

SPIS TREŚCI

STUDIA I ARTYKUŁY

Prof. dr hab. Leonard Etel (Uniwersytet w Białymstoku)

Dr Piotr Pietrasz (sędzia WSA w Białymstoku, Uniwersytet w Białymstoku)

Zapłata podatku (zaliczki) przez podatnika a wydanie decyzji w przedmiocie odpowiedzialności podatkowej płatnika	9
Summary	17

Dr Arkadiusz Cudak (sędzia NSA orzekający w WSA w Łodzi)

Podmioty legitymowane do wniesienia zarzutów w sprawie prowadzenia egzekucji administracyjnej	18
Summary	30

Dr Marek Szubiakowski (Uniwersytet Warszawski)

Postępowanie w sprawie rozdziału środków w ramach polityki rozwoju oraz sądowa kontrola w tych sprawach	31
Summary	39

Mgr Grzegorz Dudar (asystent sędziego w WSA w Białymstoku)

Sprzeciw od orzeczenia referendarza sądowego w postępowaniu sądownoadministracyjnym – wybrane problemy	41
Summary	52

Dr Gabriel Radecki (referendarz sądowy w WSA w Gliwicach, Uniwersytet Śląski)

Wniosek o przyznanie prawa pomocy złożony przed wpłynięciem skargi do sądu administracyjnego	54
Summary	70

VARIA

Dr Anna Znamiec (sędzia WSA w Krakowie)

Mgr Przemysław Florjanowicz-Błachut (specjalista w Biurze Orzecznictwa NSA)

Usprawnienie procedury prejudycjalnej – wnioski z sympozjum w Luksemburgu (30–31 marca 2009 r.) z uwzględnieniem analizy zaleceń zawartych w sprawozdaniu Grupy roboczej ds. postępowania prejudycjalnego powołanej przez Stowarzyszenie Rad Stanu i Naczelnych Sądów Administracyjnych Unii Europejskiej	73
--	-----------

ORZECZNICTWO

I. Europejski Trybunał Sprawiedliwości

Wpływ prawa wspólnotowego na prawo i procedurę administracyjną w państwach członkowskich (wyroki ETS z dnia: 1. 21 września 1983 r., sprawy połączone

