

## **The Specificity of the Preemption Mechanism to Ensure the Protection of Private Property and the Protection of the Rights of the Public Treasury**

**Hassiba Benkheda**

Faculty of Law Saïd Hamdine - University of Algiers 01, (Algeria)

drhassibabenheda@gmail.com

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### **Abstract:**

Pre-emption is considered one of the reasons for gaining real estate ownership, the provisions of which are regulated in the Civil Code in Articles 794 to 807. It is an authorization that allows taking the place of the buyer in selling the property within the terms and conditions stipulated in the law. It is an authorization that finds applications in the tax field by granting the tax administration discretionary authority in exercising this right against every taxpayer who submits false statements regarding the legal actions he undertakes for the purpose of evading his legal obligations towards the public treasury, which made the legislator expand the scope of application of the right of pre-emption to affect movable property, as well as subjecting commercial stores, shares and parts offered in the company to the right of pre-emption, and this with the aim of combating tax fraud and reducing prices, as well as preserving the rights of the public treasury.

**Keywords:** real estate property; commercial stores; shares, parts in the company; authorization; preemption.

*Corresponding author: Hassiba Benkheda, e-mail: drhassibabenheda@gmail.com*

## **. INTRODUCTION**

The current Algerian constitution (Official Gazette, 2020), like previous constitutions, consecrate the right to private property (Article 60, 2020), which can only be expropriated in accordance with a legal text which stipulates it and specifies the cases, conditions and procedures which must be taken within this scope, in a manner that does not conflict with the protection of this right. The Constitution guarantees this right with a set of guarantees that allow people to enjoy and dispose of their property freely, including purchase, sale, donation and other legal actions...

On the other hand, some people use fraudulent methods when entering into legal transactions, such as the sale or rental of real estate or commercial properties, by submitting false declarations, with the aim of evading their legal obligations towards the State or local authorities, in particular those linked to tax declarations filed with the competent services. Among the forms of tax fraud practiced by taxpayers, we find that linked to registration fees, which are resorted to when filing declarations before the notary who draws up the contracts or when filing them with the Inspectorate of the Registration of the General Directorate of Taxes, and this with the aim of evading the payment of registration fees due to the public treasury, which causes significant funds to escape from the circle of funds intended for the benefit of the State. This is why, in the concern of the public authorities of the State to fight against this phenomenon, which has negative repercussions on financial policy on the one hand and on economic development on the other hand, the procedure of the right of preemption was introduced as a legal mechanism to deal with this negative phenomenon.

If the price declared by the taxpayer is incomplete and low and does not reflect the true commercial value of the sale, and taking into account the subsequent control imposed and practiced by the tax administration on various legal actions, the law grants broad discretion for the administration to use the right of pre-emption, and on this basis we pose the following problem: How is the specificity of the preemption mechanism put in place for the benefit of the public treasury to deal with the phenomenon of tax fraud reflected?

To respond to this problem, the descriptive analytical approach was adopted, thanks to which we know the right of preemption initially established for real estate, as well as the real rights associated with it. Let us then analyze and discuss the new texts in this domain, which expanded the scope of application of the preemption mechanism to the company's shares and parts, which deepens the specificity of this mechanism.

This study is divided into two main axes: the first axis deals with the determination of the rights subject to the right of pre-emption, while the second axis deals with the modalities of exercise of this right.

### **Section one - determining the rights subject to the pre-emption procedure**

By focusing on the text of Article 38 bis 03 of the Code of Tax Procedures, which states in its content the discretionary authority established for the registration authority to use the right of preemption on real estate, real estate rights, shops, customers, or the right to rent or benefit from a promise to rent on all or part of the real estate. The same applies to the company's shares or parts if it appears that the sale price or declared value is insufficient in relation to the actual commercial value, by paying the amount of this price in a bidding of one-tenth (01/10) to those with rights, and it acquires the sold item. It appears to us from this text that the rights subject to preemption are transferred to the State which replaces the buyer, and this is what we will address in terms of defining the concept of preemption right and the basis on which the approval of this right is based on the executive authority which is authorized to exercise it on the basis of a set of justifications which motivated the granting of this right to the authority responsible for tax administration as follows:

#### **First sub-section: The concept of the right of preemption**

In order to highlight the goal behind approving this right to the public treasury, the study requires first stopping at the most important definitions given to the right of preemption in both Islamic law as well as through the general rules contained in the Civil Code, and then clarifying the justifications relied upon for approving this right to the discretionary authority of the tax administration as follows:

**First: Definition of preemption:**

**1- Preemption linguistically:** This comes from al-Shafa', meaning annexation and addition after the request, and you have preempted the thing, means you have joined it to you, so it strengthens and becomes a pair, and preemption - emption is the opposite of Witr. Al-Aswad bin Yazid said: al-Shafa' takes place on the day of Eid al-Adha and Witr is the day of Arafah, and the pre-emption in matters of property is known and it derives from the addition because the thing sold is added to the property of the pre-emptor as if they were one and odd and thus it became a preemption pair (Lisan al-Arab, p.185).

**2- Preemption as a term:** Imam Zain al-Din Ibn Ibrahim, known as Ibn Najim al-Hanafi, defined it and said: It is the ownership of the plot by force on the buyer for what he paid for it (Ibn Najim, p.144).

Some Maliki jurists also defined it as “the right of a partner to take what he compensated his partner for in terms of real estate at the price or value for which he sold it,” and some other jurists also went on to define it as “the right to own the sold property from its buyer for the price he paid, whether he agreed or not (Al-Khafif, 1990, p.27).”

**3- Definition of preemption in civil law:**

Referring to the general rules that govern the right of preemption stipulated in the Civil Code such as the general charia, which defines it as an authorization that allows the buyer to substitute himself for the buyer in the sale of the real estate. This subrogation includes all rights and obligations of the buyer arising from or resulting from the sales contract (Article 794). Whoever declares his desire to take by preemption, in the sales contract, replaces the buyer without his consent, and he is the owner of the property sold and annexes it to his original property (Khalidi, 2014, p.27). This shows us that the Algerian legislator derived the preemption system from Islamic law because it is the material and historical source of the preemption provisions.

The Civil Code (Article 795, of the Algerian Civil Code) also specifies the persons who may exercise the right of preemption, namely the owner of the property, the joint partner if part of the common property is sold to a

foreign party, as well as the owner of the usufruct right. We conclude from what was mentioned above that the right of preemption in the Civil Code was limited to the scope of its application to the property only. Did the tax legislator follow the same approach?

### **Second - Justifications for using the right of preemption**

The right of preemption granted to the tax administration is based on its extreme concern to deal with any attempt at tax evasion which would affect the collection of registration fees due on the various operations linked to the transfer of property. The application of this right is considered a deterrent measure aimed at verifying the correctness of the declarations presented by taxpayers when carrying out various legal actions transferring real estate ownership in exchange for compensation (Circular N°.140/1994, p.21).

The authorization granted to the tax administration to exercise this right is based on the fact that the State replaces any natural or legal person to purchase the property whose price is much lower than its real commercial value (Actual market value). The exercise of this right by the tax administration is not considered as a means for the State to earn money at low prices, but rather as a purely tax dissuasive objective, which is to eliminate price reduction when submitting declarations. If the Tax Administration sees that the declared price is insufficient compared to the real value of the property sold, it has discretionary authority to use the right of preemption without the need to provide any justification or specify the reasons that made it estimate that the declared price is insufficient.

