SPIS TREŚCI

STUDIA I ARTYKUŁY

Dr hab. Andrzej Kabat (profesor, Akademia Leona Koźmińskiego w Warszawie)
Bezpośrednie stosowanie Konstytucji w orzecznictwie sądów administracyjnych – uwarunkowania ustrojowe i aspekt orzeczniczy 9
Summary 19

Prof. dr hab. Leonard Etel (Uniwersytet w Białymstoku)
Dr Piotr Pietrasz (adiunkt, Uniwersytet w Białymstoku)
Niekompletność oświadczenia o przeznaczeniu oleju opałowego a zastosowanie sankcji podatkowej, o której mowa w art. 89 ust. 16 ustawy o podatku akcyzowym 20
Summary 32

Mgr Hanna Filipczyk (doradca podatkowy)
Granice związania sądu I instancji wykładnią prawa dokonaną w sprawie przez Naczelny Sąd Administracyjny – uwagi na tle orzecznictwa w sprawach podatkowych 33
Summary 42

Mgr Przemysław Ostojski (asystent sędziego, WSA w Poznaniu)
Wystawienie tytułu wykonawczego w polskim prawie o egzekucji administracyjnej 43
Summary 52

Dr Marek Szubiakowski (docent, Uniwersytet Warszawski)
Problemy indywidualnych interpretacji przepisów prawa podatkowego 53
Summary 60

Mgr Konrad Łuczak (Uniwersytet Kardynała Stefana Wyszyńskiego w Warszawie)
Sądowoadministracyjna kontrola aktów prawa miejscowego organów jednostek samorządu terytorialnego na podstawie precedensu 62
Summary 72

Prof. dr hab. Janusz Borkowski sędzia NSA (1934–2012) 74

VARIA

Dr hab. Agnieszka Góra-Błaszczykowska (sędzia WSA w Warszawie)
Sprawozdanie ze szkolenia sędziów i prokuratorów nt. prawodawstwa wodnego w Unii Europejskiej, zorganizowanego przez Komisję Europejską, Europejski Instytut Administracji Publicznej (EIPA) i Sąd Najwyższy Estonii, Tartu, Estonia, 5–7 marca 2012 r. 79

ORZECZNICTWO

I. Trybunał Sprawiedliwości Unii Europejskiej (wybór i opracowanie: *Andrzej Wróbel)*
1. Niestosowanie przez sąd krajowy ustawy sprzecznej z prawem wspólnotowym
Wyrok ETS z dnia 9 marca 1978 r. w sprawie 106/77 *Amministrazione delle Finanze dello Stato przeciwko Simmenthal SA* 85
2. Wzajemne uznawanie praw jazdy – odmowa uznania przez państwo członkowskie ważności prawa jazdy wydanego w innym państwie członkowskim osobie, która zgodnie z przepisami tego państwa nie posiada zdolności fizycznej i psychologicznej do kierowania: dyrektywy 91/439/EWG i 2006/126/WE
Wyrok TSUE z dnia 1 marca 2012 r. w sprawie C-467/10 *postępowanie karne przeciwko Barisowi Akyüzowi* 88

II. Europejski Trybunał Praw Człowieka (wybór i opracowanie: *Agnieszka Wilk-Ilewicz*)
Definicja niezawisłego i bezstronnego sądu oraz dostęp do sądu administracyjnego
Wyrok ETPC z dnia 10 stycznia 2012 r., sprawa *Pohoska przeciwko Polsce* (skarga nr 33530/06) 96

III. Trybunał Konstytucyjny (wybór: *Irena Chojnacka,* opracowanie: *Mieszko Nowicki)*
1. Wyrok TK z dnia 12 grudnia 2011 r. (sygn. akt P 1/11) oraz postanowienie TK z dnia 18 stycznia 2012 r. (sygn. akt P 9/10) [dot. regulowania praw i obowiązków jednostek aktami spoza systemu źródeł powszechnie obowiązującego prawa] 100
2. Wyrok TK z dnia 10 stycznia 2012 r. (sygn. akt P 19/10) [dot. ograniczenia prawa do składania wniosków o przyznanie uprawnień kombatanckich] 106