205-215/82 <i>Deutsche Milchkontor przeciwko Urzędowi Federalnemu do spraw Żywności i Leśnictwa</i> , s. 79; 2. 20 marca 1997 r., sprawa C-24/95 <i>Kraj Nadrenia Palatynat przeciwko Firmie Alcan Deutschland</i> , s. 81) (wybór i opracowanie: <i>Władysław Czaplinski</i>)	79
II. Europejski Trybunał Praw Człowieka	
Naruszenie prawa do poszanowania mienia (wyrok ETPC z dnia 28 lipca 2005 r., sprawa <i>Rosenzweig i Bonded Warehouses Ltd. przeciwko Polsce</i>) (opracowała <i>Agnieszka Wilk</i>)	83
III. Trybunał Konstytucyjny	
Administracyjna kara pieniężna w prawie budowlanym Wyrok TK z dnia 5 maja 2009 r. sygn. akt P 64/07 (opracowała <i>Irena Chojnacka</i>)	88
IV. Sąd Najwyższy	
Wyrok Sądu Najwyższego z dnia 14 stycznia 2009 r. (sygn. akt III SK 23/08) [dot. okoliczności zmiany lub uchylenia taryfy energii elektrycznej] (wybór: <i>Andrzej Wróbel</i> , opracowanie: <i>Dawid Miąsik</i>)	93
V. Naczelny Sąd Administracyjny i wojewódzkie sądy administracyjne	
A. Orzecznictwo Naczelnego Sądu Administracyjnego (opracował <i>Marcin Wiącek</i>)	
1. Uchwała składu siedmiu sędziów NSA z dnia 30 marca 2009 r. sygn. akt II FPS 8/08 [dot. momentu, w którym następuje zmiana właściwości naczelnika urzędu skarbowego].	98
2. Uchwała składu siedmiu sędziów NSA z dnia 27 kwietnia 2009 r. sygn. akt II FPS 9/08 [dot. konsekwencji niedopełnienia czynności wraz ze złożeniem wniosku o przywrócenie terminu do dokonania tej czynności]	103
B. Orzecznictwo wojewódzkich sądów administracyjnych (wybór: <i>Bogusław Gruszczyński</i> , opracowanie: <i>Marcin Wiącek</i>)	
1. Wyrok WSA w Gorzowie Wielkopolskim z dnia 29 października 2008 r. sygn. akt II SA/Go 450/08 [dot. decyzji nakazującej obowiązek wykonania określonych czynności lub robót budowlanych w celu doprowadzenia wykonanych robót do stanu zgodnego z prawem]	108
2. Wyrok WSA w Białymstoku z dnia 21 stycznia 2009 r. sygn. akt I SA/Bk 555/08 [dot. przedawnienia terminu na powiadomienie dłużnika celnego o zarejestrowaniu kwoty należności wynikających z długu celnego]	115
3. Wyrok WSA w Białymstoku z dnia 5 lutego 2009 r. sygn. akt II SA/Bk 733/08 [dot. zakazu odrzucenia skargi przez sąd administracyjny z powodu braku właściwości w sytuacji, gdy za niewłaściwy uznał się już sąd powszechny]	118
4. Wyrok WSA w Szczecinie z dnia 19 lutego 2009 r. sygn. akt I SA/Sz 309/08 [dot. opodatkowania czynności polegającej na nieodpłatnym przekazaniu świadczenia z zaleceniem jego wykorzystania w określony sposób]	124
5. Wyrok WSA w Gdańsku z dnia 19 marca 2009 r. sygn. akt III SA/Gd 80/09 [dot. konsekwencji wadliwego przekładu aktu prawa wspólnotowego na język polski]	129
VI. Wnioski Prezesa NSA i pytania prawne sądów administracyjnych	
Pytanie prawne WSA w Gdańsku (postanowienie z dnia 26 marca 2009 r. sygn. akt III SA/Gd 479/08, sygn. akt w TK P26/09) [dot. ustawy o wychowaniu w trzeźwości] (opracowała <i>Irena Chojnacka</i>)	134

VII. Glosy

Glosy do uchwały Naczelnego Sądu Administracyjnego z dnia 21 stycznia 2009 r. (sygn. akt I FPS 3/08) [dot. opodatkowania podatkiem od towarów i usług należności biegłych sądowych]

Mgr Krzysztof Radzikowski (doradca podatkowy)

Glosa I 136

Prof. dr hab. Tadeusz Widła (Uniwersytet Śląski)

Glosa II 146

Dr Michał Bartoszewicz (Politechnika Opolska)

Glosa do wyroku Wojewódzkiego Sądu Administracyjnego w Poznaniu z dnia 28 maja 2008 r. (sygn. akt IV SA/Po 403/07) [dot. utraty uprawnień do form pomocy materialnej przewidzianej w prawie o szkolnictwie wyższym] 155

Mgr Bartosz Sierakowski (absolwent '09 Uniwersytetu im. Adama Mickiewicza w Poznaniu)

Glosa do wyroku Naczelnego Sądu Administracyjnego z dnia 8 grudnia 2008 r. (sygn. akt II OSK 1328/07) [dot. wykładni art. 11 pkt 2 ustawy z 1920 r. o obywatelstwie

Państwa Polskiego i art. 115 ust. 1 ustawy z 1938 r. o powszechnym obowiązku wojskowym]

..... 161

KRONIKA

Kalendarium sądownictwa administracyjnego (maj–czerwiec 2009 r.)

