SPIS TREŚCI

MATERIAŁY Z OBRAD DOROCZNEGO ZGROMADZENIA OGÓLNEGO SĘDZIÓW NACZELNEGO SĄDU ADMINISTRACYJNEGO W DNIU 27 KWIETNIA 2009 ROKU W WARSZAWIE

STUDIA I ARTYKUŁY

VARIA

ORZECZNICTWO

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THE ANNUAL GENERAL MEETING OF JUDGES
OF THE SUPREME ADMINISTRATIVE COURT
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Summary

of the article: An individual's capacity to file complaints against the resolutions of the local government authorities (in the light of the administrative courts; judgements)

This article presents the premises of the capacity file complaints against the resolutions and orders of the local government authorities and the results of the lack of such capacity.

This capacity was defined in the acts on local government otherwise and more rigorously than in Art. 50 of the Act on Proceedings Before Administrative Courts (APBAC). Placing that capacity outside the APBAC was evaluated critically as unjustified violation of the codification of the law on administrative courts. The shape of that capacity does not meet the standards of the democratic state of law because it limits the right of an individual to a fair trial.

The capacity discussed in the article has its main source in the substantive law, to the limited extent in the civil law and, absolutely exceptionally, in the APBAC. The legislative procedure may not be a source of legal interest. On the other hand, the opinion appearing in the judicial decisions that the systemic law may not be its source is incorrect. The source of the capacity to file complaints must be from time to time related to a detailed regulation without reference to the division to the substantive, procedural and systemic regulations. The legal interest, of key importance for the capacity to file complaints, was defined in the so-called Bernatizk triad (public subjective right, legal interest and actual interest). However the act incorrectly perceives (as an alternative) the relation between the legal interest and right, completely neglecting the obligations.

In the judicial decisions the capacity to file complaints against resolutions is referred to as *actio popularis* against the meaning of this term established in the legal language. On the other hand, the judicial decisions include certain doubts when the applicant derives its capacity from his membership of a local government community; this source is generally rejected but there have appeared certain judgments that accept this membership as an auxiliary element and sometimes a sufficient one. The matter is open, mainly due to the legislators inconsistence. The defective regulation of the capacity to file complaints that may increase the number of complaints brought prematurely is „remedied" by the courts by interpretation of the moment in time when this capacity is updated.

The capacity to file complaints resulting from the „violation of legal interest" of the applicant is not a condition precedent for bringing a complaint or instituting the proceedings. The lack of capacity is not a formal issue the lack of which may de declared in the form of a decision.

Declaring the lack of capacity to file a complaint should result in discontinuing the proceedings. In such circumstances the court should not dismiss the complaint as it poses a threat that the resolution that was not verified by the court may be treated as finally and validly reviewed.

Summary

of the article: The principle of primacy of Community law and the powers of the Constitutional Tribunal (comments against the background of the decision of the VAC in Poznań dated 30 May 2008, file No. I SA/Po 1756/07)

1. This article was inspired by the decision of the Voivodship Administrative Court in Poznań of 30 May 2008 (file No. I SA/Po 1756/07) by which the VAC made a reference for a preliminary ruling to the ECJ regarding the relations between 1) the principle of primacy of Community law, the principle of loyalty (Art. 10 of the EC Treaty) and the freedom of establishment (Art. 43(1) and 43(2) of the EC Treaty) and 2) Art. 91.2 and 91.3 (the principle of precedence of international law over national laws) and Art. 190.1 and 190.3 of the Constitution of the Republic of Poland (the principle of general application of the decisions made by the Constitutional Tribunal and the powers of the Constitutional Tribunal to defer the loss of binding force of an unconstitutional normative act).

The reference for a preliminary ruling was made in the context of the judgement of the Constitutional Tribunal dated 7 November 2007 (file NO. K 18/06) declaring as unconstitutional certain provisions of Polish tax laws excluding the possibility to reduce the income tax by deducting the social insurance contributions paid in an EU Member State other than Poland. In that decision the Constitutional Tribunal deferred the loss of binding force of the unconstitutional legal norms until 30 November 2008.

The VAC had certain doubts as to the compatibility of the above mentioned provisions of tax regulations with the Community freedom of establishment (Art. 43(1) and 43(2) of the EC Treaty). However, there arose a question if deferring the loss of binding force of the unconstitutional provisions of tax regulations does not permit to ignore those provisions in judicial decisions as incompatible with Community law until the period of deferral has lapsed. This issue is an element of a larger problem related to the relation between the powers of courts, resulting from the principle of precedence of international treaties, and the powers of the Constitutional Tribunal.

2. The decisions of the ECJ show that even if a constitution court is the sole body authorised in the national legal order to decide on the hierarchical compatibility of legal norms, then in the event of a collision between the provisions of national and Community regulations the court considering the case must grant precedence to the provisions of Community law without the necessity to wait for the decision of the constitution court. Moreover, the court has this power when the constitution court deferred the loss of binding force of a provision of national law. If we accepted a contrasting assumption, we would have to accept that granting to the constitution courts the power to postpone the results of their decisions allows to „suspend" the effectiveness of the provisions of Community law. Such thesis cannot be reconciled with the principle of primacy of Community law but also with Art. 10 of the EC Treaty i.e. the principle of loyalty.

3. Under Art. 91 of the Constitution of the Republic of Poland the courts are authorised to refrain from applying in deciding a case the statutory norm which

cannot be reconciled with an international regulation. This power co-applies in the constitutional law with Art. 188.2 of the Constitution authorising the Constitutional Tribunal to adjudicate on the conformity of laws to the ratified international agreements whose ratification required prior consent granted in a law.

