SPIS TREŚCI

MATERIAŁY Z OBRAD DOROCZNEGO ZGROMADZENIA OGÓLNEGO SĘDZIÓW NACZELNEGO SĄDU ADMINISTRACYJNEGO W DNIU 28 KWIETNIA 2008 ROKU W WARSZAWIE

STUDIA I ARTYKUŁY

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Summary:

of the article: Taxes payable on the value of gratuitous performances

The tax law often includes terms and notions from the other branches of law where they have established meanings. If such terms and notions are not defined for the purpose of tax law then in principle they should be interpreted as in their original branch of law. However, in the event of any doubts if their original meaning is appropriate in the tax law there arises the question if the „non-fiscal" definition should be kept for the sake of uniformity of the system of law or their new meaning appropriate for the analysed institution should be sought. We face such dilemma in the case of collection of income tax on the value of gratuitous performances. A part of the doctrine supports the view that the object of taxation are gratuitous performances within the meaning of civil law. The prevailing part of decisions of administrative courts are in favour of assigning a specific tax-law meaning to that term. The latter concept is also supported by this author who in general believes that the object of interpretation are legal norms and the resulting rights and obligations rather than the terms and notions themselves. Furthermore the rights and obligations should be sought in the substantive tax law bearing in mind that the norms of the tax law should specify the subject, the object and the basis of taxation and the tax rate as well as tax reliefs, credits and exemptions, if they exist in the given construction. Taxation the element of which is a behaviour parallel to the civil-law notion of „gratuitous performance with the object of taxation" is not a civil-law event consisting in the gratuitous making of a performance and the basis of taxation is not the value of such performance. The object of taxation is obtaining income resulting from the gratuitous performance. And the income, that is the taxation basis, is not the value of such performance e.g. an amount of cash or the value of real property delivered for use. The income is the profit obtained as a result of using the given amount of cash or an asset (e.g. real property). Depending on interpretation the result of taxation is significantly different. The possible different interpretations are used to evade taxation which the administrative court rightfully oppose. The „strict" interpretation transferring the linguistic meaning of the given term from the civil law to the tax law is used here to „circumvent" the tax law.

of the article: Making the files of an administrative case available to a party and the right to trial

All evidence admitted by the court should, in principle, be made available to the parties with a view to adversarial argument. Under article 73 § 1 of the Code of Administrative Procedure (CAP) the agency is obliged to enable the party to have access to the case files and to prepare notes and copies. This right is excluded both to a party and his/her lawyer on the grounds of the state secret protection, and on account of the interest of the state (art. 74 § 1 CAP). Denial of the access to the

case file requires a ruling that is subjected to judicial control. Under no circumstances is the access to the administrative case files restricted to the judge. The likelihood is that denial of the access to the case file is accompanied by the refrainment of providing reasons of the decision delivered by the agency. In such a case, the party may share the similar problems of *Joseph K*., the character of *The Trial* by Franz Kafka. In Polish law there is not a substitute legal mechanism that would allow specially vetted lawyers to see the case file and no other mechanism has been developed that would allow the party to learn the reasons that grounded the denial the access to the case file.

In the case *Chahal* v. the UK the Court in Strasbourg recognized the possibility of using confidential material where national security is at stake. In the light of the Council of Europe *Recommendation Rec (2004) 20 on judicial review of administrative acts* in certain circumstances applying special protective measures to sensitive documents is unavoidable. Both the *Chahal* case and the Recommendation tend to strike a fair balance between protecting the public interest and the human rights approach.

De lege ferenda, it is recommended in Polish law to introduce such a mechanism that would allow, for example, an independent security-cleared counsel, to examine the case file. It could protect the individual's rights while keeping sensitive information confidential. The argument in favour of amending the law, inter alia, may be found in the judgement of 23 February 2007 r. of the Supreme Court of Canada *Charkaoui* v. Canada. As a result of the *Charkaoui* case, a recent amendment to the Immigration and Refugee Protection Act allowed special independent advocates unrestrictive access to the case files if security concerns prohibit it to the party.

Summary

of the article: The constitutionality of legalisation of buildings erected without a construction permit

This article discusses the problem of legalisation of buildings erected without a construction permit. The problem of construction works carried on without the construction permit required by law may be analysed on various levels. The problem of erecting buildings without construction permits regulated in Art. 48 of the Construction Law is a question of high practical importance and for this reason

it has become a significant theoretical issue. In the prevailing Construction Law legalisation of buildings erected without a construction permit is treated inconsequently. It introduces unclear and ambiguous principles of recognising such actions as permissible. The acceptance of buildings erected without a construction permit provided in Art. 48 of the Construction Law introduces absolutely unjustified differentiation of the legal situation of investors. Introducing such differentiation is based on criteria which are not related to the conduct of the investors thus linking the permissibility of legalisation with the objective premises beyond the investor;s control. Such situation leads to the resurfacing of the issue of constitutionality of the functioning legal solutions. In this article the author emphasises that the adopted regulations lack any constitutional grounds. The criticism of the applicable laws is based on two assumptions: the inadmissibility of different treatment of entities who breached the law and linking the results of such breach with the local zoning plan as it violates the constitutional principle of equality of entities before law and results in the improper imposition of sanctions for implementation of an investment without a required permit. The situation when under the Construction Law investors who erected a building without the construction permit may face administrative liability consisting in the obligatory legalisation or demolition of the woks performed without a construction permit and criminal liability for such tort is inadmissible. In the author;s opinion such formulation of that liability is unconstitutional.

Summary

of the article: Using the means of electronic communication in proceedings before administrative courts – the *de lege lata* and *de lege ferenda* comments

1 May 2008 was the deadline set forth in the Act on Electronic Signature for the public authorities to make it possible for the customers of the certification services to submit applications and requests and perform other actions in electronic form. The obligation to allow such possibility rests with all public authorities, including the administrative courts.

The situation of the administrative courts is specific as their functioning was excluded from the scope of the Act on Implementation of IT Technologies in the Functioning of Entities Performing Public Tasks i.e. the basic statutory act aimed at popularisation of the new technologies amongst the public authorities although all the common courts are covered by the scope of that Act. However, the provisions of law regarding administrative courts which make references, to a certain extent, to the requirements set out in the regulations on implementation of IT technologies, remain in force even now.

Using the means of electronic communications is provided in the provisions of the administrative procedural law. Both the Code of Administrative Procedure and the Tax Code define the principles of submission of the e-applications, delivery of electronic documents by an authority and access to the copies of such documents. Unfortunately the provisions of the Law on Proceedings Before Administrative Courts do not include such complex regulation and provide the norms for the issues discussed only in small parts thus preventing the performance of the obligation set fort in the Act on Electronic Signature. Further inaction of the legislator will pose a threat to the development of the E-Office. The administrative courts will not only be unable to electronically communicate with the citizens but also to exchange electronic documents with the public authorities which they control.

Summary

of the article: A complaint to an administrative court against a written interpretation of provisions of tax laws issued in an individual case

The publication outlines actual problems of court control over individual interpretations of tax regulations as well as introduces rules of lodging complains about the interpretations. The first part of this article presents character of individual interpretations of tax regulations and the following parts describe procedure of lodging complains and possible results of lack of form in them. The effects of delegating authority to issue interpretation only to competence of Finance Ministry are also described, including the necessity of hearing the case exclusively by Voivodship Administrative Court in Warsaw. Finally possibilities for solving the problem are proposed especially implementing proper act by the RP President.