(opracował *Przemysław Florjanowicz-Błachut*) 169

BIBLIOGRAFIA

I. Recenzje

1. Sebastian Maj, Postępowanie dyscyplinarne w służbach mundurowych

(rec. *Przemysław Szustakiewicz*) 183

2. Adam Habuda, Prawo administracyjne. Zagadnienia podstawowe

(rec. *Michał Bartoszewicz*) 186

II. Wykaz publikacji

Publikacje z zakresu postępowania administracyjnego i sądownictwa administracyjnego

(maj–czerwiec 2009 r.) (opracowała *Marta Jaszczukowa*) 188

TABLE OF CONTENTS

STUDIES AND ARTICLES

Professor Leonard Etel, Ph.D. (The Białystok University)

Piotr Pietrasz, Ph.D. (The Białystok University)

The payment of tax (advance) by a taxpayer and the decision on the remitter's tax liability ...	9
Summary	17

Arkadiusz Cudak, Ph.D. (judge of the SAC adjudicating in the VAC in Łódź)

The entities authorised to make pleas regarding the administrative enforcement proceedings ..	18
Summary	30

Marek Szubiakowski, Ph.D. (The Warsaw University)

Proceedings in the case of distribution of funds available under the development policy and the court supervision in such cases	31
Summary	39

Grzegorz Dudar, M.Sc. (assistant judge, the VAC in Białystok)

Objection against a decision made by a justices' clerk in proceedings before administrative courts – selected issues	41
Summary	52

Gabriel Radecki, Ph.D. (justices' clerk at the VAC in Gliwice)

The request for granting the right of assistance prior to filing a complaint with an administrative court	54
Summary	70

VARIA

Anna Znamiec, Ph.D. (judge of the VAC in Kraków)

Przemysław Florjanowicz-Błachut, M.Sc. (expert in the Bureau of Judicial Decisions of the Supreme Administrative Court)

Improving the preliminary ruling procedure – conclusions from the symposium in Luxembourg taking account of the analysis and suggestions in the report of the „Preliminary ruling procedures” Working Group set up by the Association of the Council of States and Supreme Administrative Jurisdictions of the European Union	73
--	----

JUDICIAL DECISIONS

I. The European Court of Justice

The Community law affecting the administrative law and procedure in the Member States (judgements: 1. dated 21 September 1983, joined cases 205–215/82 *Deutsche Milchkontor GmbH and others v Federal Republic of Germany, represented by Bundesamt für*

<i>Ernahrung und Forstwirtschaft (The Federal Office for Food and Forestry)</i> , p. 79; 2. dated 20 March 1997, Case C-24/95, <i>Land Rheinland-Pfalz v Alcan Deutschland GmbH</i> , p. 81 (selected and prepared by <i>Władysław Czapliński</i>)	79
II. The European Court of Human Rights Case <i>Rosenzweig and Bonded Warehouses Ltd. v. Poland</i> . Judgment of the ECHR of 28 July 2005 (application No. 51728/99) [re. the violation of the peaceful enjoyment of property] (prepared by <i>Agnieszka Wilk</i>)	83
III. The Constitutional Tribunal (selected and prepared by <i>Irena Chojnacka</i>) Administrative cash penalty in the Construction Law – judgement of the Constitutional Tribunal dated 5 May 2009, file No. P 64/07	88
IV. The Supreme Court Decision of the Supreme Court of 14 January 2009 (file No. III SK 23/08) [re. the circumstances of amending or annulling an electric energy tariff] (selected by: <i>Andrzej Wróbel</i> , prepared by: <i>Dawid Miasik</i>)	93
V. The Supreme Administrative Court and the Voivodship Administrative Courts A. The judicial decisions of the Supreme Administrative Court (prepared by <i>Marcin Wiącek</i>): 1. Resolution of seven judges of the Supreme Administrative Court of 30 March 2009 (file No. II FPS 8/08) [re. the specification of the moment when the Head of a Tax Office relevant for a taxpayer changes]	98
2. Resolution of seven judges of the Supreme Administrative Court of 27 April 2009 (file No. II FPS 9/08) [re. the consequences of failure to perform an action with the submission of a request to reinstate the time limit for performing such action] ..	103
B. The judicial decisions of the Voivodship Administrative Courts (selected by: <i>Bogusław Gruszczyński</i> , prepared by: <i>Marcin Wiącek</i>): 1. Judgement of the Voivodship Administrative Court in Gorzów Wielkopolski of 28 October 2008 (file No. II SA/Go 458/08) [re. the decision imposing the obligation to perform specific actions or construction works in order to bring the performed works to compliance with law]	108
2. Judgement of the Voivodship Administrative Court in Białystok of 21 January 2009 (file No. I SA/Bk 555/08) [re. the lapse of time limit for notifying a customs debtor of registration of the amount payable under a customs debt]	115
3. Judgement of the Voivodship Administrative Court in Białystok of 5 February 2009 (file No. II SA/Bk 733/08) [re. the prohibition of an administrative court rejecting a complaint due to the lack of competence when a common court has already declared itself non-competent]	118
4. Judgement of the Voivodship Administrative Court in Szczecin of 19 February 2009 (file No. I SA/Sz 309/08) [re. taxation of a transaction consisting in gratuitous transfer of a performance with the instruction to apply it for a specific purpose]	124
5. Judgement of the Voivodship Administrative Court in Gdańsk of 19 March 2009 (file No. III SA/Gd 80/09) [re. the consequences of a defective translation of an act of the Community law into Polish]	129
VI. The applications of the President of the SAC and the references for a preliminary ruling from the administrative courts to the Constitutional Tribunal (prepared by <i>Irena Chojnacka</i>) A reference for a preliminary ruling from the VAC in Gdańsk (decision file No. III SA/Gd, the Constitutional Tribunal's decision file No. P26/09) [re. the Act on Upbringing in Sobriety]	134

