STUDIES IN LOGIC, GRAMMAR AND RHETORIC

UNDER THE AUSPICES
OF THE POLISH ASSOCIATION FOR LOGIC AND PHILOSOPHY OF SCIENCE

Some Aspects of Interpretation of Public Law

Edited by PIOTR NICZYPORUK
PIOTR KOŁODKO

33(46) UNIVERSITY OF BIALYSTOK 2013

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Series: STUDIES IN LOGIC, GRAMMAR AND RHETORIC 33(46)

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Piotr Niczyporuk and Piotr Kołodko

University of Białystok
Białystok 2013

Series: STUDIES IN LOGIC, GRAMMAR AND RHETORIC 33(46)
http://logika.uwb.edu.pl/studies/

Subseries issued by the Chair of Logic, Informatics and Philosophy of Science
Faculty of History and Sociology
University of Bialystok

Cover design: Krzysztof Tur
Type-setting: Stanisław Żukowski

ISBN 978–83–7431–377–3
ISSN 0860–150X

WYDAWNICTWO UNIWERSYTETU W BIAŁYMSTOKU
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Druk i oprawa: „QUICK-DRUK" s.c., Łódź

CONTENTS

VERSITA

STUDIES IN LOGIC, GRAMMAR
AND RHETORIC 33 (46) 2013

INTRODUCTION

One of the greatest jurist of the Ancient Rome – Ulpian – argued that *Publicum ius est quod ad statum rei Romanae spectat* (D. 1, 1, 1, 2) and over the centuries that understanding of public law did not changed significantly. In the sphere of *ius publicum* the imperious competence of public authorities is manifested and it causes the imbalance between the parties according to legal actions. It should be mention, that the rules of public law are perceived as *ius cogens*, what had been observed by the ancient Romans (D. 2, 14, 38 – *Ius publicum privatorum pactis mutari non potest*). Contemporarily, there is no doubt, that the area of public law includes financial law, tax law and public commercial law. The book aims to discuss selected aspects of interpretation of public law with respect to these three areas.

The first text of the volume, written by B. Pahl focuses on the issue of tax law, more precisely on the interpretation of normative definition of "building object" due to the necessity of real estate taxation. The work is based on the doctrine and selected jurisdiction of Supreme Administrative Court of Poland.

The problem of teleological interpretation of tax law is dealt with by R. Dowgier in his article, where he examines the concept of static and dynamic interpretation, and historical conditions of development of the tax law interpretation.

On the other hand, M. Popławski concentrates on tax overpayment institution, which is regulated by the Tax Ordinance Act (in force since 1997). The main discussion is based on the analysis of doctrine and jurisdiction of administrative courts.

The continuation of the examination of the problems encountered in the Tax Ordinance Act is proceeded by G. Liszewski. The author carefully examines the official interpretation of legal regulations according to tax law issued by Ministry of Finance in Poland. The author's concerns concentrate on the evolution of tax law, being more precise, on the Tax Ordinance Act with further amendments.

ISBN 978-83-7431-377-3 ISSN 0860-150X

Another institution of the Tax Ordinance Act, which is examined in this volume, is the hearing in the appeal in front of the tax authorities, analyzed by K. Teszner. The author examines the interpretation of rules of law based on both relevant doctrine and jurisdiction of tax authorities.

The issue of the interpretation of the tax law is also investigated by P. Petrasz and A. Dumas who concentrate on the article 153 of the Act on Proceedings before the Administrative Courts. These two authors are also judges of administrative courts, therefore they represent not only the theoretical aspects of this issue, but also the practical dimension of the problem, analyzing the verdicts of judges of courts of different instances.

The article of M. Wincenciak, even though concerns public law issues, no longer refers to the tax law as before mentioned texts. The author focuses on local law, at the level of local government and the problems associated with its interpretation by presenting a broad spectrum of this issue.

Texts written by A. Piszcz and M. Etel are related to the broader issues of commercial law. First of them presents some notions in accordance to the term of "entrepreneur" in the Polish antitrust law, especially those related with teleological interpretation on the basis of the achievements of Polish jurisprudence and some aspects of the EU law. However, the text of M. Etel emphasises a significant problem, which is the loss and acquisition of status of 'entrepreneur' under the public law. The author presents a number of problems related with interpretation of the issue on the basis of the Polish legislation.

The editors hope that this volume – the Studies in Logic, Grammar and Rhetoric, will provoke discussion and give incentive to encourage further discussion of the problems related to the public law.

VERSITA

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 33 (46) 2013

DOI: 10.2478/slgr-2013-0010

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PRINCIPLES OF LEGAL INTERPRETATION OF A NORMATIVE DEFINITION OF THE TERM "BUILDING STRUCTURE" FOR THE NEEDS OF THE IMPOSITION OF A REAL ESTATE TAX IN POLAND

Abstract. An essential aim of this study is to present principles of the legal interpretation of the term "building structure" for the needs of the imposition of a real estate tax. The analysis of both administrative courts' judgments and the subject literature indicates lack of consistency in the scope of this term's meaning. In my opinion, interpretative discrepancies are caused by incorrect legal interpretation of the legal definition. It should be noticed that numerous controversies connected with the legal interpretation of the term building structure are connected with considerable tax burden of this type of building objects. Taxpayers, for obvious reasons, are therefore "interested" in not finding the objects owned by them to be building structures in the meaning of the Tax Law, or possibly in finding only those objects' specified parts to be building structures. It is easily apparent particularly in the case of objects of complex structures (e.g. cell phones towers, ski lifts, wind farms, facilities used in power engineering industry etc.). On the other hand, however, for many municipalities in Poland, income from building structures' taxation creates municipal budgets. This way the practice of applying local tax law encounters numerous disputes between taxpayers and self-government tax authorities.

1. General comments

Interpretation of the law is of fundamental importance in the process of tax law application. (Gomułowicz, Małecki, 2004, p. 168). It involves determination of a real meaning of legal provisions being the basis of legal norms and, as necessary, shaping them so that they could be applied in a specific case or situation. (Smoktunowicz, Mieszkowski, 1998, p. 57). Many distinct ways of making a legal interpretation have been worked out in court jurisdiction and legal doctrine. Nevertheless, the most frequently distinguished interpretations are the following ones: linguistic,

ISBN 978-83-7431-377-3 ISSN 0860-150X

system and functional (purpose-oriented). A starting point for the legal interpretation is the linguistic interpretation (Brzeziński, 2001, p. 149), which results from the fact that law, including tax law, is formulated by means of a language. A colloquial language by means of which a text of legal provisions is formulated is not always precise enough to express fully the legislator's will. This is why the legislator introduces legal definitions of specified notions. It is one of the ways of defining the meanings of words contained in legal texts precisely. As much as the unequivocalness of words used by definitions' creators allows, a definition provides a term or notion being defined by them with a specific meaning based on the legalese that competes with a colloquial meaning of the term. (Brzeziński, 2008, p. 291).