IV. Sąd Najwyższy (wybór i opracowanie: *Dawid Miąsik*)
Wyrok Sądu Najwyższego z dnia 20 września 2011 r. (sygn. akt III SK 5/11)
[dot. zmiany przez Prezesa URE decyzji o zwolnieniu przedsiębiorstwa energetycznego z obowiązku przedkładania taryf do zatwierdzenia] 111

V. Naczelny Sąd Administracyjny i wojewódzkie sądy administracyjne
A. Orzecznictwo Naczelnego Sądu Administracyjnego (wybór: *Stefan Babiarz*, opracowanie: *Marcin Wiącek*)
1. Uchwała składu siedmiu sędziów NSA z dnia 5 grudnia 2011 r. sygn. akt. I OPS 4/11 [dot. charakteru prawnego zgłoszenia przez funkcjonariusza ABW wystąpienia ze służby] 115
2. Uchwała składu siedmiu sędziów NSA z dnia 12 grudnia 2011 r. sygn. akt. II FPS 2/11 [dot. zaliczenia wydatków związanych z zaciągnięciem przez spółkę kredytu na wypłatę dywidendy do kosztów uzyskania przychodów] 119
B. Orzecznictwo wojewódzkich sądów administracyjnych (wybór: *Bogusław Gruszczyński*, opracowanie: *Marcin Wiącek*)
1. Wyrok WSA w Kielcach z dnia 29 kwietnia 2010 r. sygn. akt I SA/Ke 177/10 [dot. warunków zwolnienia usług masażu z podatku VAT] 126
2. Wyrok WSA w Białymstoku z dnia 3 lutego 2011 r. sygn. akt II SAB/Bk 79/10 [dot. bezczynności w ustaleniu odszkodowania za nieruchomość wywłaszczoną w trybie tzw. specustawy drogowej] 131
3. Wyrok WSA w Gdańsku z dnia 19 maja 2011 r. sygn. akt III SAB/Gd 12/11 [dot. bezczynności organów orzekających w sprawach dotyczących zgromadzeń publicznych] 134
4. Wyrok WSA w Gliwicach z dnia 15 czerwca 2011 r. sygn. akt II SA/Gl 151/11 [dot. opłaty z tytułu wzrostu wartości nieruchomości należącej do wspólników spółki cywilnej w przypadku zmian podmiotowych w takiej spółce] 139

VI. Glosy
Dr Kazimierz Włodkowski (funkcjonariusz celny)
Glosa do wyroku WSA w Białymstoku z dnia 16 marca 2011 r. sygn. akt I SA/Bk 584/10 [dot. wartości celnej mienia przesiedlenia] 143

Mgr Magdalena Budziarek (asystent, Uniwersytet Łódzki)
Mgr Aneta Szymczak (asystent, Uniwersytet Łódzki)
Glosa do wyroku NSA z dnia 15 października 2010 r. sygn. akt I FSK 1640/09 [dot. zaliczenia wpłaty, dokonanej przed upływem terminu przedawnienia zobowiązania lub dotyczącej innego tytułu niż określone zobowiązanie podatkowe, na poczet tego zobowiązania] 150

Aleksander Jakubowski (student V roku prawa, Uniwersytet Warszawski)
Glosa do wyroku WSA w Poznaniu z dnia 27 października 2010 r. sygn. akt II SA/Po 454/10 [dot. sądowej kontroli legalności egzaminu w szkole wyższej] 157

KRONIKA

Kalendarium sądownictwa administracyjnego (styczeń–luty 2012 r.) **(**opracował *Przemysław Florjanowicz-Błachut)* 165
Uzupełnienie kroniki (2011 r.) 178

BIBLIOGRAFIA

Publikacje z zakresu postępowania administracyjnego i sądowoadministracyjnego (styczeń–luty 2012 r.) (opracowała *Marta Jaszczukowa*) 179

TABLE OF CONTENTS

STUDIES AND ARTICLES

Professor Andrzej Kabat, Ph.D. (Leon Koźmiński Academy in Warsaw)
Direct application of the Constitution in the judicial decisions of the administrative courts – the systemic conditions and the judicial aspects 9
Summary 19

Professor Leonard Etel, Ph.D. (Białystok University)
Piotr Pietrasz, Ph.D. (assistant professor at Białystok University)
The incompleteness of a declaration concerning the purpose of heating oil and the application of a tax sanction under Art. 89.16 of the Act on Excise Duty 20
Summary 32

