

NACZELNY SĄD ADMINISTRACYJNY

ZESZYTY NAUKOWE

Sądownictwa

Administracyjnego

dwumiesięcznik

rok XV nr 6 (87)/2019

Warszawa 2019

WYDAWCA
Naczelny Sąd Administracyjny

KOMITET REDAKCYJNY

REDAKCJA

REDAKTOR NACZELNY prof. dr hab. Janusz Trzcíński
ZASTĘPCA REDAKTORA NACZELNEGO prof. dr hab. Andrzej Gomułowicz
SEKRETARZ REDAKCJI mgr Małgorzata Sawicka-Jezierczuk (e-mail: msawicka@nsa.gov.pl)

RADA PROGRAMOWA

CZŁONKOWIE

prof. dr hab. Barbara Adamiak, dr Stefan Babiarez, prof. dr hab. Wojciech Chróścielewski,
dr hab. Jacek Chlebny, mgr Irena Chojnacka, prof. dr hab. Roman Hauser,
dr Andrzej Kisielewicz, prof. dr hab. Andrzej Skoczylas, sędzia NSA Maria Wiśniewska,
prof. dr hab. Zbigniew Witkowski, prof. dr hab. Andrzej Wróbel,
prof. dr hab. Marek Zirk-Sadowski

MIĘDZYNARODOWI CZŁONKOWIE

Dr., Dr. h.c. mult. Eckart Hien, Dr. Univ.-Prof., Clemens Jabloner,
Prof. JUDr Jan Filip, Sędzia Olof Olsson, Prof. Dr. Dr.h.c.mult. Rainer Arnold,
Prof. dr Georges Ravarani, Prof. dr hab. Virgilijus Valančius

*

redaktor tematyczny dr hab. Wojciech Piątek
redaktor językowy mgr Justyna Woldańska
redaktor statystyczny dr Michał Szwast

ADRES REDAKCJI

Naczelny Sąd Administracyjny
00-011 Warszawa, ul. G.P. Boduena 3/5
tel. 22 551-67-25, e-mail: msawicka@nsa.gov.pl; www.nsa.gov.pl/zeszyty-naukowe.php

© Copyright by Naczelny Sąd Administracyjny
Warszawa 2019

ISSN 1734-803X
Nr indeksu 204358

Liczba punktów za publikację wynosi 5.

Wersją podstawową (referencyjną) czasopisma jest wersja papierowa.



Wolters Kluwer Polska Sp. z o.o.
01-208 Warszawa, ul. Przyokopowa 33
www.wolterskluwer.pl

Dyrektor Działu Publikacji Periodycznych: Klaudia Szawłowska-Milczarek
klaudia.szawłowska@wolterskluwer.com

Szczegółowe informacje o prenumeracie czasopism można uzyskać
pod numerem infolinii: tel. 801 044 545, prenumerata@wolterskluwer.pl
Obsługa Klienta: tel. 22 535 82 72, księgarnia internetowa: www.profinfo.pl

Skład i łamanie: Andytex, Warszawa
Druk ukończono w grudniu 2019 roku. Nakład 1000 egz.

SPIS TREŚCI

STUDIA I ARTYKUŁY

<i>Prof. dr hab. Andrzej Gomułowicz (Uniwersytet im. Adama Mickiewicza w Poznaniu)</i>	
Sędziowski aktywizm	9
Summary	18
<i>Prof. dr hab. Roman Hauser (Uniwersytet im. Adama Mickiewicza w Poznaniu)</i>	
<i>Mgr Marta Szustkiewicz (Naczelny Sąd Administracyjny, Biuro Orzecznictwa)</i>	
Język skutecznej komunikacji z organem władzy publicznej	20
Summary	34
<i>Dr hab. Adam Krzywoń (adiunkt, Uniwersytet Warszawski)</i>	
<i>Mgr Ireneusz Krawczyk (radca prawny)</i>	
Pośredni zakaz reformationis in peius w postępowaniu podatkowym – aspekty konstytucyjne	35
Summary	50
<i>Dr hab. Jerzy Parchomiuk (Katolicki Uniwersytet Lubelski Jana Pawła II)</i>	
Kontrola kompetencji dyskrecyjnych organów ochrony zabytków w orzecznictwie polskich sądów administracyjnych	51
Summary	75
<i>Dr Radosław Bulejak (doradca podatkowy)</i>	
<i>Dr Jacek Matarewicz (doradca podatkowy)</i>	
Dopuszczalność orzekania przez Prezesa Agencji Rezerw Materiałowych o odpowiedzialności członka zarządu spółki kapitałowej za nieuiszczone w terminie opłaty zapasowe oraz kary pieniężne	76
Summary	87