The introduction of legal definitions into a specific legal act is, therefore, to serve elimination, or at least limitation, of different interpretative possibilities of a given term, and to provide it with a specified meaning for the needs of a concrete legal act. In practice, it can be relatively frequently observed that the reasons for introducing legal definitions are problems with colloquial understanding of a given term. The term "building structure" used by the lawmaker in the provisions of the Act on Local Taxes and Charges (ustawa z 12 stycznia 1991 r. o podatkach i opłatach lokalnych (Dz. U. z 1991 Nr 9, poz. 31)), is a very good example of this. Until the end of 2002, there was no normative definition of this term in the Act on Local Taxes and Charges. That is why, there arose numerous interpretative disputes connected with it in practice. Only in effect of the amendment of the Act on Local Taxes and Charges made under the Act of 30th October, 2002 on the change of the Act on Local Taxes and Charges and the change of some other acts (ustawa z dnia 30 października 2002 o zmianie ustawy o podatkach i opłatach lokalnych oraz zmianie innych ustaw (Dz. U. z 2002 Nr 200, poz. 1683)), Art. 1a including an explanation of the terms used in the Act on Local Taxes and Charges was introduced to this Act. A definition of a "building structure" was included therein. There is absolutely no doubt whatsoever as to the fact that the legislator who was introducing new regulations intended to remove doubts arising in connection with the meaning of this term. It appears, however, that despite nine years that have elapsed from the moment the term "building structure" was introduced into provisions regulating the construction of a real estate tax, problems with the interpretation of this term are still arising.[1] The problems were (and are) so serious that even the Constitutional Tribunal (Trybunał Konstytucyjny, TK) adjudicated in the matter of constitutionality of this provision (defining a building structure). (wyrok Trybunału Konsty-

tucyjnego z dnia 13 września 2011, P. 33/09). The bench of adjudicating justices, however, did not find that a normative definition of a building structure was inconsistent with the Constitution of the Republic of Poland. (Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 (Dz. U. z 1997 Nr 78, poz. 483)).

An essential aim of this study is to present principles of the legal interpretation of the term "building structure" for the needs of the imposition of a real estate tax. The analysis of both administrative courts' judgments[2] and the subject literature[3] indicates lack of consistency in the scope of this term's meaning. In my opinion, interpretative discrepancies are caused by incorrect legal interpretation of the legal definition. It should be noticed that numerous controversies connected with the legal interpretation of the term building structure are connected with considerable tax burden of this type of building objects. Taxpayers, for obvious reasons, are therefore "interested" in not finding the objects owned by them to be building structures in the meaning of the Tax Law, or possibly in finding only those objects' specified parts to be building structures. It is easily apparent particularly in the case of objects of complex structures (e.g. cell phones towers, ski lifts, wind farms, facilities used in power engineering industry etc.). On the other hand, however, for many municipalities in Poland, income from building structures' taxation creates municipal budgets. This way the practice of applying local tax law encounters numerous disputes between taxpayers and self-government tax authorities.

2. The scope of a legal definition of the term "building structure"

The Tax Law is a starting point for determination of a normative scope of a building structure. Since the legislator defines this term in the Act on Local Taxes and Charges, there are no reasonable grounds for adopting similar terms functioning in other branches of law. In accordance with Art. 1a par. 1 point 2 of the Act on Local Taxes and Charges (Dz. U. z 2010 Nr 95, poz. 613 j.t.), a building structure is a building object in the meaning of building law provisions that is neither a building nor small architectural object, as well as a building facility which in the meaning of building law provisions is connected with the building object and which ensures a possibility of using the object in accordance with its designation.

Therefore a "tax" definition of a building structure is constructed in such a way that the legislator refers us to certain terms functioning on the basis on the Building Law (ustawa z dnia 7 lipca 1994 Prawo Budowlane

(Dz. U. z 2006 Nr 156, poz. 118 j.t.)). This referral, however, is of a very narrow scope as it does not comprise all terms present in this Act referring only to two of them: a building object that is neither a building nor small architectural object and a building facility. Therefore, for the needs of a real estate tax, a building structure is every building object which cannot be regarded as a building or small architectural object. Thus a definition of a building structure is of a negative character. It is not closed. Just the opposite, it is of an open character and its result is that many building objects may be considered as building structures.

Therefore performing a legal and tax qualification of a potential object of taxation by a real estate tax, it is necessary, first of all, to rely on the provisions of the Act on Local Taxes and Charges and only additionally, i.e. in the scope of the statutory referral, on building law. (Etel, Presnarowicz, Dudar, 2008, p. 36 and next). For this reason, building law constitutes the basis for qualifying a given object as a building object whereas the Act on Local Taxes and Charges determines exclusively and solely whether it is a building or a building structure for the needs of taxation. (Etel, Pahl, 2009, p. 32).

It should be emphasized here that the bases for qualifying a given object for the purpose of a real estate tax can be neither the provisions of the decree in the matter of the Fixed Assets Classification[4] nor the provisions of the decree in the matter of the Building Objects Classification (Rozporządzenie Rady Ministrów z dnia 30 grudnia 1999 r. w sprawie Polskiej Klasyfikacji Obiektów Budowlanych (PKOB)[5] (Dz. U. z 1999 Nr 112, poz. 1316 ze zm.)). These provisions have been created for other needs and they cannot modify tax obligations. It should be remembered, however, that Art. 4 par. 1 point 3 of the Act on Local Taxes and Charges (Dz. U. z 2010 Nr 95, poz. 613 j.t.), indicates that the taxation basis of a building structure is its value, which is mentioned in the provisions on income taxes. Both the provisions of the Act on Income Tax from Legal Persons – (ustawa z dnia 15 luty 1992 r. o podatku dochodowym od osób prawnych (Dz. U. z 2011 r. nr 74, poz. 397 j.t.)), (Art. 16b and subsequent) and the Act on Income Tax from Natural Persons – (ustawa z dnia 26 lipca 1991 r. o podatku dochodowym od osób fizycznych (Dz. U. z 2012 r., poz. 301 j.t.)), (Art. 22a and subsequent) require keeping a fixed assets register. This register is kept with the inclusion of the Fixed Assets Classification. The taxation basis of a building structure in the case of a real estate tax is its initial value resulting from the fixed assets register. In practice, determination of the value being the basis of taxation is made based on just the same register. Building structures indicated in this register are, in most cases, building structures subject to a real estate tax. The

Fixed Assets Classification, however, cannot be the basis for determination whether a given thing is an object of a real estate tax. Nevertheless, the provisions of this Classification play a significant role in determining the so called depreciation rate being the basis of a real estate tax. Conducting a tax procedure, tax authorities should, in case of questioning the data submitted by a taxpayer (in case of a legal person, the data submitted in a tax return for a real estate tax) examine the fixed assets register, where a value of a building object is specified. (Etel, 2007, p. 5).

It should be noticed in the above context that making the interpretation of the term building structure for the needs of a real estate tax based on the Classification of Types of Constructions (PKOB) or the Fixed Assets Classification disqualifies the results of their legal interpretation. It is justified by the fact that the tax legislator does not refer to the terms functioning in these legal acts at all when determining the object scope of a real estate tax, in particular considering that the acts regulating these classifications are executive acts issued based on the provisions on public statistics. It should be emphasized that according to Art. 217 of the Polish Constitution (Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 (Dz. U. z 1997 Nr 78, poz. 483)), the imposition of taxes, as well as other public imposts, the specification of those subject to the tax and the rates of taxation, as well as the principles for granting tax reliefs and remissions, along with categories of taxpayers exempt from taxation, shall be by means of statute. The quoted provision formulates a general principle according to which tax obligations, including determination of taxation objects, should result solely from the act (*nullum tributum sine lege*). In the light of the quoted provision of the Polish Constitution, it is therefore inadmissible to determine a taxation object based on definitions functioning in legal acts other than the act. What is more, also in the judgment of the Supreme Administrative Court (Naczelny Sąd Administracyjny, NSA) (wyrok Naczelnego Sądu Administracyjnego z dnia 27 maja 2010, II FSK 2049/09), the bench of adjudicating justices emphasized that by making a legal interpretation of the term "building law provisions" used in Art. 1a par. 1 point 2 of the Act on Local Taxes and Charges (Dz. U. z 2010 Nr 95, poz. 613 j.t.), in accordance with the Polish Constitution (Dz. U. z 1997 Nr 78, poz. 483), it should be deemed that this referral may solely concern provisions of a statutory rank.

