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STUDIA I ARTYKUŁY

VARIA

ORZECZNICTWO

SĄDOWNICTWO ADMINISTRACYJNE NA ŚWIECIE

KRONIKA

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Report of the proceedings

On 12 March 2018, the annual General Assembly of the Judges of the Supreme Administrative Court was held in the Session Room of the Supreme Administrative Court (NSA) in Warsaw. During its session, *Information on the activities of administrative courts in 2017*, presented by the President of the NSA, Prof. dr hab. Marek Zirk-Sadowski, was adopted by way of a resolution.

The solemn assembly was attended, apart from the President of the NSA, by the Vice-Presidents: dr hab. Jacek Chlebny, Janusz Drachal, Maria Wiśniewska, judges of the Supreme Administrative Court and presidents of voivodship administrative courts, invited guests – representatives of the highest state authorities and the judiciary: on behalf of the President of the Republic of Poland Andrzej Duda, Paweł Mucha – Deputy Chief of the Chancellery of the President, on behalf of the Prime Minister, Paweł Szrot – Deputy Chief of the Chancellery of the Prime Minister, Prof. dr hab. Małgorzata Gersdorf– First President of the Supreme Court, on behalf of the Minister of Justice, judge Małgorzata Szarek, dr hab. Jarosław Wyrembak – representing the President of the Constitutional Tribunal, Krzysztof Kwiatkowski – President of the Supreme Audit Office, dr Edyta Bielak-Jomaa– Inspector General for Personal Data Protection, Stanisław Trociuk – Deputy Commissioner for Human Rights, representative of the Commissioner for Children's Rights Bartosz Sowier – Director of the Office of the Commissioner for Children's Rights, Antoni Cyran – Head of the Supreme Court First President's Chancellery, dr Grzegorz Borkowski – Head of the Office of the National Council of the Judiciary.

After the official opening of the session and welcoming the guests, the President of the Supreme Administrative Court, Prof. dr hab. Marek Zirk-Sadowski, presented information on the activities of the Supreme Administrative Court and voivodship administrative courts in 2017. The content of his speech *in extenso* can be found on page 9-17 in this issue of the ZNSA.

Invited guests spoke after the speech of the President of the NSA.

The first speaker was Paweł Mucha, Deputy Chief of the Chancellery of the President, who read the letter from the President of the Republic of Poland, Andrzej Duda, addressed to the participants and guests of the assembly. The content of the letter *in extenso* can be found on page 18-19 in this issue of the ZNSA.

The next speaker was Prof. Małgorzata Gersdorf, First President of the Supreme Court, who, referring to the unconstitutional changes which have occurred in the judiciary in recent years in Poland, emphasised the significant part which the administrative judicature still plays in shaping relations between public authority and

an individual. She reminded everyone that a citizen can feel safe only when public authorities do not use their powers with violation of the law, do not exceed the scope of powers vested in them and do not grant themselves these powers arbitrarily. The citizen has the right to expect that he or she will find an adequate protection in the administrative court, if a public authority abuses its position, regardless of how high it is located in the hierarchy of state organs. The fundamental role of the administrative judiciary is to control the activities of public administration, this obligation follows from Article 184 of the Constitution of the Republic of Poland. In connection with this obligation, Prof. M. Gersdorf emphasised the importance of a huge judicial effort made by the judges of administrative courts. She added that this demanding job of judges does not consist in performing an ancillary role towards other authorities – on the contrary – it means that the constitutional right to court is to be reflected in ensuring judicial control of rulings, decisions and other acts of individual shaping of the legal status of an entity by bringing proceedings before a common court or an administrative court.

Professor M. Gersdorf asked a number of current questions about the rudiments of the democratic state ruled by law, referring in her reflection to the symbolism of Themis: a sword in the right hand, which is an expression of the real power of the judiciary, scales in the left hand, rendering the responsibility of a thorough assessment of opposing reasons and arguments, and a blindfold rendering the impartiality. At the same time, in the tone of reflection, she asked the question: what will the Themis of our times look like? The blindfold is pulled down, the hands are empty. The attribute of servitude to the executive power will remain. Breaking the pessimism flowing from this picture, the First President of the Supreme Court wished all those assembled for Themis to keep her insignia.

In her last words, she thanked judges for their undeniable effort and dedication in their service, for hard everyday work, the result of which is the case-law of the Supreme Administrative Court.