Hanna Filipczyk, M.Sc. (tax advisor)
The extent to which a first-instance court is bound with the interpretation of law made in a case by the Supreme Administrative Court – comments concerning the court decisions in tax cases 33
Summary 42

Przemysław Ostojski, M.Sc. (assistant to a judge in the VAC in Poznań)
Issuing an enforcement title in the Polish law on administrative execution 43
Summary 52

Marek Szubiakowski, Ph.D. (associate professor at Warsaw University)
The problems of individual interpretations of tax laws 53
Summary 60

Konrad Łuczak, M.Sc. (Cardinal Stefan Wyszyński University in Warsaw)
The control of local laws enacted by the bodies of the local government units exercised by administrative courts as exemplified by a precedent 62
Summary 72

Professor Janusz Borkowski, Ph.D., judge of the SAC (1934–2012) 74

VARIA

Agnieszka Góra-Błaszczykowska, Ph.D. (judge of the VAC in Warsaw)
Report from the Workshop on EU Water Legislation organised by the European Institute of Public Administration (EIPA) in cooperation with the Judicial Training Centre of Estonia at the Estonian Supreme Court and supported by the European Commission, Directorate-General for the Environment held in Tartu (Estonia) on 5–7 March 2012 79

JUDICIAL DECISIONS

I. The European Court of Justice (selected and prepared by *Andrzej Wróbel*)
1. A local court not applying a national law inconsistent with Community law (judgment of the Court of Justice of the EEC of 9 March 1978 in case 106/77: *Amministrazione delle Finanze dello Stato (Italian Finance Administration) v Simmenthal SpA.*) 85
2. Directives 91/439/EEC and 2006/126/EC – Mutual recognition of driving licences – Refusal of a Member State to recognise, in respect of a person who does not satisfy the physical and mental requirements for driving under the laws of that Member State, the validity of a driving licence issued by another Member State (judgment of the Court (Second Chamber) of 1 March 2012 in case C-467/10: *criminal proceedings against Baris Akyüz*) 88

II. The European Court of Human Rights (selected and prepared by *Agnieszka Wilk-Ilewicz*)
The definition of an independent and impartial court and denial of access to the Supreme Administrative Court (judgement of the ECHR of 10 January 2012, application No. 33530/06, case of *Pohoska v. Poland*) 96

III. The Constitutional Tribunal (selected by *Irena Chojnacka*, prepared by *Mieszko Nowicki*)
1. Regulating an individual's rights and obligations in the acts that are not included in the system of sources of the generally applicable laws and regulations (judgement of the Constitutional Tribunal dated 12 December 2011, files No. P 1/11 and decision of the Constitutional Tribunal dated 18 January 2012, files No. P 9/10) 100
2. Restricting the right to submit a request for awarding the veteran rights (judgement of the Constitutional Tribunal dated 10 January 2012, files No. P 19/10) 106

IV. The Supreme Court (selected and prepared by *Dawid Miąsik*)
The President of the Energy Regulation Authority changing the decision releasing a power company from the obligation to submit a tariff for approval (judgement of the Supreme Court of 20 September 2011, files No. III SK 5/11) 111

V. The Supreme Administrative Court and the Voivodship Administrative Courts
A. The judicial decisions of the Supreme Administrative Court (selected by *Stefan Babiarz*, prepared by *Marcin Wiącek)*
1. The legal nature of a notice of leaving the force submitted by an Internal Security Agency officer (resolution of the Supreme Administrative Court of 5 December 2011, files No. I OPS 4/11) 115
2. Including the expenditure a company incurred in connection with a credit facility for the dividend in the revenue earning costs (resolution of the Supreme Administrative Court of 12 December 2011, files No. II FPS 2/11) 119
B. The judicial decisions of the Voivodship Administrative Courts (selected by *Bogusław Gruszczyński*, prepared by *Marcin Wiącek*):
1. Terms and conditions for exempting the massage services from VAT (judgement of the Voivodship Administrative Court in Kielce of 29 April 2010, files No. I SA/Ke 177/10) 126
2. Inaction in determination of compensation for the real property expropriated under the so-called Special Road Act (judgement of the Voivodship Administrative Court in Białystok of 3 February 2011, files No. II SAB/Bk 79/10) 131
3. Inaction of the decision-making authorities in the cases concerning public gatherings (judgement of the Voivodship Administrative Court in Gdańsk of 19 May 2011, files No. III SAB/Gd 12/11) 134
4. Betterment levy payable for the real property owned by the partners of a civil-law partnership when the partners change (judgement of the Voivodship Administrative Court in Gliwice of 15 June 2011, files No. II SA/Gl 151/11) 139