Taking the above into account, as well as a normative definition of a building structure, it should be acknowledged that a building structure is a building object or a building facility in the meaning of building law provisions. It results from Art. 3 of the Building Law (Dz. U. z 2006 Nr 156,

poz. 118 j.t.) that a building object is: a building together with technical installations and facilities; a structure being a technical and usable object together with installations and facilities, and a small architectural object. A building object the legislator refers to in the Act on Local Taxes and Charges is a building structure defined by Art. 3 point 3 of the Building Law. (Dz. U. z 2006 Nr 156, poz. 118 j.t.). According to this provision, every building object which is neither a building nor small architectural object such as linear objects, airports, roads, railroads, bridges, trestle bridges, culverts/passages, tunnels, technical facilities networks, free standing aerial masts, free standing advertising structures permanently attached to the ground, earthen structures, defence fortifications, protection structures, hydraulic engineering structures, reservoirs, free-standing industrial installations or technical facilities, sewage-treatment plants, waste dumping sites, water treatment plants, back-up structures, pedestrian subways and pedestrian bridges, land technical infrastructure networks, sports structures, cemeteries, monuments, as well as building elements of technical facilities (boilers, industrial furnaces and other facilities) and foundations for installations of machinery and facilities, as separate technical components of objects constituting a utility whole, should be understood as building structures.

The above presented definition of a building structure contains only an exemplary catalogue of objects which are building structures in the meaning of building law. It means that there may also exist other building objects which are building structures. In the meaning of building law, each building structure is included in the definition of a building structure contained in the Act on Local Taxes and Charges. (Dz. U. z 2010 Nr 95, poz. 613 j.t.). If, then, a given building object is a building structure in the meaning of the building law, it should be also classified as a building structure for the needs of a real estate tax. While making a legal interpretation of the term building structure for the needs of taxation, the content of appendices to the Building Law should be taken into account as well. They are an integral part of this Law. What is more, in the judgment of the Constitutional Tribunal (TK), the bench of adjudicating justices decided that only building structures listed *expressis verbis* in Art. 3 point 3 of the Building Law, other provisions thereof or appendices, being building objects mentioned in Art. 3 point 1 letter b of the Building Law (Dz. U. z 2006 Nr 156, poz. 118 j.t.) together with technical installations and facilities, that is provided they constitute a technical and utility whole (wyrok Trybunału Konstytucyjnego z dnia 13 września 2011, P 33/09), may be deemed as building structures in the meaning of the Act on Local Taxes and Charges.

Considering a potential object of taxation with regard to the legal and tax definition of a building structure, particular attention should be paid to the fact that a building object in the meaning of the building law is a building structure together with technical installations and facilities connected with it functionally (Art. 3 point 1 letter b). All these elements (building and non-building) constitute a building structure provided that they make a technical and utility whole. If such a type of a connection between individual elements does exist, they compose one building object – a building structure. Nevertheless, it should be emphasized that in order to make it happen, they must constitute a technical and utility whole. Yet the building law does not explain when exactly do we deal with such a situation. We can, on the other hand, using the rules of a language interpretation, refer, within this scope, to the meaning of this term functioning in a colloquial language, as well as refer to the opinions of judicature in this scope too. Thus we would deal with a technical and utility whole when the elements of a building object constitute, as the Supreme Court (Sąd Najwyższy, SN) acknowledged, "a component part of one complex thing", which is decided by an objective evaluation of the economic meaning of physical and functional connections existing between them.

A technical connection is a physical connection resulting from the way an object is made. A utility connection is a functional connection between elements thanks to which they may be used to realize a purpose a given object has been created for. Proving the object technical and utility connection allows, in consequence, to impose on a building object composed of building elements (e.g. foundations, carrying and resistance structures) and non-building ones (e.g. technical installations and facilities – engines, pipelines, etc.) a real estate tax as a building structure in the meaning of Art. 1a par. 1 point 2 of the Act on Local Taxes and Charges. (Dz. U. z 2010 Nr 95, poz. 613 j.t.). There are no grounds for "disassembling this type of an object into prime factors" and imposing a real estate tax only on building elements even though such an opinion is presented by some representatives of the tax law doctrine. (Brzeziński, Morawski, 2007, p. 41 and next). For this reason, it is correct to impose a real estate tax for a building structure on such building objects as cable railways (ski lifts), wind farms, industrial (coke) furnaces, cell phones base transceiver stations, liquid petroleum gas bulk installations, etc. which are composed of building and non-building elements, since only if all these physically combined elements are used together, a given object may realize its functions.

Taking the above into account, is may be ascertained that in order to impose a real estate tax on a building structure being an object composed of

building and non-building elements, it is necessary to prove a technical and utility connection between the building elements, being, most frequently, a building structure in the meaning of Art. 3 point 3 of the Building Law (Dz. U. z 2006 Nr 156, poz. 118 j.t.) and non-building elements (technical installations and facilities). If such a connection cannot be proved, a real estate tax may be imposed solely on building elements of the object. Thus a building structure for the needs of a real estate tax is a building object constituting a technical and utility whole together with installations and facilities which is neither a building nor small architectural object. A technical and utility whole regards all component elements of a building structure which are connected with each other so that the building structure may be used for running a specific business activity.

When making a legal interpretation of the definition of a building structure contained in Art. 1a par. 1 point 2 of the Act on Local Taxes and Charges (Dz. U. z 2010 Nr 95, poz. 613 j.t.), a basic drawback thereof is a direct referral to Art. 3 point 3 of the Building Law (Dz. U. z 2006 Nr 156, poz. 118 j.t.), where the term building structure is defined. When determining the object scope of a real estate tax, finding the basis thereof on the reading of Art. 3 point 3 of the Building Law (Dz. U. z 2006 Nr 156, poz. 118 j.t.) is inadmissible in the light of the unequivocal reading of Art. 2 par. 1 point 3 in connection with Art. 1a par. 1 point 2 of the Act on Local Taxes and Charges. (Dz. U. z 2010 Nr 95, poz. 613 j.t.). It results from it that the definition of a building structure contained in the Act on Local Taxes and Charges differs significantly from the definition of a building structure contained in the Building Law. For these reasons, the opinion according to which a building structure for the needs of the imposition of a real estate tax are building elements of technical facilities (boilers, industrial furnaces, wind farms and other facilities) is groundless. We cannot draw far-reaching conclusions determining the principles of specified objects' taxation based on exemplary listing of various building structures mentioned in the definition formulated solely for the needs of the building law (not the tax law). (Etel, Popławski, 2009, p. 17). We should pay attention to the fact that if the legislator had wished to adopt the definition of a building structure defined in Art. 3 point 3 of the Building Law (Dz. U. z 2006 Nr 156, poz. 118 j.t.) for the needs of the imposition of a real estate tax, he would have referred to it directly in Art. 1a par. 1 point 2 of the Act on Local Taxes and Charges. (Dz. U. z 2010 Nr 95, poz. 613 j.t.). Unfortunately, he has failed to do so. Thus we may assume that the legislator wanted to provide the term defined in the quoted provision of the Act on Local Taxes and Charges with a completely different meaning than it has

in the building law. Moreover, this opinion may further be supported by the fact that the "tax" definition of a building structure comprises not only a building object but also a building facility in the meaning of the building law provisions.[6] Thus this definition has a completely different meaning than the term carrying the same name functioning in the building law. *Ipso facto*, we cannot determine a character of a building object for the needs of the real estate tax imposition based on the definition the tax legislator does not directly refer to. Art. 3 point 3 of the Building Law (Dz. U. z 2006 Nr 156, poz. 118 j.t.) provides exemplary listing of building objects deemed as building structures for the needs of a building process, but not for the needs of taxation.

