NACZELNY SĄD ADMINISTRACYJNY

ZESZYTY NAUKOWE Sądownictwa Administracyjnego

dwumiesięcznik

rok X nr 6 (57)/2014
Warszawa 2014

WYDAWCA
Naczelny Sąd Administracyjny

Korekta: *Justyna Woldańska*

ADRES REDAKCJI
Naczelny Sąd Administracyjny
00-011 Warszawa, ul. G.P. Boduena 3/5
tel. 22 826-74-88, fax 22 826-74-54, e-mail: msawicka@nsa.gov.pl

ISSN 1734–803X
Nr indeksu 204358

„Zeszyty Naukowe Sądownictwa Administracyjnego" znajdują się w wykazie czasopism punktowanych przez Ministerstwo Nauki i Szkolnictwa Wyższego na potrzeby oceny parametrycznej jednostek naukowych.
Liczba punktów za publikację wynosi 6.

W celu upowszechniania za granicą opracowań ukazujących się w „Zeszytach Naukowych Sądownictwa Administracyjnego" (ZNSA) Wydawca uzgodnił z redakcją „The Central European Journal of Social Sciences and Humanities" (CEJSH) internetową publikację ich streszczeń w języku angielskim.

Wersją podstawową (referencyjną) czasopisma jest wersja papierowa.

LexisNexis®

LexisNexis Polska Sp. z o.o.

Adgar Park West, Al. Jerozolimskie 181, 02-222 Warszawa
tel. 22 572 95 00, faks 22 572 95 68
Infolinia: 22 572 99 99
www.lexisnexis.pl.; e-mail: biuro@lexisnexis.pl
Księgarnia Internetowa dostępna ze strony www.lexisnexis.pl

Druk ukończono w grudniu 2014 roku. Nakład 1000 egz.

SPIS TREŚCI

STUDIA I ARTYKUŁY

ORZECZNICTWO

KRONIKA

BIBLIOGRAFIA

TABLE OF CONTENTS

STUDIES AND ARTICLES

JUDICIAL DECISIONS

Summary

of the article: **Resolutions of the Supreme Administrative Court adopted in the years 2012–2013**

Legislative activity of the SAC in the years 2012–2013 includes 50 resolutions and 7 other decisions (refusal to adopt a resolution or taking over cases for consideration). Compared to the previous period, it is characterised by a significant increase in adopted resolutions (in the years 2009–2011, the SAC adopted 38 resolutions). In the period under consideration, motions of entities entitled to institute procedures of abstract resolutions constituted the majority of motions to adopt a resolution for the first time since 2004. It should be emphasised that a considerable part of these motions pertained to important legal regulations, the application of which caused discrepancies in decisions of administrative courts. Thus, their explanation should lead to a significant improvement of the quality of the judicial practice with regard to the scope of these resolutions. The wording of the analysed specific resolutions indicates that the adjudication panel of the SAC was very careful while deciding on the need to use the institution of resolutions. There is no doubt that great prudence at putting forward a motion to adopt a specific resolution shows that the procedure is treated as exceptional as well as is a sign of a correct belief that consideration of means of appeal (cassation appeals and complaints) is also an important legal measure aiming at the fulfilment of duties of the SAC related to judicial supervision.

The subject of the resolutions under consideration included also legal issues related to provisions governing the proceedings before administrative courts, however, these issues were tackled less often than in previous years. It was undoubtedly influenced by a large number of resolutions adopted in the previous period which, among others, explained a number of important legal issues concerning the judicial administrative procedure and resulted in the harmonisation of the judicial practice in this respect.

In the period under consideration, the SAC took into account decisions of the Constitutional Tribunal and the Court of Justice of the European Union to a great extent while explaining legal issues. It referred very often to provisions of the Constitution of the Republic of Poland. The wording of some of the analysed issues indicates that the interpretation adopted there was mainly a consequence of applying constitutional norms.

The analysis seems to confirm the conclusion reached in studies mentioned in the introduction to the article that the regulation adopted in the proceedings before administrative courts sets proper boundaries of the activity of adopting resolutions. The interpretation of prerequisites for launching the procedure of adopting resolutions set by the SAC, which was almost entirely observed by competent adjudication panels of this Court, had an important influence on the practice in this respect.