VII. Glosses

Glosses to the resolution of the Supreme Administrative Court of 21 January 2009 (file No. I FPS 3/08) [re. levying the tax on goods and services (VAT) on the amounts payable to the court experts]

Krzysztof Radzikowski, M.Sc. (tax advisor)

Gloss I 136

Professor Tadeusz Widła, Ph.D. (The Silesian University)

Gloss II 146

Michał Bartoszewicz, Ph.D. (the Opole University of Technology)

Gloss to the judgement of the Voivodship Administrative Court in Poznań of 28 May 2008 (file No. IV SA/Po 403/07) [re. the loss of eligibility to the forms of material aid available under the Act on the System of Higher Education] 155

Bartosz Sierakowski, M.Sc. (graduated '09 from the Adam Mickiewicz University in Poznań)

Gloss to the judgement of the Supreme Administrative Court of 8 December 2008 (file No. II OSK 1328/07) [re. the interpretation of Art. 11.2 of the Polish Citizenship Act 1920 and Art. 115.1 of the General Military Service Act 1938] 161

CHRONICLE

The schedule of events in the administrative jurisdiction (May–June 2009)

(prepared by *Przemysław Florjanowicz-Błachut*) 169

BIBLIOGRAPHY

I. Reviews

1. Sebastian Maj, *The disciplinary proceedings in the uniformed services*

(review by *Przemysław Szustakiewicz*) 183

2. Adam Habuda, *The administrative law. Basic issues.*

(review by *Michał Bartoszewicz*) 186

II. Publications

Publications in the area of the administrative procedure and the proceedings before administrative courts (May–June 2009) (prepared by *Marta Jaszczukowa*) 188

Summary

of the article: The payment of tax (advance) by a taxpayer and the decision on the remitter's tax liability

This article attempts to answer the question if the payment by a taxpayer of the amount of dues in respect of the tax or an advance on account of tax when the remitter should have earlier paid such tax or advance may prevent the issuing of decision on the remitter's liability for the failure to collect and remit the tax or advance on account of tax in the due amount or renders such decision irrelevant.