The tax law doctrine appropriately draws attention to the fact that in the situation when the tax law provisions refer to definitions contained in provisions belonging to other branches of law, such referral is binding and the ensuing result is incorporation of the definition into the tax law, which treats an external definition as its own. (Brzeziński, 2008, p. 293–294). In the case of the "tax" definition of a building structure, which should be emphasized once again, the legislator referred only to two univocally determined terms functioning in the building law, i.e. a building object and a building facility, failing to refer to a building structure mentioned in Art. 3 point 3 of the Building Law. (Dz. U. z 2006 Nr 156, poz. 118 j.t.).

3. Tax law autonomy against the legal interpretation of a definition of a "building structure"

Making a legal interpretation of the tax law, including the definition of a building structure regulated in the Act on Local Taxes and Charges, we should consider tax law autonomy too. The idea of tax law autonomy involves, most of all, conferring a different meaning upon already existing legal institutions, or creating completely new institutions. Tax law autonomy provides a possibility of ignoring qualifications and effects attributed to factual situations by the provisions of other branches of law, which allows to maintain realism manifested in the specificity of taxation purposes' achievement. (Kosikowski, 2006, p. 5 and next). Legal institutions being present in tax law provisions are either created or modified by the legislator solely for the needs of taxation.

Therefore a consequence of an autonomous character of the tax law is, *inter alia*, the fact that the names adopted by tax law from other branches of law do not most frequently carry the same meaning as those terms or

notions. These names serve building specified terms in tax law whereas these terms together with other features of tax acts constitute a component part of new legal complexes and acquire special features which are necessary for taxation purposes envisaged by the legislator. (wyrok Naczelnego Sądu Administracyjnego z dnia 24 czerwca 1996, FPK 6/96). It should be noticed, however, that creating specified tax constructions, the tax legislator uses names that are also used in other branches of law, which, nevertheless, in tax law, serve building terms or notions that are necessary to construct a tax and legal factual status. These terms are interrelated and constitute component parts of certain complexes of terms having features peculiar for tax law and resulting from its essence and having purposes the legislator intends to achieve through tax law norms. In order to be able to fulfill its tasks, tax law should, therefore, be bound by its terms and notions. It does not mean, however, absolute autonomy of tax law. (Mastalski, 2004, p. 116 and next).

The reason for this is that tax law is not completely separated from other branches of law. The tax legislator uses institutions developed in other branches of law many a time. It results from the principle of unity and completeness of the system of law. (Musiał, 2011, p. 8). By all means, the system of law should be a collection that is internally free from inconsistencies and, above all, free from loopholes. (Goettel, Goettel, 2011, p. 13). Defining terms or notions and expressions in tax law in the meaning conferred upon them in other branches of law is a natural consequence of the tax norm-maker's referral to solutions applied by these branches, and proves the integrity of internal system of law. (Nykiel, 1999, p. 400). As far as it is possible, the tax legislator should use the terms or notions and expressions taken from other branches of law.

Taxation needs, however, to force the tax legislator to modify terms or notions and expressions having a consolidated meaning in other branches of law. In many tax law provisions we may find definitions characterized by a different scope of meaning. An excellent example thereof is a definition of a building structure contained in the Act on Local Taxes and Charges, whose normative content, which was discussed above, differs considerably from the same term functioning in the Building Law. Although the tax legislator is using the building law "output", he is doing this to a very limited extent. It has already been emphasized above that the tax legislator created his own notion of a building structure solely for the needs of a real estate tax. Nevertheless, he used, at the same time, a referral to several, clearly specified terms, which, in turn, entails that these terms should be used when determining the object scope of a real estate tax.

4. Conclusions

The analysis of the subject literature and administrative courts' judgments shows that a legal definition of the term "building structure" constructed for the needs of the imposition of a real estate tax, which, presumably, was to make this term more precise, creates numerous problems. They result not so far from the incorrect formulation of the definition as from the defective legal interpretation of Art. 1a par. 1 point 2 of the Act on Local Taxes and Charges (Dz. U. z 2010 Nr 95, poz. 613 j.t.) of the Building Law. Making a legal interpretation of this provision, we should take into consideration regulations contained, most of all, in Art. 3 point 1 of the Building Law. (Dz. U. z 2006 Nr 156, poz. 118 j.t.). In this context, a building structure for the needs of the imposition of a real estate tax is a building object constituting a technical and utility whole together with installations and facilities, which is neither a building nor small architectural object, as well as a building facility in the meaning of building law provisions connected with a building object which ensures a possibility of using the object in compliance with its designation. There are not any legal basis whatsoever to refer, in the first place, to Art. 3 point 3 of the Building Law (Dz. U. z 2006 Nr 156, poz. 118 j.t.), which defines the term of a building structure, yet not for the needs of taxation but a building process, when determining the "tax" meaning of the term building structure. The legislator does not refer to this term in the tax act. Therefore the assumption according to which in the meaning of the Act on Local Taxes and Charges a building structure is a building structure in the meaning of building law provisions disqualifies the result of the legal interpretation, which, in turn, leads to a wrong settlement of a tax case.

NOTES

[1] Problems connected with applying a legal definition of a building structure are also signaled by Bielska-Brodziak, A. (2009). *Interpretacja tekstu prawnego na podstawie orzecznictwa podatkowego.* Warszawa: Wolters Kluwer, 47–48.

[2] See, *inter alia*, judgments available in the central base of administrative courts' judgments: (wyrok Naczelnego Sądu Administracyjnego z dnia 20 stycznia 2012, II FSK 1405/10; Wyrok Naczelnego Sądu Administracyjnego z dnia 14 lutego 2012, II FSK 1589/1; Wyrok Naczelnego Sądu Administracyjnego z dnia 13 stycznia 2009, II FSK 1391/07; II FSK 2049/09; Wyrok Naczelnego Sądu Administracyjnego z dnia 5 stycznia 2010, II FSK 1101/08; Wyrok Naczelnego Sądu Administracyjnego z dnia 7 października 2009, II FSK 635/08; Wyrok Naczelnego Sądu Administracyjnego z dnia 3 lutego 2006, II FSK 656/05; Wyrok Wojewódzkiego Sądu Administracyjnego w Poznaniu z dnia 16 grudnia 2010, III SA/Po 675/10).

[3] See, *inter alia*, (Etel, 2002); (Etel, 1998); (Etel, 2000); (Etel, Popławski, 2008); (Brzeziński, Kalinowski, 2001); (Hanusz, 2001); (Lipiński, 1998); (Presnarowicz, 2002); (Brzeziński, Morawski, 2008); (Teszner, 2003); (Dowgier, 2004); (Wacławek, 2005); (Dudar, 2003); (Unisk, 2006).

[4] Rozporządzenie Rady Ministrów z dnia 30 grudnia 1999 r. w sprawie Klasyfikacji Środków Trwałych (KŚT) – Fixed Assets Classification (Dz. U. z. 1999 Nr 112, poz. 1317) – it was in force until the end of 2010, whereas since 1st January, 2011 the Rozporządzenie Rady Ministrów z dnia 10 grudnia 2010 r. w sprawie Klasyfikacji Środków Trwałych (KŚT) – Fixed Assets Classification (Dz. U. z 2010 Nr 242, poz. 1622) has been in force.