Summary

of the article: **Legal nature of financial corrections and decisions specifying the amounts of funding to be returned**

Distribution of financial means within the European Union requires proper control of their use by beneficiaries in order to ensure safety of financial interests of the EU. When concluding a co-financing agreement the beneficiaries of the EU public aid have to take into account potential risk of returning these means if any "irregularity" of their use is identified. So far, the practice of applying regulations governing rules for making financial corrections and decisions specifying the amounts of funding to be returned has been divergent. The most important conclusion of this study is that the determination and the imposition of a financial correction referred to in Art. 26 section 1 point 15a of the Act of 6 December 2006 on the Principles of the Development Policy-Making (Dz.U. [Journal of Laws of the Republic of Poland] of 2009 No. 84, item 712, as amended) do not occur on the basis of an administrative decision. At the same time, the authors challenged the view accepting the civil-law way of verifying financial corrections before general courts.

The solution from Art. 207 section 1 *in fine* of the Public Finance Act of 27 August 2007 (Dz.U. of 2013, item 888, as amended), providing for charging interest starting from the day of transfer of means in the same amount as in the case of tax arrears, was criticised. This solution does not include circumstances beyond control of the party resulting in long-term proceedings on the case (such as the prerequisites indicated in Art. 97 § 1 of the Code of Administrative Proceedings resulting in suspending the proceedings). In many cases beneficiaries awaiting the final decision on their administrative cases – the return of the funding granted as EU public aid – are obliged to incur long-term costs of the waiting period, which is usually completely beyond their control, by payment of the interest (just as in the case of tax arrears), the amount of which can exceed the principal sum upon completion of the proceedings.

Summary

of the article: **Taxation of scriptural money constituting the subject of a loan (selected issues)**

The adoption of a basic loan construction resulting from the wording of Art. 720 of the Civil Code (hereinafter referred to as: CC) is not decisive with regard to many secondary issues, including the imposition of tax on civil-law transactions on a loan agreement (Act of 9 September 2000 on Tax on Civil-Law Transactions, Dz.U. [Journal of Laws of the Republic of Poland] of 2010 No. 101, item 649, as amended – hereinafter referred to as: ATCLT). In times when the legal construct of the loan agreement was being shaped, money existed in material form only.

A constant development trend of modern financing and lending forms is visible, where scriptural money plays an increasing role. It appears that the world will take another step forward towards the dematerialisation of money in the near future and will completely give up cash in favour of abstract money in the form of records on bank accounts and electronic money. These circumstances cannot be ignored in the analysis of Art. 720 CC.

Scriptural money can be the subject of a loan. The wording of Art. 720 § 1 CC indicates that "monetary units" expressing an economic value are the subject of a loan and that it is possible to use various payment forms in the case of a financial loan (in cash, via bank or electronic transfer). This means that also scriptural money, i.e. monetary units (as distinct from token money, i.e. cash – coins and paper notes), can be the subject of a loan.

According to some opinions a financial loan agreement is subject to tax on civil-law transactions if the property right which is the subject of the loan agreement is exercised on the territory of the Republic of Poland. Then, it is necessary to apply Art. 1 section 4 point 1 *in fine* ATCLT in order to assess the occurrence of tax liability – because a property right is the subject of the loan agreement. As a consequence, it is necessary to analyse where the agreement as such, binding the parties within a specified time limit, is "exercised," instead of solely carrying out the liability arising upon conclusion of the agreement.

However, the source of misunderstandings is the thesis that the wording of Art. 720 CC pertains allegedly only to a certain amount of token money. Money is yet an item *sui generis*, the value of which does not result from its physical properties, but from the designation and guarantee provided by the state.

There is a need for uniform treatment of loan agreements in the case of use of money, irrespective of its legal form. Electronic money is a substitute for cash and has the same functions due to the same (model) features, including the unit of account and legal tender.

So, assuming that a financial loan can be provided not only by handing over a specific amount of token money to the borrower, but also by transferring to the borrower a specific amount of money in any available form, including electronic transfer of scriptural money, it should be assumed that this action is subject to tax liability (according to Art. 1 section 1 point 1 (b) ATCLT).

Principles of the market economy, as well as the principle of equality before the law arising from Art. 31 of the Constitution require granting equal rights and the imposition of equal obligations on all entities pursuing business activities which provide loans for each other in various ways.