VI. Glosses

Kazimierz Włodkowski, Ph.D. (customs officer)
Gloss to the judgement of the VAC in Białystok of 16 March 2011, files No. SA/Bk 584/10 [re. the customs value of a displaced persons' property] 143

Magdalena Budziarek, M.Sc. (assistant, Łódź University)
Aneta Szymczak, M.Sc. (assistant, Łódź University)
Gloss to the judgement of the SAC of 15 October 2010, files No. I FSK 1640/09 [re. applying a payment made before the lapse of the period of limitation of an obligation or concerning a title other than a specified tax obligation towards such obligation] 150

Aleksander Jakubowski (5th year student, Warsaw University, Department of Law and Administration)
Gloss to the judgement of the VAC in Poznań of 27 October 2010, files No. SA/Po 454/10 [re. the court control of legality of an exam in a higher education institution] 157

CHRONICLE

The schedule of events in the administrative jurisdiction (January–February 2012) (prepared by *Przemysław Florjanowicz-Błachut*) 165
Supplement (2011) 178

BIBLIOGRAPHY

Publications in the area of the administrative procedure and the proceedings before administrative courts (January–February 2012) (prepared by *Marta Jaszczukowa*) 179

Summary

of the article: **Direct application of the Constitution in the judicial decisions of the administrative courts – the systemic conditions and the judicial aspects**

This article concerns the part of the administrative courts' adjudicating activity that consists in applying the provisions of the Constitution to the making of decisions in the cases they consider. The administrative courts' application of the Constitution is the implementation of the principles expressed in Art. 8.2 thereof providing that the constitutional norms are directly applicable. Therefore the administrative courts' adoption of the constitutional norms as the basis of the decisions they make in the cases they consider is a form of the application of law.

In their adjudicating practice the administrative courts sometimes must take into consideration the general constitutional principles and the specific values. Certain authors claim that in such events the courts' decisions have legislative nature. The above opinions give rise to the question if in the legal status prevailing after the effective date of the Constitution the claim that applying the constitutional norms in the court decision may in certain events constitute judicial legalisation is justified. Although a significant part of the representatives of the legal doctrine acknowledges the legislative nature of certain court decisions and raises arguments corroborating this position, it seems that attributing this feature also to the decision in which an administrative court applied the provisions of the Constitution under Art. 8.2 thereof may be give rise to doubts.

Analysed were mainly the administrative courts' decisions in which directly applied were the constitutional principles and, to be specific, the legal norms stemming from these principles. The reason for making such selection was such that, according to the above mentioned representatives of the legal doctrine, reaching for the general constitutional principles has the form of judicial legislation. It was determined that the direct application of the Constitution, referred to in Art. 8.2 thereof, is the form of application of law, irrespectively of whether it concerns specific constitutional principles or the norms stemming from the constitutional principles.

The need to reach for the constitutional provisions most often resulted from the various defects of the applied laws consisting in, among others, the lack of internal coherence of laws and regulations, the legislative omissions or other negligence. The court decisions applying the constitutional principles remedied these defects only to the extent necessary in order to make the proper decision in the case in consideration. The effective removal of these defects or deficiencies from any law requires the legislator's intervention.

Summary

of the article: **The incompleteness of a declaration concerning the purpose of heating oil and the application of a tax sanction under Art. 89.16 of the Act on Excise Duty**

In this article its authors analyse the legal solutions in Art. 89.5, 89.6, 89.8 and 89.16 of the Act on Excise Duty 2008 that on the one hand impose on the sellers of certain energy products designated for heating purposes the obligations related to evidencing the sales of these products and on the other hand – in the case of even negligible violation of the obligation to properly evidence a sale transaction - provide for the application of the tax rate chargeable on trading in engine fuels.

