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of the article: The principle of proportionality and the discretionary power of public administration in the light of the Polish administrative court decisions

The contemporary administration may not function without the statutorily awarded „freedom of decision", following the German terminology referred to as „discretion" although the proper term should rather be „administrative discretion" or, adapting the French and English terminology „discretionary power of public administration" – contrary to the statutory binding force excluding all discretion. Apart from the traditional discretion, Poland has seen the development – following the Community law – of the new formulae of „freedom of decision" related to the developing function of public authority referred to as the regulation of imperfect and at the same time socially sensitive markets. These formulae, if interpreted literally as in the case of Art. 77 of the Telecommunication Law, may mean that the authorities enjoy full discretion in making decisions which must be recognised as inconsistent with the principle of legalism expressed in Art. 7 of the Polish Constitution.

Substantially it was beyond doubt that courts might control the decisions made in the area of discretionary power from the perspective of compliance with the administrative procedure, but the very nature of discretion traditionally excluded verification if the decisions made by exercising discretion were consistent with the substantive law. Various legal systems have gradually developed in the decisions

of their administrative courts certain specific substantive-law criteria of „internal" legality of such decisions; in France this was achieved with the use of the „*detournement de pouvoir*" and in Poland, since 1981, the principle of „*Art. 7 of the Administrative Procedure Code"*. Nowadays, following the Community law and the legal standards of the Council of Europe, the role of the substantive-law delimiter of the discretionary power of administration is played by the principle of proportionality that for a long time has been developing in the decisions of the Prussian and then German courts.

This article discusses the extent to which the principle of proportionality – several years ago recognised by the Constitutional Tribunal as the constitutional principle of law-making – is taken into account as the principle of application of law by Polish courts, and in particular the administrative courts. Polish judges, in particular following Poland' s accession to the EU, show they are generally familiar with this principle which does not mean that it has already reached a position in the application of law that it has in the process of application of law in the „old" EU Member States; its more general application is hindered by the tradition of textualism and formalism and its relation to principle of „*Art. 7 of the Administrative Procedure Code"* has not been sufficiently clarified. Progress is clear but we are still far from the general recognition of the principle of proportionality as the substantive-law norm of application of law.

Summary

of the article: On settling controversies regarding legal succession of heirs in the Polish tax regulations

The institution of legal succession in tax law has existed since 1 January 1998. It causes many controversies in the legal literature and is the source of contrasting judgements. The legislator and the Constitutional Tribunal have attempted to remove these controversies by successive amendments to the Tax Code. However, the method the legislator uses to remove them has not always been appropriate. Granting to the heirs their individual rights in doubtful cases may be justified e.g. the right to extinguish tax liabilities, lift certain time limits of tax law under Art. 97a or Art. 67c.2 of the Tax Code, but also controversial (e.g. granting to the heirs their individual right to make an appeal, complaint or grievance to an administrative court under Art. 103.2 of the Tax Code), first of all because such solutions undermine the very construction of general legal succession regulated in Art. 97.1 – 97.4 and Art. 133.1 of the Tax Code. It would be desirable to see a general principle of legal succession for the heirs of a withholding agent or an acquirer of inheritance. In the latter case the legal succession of an acquirer of inheritance is provided for in Art. 1053 of the Civil Code, but through the legal construction of a reference included in Art. 98.1 of the Tax Code we only obtain in the tax law the legal succession of an acquirer of inheritance to a singular extent i.e. assumption of liability with the transferor of joint and several nature under Art. 1055.1 of the Civil Code.

It is necessary to record here the positive role of the judicial decisions made by the administrative court for the understanding of the term „the property rights and obligations of a testator". These are, for example, the following judgements discussed in the article: the judgement of the VAC in Gorzów Wielkopolski dated 13 March 2008, file I SA/Go 477/07 upheld by the judgement of the SAC dated 16 December 2009, file II FSK 1163/98 or the judgement of the VAC in Gliwice dated 24 April 2008, file I SA/Gl 74/08 related to the earlier appropriate opinion of the SAC included in the decision dated 21 November 2007, file II FSK 1258/ 06.

Summary

of the article: Tax residence in the Polish and German national tax laws – comparative study

Poland's joining the European Union on 1 May 2004 and later the Schengen Area in December 2006 resulted in the simplification of the travel requirements and later removal of systematic border controls between Poland and the neighbouring EU Member States. This provided a significant boost to both the economic ties between Poland and Germany and the personal contacts between Polish and German nationals. A significant factor in this process is the geographical proximity of the two countries and their shared border.

