SPIS TREŚCI

STUDIA I ARTYKUŁY

ORZECZNICTWO

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Summary

of the article: **Do the administrative courts apply the provisions of substantive law?**

This article attempts to answer the question whether the Polish administrative courts apply the substantive law. Explaining the essence of this question the author finally concludes that the provisions of the Law on Proceedings Before Administrative Courts allow the administrative courts to perform this task to a very narrow extent. The administrative courts' decisions are in principle of the nullifying nature i.e. when the court allows a complaint the challenged act is removed from the system of law (the court reverses or declares it null and void) or adjudicates on the ineffectiveness of the challenged action.

The authorisation for the administrative courts to make the merit-based decisions stems from Art. 146.2 and 154.2 of the Law on Proceedings Before Administrative Courts. Under Art. 146.2 in the cases referred to in Art. 146.1 (when the court allows the complaint against an act or action referred to in Art. 3.2.4 and 3.2.4a of the Law on Proceedings Before Administrative Courts by reversing the act or written interpretation of the tax law provisions or declaring the action null and void), in the judgement the court may acknowledge the right or obligation stemming from the provisions of law. Under Art. 154.2 upon receiving a complaint with the demand to fine an administrative authority for the failure to perform a judgement allowing the complaint on the inactivity or excessive duration of proceedings and when the authority is inactive or it conducts the proceedings with excessive duration after the judgement reversing or declaring an act or action null and void, the court may adjudicate on the existence or non-existence of the right or obligation if the nature of the case and the circumstances of its factual and legal status that do not give rise to reasonable doubt permit.

Making decisions as to the merits of the case, also in the matters determined by virtue of the administrative decisions is supposed – in the author's opinion – to ensure the additional protection to the complaining party by the binding determination of its legal situation. Exercising jurisdiction understood this way is justified by the effectiveness of the court control of the public administration and it does not preclude, in certain exceptional cases, replacing the public administration authority – in a specific legal form – in performing its statutory roles.

Summary

of the article: **A party to the proceedings to grant a construction permit**

This article presents the issue of a party to the proceedings to grant a construction permit being a type of administrative proceedings. The definition of a party to the proceedings is included in Art. 28 of the Administrative Procedure Code that served as the basis for the theory of the objective capacity of a party to the proceedings and the theory of the subjective capacity. According to the proponents of the theory of objective capacity a party to the proceedings is a category from the domain of substantive law and an authority verifies its capacity prior to instituting the administrative proceedings. According to the proponents of the theory of subjective capacity, a party to the proceedings is a category from the domain of procedural law and any person filing an application to an administrative authority is a party to the proceedings.

Until recently in the practice of the administrative authorities the parties to the proceedings to grant a construction permit were deemed the owners and the holders of the right of perpetual usufruct of the real properties adjacent to the investment. The Act dated 27 March 2003 thoroughly amended the Construction Law narrowing the scope of the entities enjoying the status of a party to the proceedings to grant a construction permit. Amended was Art. 28 of the Construction Law by adding the term „area impacted by the structure". Under this provision the parties to the proceedings to grant a construction permit are: the investor and the owners, holders of the right of perpetual usufruct and managers of the real properties located in the area impacted by the structure. This provision specifies Art. 28 of the Administrative Procedure Code and may not be interpreted extensively.

It must be considered if the investor has a specific title to demand that it is granted the construction permit or if the substance of this depends on the outcome of the administrative proceedings. The title to demand the granting of a construction permit may be invoked from the right to develop formulated in Art. 4 of the Construction Law. The other parties to the proceedings to grant a construction permit have the legal interest entitling them to act in the proceedings to grant a construction permit. These parties enjoy the passive procedural capacity to which there will apply the concept of the so-called reflexive right developed in the doctrine.

The term „area impacted by the structure" introduced by the 2003 amendment is a source of a particular interpretative problem. The structure's impact should be understood as the potential restrictions in the development of the adjacent plots of land resulting from the intended investment. The „area impacted by the structure" is designated by an administrative authority based on the generally applicable laws and regulations, including, without limitation, the technical-construction regulations. The proper designation of this area determines the proper designation of the parties to the proceedings to grant a construction permit. The author supports the view that the amended Construction Law grants to the parties to the proceedings (except for the investor) the objective procedural capacity because it is the administrative authority who decides on the basis of the generally applicable laws and regulations who is a party to the proceedings to grant a construction permit. This view was expressed in the judicial decisions of the administrative courts and in the literature.

The 2003 amendment to the Construction Law was supposed to accelerate and facilitate the investment process by narrowing the scope of parties to the proceedings and the number of their complaints and appeals. The desire to protect the investor's interests prevailed. However, the adopted solutions failed to meet all the expectations.

Summary

of the article: **The legal limitations in implementing investments in the Natura 2000 areas**

This article presents the legal grounds for delimiting the Natura 2000 areas under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ L 363, 20.12.2006, p. 368) and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, p. 7) and the Nature Protection Act dated 16 April 2004 (J.L. of 2009, No. 151, item 1220, as amended), as well as the grounds for conducting the environmental impact assessment under the Act on Disclosing Information on the Environment and Its Protection, Public Participation in

Environmental Protection and Environmental Impact Assessments dated 3 October 2008 (J.L. of 2008, No. 199, item 1227, as amended).