Then, the President of the Supreme Audit Office, Krzysztof Kwiatkowski, spoke out and noted as an introduction that each year he based his speech on the results of budgetary control, but due to the earlier date of the annual General Assembly of the Judges of the Supreme Administrative Court this year the audit has not been completed yet. However, he added that everything suggests that the assessment of the control which has just been carried out could be positive and that no irregularities would be found. The President of the Supreme Audit Office stressed that the judicial work of administrative courts constitutes an important determinant of interpretation of provisions which are the legal aspect of control and its use by the Office serves a proper preparation and performance of control, as well as final preparation of information on its results. The ability to refer to the authority of judicial decisions of administrative courts is a significant support for the activities of the Supreme Audit Office.

The President of the Supreme Audit Office illustrated the Office's reference to the interpretation of legal provisions of administrative courts with several examples. The results of inspection of functioning of the system for subsidising tasks entrusted to local government units in the field of government administration and other tasks entrusted by acts conducted in 2015-2017 were published in 2017. This publication describes a system of subsidising entrusted tasks, financed from the state budget in those parts the administrators of which are province governors. The evaluation of this system varied depending on the nature of the subsidy. The results of the inspection showed that it has still not been possible to find a solution which would eliminate the problem of co-financing of entrusted tasks by local government units, and at the same time protect the state budget from uncontrolled increase in subsidies. As it was established, the amount of subsidies intended primarily for financing personal and material expenses incurred by local government organisational units in connection with the implementation of entrusted tasks in the field of government administration and other tasks entrusted by acts has remained the subject of disputes between the government and local governments. According to the Supreme Audit Office, the source of these disputes are ambiguous and inconsistent provisions regulating the issues of planning and clearing of these subsidies. While analysing the legal status regarding claims for payment of the amount necessary for the full performance of tasks entrusted to local government units, the employees of the Office noted different views presented by the Supreme Administrative Court and common courts regarding the interpretation of Article 49(6) of the Act of 13 November 2003 on the income of local government units, which, if a targeted subsidy from the state budget is not transferred in a way that allows full and timely performance of the entrusted tasks, authorises a local government unit to claim the benefit due with interest in the amount determined as for outstanding tax in court proceedings. The Supreme Administrative Court (judgment of 3 March 2015, II GSK 207/14) assumes that this provision does not constitute a basis for seeking the reimbursement of expenses incurred for the performance of entrusted tasks in court, but a basis for claiming due benefit for performance of entrusted tasks. The amount of the targeted subsidy is a financial limit under which a local government unit performs the task; this amount cannot be supplemented with funds from the budget of this local government unit. However, in the light of judicial decisions of common courts (see judgment of the Court of Appeals in Krakow of 12 April 2016, I ACa 1827/15), a pecuniary claim against the Treasury for reimbursement of incurred expenses is legitimate if the entity incurs expenses related to the performance of entrusted task in an amount higher than the amount of the targeted subsidy from the state budget. It appears to the Appellate Court that such a dispute or failure to provide sufficient funds to perform the tasks cannot result in suspension of their performance, as the administrative bodies play an ancillary role in relation to the citizen. Even though such discrepancies are not subject to the assessment of

the Supreme Audit Office, they must be noted due to the proper assessment of the controlled activity in the application of provisions being the source of non-uniform interpretation. President K. Kwiatkowski admitted that the lack of uniform interpretation in this matter causes serious problems.

Further in his speech, he referred to the information published a year ago on the results of inspections of shaping the landscape and public space in cities in which the Office assessed actions taken by local government to improve the quality of public space. The establishment of cultural parks was assessed positively as a very good instrument of utilising public space, however, attention was drawn to the doubts revealed in the course of the inspection related to the legal nature of the conservation plan for the park, the date of its preparation and approval. The Office assessed other landscape management activities differently, as it recognised that these activities related to planning and spatial development are ineffective. While giving a description of the legal status of the studied area, President K. Kwiatkowski thanked the judges for helpful judgments: of the Supreme Administrative Court of 7 December 2007, II OSK 148/07, and of the Voivodship Administrative Court in Szczecin of 5 August 2010, II SA/Sz 166/10, regarding the precision of formulated resolutions of the commune council on the creation of a cultural park, especially the correct incorporation of the necessary elements of the resolution, and regarding the legal nature of the conservation plan for the cultural park. The Office also used the judgment of the Supreme Administrative Court of 24 November 2014, II OSK 906/13, which stated, *inter alia*, that a local government body shall take into account the conservation guidelines in the course of the planning procedure. Thanks to the fact that the draft spatial development plan is agreed with the voivodship conservator of monuments, the adopted solutions become a local law.