VARIA

Sprawozdanie z konferencji naukowej „ Administrative Dispute in the Central and Eastern European States ”, w dniach 3–4 czerwca 2019 r. w Opatiji (Chorwacja) (Opracowała <i>dr hab. Joanna Wegner</i>)	89
---	----

ORZECZNICTWO

- I. **Trybunał Sprawiedliwości Unii Europejskiej** (wybór i opracowanie: *prof. Andrzej Wróbel, dr Piotr Wróbel*)
Odesłanie prejudycjalne – Podatki – Podatek od wartości dodanej (VAT) – Dyrektywa 2006/112/WE – Artykuł 146 – Zwolnienia w eksporcie – Pojęcie „dostawa towarów” – Artykuł 131 – Warunki ustanawiane przez państwa członkowskie – Zasada proporcjonalności – Zasada neutralności podatkowej – Dowody – Oszustwo – Praktyka państwa członkowskiego polegająca na odmowie przyznania prawa do zwolnienia, w przypadku gdy nabywca wywożonych towarów nie jest ustalony

Wyrok TS z dnia 17 października 2019 r. w sprawie C-653/18 <i>Unitel Sp. z o.o. przeciwko Dyrektorowi Izby Skarbowej w Warszawie</i> , ECLI:EU:C:2019:876	95
II. Europejski Trybunał Praw Człowieka (wybór i opracowanie: <i>dr Agnieszka Wilk-Ilewicz</i>)	
Nakaz zwrotu wypłaconego zasiłku dla bezrobotnych naruszeniem art. 1 Protokołu nr 1 do Konwencji	
Wyrok ETPC z dnia 26 kwietnia 2018 r. w sprawie <i>Čakarević przeciwko Chorwacji</i> (skarga nr 48921/13)	104
III. Sąd Najwyższy (wybór i opracowanie: <i>mgr Michalina Szpyrka</i>)	
1. Wyrok SN z dnia 26 marca 2019 r. (sygn. akt I NO 57/18) [dot. wymogów, jakie powinna spełniać uchwała o wyrażeniu zgody na dalsze zajmowanie stanowiska sędziego po ukończeniu przez niego 65. roku życia]	109
2. Wyrok SN z dnia 28 marca 2019 r. (sygn. akt I CSK 94/18) [dot. charakteru prawnego i terminu przedawnienia odsetek za nieterminowe wypłacenie dotacji celowych]	113
IV. Naczelny Sąd Administracyjny i wojewódzkie sądy administracyjne	
A. Orzecznictwo Naczelnego Sądu Administracyjnego (opracował <i>dr hab. Marcin Wiącek</i>)	
Wyrok składu siedmiu sędziów NSA z dnia 28 października 2019 r. (sygn. akt I FSK 164/17) [dot. działania gminy jako podatnika VAT prowadzącego działalność gospodarczą]	121
B. Orzecznictwo wojewódzkich sądów administracyjnych (wybór: <i>prof. Andrzej Gomułowicz</i> , opracowanie: <i>dr hab. Marcin Wiącek</i>)	
1. Wyrok WSA we Wrocławiu z dnia 16 lutego 2018 r. (sygn. akt I SA/Wr 1234/17) [dot. rozumienia pojęcia „osoba samotnie wychowująca dziecko” zawartego w ustawie o podatku dochodowym od osób fizycznych]	128
2. Wyrok WSA w Poznaniu z dnia 27 lutego 2018 r. (sygn. akt III SA/Po 21/18) [dot. egzekucji zaległości z tytułu opłaty abonamentowej]	131
3. Wyrok WSA w Gliwicach z dnia 28 marca 2018 r. (sygn. akt I SA/Gl 1362/17) [dot. podmiotu zobowiązanego do uiszczenia opłaty za wywóz odpadów z nieruchomości]	133
4. Wyrok WSA w Gorzowie Wielkopolskim z dnia 10 maja 2018 r. (sygn. akt II SA/Go 220/18) [dot. uchwały rady gminy określającej zasady wynajmowania lokali wchodzących w skład mieszkaniowego zasobu gminy]	137
5. Wyrok WSA w Olsztynie z dnia 28 września 2018 r. (sygn. akt II SA/Ol 614/18) [dot. uchwały rady gminy wprowadzającej obowiązek stosowania dodatkowych oznaczeń taksówek]	143
V. Glosy	
<i>Mgr inż. Bogusław Kler (rzecznik patentowy, biegły sądowy)</i>	
Głosa do wyroku Naczelnego Sądu Administracyjnego z dnia 19 września 2018 r. (sygn. akt II GSK 2404/16) [dot. przesłanek zdolności rejestracyjnej wzoru przemysłowego]	146
Summary	152