In practice the assessment of the effects of the Natura 2000 areas on the environment may have four variations, firstly in the course of the proceedings to determine the environmental constraints to the project implementation in the course of which the effects of the intended project on the Natura 2000 areas should be assessed, secondly when the project implementation does not require determining the environmental constraints of its implementation, but it may potentially have a material impact on this area, such assessment may be conducted in the course of the proceedings to issue the decision providing the basis for its implementation, thirdly such assessment may be conducted in the course of the proceedings to grant, acting under Art. 34.1 of the Nature Protection Act, a permit to implement an investment which may have a material adverse impact on the Natura 2000 areas for the reasons of the overriding public interest. Fourthly, the environmental impact assessment, including the assessment of impact on the Natura 2000 areas, may be conducted once again under Art. 88.1 of the Act on Disclosing Information on the Environment and Its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments

The next part of the article refers to the provisions of Art. 96.1 of the Act on Disclosing Information on the Environment and Its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments specifying the scope of the obligation to assess the impact on the Natura 2000 areas. Art. 96.1 refers to a potential material impact while Art. 34.1 of the Nature Protection Act refers to a material adverse impact on the environment being a qualified form of material environmental impact. The author concludes that if the above mentioned provisions refer to the „material" and, respectively, „material adverse" impact on the Natura 200 areas, therefore if the scope of the projected impact does not reach such level, then the impact does not need to be assessed individually, even if the impact itself will occur in practice.

Summary

of the article: **Taxes and other public levies – the basic constitutional terms**

This article attempts to create a coherent network of terms concerning the public levies used in the Constitution of Poland. The Polish Constitution uses the terms known from the judicial decisions and the financial law doctrine such as „public levy" or „tax" (Art. 84 and Art. 217). When construing the Constitution, and in particular its guaranteeing norms, another construction method must be used i.e. these terms must be interpreted extensively. This will result in strengthening the legal certainty of the individuals – the supreme value from the constitutional point of view.

In the light of the financial constitutional norms the basic terms are the „public levies" which include pecuniary performances provided in order to allow the state to discharge its constitutional and statutory obligations. The levies do not include any cash penalties and administrative sanctions, given that the latter are charged in order to impose a financial burden resulting from the violation of the prevailing legal order. The constitutional term „public levies" should not be construed on the basis of the statutory definitions of this term, in particular these used in the Act on Public Finance. As a result of such an interpretative attempt a statutory modification of the definition of „public levies" might lead to the changed scope of application of the constitutional norms.

The most important category of „public levies" are the taxes referred to in Art. 84 and 217 of the Constitution. The 1997 Constitution treats this term as the so-called inherited term – its normative substance was determined before the effective date of the Constitution and has been used in this specific meaning in the process of interpretation and application of the constitutional norms to date. The term „taxes" should be understood substantively and it should be verified from time to time if the relevant pecuniary performance is gratuitous, obligatory and non-refundable.

The other public levies include – frequently adjudicated on by the Constitutional Tribunal – fees which are chargeable performances. Incurring these fees involves a counterperformance by the state more or less equivalent to the burden carried by an individual. In the light of the Constitution levies include the customs duties, subsidies and grants, social security and health insurance premiums.

Summary

of the article: **Instituting the proceedings to declare the expiration of a decision that became groundless (Art. 258.1.1 of the Tax Code)**

This article attempts to answer the question if the proceedings to declare the expiration of a tax decision may be instituted at the request of a party or only by virtue of law. The author believes such proceedings may be instituted also at the request of a party.

Under the Tax Code a tax authority decides on the expiration of its earlier decision when, among others, such decision has become groundless (Art. 258.1.1 of the Tax Code). Traditionally the reason for a decision becoming groundless is in particular the situation when one of the elements of the legal relationship being the object of the decision has ceased to exist. This happens when the legal existence of rights or obligations being the substance of the legal relationship shaped by the decision has ceased. The tax authority declares that its decision has expired following the appropriate proceedings in this respect.

The statutory provisions do not explicitly specify the procedure of instituting the proceedings to declare the expiration of a decision. It is beyond doubt that such proceedings may be instituted by virtue of law given that there are no provisions requiring a party's request or at least its consent. The question is whether such proceedings may be instituted at the request of the party concerned.

The author is of the opinion that such proceedings may be also instituted at the party's request and justifies her position invoking the analogy to the other provisions regulating the elimination of decisions from the legal turnover beginning with the reopening of the proceedings and declaring the decision invalid and ending with Art. 253, 253a and 254. All these procedures may be instituted not only by virtue of law but also at the party's request. As regards declaring a decision invalid, which is also a method of eliminating the decision from the legal turnover, the procedure of instituting the proceedings was not specified. The author has identified a gap which must be closed by legal analogy.