Thus, the loan agreement is subject to tax on civil-law transactions no matter how it is exercised and how the money is given. The tax liability arises upon conclusion of the agreement and by virtue of law. It is important that on the day of conclusion of the agreement a given entity was the owner of monetary units on a bank account maintained by a bank institution with its registered office in Poland, which means that the subject of the agreement was on the territory of Poland on the day of conclusion of the agreement. This circumstance is of key importance for deciding on the issue of imposing tax on civil-law transactions.

Summary

of the article: **The scope of judicial review in cases concerning complaints to levy a fine on a body due to the failure to comply with a judgement of an administrative court**

The aim of the article was to provide the answer to the question concerning situations in which the administrative court is obliged to give judgement stating the failure to comply with a judgement of an administrative court. The analysis of provisions of the Act of 30 August 2002 – Law on Proceedings before Administrative Courts (LPAC) and of the opinions of the doctrine led to the conclusion that the discussed complaint against the failure to comply with a judgement of an administrative court constitutes, in fact, a complaint aiming at disciplining public administrative authorities to implement valid judgements of administrative courts. The scope of Art. 154 § 1 LPAC is, however, limited and refers only to such cases of „failure to comply with" a judgement of an administrative court, in which a public administrative authority is inactive or the proceedings after the court's judgement last too long.

In the case of a complaint against the failure of a public administrative authority to comply with a judgement of an administrative court, including a complaint against inactivity or too long proceedings, the administrative court is obliged to assess whether the administrative authority exceeded the period specified in the judgement, referred to in Art. 149 § 1 LPAC, counted – according to Art. 286 § 2 LPAC – starting from the delivery date to the authority of administrative files after the judgement had been validated. Whereas in the case of complaints against inactivity of an administrative authority or too long proceedings after the annulling judgement or judgement stating invalidity of an act or action, the scope of the court's control will depend on the request of the complainant. So, in the case of complaints against inactivity of an authority after the annulling judgement or judgement stating invalidity of an act or action, the court is obliged to control the timelines of the undertaken actions, i.e. to answer the question whether the act was issued or the action was undertaken within the period specified by the law. While in the case of complaints against too long proceedings carried out by an authority after the annulling judgement or judgement stating invalidity of an act or action, the court's role consists in the assessment of validity of the actions undertaken by the authorities in order to decide whether they are/were necessary to end the case.

It is also possible to lodge a complaint against the failure to comply with a court's judgement repeatedly, however, this rule is not applicable, if the court dismissed a complaint against the failure to comply with a judgement before, due to the compliance of the administrative authority with the judgement.

Summary

of the article: **Withdrawal of the application to award an academic degree vs. public interest clause in the light of the Law on Academic Degrees and Title and Degrees and Title in the Arts**

The aim of this article is to present issues related to withdrawal of the application to award an academic degree taking into account conditions resulting from the public interest clause contained in Art. 105 § 2 of the Code of Administrative Proceedings (Act of 14 June 1960, Dz.U. [Journal of Laws of the Republic of Poland] of 2012, item 267, as amended), which is applicable in the proceedings with regard to awarding the academic degree of a doctor and doctor with 'habilitation' [a post-doctoral degree] under Art. 29 section 1 of the Law on Academic Degrees and Title and Degrees and Title in the Arts (Act of 14 March 2003, Dz.U. No. 65, item 595, as amended).

The fundamental question posed in the article concerns the issue of the faculty council (equivalent body) being bound by the statement of the candidate for a degree about his/her withdrawal of the application to award an academic degree which, causing controversies, can result either in the refusal to award the academic degree or in the termination of proceedings for its conferment.

The analysis of all issues in the area provided arguments indicating that accepting the situation when a statement about the withdrawal of the application to award an academic degree due to negative reviews of academic achievements (doctoral dissertation) is approved and proceedings in such cases are terminated opens up a possibility to take advantage of "the boon of academic tourism" and is not only not compliant with the clause of public interest governed in such cases by provisions of the Law on Academic Degrees and Title as well as the Law on Higher Education, but it is also contrary to the general clause of good manners in science. As a result, it has been assumed that the statement about withdrawal of the application to award an academic degree should be considered in such situations not binding, and the proceedings for conferment of an academic degree should be continued and end with a decision in the form of a resolution of the faculty council on the refusal to award the academic degree, preceded by a decision to refuse to terminate the proceedings in this case.