### **Second Sub-section: Expanding the scope of exercising the right of preemption**

Relying on the Tax Procedures Law, which regulates the modalities of exercise of this right authorized to the tax administration under article 38 bis 03 (Article 20, 13/10) aforementioned which authorizes the Registration Department to use, for the benefit of the public treasury, the right of preemption on real estate, real estate rights, commercial stores, or customers, or the right to rent or benefit from a promise to rent on all or part of the property, as well as the shares or parts in a company, in which it deems that the price or value is insufficient. **Through our analysis of its content, it**

clearly appears to us that the tax legislator, unlike the civil legislator, deviated from the general rules applicable to the application of the right of preemption. It has broadened its scope of application to include, in addition to real estate, movable property, which constitutes the particularity of tax law, which extends its scope of application to any commercial store or one of its elements, demonstrating the legislator's concern to preserve the rights of the public treasury of registration rights.

The tax legislator also intervened again to amend the text of Article 38 bis 03 of the Tax Procedures Law by adding a new paragraph related to shares and shares in the company, **pursuant to article 38 of Ordinance No. 15/01 relating to the supplementary finance law for the year 2015, according to which the procedure for preferential subscription rights exercised on the shares and shares of the company was established.**

This new text indicates that the legislator not only granted the registration service authorization to exercise the right of preemption over real estate and the real estate rights associated with it only (*It should be noted here that the aforementioned ministerial circular specifies that the following assets are exempt from the right of preemption: free transfer of real estate property (i.e. donations and inheritances), partitions and exchanges with or without difference in shares, goods sold at administrative or judicial auction if the sale takes place between goods and branches, or between spouses, or between relatives up to the fourth degree, or between in-laws up to the fourth degree*), but that he went further by broadening the field of pre-empted funds which includes, in addition to the commercial store or one of its elements, both parts and shares of the company, all this with the aim of activating tax collection operations and combating the phenomenon of undervaluation and submission of false declarations when concluding contracts before a notary (Bouteghrar, 1998, p. 21). This is what we will address through the following elements:

### **First - Use of the right of preemption in commercial premises**

This right can affect the commercial premises as a whole or only one of its elements, knowing that the customers and the rental right are among the most important elements which make up the commercial premises (Article 78, of the Amended and Supplemented Commercial Code), considering that the right to rent constitutes an essential element in the commercial store because it plays an effective role in attracting customers and clients, which makes it an element sufficient on its own to raise the value of the commercial store and give it greater commercial value. On this basis, if the registration authority finds that the declared price is insufficient due to the control it exercises, it can resort to the right of preemption against the commercial premises or one of its elements and there, the preemption in criminal matters are highlighted in their application to movable property.

### **Second - Use of the right to preemption on the parts or shares of the company**

The company has been defined by civil law, that it is a contract which is attended to bring together more than one person, until the economic object of the contract based on the pooling of funds to carry out the common project is reached (Al-Kilani, 2009, p. 17).

From a legal point of view, the company's establishment process requires the contribution of each partner by providing the share contained in the contract of the company (Al-Masry, 2002, p. 27) stipulated according to the forms mentioned in (article 416 of the Civil Code)," which is either a share in cash, a financial part or a service, because these actions represent the initial financial contribution to the company (Ripert, Roblot, p.02) that we discuss by the following elements:

**1- In the case of the cash share:** The partner is often required to provide a sum of money as a share to contribute to the constitution of the company, knowing that money is considered movable property by nature, and despite this, it is subject to the application of the right of pre-emption, which confirms that the movable property is subject to the right of preemption initially established for the property, which demonstrates the specificity of this procedure in matters of taxation.

**2- In the case of an in-kind share:** A partner may contribute his share in the company with money other than cash, such as offering real estate or a movable property. The property may be a constructed building, a factory, or bare land. This type of share does not pose any problem because the principle of preemption is to be established on the property, as for the movable property, it may be material, such as machinery and goods, or it may be a movable property, according to its fate, after it is separated from the land, such as fruits after they are harvested, or trees after they are cut down to become wood. It may also be an intangible movable property, such as a commercial store, a patent, or a trademark (Fodil, 2009, p. 34).

**3 - In the case of a share in the work:** Where the partner is committed to doing a specific job for the benefit of the company, and the company resorts to this type of share when it wants to benefit from the experience and scientific, administrative, and even technical competence that the partner possesses (Sami Fawzi, 2006, p. 21).