The authors concluded that creating a specific construction of the substantive tax law of instrumental nature i.e. the buyer's declaration concerning the purpose of heating oil the legislator introduced the norms materially protecting the interests of a public-law creditor. The authors claim that the legislator ignored the constitutional aspect of proportionality of the sanction-like intervention resulting from Art. 89.16 of the Act on Excise Duty and the purpose of introducing the instrumental obligations related to receiving the declarations.

In the authors' opinion Art. 89.16 of the Act on Excise Duty violates Art. 2 and Art. 31.3 of the Constitution by breaching the principle of proportionality to the extent it permits the application of the excise duty at the rate set out in Art. 89.4. 1 of the Act on Excise Duty, in the event the declarations referred to in Art. 89.5.1 and Art. 89.5.2 of the Act on Excise Duty include defects negligible from the perspective of determining the buyer's identity (identification) and the product's purpose.

Summary

of the article: **The extent to which a first-instance court is bound with the interpretation of law made in a case by the Supreme Administrative Court – comments concerning the court decisions in tax cases**

This article discusses the extent to which a Voivodship Administrative Court reconsidering a case is bound with the interpretation of law that the Supreme Administrative Court made in such case under Art. 190 of the Law on Proceedings Before Administrative Courts dated 30 August 2002 (Journal of Laws No. 153, item 170, as amended) (the LPBAC). This problem is discussed with regard to the court practice in tax cases.

Given the contents of the first sentence of Art. 183.1 of the LPBAC, in principle a VAC may be bound with the judgment of the SAC only to the extent to which the SAC referred to the cassation charges the complaining party had made.

The "interpretation of law" binding on a first-instance court undoubtedly covers the interpretation of substantive and procedural law, but it is controversial whether it also covers the assessments of the facts determined by an administrative authority. In this respect the position of the administrative court (in particular in the tax cases) is not uniform. Moreover, under Art. 190 of the LPBAC in connection with Art. 153 and Art. 174.1 thereof one may have doubts whether the "interpretation of law" also covers the legal assessment of the method in which the administrative authority (a tax authority) applied the substantive law. However, given a cassation court's systemic position, it is desirable that the wide understanding of the "interpretation of law" (being the equivalent of the "legal assessment) is adopted, but the author believes the arguments presented so far in support of this claim display certain weaknesses. An amendment to Art. 190 of the LPBAC, severing its links to Art. 398^{20} of the Civil Procedure Code, might finally cut this "Gordian knot"

On the other hand, it is not controversial that a VAC ceases to be bound with the SAC's judgement when, following the passing of such judgement, a resolution is made that includes the interpretation of law different from that adopted in the judgement passed by the cassation court adjudicating in the relevant case (alike when the Constitutional Tribunal decides a regulation interpreted by the SAC is inconsistent with the Constitution).

Finally, the interpretation of law in a case by the SAC does not prevent the first-instance court, to which the case was transferred, if such court has any doubts concerning the validity or interpretation of any EU laws, from lodging a reference for a preliminary ruling to the Court of Justice of the European Union under Art. 267 of the Treaty on the Functioning of the European Union. The CJEU's current decisions confirm this claim.

Concluding, the extent to which a VAC is bound with the SAC's decision in principle is uniformly identified in the judicial decisions of the administrative courts but with one significant exception concerning the assessment of the correct determination of the facts and proper application of the substantive law.

Summary

of the article: **Issuing an enforcement title in the Polish law on administrative execution**

This article presents the question of issuing an administrative enforcement title that so far has not been frequently discussed in the Polish doctrine of law and the judicial decision of the Polish administrative courts. This problem is closely related to the legal nature of this institution and its function in the procedure of the enforced performance of public-law obligations.

This article was supposed to be an attempt to prove the above mentioned dependence and the fact that an enforcement title is only a condition of applying the administrative coercion, but is not the basis of execution. Then the author attempted to present the legal form of the title and the rigours related to such form. The scant legal literature in this area did not make his task easier. To a certain degree – in particular as regards the individual elements of the content – the judicial decisions of the administrative courts proved to be helpful.