In this context, the question arises whether an individual taxpayer should be liable to unlimited taxation in Poland or in Germany. The wide spectrum of possibilities here ranges from the horror of double taxation, which would have a most adverse effect on the economic links between the two countries, to a blissful vision of being able to steer clear of any liability for taxation whatsoever.

Summary

of the article: The procedural problems of applying Art. 33 and 34 of the Act on the Institute for National Remembrance – the Commission for the Prosecution of Crimes Against the Polish Nation

The Act on the Institute for National Remembrance – the Commission for the Prosecution of Crimes Against the Polish Nation of 18 December 1998 (Journal of Laws of 2007, No. 63 item 424, as amended) (hereinafter the Act) brought to life a new public administration authority – the Institute for National Remembrance – the Commission for the Prosecution of Crimes Against the Polish Nation (hereinafter INR). Its functions include, among others, the tasks related to collecting and making available documents on the functioning of the security authorities in the Peoples; Republic of Poland. For this purpose the INR created a special archive, separated from other archives. It is subordinated solely to the President of the INR who grants access to the documents stored in this archive on the terms and conditions set out in the Act.

The Act provides for a two-phase procedure of granting access to the material stored in the INR's archive. A person interested in reviewing these documents must submit, under Art. 30.1 of the Act, an application to be granted access to the copies of the documents pertaining to him or her generated by the security authorities in the Peoples; Republic of Poland. The application is evaluated by the INR who then grants to the applicant access to the relevant documents in the form of a copy with blacked out personal data of third parties. If the applicant were an employee or an informer of the secret services in the Peoples; Republic of Poland, he or she will not be granted access to the documents he or she generated. In the second phase of the proceedings the person who satisfies both the following conditions: 1) was granted access to the copies of documents under Art. 30.1 of the Act and 2) satisfies the conditions set out in Art. 31.1 in connection with Art. 33.2 of the Act i.e. there exist no documents generated by him or her in the course of his or her employment or service with the security authorities in the Peoples; Republic of Poland or the activities of a secret informer or assistant in the course of the operative collecting of information, may submit a few applications to be granted

further access to information and documents in the INR's archive. The method the INR has been handling cases at the second phase of the proceedings is problematic.

Analysis of the Act and the principles of administrative procedure show that the requested documents or items are released in the form of a substantial-technical action, while the refusal to release the documents or items has the form an administrative decision. An administrative decision issued in the second instance may be appealed against to an administrative court and is considered in the usual procedure. However, in the case of a complaint about inactivity of an authority, it may be brought irrespective of an earlier request to such authority to remedy the breach of law.

Summary

of the article: Exemption from VAT and the principle of neutrality – the aspect of judicial decisions

1. The article presents the judicial decisions of the ECJ on exemptions from VAT. The author emphasises differences in the interpretation of regulations providing for exemptions, depending on the effect of an exemption on the system of VAT deductions and the degree of implementation of the principle of neutrality.

The neutrality of imposition of VAT is the variable determining the understanding of the individual exemptions provided for in the VI Directive and Directive 112. Exemption from VAT should not be perceived solely as a tax privilege. An exemption may restrict competition as well as violate the principle of neutrality. These phenomena and the way to counteract them are coupled with the need to apply the „autonomous notions of the Community law" and the contents of the ECJ' s interpretative guidelines

Due to the role of the exemptions from VAT and other taxes, in particular due to the profits earned by an entity on whom VAT is levied, exemptions from VAT are not always beneficial for the taxpayers.

The author analyses the „principle of legality" and its interpretation by the ECJ and the national courts.

2. The Polish courts have generally accepted the above mentioned principles concerning VAT. These principles are based on the assumption that the terms and conditions of applying exemptions set out in the national regulations of the Member States may not exceed what is necessary to ensure the proper tax collection and avoiding tax frauds. The Administrative Courts, interpreting the institution of exemptions, emphasise both the contents of the institution and the purpose and application of the individual elements of a relief: depending on the type of a case.

3. The problems related to the application of the Community law the Polish courts face concern the lack of official translations of the decisions made prior to the accession date (and certain also thereafter), the differences in translations of the individual language versions, the difficulties resulting from following the guidelines included in the judgements of the ECJ in the matters heard by Polish courts due to the separation of the legal systems. These are important problems due to the fact that the ECJ's judgements may serve as precedents and show a specific direction of interpretation of the Community law. This in turn will allow such understanding of the national law that its result is consistent with the Community legal order.