In the authors' opinion the problem of issuing a decision on the remitter's or collector's liability specifying the amount of dues in respect of the non-collected tax or the tax collected but not remitted (Art. 30.4 of the Tax Code) must be distinguished from the actual imposing of the obligation to pay such dues on the remitter. If the tax liability in respect of such tax has already arisen and the dues (tax, advance) have been paid by the taxpayer, the relevant laws and regulations do not permit for such dues to be enforced against the remitter. The same tax (advance on account of tax) may not be paid twice. However, the fact that the tax has been paid does not prevent a tax authority from issuing a decision on the remitter's liability for the failure to collect and remit the tax or advance on account of tax in the due amount. Such decision first of all confirms only the amount of the dues in respect of the non-collected tax or the tax collected but not remitted and serves as the basis for enforcing such dues but only if they have not been already paid. Therefore such act does not impose on the remitter the sanctions set out in Art. 8 of the Tax Code (calculation and collection of the tax from the taxpayer and remitting it in due time to the tax authority) but allows the tax authority to enforce the outstanding tax dues. Furthermore, such decision allows to enforce against the remitter the interest on the non-collected tax or the tax collected but not remitted also when the tax has been paid but after the lapse of the time limit for its payment.

Summary

of the article: The entities authorised to make pleas regarding the administrative enforcement proceedings

The pleas concerning the conduct of the enforcement proceedings are of particular importance among the legal remedies available in the administrative enforcement proceedings. This article presents considerations concerning the entities authorised to seek such legal remedy.

The literature indicates that the only subject of administrative enforcement authorised to seek such remedy is the obligor. However, not each obligor will be authorised to make pleas concerning the conduct of the administrative enforcement. Such authorisation is attributable only to the obligor named in the enforcement title.

Furthermore, the person who is not an obligor but was erroneously named in the enforcement title is also authorised to make pleas concerning the conduct of the administrative enforcement. In such event that entity may not be treated as a third party who would be obliged to protect its rights by making a demand to exclude a property right or an asset from execution.

This article also discusses the authorisation of the obligor's spouse. Under Art. 27c of the Act on Enforcement Proceedings in Administration (the AEPA) if enforcement is to be conducted against the joint property of the obligor and his/her spouse as well as their individual personal properties, the enforcement title is issued for both spouses. This legal norm is analysed on the assumption that the enforcement title referred to therein is issued for the taxpayer and his/her spouse when enforcement is to be conducted against the obligor's joint property. Therefore the scope of those authorised to make pleas concerning the conduct of the administrative enforcement must be extended to include the spouse of the obligor in respect of whom the enforcement title was issued under Art. 27c of the AEPA and against whose joint property the enforcement was instituted. This right shall accrue also when the person seeking that legal remedy is not named in the enforcement title. The obligor's spouse, when the administrative enforcement is conducted against his/her personal property, is not authorised to make a pg, those authorised to make pleas concerning the conduct of the enforcement proceedings are the obligors named in the enforcement title and the person who is not an obligor but was erroneously named in the enforcement title. Furthermore, the authorisation to make pleas concerning the conduct of the administrative enforcement is also vested in the obligor's spouse when the administrative enforcement is conducted against their joint property.

Summary

of the article: Proceedings in the case of distribution of funds available under the development policy and the court supervision in such cases

This article discusses the problems related to the solution introduced in the Act on the Principles of Implementing the Development Policy (the APIDP) dated 6 December 2006 which on the one hand excludes the application of the Administrative Procedure Code to the decisions made under the APIDP and, on the other hand, provides for the far-reaching modification in the proceedings before administrative courts in the cases regulated by the APIDP.

The first part presents the problem of effects of the adopted solutions for the situation when the distribution of funds is decided. It outlines the effects of resignation from the application of the general procedure and the constitutional implications of the adopted solution. The conclusion of this part justifies the opinion on the unconstitutionality of the existing regulation due to its intervention in the matter for which the Constitution includes detailed requirements.

The second part refers to the detailed modifications in the proceedings before administrative courts. It presents the discussion of the solutions by which the APIDP modified the court procedure. The analysis shows that the court procedure was not only significantly modified for one type of cases but it was modified in the way preventing the reconciliation of many of the new solutions with the existing regulations.

