SPIS TREŚCI

STUDIA I ARTYKUŁY

VARIA

ORZECZNICTWO

SĄDOWNICTWO ADMINISTRACYJNE W EUROPIE

KRONIKA

BIBLIOGRAFIA

TABLE OF CONTENTS

STUDIES AND ARTICLES

VARIA

JUDICIAL DECISIONS

Summary

of the article: An administrative court judge and the idea of authority

Judges not dot acquire authority or respect simply by being nominated. What they acquire is rather formal authority. What is important for any judge is his or her actual authority i.e. the authority he or she must earn on his or her own. This means that a judge must lend his or her authority to his or her position. This authority does not come out of nowhere. It must grow slowly and this process requires demanding external conditions: first of all respect and esteem for a judicial position as the independence of a judge is the basis of a state of law, and, furthermore, skills, impartiality, dignity, accuracy, integrity and honesty.

The starting point for evaluating a judicial authority shall be the method, the form of respecting and understanding of independence of adjudication. There are three mutually related arguments explaining why a judge must build his or her authority. First of all, a judicial authority is necessary to earn the trust of the general public in the judicial branch. It is also necessary to earn trust in the moral strength of the judicial branch. It is of ultimate importance in any democratic state and at any time. Secondly, the judicial authority is necessary for a judge to be able to act as a guardian of the rights, freedoms and liberties protected by the

Constitution and, therefore, to act as an effective and authentic surety of the rules of the state of law stemming from the constitutional standards. Thirdly, a judge must guarantee the effective protection of the subjective rights of an individual. This is the task which only a judge may perform as exercising the rights protected by the Constitution, laws and regulations always and ultimately depends only on the judge's understanding of the administration of justice.

The judges not only apply the law but also, in certain particularly justified circumstances, make the law by its development and supplementation. There are no pure, classical, explicit rules applicable to making law by the judges. The issues concerning relations between application and supplementation of law are hard to separate in many instances.

Founding law and its source on social facts allows a judge to make two crucial assumptions. First of all, the nature of law requires all the disputes and doubts concerning the issues to which the law does not apply or applies to an insufficient extent to be settled on the basis of universal axiological values. Secondly, those universal axiological values apply notwithstanding the generally accepted conventions of law-making. That's why they always become a part of the system of law prevailing in the given country.

A judge's conscience is always accompanied by the following reflections: when am I a subject implementing the idea of justice and when do I become a mere tool of law? Where are the limits? A judge may not share his or her responsibility with anyone else. Conscience is always referred to the singular and not plural. The judge examines his or her conscience always on his or her own. The psychological loneliness ceases to be a burden if the judge is deeply convinced that he or she is true to himself or herself when making judicial decisions.

The judge must bear in mind the Latin maxim *bonum est faciendum, malum vitandum est* (good must be done, evil avoided) and ignore the other one *quisquid principi placuit, legis habet vigorem* (what pleases the prince has the force of law).

Summary

of the article: The special principles of administrative proceedings in matters handled by the Agency for Restructuring and Modernisation of Agriculture

This article describes the special principles of administrative proceedings in matters handled by the Agency for Restructuring and Modernisation of Agriculture (ARMA) concerning granting direct payments for agricultural land and funds allocated for development of rural areas.

The changes in legal status introduced by the Act on Direct Payments to Agricultural Land and Sugar Payments dated 26 June 2007 and the Act on Supporting the Development of Rural Areas with Funds from the European Agricultural Fund for Rural Development (EAFRD) dated 7 March 2007 brought about far-reaching changes in relation to the basic principles of administrative proceedings regulated in the Administrative Procedure Code.

The most important procedural changes include: introducing the principle of balancing the burden of evidence, releasing the bodies of the ARMA from the obligation to gather full evidence and limiting that obligation to the full consideration of evidence and limiting the obligation to allow the parties to actively participate in the proceedings to those cases when a party makes such a request. The information obligation of the bodies of the ARMA was similarly limited.

The newly introduced principles of administrative proceedings will undoubtedly promote the facilitation and acceleration of proceedings before the bodies of the ARMA, but at the same time they are a source of fear that they may violate the interest of a party to those proceedings.

Summary

of the article: Evasion and abuse of law in tax laws

This article refers to the problems discussed in the monograph by K. J. Stanik and K. Winiarski, *Transfer pricing and transfer pricing agreements in practice. Selected tax-law issues – 2008*, where the authors pointed to the constructional coincidence of regulations governing taxation of related parties [see: Art. 11 of the Corporate Income Tax Act dated 15 February 1992 (the uniform text in the Journal of Laws of 2000, No. 54, item 654, as amended), Art. 25 of the Personal Income Tax Act dated 26 July 1991 (the uniform text in the Journal of Laws of 2000, No. 14, item 176, as amended), Art. 32 of the Act on Tax on Goods and Services dated 11 March 2004 (the Journal of Laws of 2004, No. 54, item 523, as amended) and Art. 80 of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (Official Journal of the European Union, 347/1) with the institutions of evasion and abuse of tax law. This was a stimulus to discuss those institutions where, first of all, due to the lack of the normative regulations defining those institutions in the national tax law, the authors attempted to define them and to designate their scope. Concluding the authors stated that those terms were not equivalent and emphasised, following the doctrine (professor S. Grzybowski, [in:] *The system of civil law*, *Book I*, Ossolineum 1974, page 512 ff.), that „evasion of law" is more extensive than „abuse of law". Therefore they recognised as justified the conclusion that all the cases of abuse of law are included in the concept of evasion of law, but not each event of evasion of law will be at the same time an event of abuse of law within the above mentioned sense.