[5] PKOB means Polish Classification of Types of Constructions.

[6] Pursuant to Art. 3 point 9 of the Building Law (Dz. U. z 2006 Nr 156, poz. 118 j.t.), the term building facility should be understood as technical facility connected with a building object assuring a possibility of using the object in compliance with its designation, as well as connections and installation facilities including those serving sewage cleaning and collecting, as well as passages, fences, parking sites and sites to be used for refuse dumps.

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VERSITA

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 33 (46) 2013

DOI: 10.2478/slgr-2013-0011

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THE PURPOSIVE INTERPRETATION OF POLISH TAX LAW

Abstract. The results of the linguistic interpretation should be verified through systemic and purposive methods of interpretation. That process is especially desirable in the cases where the result of the linguistic interpretation is not unequivocal. Whereas, as practice demonstrates, the quality of tax law is not the best, it is impossible to overestimate the role of the non-linguistic method of interpretation. The object of this paper was to present the role which the linguistic interpretation may play in interpreting the tax law. However it was also important to: place the purposive interpretation among the methods of tax law interpretation and to present static and dynamic elements in tax law interpretation. Within the frames of this paper one can find out about historical interpretation of tax law, economic method of tax law interpretation and purposive interpretation directives. The above considerations allow for posit a thesis according to which purposive interpretation is an indispensable element of the process of interpreting a legal text. Its role in the scope of norms of tax law is, however, peculiar, since it serves only to verify the results of linguistic interpretation. However, it can be indicated that the growth in importance of purposive interpretation is direct proportional to the fall in the quality of tax law regulations.

General remarks

The derivative concept of law interpretation expressed in the legal maxim *interpretatio cessat in claris*, means the proposition of employing any possible interpretative methods seeking a full clarity as to the substance of a legal norm. At this assumption the results of the linguistic interpretation are verified through other methods of interpretation: systemic and purposive. Application of these methods is especially desirable in the cases where the result of the linguistic interpretation is not unequivocal. Whereas, as practice demonstrates, the quality of tax law is not the best, it is impossible to overestimate the role of the non-linguistic method of inter-

ISBN 978-83-7431-377-3 ISSN 0860-150X

pretation. The object of this paper is to present the role which the linguistic interpretation may play in interpreting the legal texts which are the sources of tax law.

Purposive interpretation constitutes a particular type of functional interpretation. It involves an attempt at reading the meaning of a legal provision taking into consideration the aim of the legislator making it. Law is, after all, not only a certain form but also a substance, which is sometimes called a spirit of law: *ratio est anima legis*. Assuming that it is an instrument of purposive organising social relations, when establishing its meaning we cannot restrict ourselves to examining the form only, but we also, or even foremost, take into consideration its meaning, i.e. the objective or rather objectives which a given regulation is supposed to achieve. (Smoktunowicz, Mieszkowski, 1998, p. 78). What intentions accompanied the legislator while creating a particular regulation may be seen in such elements of a normative act as its title or preamble (if there is one), or else non-normative elements, such as, for example: transcripts of parliamentary work proceedings on an act of law, or also a justification of the bill. If we can determine the purpose of the regulation analysed, we can interpret it correctly, for adopting the assumption of the comprehensiveness of tax law interpretation, the correctness of this process is dubious. However, the issue of mutual relations between the purposive interpretation on the one part and systemic and linguistic interpretations on the other is understood differently in judicial practice and doctrine.

1. The place of purposive interpretation among the methods of tax law interpretation

It is beyond question that purposive interpretation in tax law should be applied in strict connection with linguistic and systemic interpretation. The problem is if it is expected only to eliminate interpretative doubts connected with the vagueness of a legal text and eliminate any other ambiguities, or else it may also be used for correcting the results of a linguistic interpretation? Opinions on this subject matter are split. Legal decisions of the Supreme Administrative Court (Naczelny Sąd Administracyjny, NSA) point out that purposive interpretation as an auxiliary tax law method of decoding the substance of legal provisions, may and should be applied only exceptionally, when in view of the acceptable semantic rules of an ethnic linguistic the sense of legal rules is ambiguous. In its statement of reasons for another decision NSA stated that a purposive interpretation cannot cancel a linguis-

tic interpretation. Also the Constitutional Tribunal (hereinafter referred to Trybunał Konstytucyjny, TK) decided in its statement of reasons for the wyrok TK z 20 lutego 1991 (W. 5/90), that since the linguistic and logical interpretation lead to a particular conclusion, and this conclusion does not result in unacceptable solutions, there are no grounds for using a purposive interpretation. The aforesaid implies that purposive interpretation is exceptional and is acceptable only if the linguistic method leaves us with doubts, but even then it cannot lead to results contradictory to this method of interpretation. Nevertheless, against this seemingly unequivocal standpoint, we can propose a thesis that purposive interpretation is acceptable also when the text is unequivocal, which, in extreme situations, may result in purposive interpretation giving legal texts the meaning which is far from their linguistic meaning. (Gizbert-Studnicki, 1996). This position is justified by a clear move of the interpretation limits from "the sound of the law wording" towards "the possible sense of the law wording". In the field of tax law, where the text of a normative act plays a special role in the context of the principle of legal certainty, the cases whose meaning by a purposive interpretation differs considerably from the linguistic meaning will be rather rare, which does not mean that they will cease to occur. Such a situation may be especially encountered when the application of the linguistic interpretation may lead to ignoring provisions of law. On the other hand, the process of purposive interpretation should be recognised as fully justified in any case, which was demonstrated by the statement of NSA (wyrok NSA z 23 czerwca 1983, II SA 535/83) pointed out in (Smoktunowicz, Mieszkowski, 1998, p. 80), which stated that the organ of state administration is obligated to pursue the purpose of the act of law and general rules included foremost in Article 7 of the Administrative Proceeding Code (ustawa z dnia 14 czerwca 1960 r. – Kodeks postępowania administracyjnego (Dz. U. z 2013, poz. 267 j.t.)). Furthermore, in the statement of reasons of the statement of NSA (wyrok NSA z dnia 6 listopada 1996, SA/Ka 1895/95) this Court argued that the interpretation error may involve the isolation of the analysis of the provision referred to as a basis for the decision from the provisions of the act which determine the tax subject (...) as well as failing to assess what end the provision was supposed to serve.

Taking into consideration the aforementioned output of judicial decisions, it is important to note that the literature underscores that the applicable interpretation methods can be put into a certain formula, which has a form of algorithm, where the starting point is linguistic interpretation. (Brzeziński, 2008). Regardless of its results, which could be unequivocal or ambiguous, it is necessary to apply non-linguistic methods. Purposive in-

terpretation allows to find the sense of a legal text through giving it such a meaning, with which it would have the best axiological justification in the adopted system of values. (Mastalski, 1998, p. 97).

The application of purposive interpretation is connected, however, with a certain danger connected with a too far-going discretion of the entity applying the law in pursuing the purpose of an act of law. As a result, the adopted aim of a particular regulation may not reflect the will of the legislator but exclusively meet the interpreter's expectations or express his particular interests. In tax law this danger may manifest itself in the administration organs, and even courts, applying purposive interpretation inclining towards the interest of taxing authorities, pursuing the interpretation *in dubio pro fisco*.[1] There are, however, certain 'safety devices', which are expected to prevent such situations occurring. First of all, it is important to note the rule of the statutory regulation of tax matters in Article 214 of the Constitution of the Republic of Poland (Konstytucja Rzeczpospolitej Polskiej z dnia 2 kwietnia 1997 (Dz. U. z 1997 Nr 78, poz. 483)). The constant qualities of tax named in this provision, such as subject and object of taxation as well as tax rates, as *expressis vebis* in the act of law, will not be subject to purposive interpretation, since they should be interpreted precisely.