KRONIKA

Kalendarium sądownictwa administracyjnego (wrzesień – październik 2019 r.) (opracowała <i>dr Anna Rossmannith</i>)	155
---	-----

BIBLIOGRAFIA

Publikacje z zakresu postępowania administracyjnego i sądownictwa administracyjnego (wrzesień – październik 2019 r.) (opracowała <i>mgr Marta Jaszczukowa</i>)	175
---	-----

TABLE OF CONTENTS

STUDIES AND PAPERS

<i>Prof. dr hab. Andrzej Gomułowicz (Adam Mickiewicz University in Poznań)</i>	
Judicial Activism	9
Summary	18
<i>Prof. dr hab. Roman Hauser (Adam Mickiewicz University in Poznań)</i>	
<i>Mgr Marta Szustkiewicz (Supreme Administrative Court, Case-law Office)</i>	
Language of effective communication with a public authority body	20
Summary	34
<i>Dr hab. Adam Krzywoń (assistant professor, University of Warsaw)</i>	
<i>Mgr Ireneusz Krawczyk (attorney at law)</i>	
Indirect prohibition of reformationis in peius in tax proceedings – Constitutional aspects	35
Summary	50
<i>Dr hab. Jerzy Parchomiuk (John Paul II Catholic University of Lublin, trainee judge at the Voivodship Administrative Court in Lublin)</i>	
The control of discretionary competences of historical objects protection bodies in the case law of Polish administrative courts	51
Summary	75
<i>Dr Radosław Bulejak (tax advisor)</i>	
<i>Dr Jacek Matarewicz (tax advisor)</i>	
President of the Material Reserves Agency’s competence to decide on the liability of the member of the capital company’s management board for spare payment and financial penalties unpaid on time	76
Summary	87

VARIA

Report from the ‘ Administrative Dispute in the Central and Eastern European States ’ academic conference held on 3–4 June 2019 in Opatija (Croatia) (prepared by <i>dr hab. Joanna Wegner</i>)	89
---	----

CASE-LAW

- I. **Court of Justice of the European Union** (selected and prepared by: *prof. Andrzej Wróbel, dr Piotr Wróbel*)
Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Article 146 – Exemptions on exportation – Concept of ‘supply of goods’ – Article 131 – Conditions laid down by the Member States – Principle of proportionality – Principle of fiscal neutrality – Evidence – Tax evasion – Practice of a Member State consisting in refusing the right to exemption where the person acquiring the goods exported is not identified

