

## Legal status of a surety in tax proceedings

### Resume

This paper deals with the legal status of a surety pursuant to the Tax and Fee Administration Act and to the applicable Code of Tax Procedure not effective yet. It is generally known that the procedural legal status of a surety in tax proceedings has always been one of the problematic topics for tax administration. It was covered by Section 57, Subs. 5 of Tax and Fee Administration Act No. 337/1992 Coll. as amended, by one paragraph only, which resulted in many disputes, discussions, and last but not least, civil proceedings. This was mostly caused by the fact that standing surety for someone, being one of the securities provided, was ranked in section six, called “*Tax payment*”; however, a surety had never been explicitly stated in legal provisions which related to its legal status. The judicature had always characterised only a principal, not a surety. The surety was explicitly mentioned in the provisions of S. 7, Subs. 2 ZSDP, in which it was ranked as a party to tax proceedings. However, this only meant that *a surety did not have the status of a tax principal or its rights or obligations*, although, by operation of law, it bore the responsibility for any outstanding tax unpaid by the principal, provided such obligation to stand surety was imposed on it and the tax office called upon the surety to cover the outstanding debt. The inequality of the procedural status of a tax principal and its surety resulted in the fact that a surety had no opportunity to influence the existence or amount of the outstanding tax debt and its following surety obligation. Over time, the judicature has significantly amended the interpretation of the surety status in tax proceedings; however, this interpretation was fragmentary and heterogeneous and lasted until the amendment to Act No. 230/2006 Coll., effective from 1 June 2006. Act No. 230/2006 Coll. cancelled the provision of S. 57, Subs. 5 and replaced S. 57 with a new provision, S. 57a, called “*Surety*”<sup>1</sup>. Compared to one paragraph in the former judicature, the new amendment dealt with the status of a surety in tax proceedings in the whole new S. 57a. The amended ZSDP provided by Act No. 230/2006 Coll. did not remove all weaknesses of the then tax surety provisions criticized by the judicature; however, it

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<sup>1</sup> The provision of S. 57, Subs. 5 of ZSDP had been effective from the date ZSDP came into force, i.e. from 1 January 1993 until it was cancelled by Act No. 230/2006 Coll., i.e. to 31 May 2006, for the whole time without any amendment.

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introduced important changes improving the discriminating status of a surety in tax proceedings. The technical amendment to ZSDP introduced a further improvement to the procedural status of a surety (Act No. 270/2007 Coll., which came into force on 31 October 2007). It amended both the provisions of S. 55 Subs. 4 and Subs. 9 of ZSDP (status of a surety in reopened proceedings, if a tax entity died without a heir or ceased without a legal successor), and the provisions of S. 57a of ZSDP (with improved terminology related to definitions such as outstanding debt, withdrawal of the surety's obligation to pay proceedings costs and interest, improvement of the surety status in outstanding debt payment and returning excess payment). The amendment to ZSDP provided by Act No. 296/2007 Coll. as of 1 January 2008 (in the provisions of S. 59 of ZSDP with a newly introduced clause 6 stating that the tax payment pursuant to S. 59, Subs. 5 shall be provided separately for the outstanding tax to be covered by a surety) related to surety. The status of a surety in tax proceedings was considerably changed by the decision of the Constitutional Court, case No. Pl. ÚS 72/06, published in the collection of acts No. 291/2008 Coll. dated 29 January 2008. The Constitutional Court decided that the provision of S. 57, Subs. 5, sentence three of ZSDP in the amendment effective to 31 May 2006 was in contradiction to the Declaration of Human Rights as well as the European Convention on Human Rights. Sentence three of S. 57, Subs. 5 of ZSDP was found contradictory to the Constitution, since: *“A surety can only appeal to the fact that it is not a surety or that the surety was applied in a bigger scope than the one identified by the law or that had already been paid.”* The decision of the Constitutional Court stated in Decision No. 291/2008 Coll. possibly influenced Code of Tax Procedure Act No. 280/2009 Coll., where a surety's appeal was newly interpreted by the provisions of S. 171 Subs. 4 of the Code of Tax Procedure. The surety has now an opportunity to lodge an appeal against the call of the tax office to pay the outstanding debt. The Code of Tax Procedure introduced another important change to the surety status, effective from 1 January 2011, by introducing a voluntary tax guarantee. Actually, a statutory surety becomes a legislative victim at the end of the chain, who can only helplessly wait and see if it has its turn or not. It faces an extremely difficult situation which cannot be affected in any way. The above stated weaknesses of the statutory tax guarantee could be removed by the newly introduced “contractual guarantee”, which could replace the statutory tax guarantee completely in the future.

To sum up, over the last four years, the government has adopted laws which have improved the procedural status of a surety and has recognised the rights of a surety who is being forced to pay outstanding tax for a tax principal.