The decision of the Supreme Court (wyrok Sądu Najwyższego z 22 października 1992, III ARN 50/92) expressed the view according to which "the fundamental rule of tax law in a democratic state ruled by law is that the range of the subject of taxation must be precisely determined in the Act of Taxation, and the interpretation of its provisions cannot be extensive."

Another protection may be the rule, accepted on the grounds of tax law, that doubts cannot be interpreted to the detriment of the taxpayer. Thus, if a provision is linguistically questionable, it is possible to seek its meaning by means of purposive interpretation. However, it is not allowed to extend the range of taxation. This type of reasoning has been raised in the literature to the rule of tax law, according to which doubts should be resolved in favour of the taxpayer. (Mariański, 2009). It is even proposed to establish this rule explicite in general provisions of tax law. (Mariański, 2009, p. 243).

2. Static and dynamic elements in tax law interpretation

When searching for a purpose in law it is necessary to pose a question from whose point of view this purpose should be determined. Should it be

looked at from the perspective of the historic legislator creating a particular act or should we take an attempt at "updating" the approach, i.e. take into consideration the changes which have occurred since the day of its origins until the moment of interpretation? This dilemma may be reduced to the choice of one of the conceptions of interpretation: static (subjective), which assumes that the change of social relations should have no bearings on the results of the law interpretation, or dynamic (objective) based on the assumption that the change of socio-economic relations allows us, with the course of time, to change the interpretation of the provisions of the act. To grasp an essence of the problem, it is worth distinguishing the purpose of the legislator from the purpose of the act of law. B. Brzeziński introduces such a distinction (Brzeziński, 2001, p. 164). The aim of the legislator remains basically unchanged regardless of the circumstances and cannot be corrected. This means that a norm once established by means of a rule of law is not changed until the time when the legislator himself repeals (changes) it: the static interpretation. Furthermore, the purpose of the act of law may evolve, which means that it should be read through the prism of current needs and requirements expected from the law: the dynamic interpretation. Both types of interpretation have their advantages and disadvantages. The static interpretation is desirable from the point of view of the stability of the binding norms and legal security (certainty of law). On the other hand, the dynamic interpretation does not guarantee such a certainty but may prevent the law from petrifaction and its anachronistic interpretation.

Bearing in mind the specificity of tax law, where the principle of security and certainty of law is emphasised, it could seem that it would make more sense to adopt the static theory of interpretation. However, it is important to underscore a certain drawback of this assumption, which results from the fact that through fast-changing social and economic relations as well as the excessive length of legislative procedures, the law would lose its value. Granting only the legislator the title to changes and adjustment of legal regulations, we expose ourselves to the dissonance between law and life. Therefore, to some extent it seems necessary to reach the dynamic theory of interpretation, which allows us to "go along with the spirit of time".[2] It seems justified to argue that the interpretation of tax law should be a compromise between one and the other theory. Especially the static theory is applicable in reference to the regulations imposing tax obligations, whereas the dynamic interpretation will apply to the provisions concerning tax reliefs and exemptions. (Smoktunowicz, Mieszkowski, 1998, p. 124).

3. Historical interpretation of tax law

The so-called historical interpretation should be recognised as a special type of interpretation, which is connected with the notion of purpose.[3] It should not be confused with the static theory of interpretation, which is sometimes also referred to as historical. The essence of historical interpretation, which is discussed here, is searching for arguments for a certain meaning of the provision of law on the basis of the changes in the given legal regulation as well as differences between the original and subsequent wording of the provision. The starting point is establishing the legislator's purpose creating a particular regulation in the past (static interpretation), determining the purpose of the regulation itself (dynamic interpretation), as well as the reasons which made the legislator change its substance. Knowing the reason of the change, the provision in its new wording is interpreted in such a way that the norm resulting therefrom was devoid of flaws or weaknesses, which manifested themselves during the application of the provision in its previous form. This conception of interpretation may raise doubts, however, the final form of the norm is determined in this situation not by what the legislator did but what, according to the interpreter, he intended to do. (Brzeziński, 2001, p. 166). The aforesaid question was reflected in the decision of NSA (wyrok NSA z dnia 18 października 1995, SA/Gd 2062/94), where the Court recognised that the interpretation which on the basis of *analogiae legis* to the subsequent provision allows for the interpretation of the previous provision is by no means justified, since analogy in tax law is unacceptable. This opinion should not be considered as completely accurate, for example for the fact that analogy in tax law is acceptable in certain cases, and sometimes even necessary. Also in judicial decisions there is a great number of examples of using historical interpretation by judges. The decision of NSA (wyrok NSA z dnia 28 listopada 1996, SA/Ka 2006/95) outlined the direction of changes in provisions, as a significant element for their interpretation. On the other hand, the same Court, in the statement of reasons of the decision of NSA (wyrok NSA z dnia 14 marca 1994, III SA 1794/93) stated that using historical interpretation is a commonly acceptable form of interpretation of law on condition that it does not lead to the views contradictory to the wording of law. Unless grammatical interpretation gives an unequivocal answer as to the wording of the law, it is an advantage, and not a mistake, of the interpretation to reach for arguments resulting from the evolution of legal regulations concerning a certain problem.

Thus, it is important to admit that historical interpretation may be useful in the process aiming at the establishment of the meaning of a particular provision of tax law. It should never, however, be treated independently, isolated from the other methods of interpretation, but should constitute the subsequent, the last stage of interpretation. A good example confirming the aforesaid thesis is the decision of TK (wyrok TK z dnia 6 września 1995, W.20/94) concerning the interpretation of Article 2 point 1 of the Act on Local Taxes and Fees (ustawa z dnia 12 stycznia 1994 r. o podatkach i opłatach lokalnych (Dz. U. z 1991 Nr 9, poz. 31)) in which the Tribunal explained what premises should make up the basis for establishing a taxpayer by a tax organ from among the owner or possessor of a property or a civil structure not permanently fixed with the ground, at determining the property tax. After linguistic, systemic and purposive interpretations, the Tribunal reached for historical interpretation and decided that "(...) also historical interpretation leads to the conclusion that in the property tax the taxpayer is the person who really owns the land. (...). Using historical interpretation it is foremost important to bear in mind the solutions of the first years after the war, made with an assumption that property tax is a municipal tax, and the person actually owning the property profits from this title. (...) Both systemic interpretation in compliance with constitutional provisions and other provisions of the Act of 12 January 1991 (ustawa z dnia 12 stycznia 1991 – o podatkach i opłatach lokalnych (Dz. U. z 1991 Nr 9. poz 31)), as well as purposive and historical interpretation lead to the assumption that in the situation where the autonomous possessor of the property is not its owner, the tax liability provided for in Article 2 point 1 of the Act of 12 January 1991 rests on the autonomous possessor. The tax organ cannot discretely select the taxpayer."

4. The economic method of tax law interpretation

A type of purposive interpretation is the so-called economic method of considering tax law. This type of interpretation is especially widespread in the countries of the German legal tradition (Germany, Austria, Switzerland), as well as in American and British law, where its counterpart is the principle substance over form. In accordance with the views of German authors the economic method of considering tax law narrows down to the establishment if the notion in a tax provision, which is simultaneously a notion of civil law, should not be attributed with an economic meaning, which is different from its meaning under civil law. (Tipke, Lang, 1991, p. 101).