	The judgment of the Court of Justice delivered on 17 October 2019 in case C-653/18, <i>Unitel Sp. z o.o. v. Dyrektor Izby Skarbowej w Warszawie</i> , ECLI:EU:C:2019:876	95
II.	European Court of Human Rights (selected and prepared by: <i>dr Agnieszka Wilk-Ilewicz</i>) The order to return the unemployment benefit violates Article 1 of Protocol No. 1 to the Convention. ECtHR judgment of 26 April 2018 in case <i>Čakarević v. Croatia</i> (Application No. 48921/13)	104
III.	Supreme Court (selected and prepared by: <i>mgr Michalina Szpyrka</i>) 1. Judgment of the Supreme Court of 26 March 2019 (Case No. I NO 57/18) [concerning the requirements to be satisfied by a resolution on the approval of further service of a judge who turns 65 years]	109
	2. Judgment of the Supreme Court of 28 March 2019 (Case No. I CSK 94/18) [concerning the legal nature and the limitation period for interest payment for untimely payment of designated subsidies]	113
IV.	Supreme Administrative Court and voivodship administrative courts A. Case-law of the Supreme Administrative Court (prepared by: <i>dr hab. Marcin Wiącek</i>) The resolution of the adjudicating panel of seven judges of the Administrative Supreme Court of 28 October 2019 (Case No. I FSK 164/17) [concerning the actions of a commune as a taxable person for VAT purposes conducting economic activity]	121
	B. Case-law of voivodship administrative courts (selected by: <i>prof. Andrzej Gomułowicz</i> , prepared by: <i>dr hab. Marcin Wiącek</i>) 1. Judgment of the Voivodship Administrative Court in Wrocław of 16 February 2019 (Case No. I SA/Wr 1234/17) [concerning the meaning of a ‘person raising a child alone’ in the Act on Personal Income Tax]	128
	2. Judgment of the Voivodship Administrative Court in Poznań of 27 February 2018 (Case No. III SA/Po 21/18) [concerning the enforcement of outstanding payments for subscription]	131
	3. Judgment of the Voivodship Administrative Court in Gliwice of 28 March 2018 (Case No. I SA/Gl 1326/17) [concerning the entity obliged to pay the fee for the collection of waste from property]	133
	4. Judgment of the Voivodship Administrative Court in Gorzów Wielkopolski of 10 May 2018 (Case No. II SA/Go 220/18) [concerning the resolution of the commune’s council defining the rules of letting apartments forming parts of the local authority housing for rent]	137
	5. Judgment of the Voivodship Administrative Court in Olsztyn of 28 September 2018 (Case No. II SA/Ol 614/18) [concerning the resolutions of the commune’s council establishing the obligation to use additional identification marks for taxis]	143
V.	Notes <i>Mgr inż. Bogusław Kler (patent lawyer, expert witness)</i> Note to the judgment of the Supreme Administrative Court of 19 September 2018 (Case No. II GSK 2404/16) [concerning the conditions of the registrability of industrial design]	146
	Summary	152

CHRONICLES

	Calendar of the administrative judiciary (September–October 2019) (prepared by <i>dr Anna Rossmannith</i>)	155
--	--	-----

BIBLIOGRAPHY

	List of publications on administrative proceedings and administrative court proceedings (September–October 2019) (prepared by <i>mgr Marta Jaszczukowa</i>)	175
--	---	-----

Summary

of the article: **Judicial Activism**

Judicial activism which is founded on Article 178(1) of the Constitution gives judges a right to interpret a statutory act [act of parliament] or a regulation in a pro-constitutional manner, in accordance with Article 8(2) of the Constitution. This is one of four forms of direct application of the Constitution. Pursuant to Article 178 of the Constitution, the framework of free judicial decisions is shaped by the Constitution and statutory acts. Since judges are bound by the Constitution, they are equally bound by its values and axiology. The idea of a fair decision, as far as the application of law by the court is concerned, is a part of the judge function's ethos. Pursuant to Article 175(1) of the Constitution, the administration of justice in the Republic of Poland is implemented by: the Supreme Court, common courts, administrative courts and military courts. Fairness must be taken into account in every act of interpreting and applying law by a judge. The above arises from the fact that justice, human dignity (Article 30 of the Constitution) and good are universal values, and this is an argument for using them as guidance, while interpreting legal regulations. Only an independent judge is able to act in this manner. The stronger the need to run the state of law, the more emphasis is put on who judges are and who they should be. Judicial independence is not a privilege of judges, but it is a privilege of every person's right to a fair trial before a court that is free from pressures.

A judge, who is respected, takes proper care of the good entrusted to them and administers justice by giving fair rulings. This is also a moral duty of a judge.

Keywords: justice of law, fairness of law, legalistic justice, law and axiology, judicial dimension of law, Constitution and the contents of law, direct application of the Constitution

Summary

of the article: **Language of effective communication with a public authority body**

Polish language, as a cultural good, is subject to legal protection not only under the Constitution but also under many ordinary statutory acts [acts of parliament]. It is a duty of any public authority body to ensure that official texts are comprehensible and written in correct Polish, as this is not only a manifestation of care about national culture, but also satisfies the obligation imposed on public authority bodies (under Article 8 and 9 of the Code of Administrative Proceedings) to build trust and provide any necessary information on the circumstances of cases.

Keywords: Constitution, official language, Polish language, administrative proceedings, public authority body

Summary

of the article: **An indirect prohibition *reformationis in peius* in the tax proceedings – constitutional aspects**

The principle of the non-deterioration of the appellant's situation belongs to the catalogue of principles governing all of the proceedings. It was also included within the framework of the tax procedure, however, the prevailing regulations and the practical application thereof indicate that there exists an area where no sufficient protection is afforded from the point of view of the prohibition *reformationis in peius*. This takes place in a situation in which after the taxpayer exercised its right to judicial review, the tax case was referred for review to the first instance or to the second instance body (the indirect prohibition *reformationis in peius*). From the practical experience it appears that at this stage the appellant's situation may be deteriorated, taking into consideration its position at the time preceding the lodging of a complaint to the administrative court. This takes the form of a tax assessment in an amount higher than the one determined in the former decision, which was set aside by the court in response to the initiative launched by the taxpayer.