The last case discussed by the President of the Supreme Audit Office was also completed in 2017, and concerned a socially important control of counteracting the sale of the so-called designer drugs (synthetic drugs). It was to provide the necessary data to carry out the analysis and evaluation of whether the actions of public administration bodies affected the limitation of the availability of these drugs and their distribution. Unfortunately, its findings showed that the upward trend in the availability of designer drugs in the country and drug poisonings in Poland has been recorded again despite the actions taken by the state authorities. President K. Kwiatkowski noted that in 2010, when an increase in such cases was recorded (up to about a thousand per year), as a result of multi-layered actions taken by the government administration, the scale of these cases was reduced to about one hundred per year. Today, this upward trend (several thousand cases per year) of consumption and poisoning with substances which are the so-called designer drugs is very dynamic. It showed how multidimensional this problem is, because the elimination of shop sales increases online sales or sales through couriers. The Office pointed out the need to develop new comprehensive solutions in this area. During the prepa-

ration and conduct of control activities, judicial decisions of administrative courts concerning, among others, defining the concept of placing narcotic replacement drugs on the market (see judgments of the Supreme Administrative Court of 29 September 2015, II OSK 1403/14 and II OSK 1407/15), and the scope and manner of application of the Act of 2 July 2004 on the freedom of economic activity towards entrepreneurs in the case of whom there is a reasonable suspicion that they produce or place such drugs on the market (see judgment of the Voivodship Administrative Court in Łódź of 23 January 2014, III SA/Łd 962/13). President K. Kwiatkowski emphasised the importance of the case-law for the functioning of public institutions. On the other hand, he expressed his satisfaction that the Supreme Administrative Court is the beneficiary of budgetary control carried out by the Supreme Audit Office. The Supreme Audit Office receives between 6,000 and 10,000 applications for inspection annually, a large part of which are citizens' requests. In practice, the Office may conduct several hundred inspections per year, and therefore it is faced with the necessity of making an extremely difficult choice of the most significant applications.

At the end, President K. Kwiatkowski recalled the case related to the complaint to the administrative court which the nominated auditor of the Supreme Audit Office is entitled to pursuant to Article 96 of the Act of 23 December 1994 on the Supreme Audit Office. In decision of 21 February 2017, I OSK 1568/15, the Supreme Administrative Court stated that the case of referring the nominated auditor of the NIK to a medical examination pursuant to Article 92(3) of the Act on the Supreme Audit Office does not fall within the jurisdiction of administrative courts related to subject matter. The speaker stressed that this position differs from the previous practice of the Viovodship Administrative Court in Warsaw, which assumed that the decision of the President of the Supreme Audit Office to refer a nominated auditor to the medical examiner of the Polish Social Insurance Institution can be complained against to the administrative court. It appears to the Supreme Administrative Court that the issue of referring an auditor to medical examination is not an independent case but an internal-service incidental subsidiary act regarding the grounds for termination of employment due to health issues, and therefore such case cannot be subject to administrative court decision. The presented interpretation refers to the *ratio legis* of this regulation. President K. Kwiatkowski added that this decision deserves recognition and will certainly affect the efficiency of proceedings in personnel cases related to employment in the institution he is representing.

In the last words of his speech, he thanked judges for their enormous judicial efforts, congratulating the President of Supreme Administrative Court, Prof. Marek Zirk-Sadowski, and extending personal thanks to the First President of the Supreme Court, Prof. Małgorzata Gersdorf.

Then, the Vice-President of the Supreme Administrative Court, dr hab. Jacek Chlebny read an occasional letter addressed to the participants of the meeting by

the Marshal of the Sejm, Marek Kuchciński. The content of the letter *in extenso* can be found on page 20 in this issue of the ZNSA.

At the end of the session, the President of the Supreme Administrative Court ordered a vote of the assembled judges of the NSA on the adoption of the presented *Information on the activities of administrative courts in 2017*. The General Assembly of the Judges of the Supreme Administrative Court unanimously adopted a resolution on its adoption.

Prepared by *dr Anna Rossmanith*
(Supreme Administrative Court,
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Summary

of the article: **Legal status of an entity implementing public communication as a public purpose investment**.