The doctrine substance over form, on the other hand, is characterised in the following way (Brzeziński, 1996, p. 24): "This doctrine, assessing its tax and legal effects, assumes priority of the substance of a legal action over the form in which the action was performed. This doctrine is based on an assumption that the economic result of a particular action is its essence. The form in which the action is performed, on the other hand, is a secondary circumstance. Consequently, in the situations where a taxpayer chooses forms convenient in terms of tax – if these forms mask such economic occurrences which should be taxed – the substance should be a priority and taxation should be applied."

In the Polish tax law system the above-presented conception is reflected in Article 199a of the Tax Ordinance Act (ustawa z dnia 29 sierpnia 1997 r. – Ordynacja podatkowa, Dz. U. 2012, poz. 749 j.t.). On the basis of this provision tax organs were granted authorisation to establish the substance of a legal action in compliance with the consistent intention of the parties and the purpose of this action, and not only on the basis of the literary wording of the intention statements submitted by the parties. If under the guise of a legal action another legal action was performed, the tax effects are derived from this implicit legal action (Article 199a § 2 Tax Ordinance Act). (Dz. U. 2012, poz. 749 j.t.). This regulation is a response to the views concerning the interpretation of contractual provisions in the aspect of their tax and legal effects, which occurred in judicial decisions of courts much earlier. Especially in the decision of the Supreme Court (wyrok Sądu Najwyższego z dnia 3 września 1998, CKN 815/97) expressed an opinion that "the interpretation of the provision of an agreement, semantically vague, cannot be based on the linguistic analysis of the relevant part of the agreement only but it is also necessary to examine the intention and the purpose of the parties, as well as the actual context in which the contract was agreed upon and signed. It is impossible to do it without interrogating the people directly involved, or possibly taking into consideration substantive circumstances, such as, essential in economic relations, rules and customs of cooperation, both between the parties as well as in the contracts of the parties with other people."

In the content of Article 199a of the Tax Ordinance Act (Dz. U. 2012, poz. 749 j.t.) we can attempt to find elements of the principle of economic interpretation of law. This interpretation aims at the interpretation of law from the point of view of economic reality, clearly distinguishing the substance from the civil law form of legal actions. The emphasis is put on the real substance of these actions and not their external form. (wyrok Naczelnego Sądu Administracyjnego z dnia 14 grudnia 2004, FSK 826/04).

It is indicated that the economic interpretation is connected, on the one hand, with the problems of adequacy of commercial exchange actions and the forms in which they are performed, and on the other hand, with the substance of the economic actions which are concerned with these behaviours and expressed by the forms. (Pietrasz, 2011, p. 971). Applying the forms of exchange, more or less adequate to the economic substance of economic occurrences is not a subject of interest either on the part of the legislator, or the tax administration until it leads to lowering the tax liability below the level considered adequate. (Brzeziński, 2008, p. 151 and next).

5. Purposive interpretation directives

The theory of law developed several directives of functional interpretation, which may be also referred to as purposive interpretation. Selecting them for their usefulness for the needs of tax law, the following directives of purposive interpretation can be distinguished:

- Interpreting a norm, we should take into consideration social and economic consequences to which a certain interpretation will lead and choose such interpretation which leads to the most favourable consequences

The aforementioned directive is of considerable importance in tax law because it is expected to fulfil several provisions, such as the fiscal function and also social functions. A good example of this is the statement of reasons of the decision of NSA (wyrok NSA z dnia 26 sierpnia 1998, I SA/Wr 1980/96) on the possibility of acquiring the reduction defined in Article 16 of the Act on Tax on Inheritance an Donations (ustawa z dnia 28 lipca 1983 r. o podatku od spadków i darowizn (Dz. U. z 1983 Nr 45, poz. 207 z późn. zm.)). In the statement of reasons for this decision the Court stated: "The provision of Article 16 of the Act of 28 July 1983 on Tax on Inheritance and Donations establishes a housing reduction for the persons who acquire, through inheritance or donation, a flat, a house or its part. The reduction involves exempting from the tax base their value up to the combined amount not exceeding 110 square meters of the usable area of the building or premises. The objective of this regulation is not charging the donator or the testator's close and closest persons with financially considerable tax effects due to the material profit in the form of the aforementioned property, when they do not have a building or a flat at their disposal and intend to reside

in the premises or the building acquired for 5 years or sell them in order to make a necessary change of housing conditions. Legal norms included in these regulations are undoubtedly norms of a community purpose directed to implementing the state's policy in guaranteeing citizens decent housing standards. Thus, interpreting this regulation tax organs should pursue not only linguistic interpretation but also purposive interpretation, proceeding in such a way that the interpretation applied does not result in inability to implement the assumed end of the legal norm."

- Interpreting legal provisions we should take into consideration the purpose of the legal regulation (*ratio legis*).

In the case of the above-mentioned directive it is important to assume that the actions of the legislator are purposive actions serving to achieve certain ends. They do not have to be social ends. Frequently the only purpose of a particular regulation is securing incomes for the budget, i.e. a fiscal aim. Therefore the interpretation should be carried out not only in the context of social effects, to which it actually leads, but also in the context of other effects, which the legislator wanted to achieve.

- Legal provisions should be interpreted in accordance with the will of the historical legislator, referring to the rights of the current legislator only to a limited degree.

In the interpretation of tax law we should, however, opt for the domination of the static theory of interpretation because of the dominant role of the principle of certainty of law. Particularly the tax and legal scope of the actual state should result from the act of law and be unchangeable, in accordance with the legislator's intention. Exceptions in favour of the dynamic theory are possible, and from the point of view of taxpayers desirable, in reference to tax reductions and exemptions. In this case it is rather the end these institutions are to pursue that is decisive than the very, vague, wording of the provisions of the act.

- If we take into consideration the aims, values and extra-legal rules in establishing the meaning of the legal rule interpreted, they should be equally taken into consideration in relation to all the rules of which the institution is composed, to which the rule interpreted appertains.

This directive demands consistency in purposive interpretation – if a particular institution is to achieve a certain end, then all regulations constituting it should be interpreted in compliance with this end.

Conclusions

The above considerations allow for posit a thesis according to which purposive interpretation is an indispensable element of the process of interpreting a legal text. Its role in the scope of norms of tax law is, however, peculiar, since it serves only to verify the results of linguistic interpretation. The primacy of linguistic interpretation stems from Articles 84 and 217 of the Constitution of the Republic of Poland (Dz. U. z 1997 Nr 78, poz. 483), which reserves the obligation of bearing public burdens, as well as determining their components for an act of law. Such acts, as well as other legal texts, should be interpreted with the commonly applied rules of interpretation. Thus, adopting the derivative conception of law interpretation, it is important to recognise that it is recommendable to apply also non-linguistic methods of interpretation. In this context purposive interpretation becomes especially important, which foremost allows us to eliminate the doubts connected with the ambiguity of a legal text, referring to the end which the legal rule is supposed to pursue.

A particular aspect of applying purposive rules of interpretation, currently emphasised in the literature, is raising the rule *in dubio pro tributario* to the status of a tax law rule. Such a high distinction of this rule may be disputed, of course, which does not change the fact that it has long been noticeable in interpreting tax law regulations.

In conclusion, we can posit a thesis that the growth in importance of purposive interpretation is directly proportional to the fall in the quality of tax law regulations. Taking into consideration the legislative experience of recent years, it does not seem that this state of affairs will change soon.