Then this author presents the issue of attitude of the tax practice and doctrine to the institutions of evasion and abuse of law, emphasising it depended on the current legislation, and in particular the Tax Code dated 29 August 1997 (the Journal of Laws of 1997, No. 137, item 926, as amended; the uniform text in the Journal of Laws of 2005, No. 8, item 60, as amended). Due to this turning point this author identified three periods of time out of which – as emphasised – the first (until 31 December 2002) and the third (from 1 September 2005) are similar to a certain extent. In those periods the institutions in questions were implemented in practice at the stage of proceedings to take evidence aimed at determining the factual status of the given, specific tax matter. The difference between them stems for the fact that in the first of the above mentioned periods of time there were no regulations applicable to those institutions. Currently they are to be found in Art. 199a of the Tax Code. Hence later on this authors discusses that provision of the Tax Code, emphasising the importance of the judgement of the Voivodship Administrative Court in Warsaw of 19 September 2007, file No.: VIII SA/Wa 425/07, for its correct understanding and application.

In the final part this author presents the opinion of the ECJ on tax evasion and abuse, included, among others, in the following judgements dated 21 February 2006: in the case C-255/02 *Halifax plc, Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd, v Commissioners of Customs & Excise*; in the case C-223/03 *University of Huddersfield Higher Education Cor-*

poration v Commissioners of Customs & Excise and in the case C-419/02 *BUPA Hospitals Ltd, Goldsborough Developments Ltd v Commissioners of Customs & Excise*, emphasising that those judgements may materially affect the opinions of national courts, especially in respect of turnover taxes. Those judgements clearly show that in the case of VAT the circumstances such as the goals and motives of actions of a taxable person are neutral, but the principle of abuse of law applies also to VAT. As a result the ECJ assumes that the national tax authorities are not just entitled to but simply obliged to verify the transactions concluded by a taxable person to identify any events of abuse of the Community law.

Concluding this author declares that due to the conditions of legal nature of evasion and abuse of tax law may, and even should, be discussed and this article is the demonstration thereof.

Summary

of the article: A public administration case against the background of an administrative case and a civil case – the theoretical-legal issues

A right to trial, being a right of an individual towards the state, separate from and independent of any other normative relations, requires that a case submitted for consideration be actually considered by a common or any other court. An individual shall have his or her rights actually protected not when he or she simply may have his or her case recognised by the authority administering justice but when such authority is able to use the instruments appropriate to duly consider a case of the given type. Although qualifying cases to the specific branches of law is to a certain extent arbitrary, but the analysis of the situation when cases are submitted for consideration to an authority administering justice shows the true value of the appropriate classification of a case and, consequently, the value of protection the state may give to an individual.

Both in the doctrine and in the judicial decisions, a public administration case or – more frequently – an administrative case is juxtaposed with a civil case. The doctrinal determinations of the administrative and civil law to that extent meet halfway, supplementing and enriching each other. Comments on the nature of relations between those two categories of cases are often present also in the determinations made by courts deciding in such cases. In spite of many, often serious, differences between a civil and administrative case or a public administration case, one may notice a few similarities between them, resulting from the frequent coexistence and interspersing of legal relations of administrative and civil nature.

It seems it is not possible to determine the meaning and scope of a public administration case without analysing the nature of an administrative case which is done best on the basis of determinations regarding a civil case.

This author first of all has analysed the methods of defining a civil case and an administrative case. Both notions are based on the one hand on the substantive-law criteria, and on the other hand – on the formal-legal criteria. Although the substantive-law criterion used to distinguish the civil cases from the administrative cases are recognised in the doctrine as primary, but it is not possible to depart from their formal-legal definition. In the event of civil cases such definition must be related on the one hand with the necessity for such cases to be heard by a common court, and on the other – with the requirement that they be considered on the basis of the Civil Procedure Code. In the event of administrative cases a formal-legal definition allows to qualify an administrative case as an object of a jurisdictional administrative proceedings. In this context this author further analyses relations between the notion of an administrative case and that of a public administration case and discusses the issue of administrative-law situation. It has been argued for a long time in the doctrine that the need for a wider interpretation of the rights and duties of entities regulated in the administrative law could be better satisfied upon introduction of a notion of legal situation next to the notion of a legal relation.