of a certain comparison, examine also the criminal-law sanctions, which are related to tax evasion and non-payment. The tax criminal law is a dynamically developing subdiscipline of criminal law and taking into account the experiences in foreign countries, it is possible to suppose that in future, it will constitute even more important and considerable branch of law. Many tax criminal acts are prosecuted exactly on the basis of the discoveries made in connection to the tax control.

As concerns the issues of penalty (especially its amount), it is very important to compare, how the sanctions in tax proceedings are regulated in other European states. Therefore, in the Chapter 4, there is a detailed description of tax sanctions system in Austria and the annexed chart contains information concerning other selected European states.

In comparison with other European states, the Czech tax sanctions system is very severe. Therefore, it is interesting to look at it from the point of view of the European law pointing out namely two principals, scilicet the principal of proportionality and the one of property right protection. The provision of the article 63 of the TFAA (as amended up to 31 December 2006) should have ensured timely payment of taxes and fees within the Czech tax system. In the event that a tax is paid behind schedule, a penalty by law (*ex lege*) for every day of delay is added to it. Nevertheless, a Czech tax administrator cannot

fix the penalty at discretion – only in case of discrepancies resulting from enforcement of tax laws or on the ground of penalty rigour remedy, he is entitled to completely or partially remit the penalty in accordance with the article 55a of the TFAA. The application filed within the meaning of the article 55a of the TFAA is ranged among extraordinary legal remedies and therefore, there is no legal claim for compliance with it. In principle, the provision of the article 63 of the TFAA (as amended up to 31 December 2006) is suitable for attainment of the objective, i.e. the timely tax payment, because the longer the tax payer postpones tax payment, the higher is the penalty, which he will have to pay. However, it is not so clear, whether the article 63 of the TFAA (as amended up to 31 December 2006) is also indispensable. From the point of view of the ECJ case-law, it is important to examine, if there exists a more reasonable, but equally efficient instrument. It could be more proportionate to reduce penalty growth rate, but to let it continuously grow throughout the duration of the delay (an effort – even if imperfect – to find such a solution is contained in the new penalization system in force from 1 January 2007). This system would have the same effect as the article 63 of the TFAA (as amended up to 31 December 2006), i.e. the enforcement of timely payment of taxes due. Simultaneously, it would have the advantage that in the case of a short delay, it would be connected with a less intensive property incidence, but in the same time, it would force the debtors being delayed for a long time to settle their tax debts faster. This is important especially due to the fact that after 500th day, the motivation to pay the taxes becomes very low. Another substantial weak spot of the article 63 of the TFAA (as amended up to 31 December 2006, but also of the new penalization system) in relation to the principle of proportionality consists in the fact that the administrative bodies have no space for discretion. Therefore, neither the objective gravity of violation of law, nor the subjective seriousness of delinquency may influence the extent of the sanction. In addition to it, as to the question, whether the article 63 of the TFAA (as amended up to 31 December 2006) is in proportional relation to the purpose in view, it is possible to conclude that this is not the case. The reason consists in a fact that the absence itself of any possibility to take into account individual circumstances of the act and delinquent is to be considered as disproportionate. Another disproportion can be seen in the aforementioned distinguishing between two periods, i.e. between the period up to the 500th day of the delay and the period after that day, which is not based on any objective basis.

In relation to the article 63 of the TFAA (as amended up to 31 December 2006), it is possible to have grounded doubts, whether the legislator have chosen the instrument burdening as minimally as possible, but being equally efficient. As it was several times mentioned, it would be more systematic, if the penalty had a lower rate at the beginning, but continuously increasing up to an absolute maximum level and not – as it is the situation according to the present rules – to anchor a system break from the 501st day. On the other hand, if the large area for discretion of a legislator is taken into account, it is to be stated that although there is not proportional equilibrium within the meaning of the ECHR case-law, there is neither disproportion within the meaning of the ECJ case-law, because as it is known, it does not proceed from intensity of individual recourse.

The new legal regulation of the recourse for delayed payment of the tax, i.e. penalty and interest on late payment effective from 1st January 2007 corresponds by its structure to the systems enforced in other European states. However, in consideration of the fact that after a lapse of five years from the original date of supplementary tax assessment, the resulting cumulated sum of the penalty and interest on late payment amount to more than 100 % of that original supplementary assessment, there are always doubts about proportionality of this new sanction system and its compatibility with the international legal obligations of the Czech Republic.