The third part discusses the drafting of the APIDP and presents the opinion that as a result of disregarding many entities whose participation in the drafting process is obligatory the adopted regulations may not be recognised as implementing the norms whose observance ensures the satisfaction of the requirements of the legislative procedure set out in the constitutional standards. The degree of the APIDP's defectiveness justifies the opinion on the poor quality of the legislative procedure in which such defective legal act was adopted.

Summary

of the article: Objection against a decision made by a justices' clerk in proceedings before administrative courts – selected issues

Together with the introduction of the institution of the justices' clerk four years ago the legislator made available a new, previously unknown, remedy – an objection. However, the legislator devoted to it only 2 articles i.e. 259 and 260 of the Law on Proceedings Before Administrative Courts (the LPBAC) and hence in the legal practice there have arisen many doubts concerning the challenging of decisions made by the justices' clerks.

An objection is a quasi-remedy that may be sought only against the orders and decisions made by a justices' clerk. It is not a means of appeal or devolution – a court is not authorised to consider the merits of the reasons for the objection and making the objection does not transfer the proceedings to a court of higher instance. Making an objection renders the challenged decision ineffective and results in the reconsideration of the case by the court of the 1st instance which may not reverse the challenged decision and transfer the case for reconsideration to the justices' clerk.

Analysis of the institution of an objection regulated in the LPBAC indicates that an objection may be made by a party to the proceedings only in respect of the right of assistance (an attorney, a representative) or a last resort advocate, legal advisor, tax advisor or patent attorney. Nevertheless, only an objection made by an attorney appointed under the right of assistance (an advocate, legal advisor, tax advisor or patent attorney) must be justified and if the objection is not justified it must be rejected. In its objection a party may not effectively expand the scope of the demand to be granted the right of assistance as the court verifies only the merits of the request for granting the right of assistance and not the objection itself. It must be also assumed that an objection, as any other pleading, may be withdrawn by its author, but such action may not reinstate the validity of the decision made by the justices' clerk. In such event the court may not discontinue the proceedings to such extent as being irrelevant but it should reconsider the request for granting the right of assistance. It should be beyond doubt that the court's decision on rejecting the objection may be appealed against.

Summary

of the article: The request for granting the right of assistance prior to filing a complaint with an administrative court

The model of proceedings before administrative courts adopted in Poland gives rise to the specific doubts concerning a request for granting the right of assistance made before the commencement of the proceedings or, generally, before a comp-

laint is filed with a court (Art. 243.1 of the Law on Proceedings Before Administrative Courts dated 30 August 2002, Journal of Laws No. 153, item 1270, as amended) (the LPBAC). These doubts are related to the necessity to consider the request when a court (a justices' clerk) does not have access to the complaint and the administrative files. Nevertheless the proceedings concerning such request, although being partially independent, alike other proceedings of this type, is incidental towards the proceedings before an administrative court being accessory in relation to the case to which it refers. In this context the issue of the formal conditions of the request, in particular the designation of the act or action which the request refers to or is supposed to refer to is of particular importance. It allows to „bind” the granted right of assistance with the specific complaint and, as a result, with the proceedings instituted by such complaint and the court competent to consider the request. The right of assistance may be granted to a party, therefore it must be also determined in the course of the proceedings if the requesting party may be a party to the given proceedings. Such determination may not obviously consist in specifying the role in which such party might participate in the proceedings as before the proceedings are instituted this issue must be deemed open. Before a complaint is filed with a court the proceedings concerning the request to grant the right of assistance are basically conducted on the same principles as any other proceedings in this respect. Therefore it is possible to apply in such proceedings Art. 247 of the LPBAC (it is not possible to grant the right of assistance if a complaint is obviously groundless) and Art. 249 of the LPBAC (withdrawing the right of assistance). The attorney appointed in exercising of the right of assistance will not be awarded any remuneration if the complaint has not been lodged at all.