Implementation of public investments is a domain of the state authority, which carries out such undertakings using various enforcement mechanisms, thus limiting the rights of third parties. These include admissibility of expropriation, which leads to deprivation of the ownership right to real property, on which the investment is to be carried out. The use of such severe legal measures should be reserved for unique situations, restricted for only single cases and addressed strictly to a specific group of entities who may and should take advantage of such privilege. Considerations raised in this paper concern this topic, presenting the points and comments on the background of the current state of law governing the principles of locating investments, including infrastructure related to public communication. Detailed considerations concern the issue of the relationship between the legal status of the enterprise building such infrastructure and admissibility of applying special solutions, which are intrinsically associated with the actions of the state authorities. The main point of the analysis is that enabling the use of privileged legal solutions related to public communication must be strictly related to the public nature of the entity that carries out such tasks; such public nature of the contractor may be derived directly from the fact that it is a public sector entity, but it may also be derived from existing legislation that allows private entities to carry out public tasks; however, an explicit legal basis must always exist for granting the said status to an enterprise.

Keywords: expropriation, public purpose investments, decision on the localization of the public purpose investment, public communication

Summary

of the article: **Procedural problems with freezing a bank account to prevent fiscal fraud**

The amendment of the Tax ordinance of 24 November 2017, which added a new section IIIB to the statute's text, contains legal solutions which are the source of many doubts as to their nature and legislative correctness. The new provisions not only introduce amendments to the act – Law on proceedings before administrative courts (LPAC), locating it outside the text of court laws, but they also introduce a new, unusually shortened procedure, by making a reference to tax proceedings in the matters that are not regulated therein. Apart from these solutions, a new legal form of operation of the Head of the National Revenue Administration (Krajowa Administracja Skarbowa, KAS) was defined, and the definition is so unclear that it is problematic to indicate the procedure in which such operations are to be undertaken.

In addition, as the time limits for undertaking actions by the Head of the National Revenue Administration and for holding a court-ordered fiscal inspection were shortened significantly, the number of doubts caused by the new provisions is very high. Some of the aforementioned issues are discussed in this paper.

Keywords: STIR act, Head of the National Revenue Administration, freezing bank accounts, amendments to LPAC, court-ordered inspection time limits

Summary

of the article: **Interest on the surplus payment of tax as a result of the ruling of the Constitutional Court**

The Tax ordinance governs the interest on the surplus incurred as a result of the ruling of the Constitutional Court precisely only in the case of declared taxes. As regards [administrative] decision-based tax, interest is granted only if the tax authority did not contribute to triggering a prerequisite for revoking the decision.

The practice of tax authorities and in the case law of administrative courts is dominated by the position that a tax authority may not contribute to revoking a decision due to the grounds that is non-constitutional, and as a result, the tax authority is not obligated to impose interest on the surplus payment. Therefore, it is the tax payer who should bear the consequences of breaching the Constitution by the state authorities.

This position is unacceptable not only due to the obvious injustice, but also due to the fact that constitutional norms must be applied in the process of interpreting tax law. Both tax authorities and administrative courts are obligated to respect the consequences arising from the rulings of the Constitutional Court, and these include, apart form the reimbursement of the surplus tax paid, compensation for depriving the tax payer of their assets.

Therefore, interpreting tax law in line with the Constitution is necessary and legitimate. As a result of such interpretation it must be considered, taking into account the constitutional principle of compensation for improper actions of the administration and the principle of equality before law, that the interest on the subject surplus payments is the only solution that is compliant with the Constitution.

In turn, it would be contrary to the principle of proper legislation and to the principle of trust in the state authorities to interpret tax law in such a way that would stipulate that the tax payer should enforce their claims on the grounds of civil law. As the tax is collected in administrative mode, its reimbursement and interest should be carried out in the same mode.

Keywords: Constitutional Court, surplus, interest on surplus

Summary

of the article: **Self-control of an administrative decisions in administrative court- proceedings in Polish, Austrian and German law**

This paper aims to analyse and compare the law and discuss the institution named self-control of an administrative decision in administrative court proceedings in the legal orders of Poland, Austria, and Germany. The purpose of self-controlling powers is to allow public administration authorities, if an incorrect decision has been made, to correct it, without involving an administrative court.

The paper discusses in details the competences of national public administration authorities related to self-controlling; it also contains a legal comparative analysis, whose aim was to present the differences and similarities among the Polish, Austrian, and German regulations in this respect.

The deliberations made it possible to conclude that the regulations adopted under the Polish, Austrian, and German laws, despite the present differences, were introduced for the same reasons. Both in Poland, as well as in Austria and Germany, granting self-controlling powers to the authorities is intended to grant an individual legal protection in a simpler, faster, and cheaper way than before the court. Moreover, if an authority exercises the self-controlling powers it lessens the burden on administrative courts.

Keywords: self-control, administrative court proceedings, administrative decision, comparative law