In principle, the decision of the Constitutional Tribunal does not prevent the courts from exercising their power to refuse to apply a statutory provision that may not be reconciled with a norm included in an international treaty. The VAC in Poznań was therefore individually authorised to grant precedence to a Community norm and disregard in making its decision in the case the doubtful and discriminatory tax regulations. There was no need to make a reference for a preliminary ruling.

Summary

of the article: The increased fees for storage of waste in the Environmental Protection Law – the interpretative problems

This article presents the problems with interpretation of provision on increased fees for storage of waste in the Environmental Protection Act of 2001 compared to other administrative fees and penalties. The author discusses the nature of increased fees in the context of the divergent positions of the doctrine and the judicial decisions. These fees have many features of administrative penalties

although the legislator did not define them as such. Due to the fact that they are determined by way of the so-called „self-assessment" they also have some features of taxes, moreover that to a certain extent it is possible to apply to them the procedure provided for in the Tax Code.

The author presents the principles of determining, paying and assessing the increased fees in the context of the practice of the public administration authorities. Making use of this opportunity the author points to the improper practice of those authorities consisting in including the calculations of those fees in a table attached to the decision made under Art. 288 of the Environmental Protection Act instead of in the rationale to such decision. The object of every administrative decision stems from its grounds and rationale and not any schedules thereto. Such practice undermines the provisions of the Administrative Procedure Code discussed in the article and violates the generally accepted European standards applicable to administrative sanctions.

In the part referring to the problems of admissibility of refraining from imposing an increased fee the author presented the position supporting the objective premises of increasing these fees as well as the position taking into account the fact that the entity had no influence on the violation of law. When declaring in favour of the objective premises, one must postulate the statutory possibility of disclaiming that liability in special circumstances e.g. when the entity used its best efforts to avoid the violation of an obligation.

The issues related to time-barring of liability to pay an increased fee and to refund the overpaid fee were discussed on the basis of the applicable provisions of the Tax Code.

Summary

of the article: The institution of suspension as an exception to the principle of expedient and continuous proceedings before administrative courts. Selected issues

The suspension of court proceedings is a procedural institution that consists in withholding the proceedings without discontinuing the case itself.
It is a deviation from the general principle of „expedient and continuous proceedings" imposing on the court the obligation to act in the given case without undue interruptions and breaks using the simplest available means to ensure its settlement (see Art. 7 of the Act on Proceedings Before Administrative Courts). Each day of delay makes more remote or sometimes even prevent the implementation of a rule of law. A decision which at a certain moment in time might have had a real social or individual value becomes useless on a later date. Sometimes the flow of time invalidates a basically correct settlement in the given case. The protraction of proceedings denies the stability and certainty of community life and undermines the authority of public administration in the peoples' eyes consuming a lot of precious time available to the parties. Each reasonable legislator is obliged to create such legal construction which would ensure the effective protection against negative effects of the flow of time and therefore increase the effectiveness of the administration of justice.

The above is deemed to be guaranteed by the principle of „continuity of proceedings" consisting in their concentration and non-interruption. Continuity allows to ensure the proper dynamics of the proceedings coupled with limited usage of human resources and promotes the implementation of the praxeological postulate of „effective functioning" elevated to the level of the primary principle known as the principle of „effective functioning" that meets the general expectations of effective administration of justice, and furthermore guarantees the permanent performance of the individual procedural activities and allows to stick to the object of proceedings.

The need to conduct the proceedings expediently and continuously may not invalidate the obligation to undertake the procedural actions in accordance with

law. Moreover, on the course of proceedings there may frequently arise the factual obstacles preventing the proceedings from being duly conducted. Employing the institution of suspension of proceedings in such event allows to reach the necessary compromise as its has no other results apart from delaying the final decision.

As the premises of suspending the court proceedings may be of various nature this article discusses only those which arise as a result of the circumstances or events independent of the will of the parties and the persons statutorily authorised to act on their behalf. They are enumerated in Art. 24.1 of the Act on Proceedings Before Administrative Courts. They include among others: a death of a party or its statutory representative, loss of capacity to be a party to court proceedings, insufficient number of members of the governing bodies of an organisational unit being a party to the court proceedings, a party or its statutory representative being unable to communicate with the court or opening of insolvency proceedings in respect of a party. The arising of such premises makes that specific procedural institution i.e. the court suspending the court proceedings upon its own initiative obligatory.

Summary

of the article: A substitutive power of attorney in proceedings before administrative court – selected issues

This article discusses the selected problems related to granting further powers of attorney (substitutions) in proceedings before administrative courts.

The author explains the nature of a further power of attorney and its practical consequences, particularly emphasising the necessity to distinguish between the substitutions granted under separate corporate regulations and the substitutions granted under additional authorisations included in the document of the power of attorney.

The author points to the distinctive features in the solutions adopted in this matter compared to the Civil Procedure Code and the effects thereof for the parties. It concerns in particular the lack of possibility to grant by virtue of law a further power of attorney to a barrister or legal advisor.

The author analyses the individual principles of granting substitutions by virtue of law included in the corporate laws (Law on Barristers, Act on Legal Advisors, Act on Tax Consultancy, Act on Patent Attorneys) as well as the specific nature of substitutions granted to articled clerks.

In the author's opinion Art. 39.2 of the Act on Proceedings Before Administrative Courts (APBAC) requires urgent amendments by allowing the granting of further powers of attorney to barristers and legal advisors by virtue of law (alike in the civil procedure). This is necessary to ensure the due protection of interests of parties to proceedings before administrative courts.