Such practice was the subject-matter of judicial decisions of administrative courts and no violation of law was discerned in this regard. However, the analysis of this institution should be made with consideration given to the constitutional standards. In particular, the following principles stemming from the Constitution of the Republic of Poland are meant here: the principle of trust in the state and in the codified law (statutory law) and the principle of legal safety, the principle of non-taking advantage by the state of unlawful actions taken the state bodies, the principle of property protection and the right to have recourse to the court of law. The taking into consideration of the constitutional values leads to the conclusion that the deterioration of the appellant's situation as a result of appeal measures it has lodged at its own expense gives rise to legitimate doubts as to the compliance with the constitutional principles. This is indirectly confirmed by the direction of the evolution of the tax regulations, including the solutions drafted within the framework of the new Tax Ordinance.

Keywords: non-deterioration of a taxpayer's situation, appeal measures, the Constitution of the Republic of Poland,

Summary

of the article: **The review of discretionary powers of historical monuments protection bodies in the Polish administrative courts case law**

The sovereign nature of the forms of operation of historical monuments protection bodies, the polarization between the individual interest and the public interest, discretion margin in the activities of the authorities, all these elements create a kind of “explosive mixture”, which is the source of the legal disputes between the owners of historical monuments and historical monuments protection bodies. The key element of the guarantee of individual freedom is judicial review of public administration. Therefore, it is a matter of dispute to which extent the public administration is subject to judicial review when performing the tasks entrusted. The aim of this article is to analyze how Polish administrative courts approach the problem. What methodology of the review of the margin of they use? How they solve the dilemma: who makes the final decision – the body or the court? Whether they retain the judicial self-restraint or rather they are ready willing to interfere in the merits of the decision?

Keywords: protection of historical monuments, judicial review, margin of discretion, discretionary powers, public and individual interest, property right

Summary

of the article: **President of the Material Reserves Agency's competence to decide on the liability of the member of the capital company's management board for spare payment and financial penalties unpaid on time**

The article deals with the issue of the possibility of adjudicating the liability of management board members for arrears of companies due to crude oil's charge and a fine imposed under the provisions of the Act of 16 February, 2007 on stocks of crude oil, petroleum products and natural gas and the rules for dealing with threats to fuel security of the state and disruptions in the oil market. In the opinion of the authors, adjudicating such liability is included in the provisions of the binding law. A wide range of referral to the provisions of the Tax Ordinance provides grounds for considering that in the case of both public law liabilities it is permissible to apply the provisions on the liability of a member of the management board of a capital company in accordance with the principles provided for in Article 116 of the Tax Ordinance.

Keywords: minimum stocks of crude oil and/or petroleum products, liability of a member of the management board of capital company, crude oil's charge, the supply of crude oil, emergency stocks

Summary

of the note to the judgment of the Supreme Administrative Court of 19 September 2018 (Case No. II GSK 2404/16)

The commented judgment concerns the decision of the Patent Office of the Republic of Poland declaring the invalidity of 'Upper guide for sliding doors' (*Prowadnik górny drzwi przesuwanych*) industrial design. Both before the Supreme Administrative Court and before earlier instances it was correctly established that the design was identical to the product that the applicant requesting cancellation had presented earlier in its product catalogue; the applicant also provided invoices to prove its selling activity before the date of registration. An important part of the judgment is the refusal to share the first instance court's view that 'the lack of individual character is equivalent to the lack of novelty'. The Supreme Administrative Court stated that the novelty and the individual character are separate criteria, and if any of them is not satisfied the mark should not be subject to protection. Despite emphasising the distinctiveness of the two criteria, the Supreme Administrative Court did not avoid an error in assessment thereof. It repeated, after the decision under review and the judgment of the Voivodship Administrative Court, that the guide is identical to the one disclosed earlier, but shared the opinion included in the decision under review to the effect that the result of this is lack of individual character. Since all essential features of the disputed design are identical to the previously disclosed one, this speaks for the lack of novelty.

Keywords: industrial design, declaration of the registered mark invalid, novelty of design, individual character