It is clear to us from what was mentioned above that the tax administration can exercise the right of preemption on the shares or stakes in the company. The reason for this is the necessity of protecting the national economy by protecting the investment made by citizens or foreigners and this the reason why the legislator intervened by amending Article 38 bis 03 of the Tax Procedures Law by adding a paragraph specifically about shares and stakes in the company in accordance with the Finance Law of 2015.

### **Third - Applied case: A model of performing the right of preemption in the field of investment**

The right of preemption was applied in the field of investment under the Supplementary Finance Law of 2009, and the reason is the case of the Orascom Construction Company of the State of Egypt, which purchased two cement factories in Algeria in the year 2007 for the purpose of investing in this field. However, this company, without prior warning and without referring to the Algerian authorities, sold the manufacturers to a French company and this without respecting the legal texts and procedures in this field. In return, the Algerian authorities responded to this behaviour with denunciation and total rejection, which prompted them to seek a mechanism



that would allow the Algerian State to have a right of priority over any transfer or concession to and from foreign shareholders. As a result, they reached a solution represented by the need to exercise the right of preemption as a new mechanism developed to preserve the investments it holds in Algeria and benefits from important privileges, incentives and tax facilities (Bahouni, p. 260).

### **Section two – How to exercise the right of preemption**

The Evaluation Team of the Sub-Directorate of Tax Control undertakes the control process by re-evaluating the tax declarations on real estate and commercial properties. If it finds that the declared price is insufficient compared to its true commercial value, it exercises the powers granted to it under the Tax Procedures Law. If it appears to it that the price declared by the taxpayer is insufficient, it asks him, in accordance with the subsequent control it authorizes, to supplement the price. If the tax administration's request is rejected by the taxpayer, it refers it to the state reconciliation commission established for this purpose, in accordance with the provisions of article 38 bis 02 of the law. However, if it notices a significant insufficiency in the declared price, it exercises the right of pre-emption authorized in accordance with the text of article 38 bis 03 of the Code of Tax Procedures. In this regard, Ministerial Circular No. 01/09 of 08/12/2009, emanating from the Minister responsible for Finance and addressed to tax directors and directors of the State domain and land conservation, specifies the rules and procedures to follow to exercise the right of pre-emption.

#### **First sub-section: Procedures that precede the process of using the right of preemption (the lawsuit filed before the state conciliation committee)**

Firstly, it is necessary to determine the composition of the state conciliation commission responsible for examining the tax file in the event of insufficiency, which is made up (Article 38bis/02) of:

- Director of State Taxes as President
- Registration inspector
- Inspector of national real estate affairs
- Collector of various taxes
- Various tax inspectors

- A notary designated by the president of the regional chamber of notaries concerned
- A representative of the state administration

The registration controller performs editorial functions and attends sessions in an advisory capacity. The non-employee members of the committee are appointed for a period of two years and their mandate is subject to renewal, within the scope of respect for professional secrecy. The committee meets when convened by its president and its deliberations are only valid if at least five members are present, including the president.

The committee summons the taxpayers to amicably acknowledge the insufficiency (Article, 38 bis), and this is with the intention of supplementing the price by adding the difference on the net rights and fines. If the taxpayer agrees to this and supplements the price in an amicable manner by means of a submission subscription that is submitted for approval by the administrative authority and this subscription arranges a new contract between Administration and tax filing.

However, if the taxpayer objects to completing the difference amicably assessed by the administration, then he is referred before the committee to take the measures stipulated in the Tax Procedures Law.

The taxpayers concerned will be summoned at least 20 (twenty) days before the date of the meeting and invited to make their declarations or send their written observations. They will also be able to be assisted by a consultant of their choice. If an agreement is not reached between the administration and the taxpayers, either the taxpayers are absent and do not appear before the commission, or they do not send their observations, the commission issues an opinion which is communicated to the taxpayer by registered letter with acknowledgment of receipt. If the taxpayer does not pay the taxes and fines imposed on him within ten days, a recovery bond will be issued against him within the time limits provided by the Registration Law (Article 354 of the Registration Law).