The above analysis led the author to the conclusion that an administrative enforcement title – although does not represent the basis for execution, is a central legal institution of the Polish law concerning administrative execution. It represents a substantive premise of execution. It has a form of an official document and its purpose is to ensure that proper course of the administrative execution and, therefore, to protect the obliged party. For this reason all the elements set out in Art. 27 of the Act on Execution Proceedings in Administration and the form on an enforcement title must be observed, and if they are illegally ignored, the execution proceedings must be discontinued.

Summary

of the article: **The problems of individual interpretations of tax laws**

This article discusses the institution of individual interpretations of tax law that has existed in our system of law for several years. The discussion is focused on the problems that

the administrative courts encountered when making their judicial decisions in this area. The other discussed issue is the theoretical justification of the applied solutions and the construction of the regulation.

The development of the judicial decisions against the background of court control leads to the conclusion that the administrative courts encountered many problems when controlling the interpretations the solutions to which in many instances determined the essence of the interpretations' effect. Therefore it must be concluded that due to the weakness of the prevailing solutions the administrative courts must solve the problems that should have been dealt with by the legislator. This points to the need to improve the regulation following the analysis of its systemic function that should stem from the theoretical concept of the institution.

Summary

of the article: **The control of local laws enacted by the bodies of the local government units exercised by administrative courts as exemplified by a precedent**

This article presents the basic theoretic-legal assumptions concerning the application of precedents by administrative courts when controlling the legality of the acts of local law issued by the bodies of the local government units. The authors has analysed in detail the following issues: a) the admissibility of applying precedents in order to control an act of local law, b) the characteristics of the administrative courts' decisions from the perspective of construction of a precedent, c) the method of applying precedents when controlling an act of local law and d) the consequences of declaring an act of local law inconsistent with a precedent.

The administrative courts' application of precedents in the course of controlling the legality of the acts of local law is justified mainly by the need to ensure the cohesion of the system of law achieved by removing the acts of local law inconsistent with the acts of higher rank such as a law or the Constitution. In such event the operating mechanism of a precedent consists in the administrative court taking into account, when controlling the legality of a specific act of local law, its earlier decision in another case in which similar or identical provisions of another act of local law were evaluated. It must be emphasised that not only the national system of law but also the Polish legal culture do not allow for a precedent to be an independent standard of evaluation of an act of local law and therefore in each case it should be related to the provisions of the generally applicable acts of law, creating harmonious whole.

The individual types of the administrative courts' decision match the classical types of precedents. The abstract resolutions and specific resolutions adopted by the Supreme Administrative Court are the precedents *de iure* binding on all the administrative courts. A judgement the Supreme Administrative Court issues as a result of a cassation complaint is binding only on the Voivodship Administrative Court to which the case is returned for reconsideration and in all other cases it is a *de facto* precedent. All the Voivodship Administrative Courts' judgements have this latter form. Each of the above mentioned types of decisions may include an interpretative precedent or a solution precedent and may have a legislative effect or not.

Irrespective of the above mentioned similarities, there are two significant differences between the administrative courts' decisions and the typical precedents. First of all, the administrative courts refer to the precedents not in order to grant rights or impose obligations on an individual, but in order to evaluate the legality of an act of local law. Secondly, the administrative courts do not conduct the full proceedings to take evidence which is due to the very nature of controlling the acts of local law and results from Art. 106.3 of the LPBAC. As a result analysing the similarities between the cases is focused mainly on comparing the

nature and the contents of the previously controlled acts of local law to these currently evaluated by the court, while the elements of the facts of the case are of secondary importance.

The method of applying precedents the administrative courts use when controlling an act of local law is predominantly defined by the regulations concerning the functioning of these courts and the concepts and views co-creating the Polish legal culture, although it is worth mentioning that the courts are authorised to exercise certain discretion. For these reasons the role of a precedent when evaluating an act of local law will differ and in one case may be dominant, when the legality of the given act of local law entirely depends on its relation to the precedent, an in the other case it may be only auxiliary – as the argument confirming the proper decision made on the basis of the statutory law. Given that a precedent may have stronger or weaker effect on the control of an act of local law, it must be emphasised that not every inconsistence in this respect results in the decision declaring such act invalid, but only the so-called qualified inconsistence i.e. when the violation of law was significant, what the courts determines *ad casum*.