The tax debtor who protests against the sums claimed may submit an objection before the Administrative Court within four months following receipt of the notice relating to the execution bond. The opposition does not

stop the payment of the basic amount of the execution bond, and the fines, financial sanctions and fees remain in force until the decision of the Administrative Court. However, the taxpayer may defer payment of the basic amount invoked if he requests it in his opposition after having determined the amount of the reduction to which he considers himself entitled or determining the tax base.

In addition to these measures, the commission can use more dissuasive powers to protect public funds, since the law authorizes it to impose sanctions on the taxpayer who objects to the insufficiency, or even extend its protection of public funds up to impose penalties even on those who are not personally responsible for this tax, like the notary and any public employee responsible for receiving contracts concerning the real estate.

### **Second sub-section: The basic stages of exercising the right of pre-emption**

The aforementioned ministerial circular specifies the procedures and modalities for exercising the right of preemption by the administration, emphasizing that this authorization concerns real estates, real estate rights, commercial stores, customers, the right to rent, or to benefit from the promise of rental on all or part of the property, for which the declared price is not sufficient, which requires taking administrative measures to deal with the drop in prices and fight against the phenomenon of tax fraud, which involves the following steps:

#### **First - Census of real estate funds subject to preemption:**

This is the role assigned to the registration inspections at the level of the National Tax Directorate, which are responsible for counting the cases in which the price reduction clearly appears and this through the contracts which are subject to registration procedures in its services. They then compose complete files including information relating to the location of the property, its nature, whether individual or collective, and its surface area, its total amount and the financial amount declared during the sale, as well as the evaluation carried out by the evaluation team of the Tax Control Sub-Directorate.

Once the files have been compiled, the files concerned by the right of pre-emption are sent to the State tax director for study, who then decides on the funds which must be subject to the right of preemption and this within a period of time exceeding not more than two months, from the date of submission of the property transfer contract to the Registration Inspectorate.

**Second - compliance with the one-year deadline for reporting:**

The Tax Administration is granted a period of one year, starting from the date of registration of the insufficient contract, to notify the rights holders of the decision to exercise the right of preemption. This period cannot be suspended or extended, and this is with the aim of completing the preemption procedures and not exposing them to lapse, which requires the state director of taxes to ensure that these procedures are completed and within the deadlines. He is also obligated to notify the preemption decision to the buyer or the rights holders by registered letter with notification of receipt, and to include in this decision the administration's commitment to pay the declared price plus a tenth percentage (01/10) of the declared price.

**Third: Transferring the property subject to pre-emption to the state:**

The Director of State Property, as notary of the State and legal guardian of the management of its property, undertakes to pursue the procedures of pre-emption and payment of the price set by the registration services affiliated to the Directorate taxes. Then, the taxpayer disburses the price and prepares the administrative purchase contract on the basis of the file sent to him by his counterpart, the Director of State Taxes (Khaldi, p.148), composed of the following documents:

- A copy of the property transfer contract subject to the right of preemption.
- A copy of the preemption decision issued by the local Tax Director.
- A copy of the decision to be notified to the buyer or beneficiaries.

This file is attached to the administrative contract for the acquisition of the money resulting from the preemption. Accordingly, the Director of State Property of the State issues an order for payment of the specified amount (i.e. the declared price) plus one-tenth, and it is paid to the treasurer of the state fund. State in which the person concerned resides. On this basis, the

deposited money is incorporated into the state's property and is subject to the National Property Law.

This procedure authorized by the Penal Administration allows it to recover real estate funds and commercial stores, as well as the real estate rights linked to them, with the aim of financing the public treasury. It also makes it possible to eliminate the most dangerous phenomenon, which ravages the national economy and loses significant sums to the public treasury, which is the scourge of tax evasion and fraud.

We conclude through this study that this process is practiced exceptionally, since the Registration Service identifies suspicious cases through contracts subject to the registration formality, where funds with significant commercial value are selected based on their location, nature, surface area, declared price and quote provided by the registration office, which is transferred to the commission responsible for selecting the properties subject to preemption and meeting the following conditions: that the restored amount of the properties subject to preemption is equal to or greater than 4,000,000 DZD for built and unbuilt properties and 3,000,000 DZD for commercial premises, and that the difference between the restored value exceeds 50/0 compared to the declared value.

It should be noted that the pre-emption process is carried out in a secret manner, according to which the state replaces the buyer retroactively, and this dangerous procedure is only used in cases of gross fraud.

## **CONCLUSION**

Through this study, we concluded that the right of preemption granted to the tax administration is part of the fight against the phenomenon of tax evasion and fraud, which waste significant sums for the public treasury and negatively affect economic development. However, in practice, this right conflicts with the constitutional principle of protecting private property, as well as the principle of sovereignty of will, which requires freedom of contract between individuals and this is the reason why many countries, particularly developed ones, have worked to eliminate the preemption system as a fiscal and dissuasive measure for the benefit of the public treasury,

including the French law of 1996 following the condemnation of this mechanism by the European Court of Human Rights relying on the text of Article 64 of the Constitution, which stipulates that private property is guaranteed, as well as on the text of Article 22 thereof, which stipulates also that expropriation can only take place within the framework of the law.

From a practical point of view, the question of the application of the right of preemption of the tax administration in favor of the public treasury raises certain contradictions which are part of all the **results obtained, among which we find that:**

- The tax administration is not required to exercise the right of preemption, but it is an authorization and a right that it is entitled to use freely depending on the particular circumstances of each transaction, and this under his discretionary power. It may also be not practice it, which raises the question of tax justice and equality in the selection of files subject to preemption among taxpayers, especially since this affects a right enshrined in the Constitution, which is the right to the protection of private property. In other words, granting the tax administration the discretionary power to freely use this right implies the possibility of using this authorization arbitrarily by selecting certain taxpayers equal in status by applying to them the right of pre-emption, by depriving them of their property, and by exempting other taxpayers by not applying preemption to them despite its conditions being met, which constitutes a violation of the constitutionally enshrined principle of equality before tax. The use by the legislator in the text of article 38 bis 03 of the Code of Criminal Procedure of the expression "may" opens up the possibility of exercising this power according to his good will, that is to say the possibility of applying it against a taxpayer and not applying it to another taxpayer who benefits from the same conditions, noting that leaving this margin of discretionary power to the administration opens the door to arbitrariness and selectivity on his part.

- The use of the right of pre-emption by the tax administration can involve the Public Treasury, which finds itself pre-empting each time the conditions for offenses committed by taxpayers are met. This authorization causes it to become preemptive for the benefit of the public treasury, which can lead to

unfavourable results by depleting the funds of the public treasury by purchasing the funds resulting from the preemption, instead of preserving them.

- The use of the right of pre-emption contradicts one of the most important principles that govern the tax base, which is the principle of economy of expenditures established by Adam Smith, which stipulates that the money spent by the tax administration in order to collect taxes must be less compared to the value of the taxes collected.

- The right of preemption authorized for the benefit of the public treasury remains a dangerous measure that affects the constitutionally guaranteed right to private property.

Based on the results obtained from this study, the following suggestions can be given:

- If the preemption procedure is an admissible mechanism authorized by the tax administration, which has discretionary power to use it or not depending on the case, then the legislator must intervene and resolve this issue by establishing legal texts which specify the conditions and terms of application of this mechanism according to specific controls and standards to ensure the protection of private property on the one hand and the protection of the public interest of the public treasury on the other hand.

-The tax administration's enjoyment of the privileges of public authority gives it the authority to use other alternatives to force taxpayers to pay their financial dues, such as seizure, or activating the procedures of Article 38 bis 02 instead of resorting to exercising the right of pre-emption that affects private property.

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