NOTES

[1] This problem is widely perceived by the literature: compare: Mastalski, R. (1989, p. 108), Smoktunowicz, Mieszkowski (1998, p. 129).

[2] It seems that this thesis finds its confirmation in judicial decisions: compare, for example, the wyrok NSA z dnia 1 marca 2000 (I SA/Wr 2915/98), *Monitor Podatkowy* (2000, 11), where the Court interpreting the term "renovation" stated that using the dynamic interpretation with the word "renovation", we should take into consideration the changing economic reality and technological progress, which influence the method and the means of the works included in this term.

[3] In the question of qualifying historical interpretation as a particular variation of purposive interpretation there may occur certain doubts for an analysis of judicial decisions leads to the conclusion that these two types of interpretation are clearly different from each other. However, bearing in mind that the element of purpose connects them, the paper assumes that their mutual connection is reasonable.

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VERSITA

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 33 (46) 2013

DOI: 10.2478/slgr-2013-0012

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LEGAL INTERPRETATION OF POLISH TAX LAW BASED ON THE INSTITUTION OF REMUNERATION OF EXCESS PAYMENT – SELECTED ISSUES

Abstract. In order to achieve a desired effect of tax legal interpretation, its linguistic mechanisms are frequently insufficient. Elements of paralinguistic interpretation are more and more often indispensable. It applies inter alia when domestic tax law regulations must be verified in the light of the EU tax law. However, the study depict interpretative problems regarding the institution of remuneration of excess payments, which is regulated in Polish tax law. Considerations presented in this article confirm that legal interpretation of tax law is a complicated process. It is important to establish correct system connection between the analyzed legal regulations and other provisions, often contained in other legal acts. Moreover, it seems necessary to refer to the purpose-oriented interpretation of the law. Only then a chance for a satisfactory final result of the provision's legal interpretation can be guaranteed. What is more, such an effect will create an element being a part of a logically composed and arranged unity.

Introduction

Tax law regulations more often than not require a complex process of interpretation to be carried out. In order to achieve a desired effect of tax legal interpretation, its linguistic mechanisms are frequently insufficient. Elements of paralinguistic interpretation are more and more often indispensable. Such actions should be undertaken so that the results of such interpretation could, on the one hand, produce a clear effect, whereas on the other hand, elements should be logically related to other legal provisions. There are numerous reasons for such a state of affairs. What is more, they differ depending on the kind of law being subject to legal interpretation. The issue looks different when domestic tax law regulations, which must be verified in the light of the EU tax law, are subject of the analysis. Evaluating compliance of domestic tax law with the EU law, it is frequently not

ISBN 978-83-7431-377-3 ISSN 0860-150X

sufficient to carry out the analysis through the prism of individual provisions contained in legal acts created on the EU level. It results from the specificity of the EU law, which uses very general, and hence ambiguous, expressions. A problem with determination of the meaning of specified EU regulations may also be linked with the multiplicity of existing linguistic versions of the law. It may cause lack of adequacy in explanations of individual terms or notions. In consequence, it leads to evaluation of the compliance of specified domestic law regulations through the prism of frequently only generally outlined purposes set forth in preambles to individual acts of the EU law.

Moreover, paralinguistic interpretation plays a crucial role as far as tax law acts which fully remain within the scope of Polish fiscal jurisdiction are concerned. It refers to the acts which, as a rule, do not have to be evaluated through the prism of the EU law. There are many reasons for such a state of affairs. The following ones may be indicated therein. First of all, tax law regulates a complex matter. Consequently, a language describing it is often unable to include all issues related to this matter. Secondly, some attention should be paid to excessive casuistry of tax law acts. This mechanism makes tax law regulations barely legible. What is more, this method entails danger of committing mistakes by the legislator. Thus, one may easily lose his or her way in the web of provisions created by the legislator. Such connections occur not only within one legal act but they often form networks covering many tax law acts. The study will further depict interpretative problems regarding the institution of remuneration of excess payments, which is regulated, above all, in Art. 78 of ustawa z dnia 29 sierpnia 1997 – Ordynacja podatkowa (Dz. U. z 2012, poz. 749 j.t.) hereinafter referred to as the Tax Ordinance Act.

A manner and legal form of decisions on remuneration of excess payment

Remuneration of excess payment is subject to refund by virtue of the law. It means that the refund thereof does not have to be preceded by determination of the amount of remuneration by way of a decision. This opinion, however, does not result directly from any legal provision. Such a conclusion may be drawn from the system and purpose-oriented legal interpretation. In the case of ascertainment of basis for the refund of interest, a tax authority transfers the amount of interest a taxpayer is due to receive together with excess payment as part of financial-technical acts.

This opinion is justified in jurisdiction (see: wyrok Wojewódzkiego Sądu Administracyjnego w Białymstoku z dnia 14 stycznia 2004, SA/Bk 35/03; wyrok Wojewódzkiego Sądu Administracyjnego w Łodzi z dnia 2 lutego 2005, I SA/Łd 176/04) and literature (Etel, 2011), where it is depicted that the refund of interest on ascertained excess tax payment a taxpayer is due and legible to receive may be regarded as a financial-technical act that does not require an administrative decision to be issued. The following arguments prove that there is no need for a tax authority to issue a decision on remuneration when it decides that a taxpayer is eligible to such a payment. The amount of interest can be calculated directly based on the application of provisions contained in the Act. Therefore an action involving a settlement of excess payment remuneration without issuing a decision will not violate taxpayer's interest. A settlement by way of the issue of a decision on remuneration of excess payment has, by design, a limited scope. A tax authority may ascertain relevance of remuneration without determining its amount at the same time. It results from the fact that interest payment is due on the day excess payment is paid out and not on the day its relevance is confirmed.

In some cases, however, a tax authority should resolve the issue related to remuneration of excess payment by way of the issue of a tax decision. The jurisdiction indicates that if, however, a tax authority refuses to make the payment to a taxpayer claiming that he or she is not entitled to it, then the tax authority should issue an administrative decision within this scope. (SA/Bk 35/03, wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie z 13 kwietnia 2010, III SA/Wa 261/10). At the same time, it should not matter here whether a taxpayer demanded remuneration of excess payment as part of the proceeding.[1] Moreover, it is emphasized that, as a rule, settling a case as far as its essence is concerned (it shapes the party's financial-legal situation), a tax authority is obliged to issue a decision – Art. 207 § 2 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.). What is more, the essence of a case is not only the award of rights or imposition of duties but a refusal to acquire rights too. (wyrok Wojewódzkiego Sądu Administracyjnego w Białymstoku z dnia 14 lipca 2009, I SA/Bk 200/09). It is also rightly pointed out that a tax authority should issue an administrative decision within this scope not only when it entirely refuses to pay out interest to a taxpayer under Art. 78 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) but such settlement should also be issued when a tax authority calculates the amount of interest incorrectly, or does not pay out a full amount of interest due and a taxpayer applies for the payment of the whole amount of remuneration of excess payment he or she

is eligible to. (wyrok Wojewódzkiego Sądu Administracyjnego w Krakowie z dnia 14 lutego 2008, I SA/Kr 520/07). Another opinion that should also be regarded as relevant in its essence is the one according to which it is necessary to issue a decision on remuneration of excess payment each time the amount of such interest bears controversies between a taxpayer and tax authority, or when a tax authority issues a decision on ascertainment of excess payment, a decision on the amount of interest should be an element (part) of such a settlement, and if there are no bases whatsoever to issue a decision on excess payment, the amount of interest should be comprised by such a decision. (wyrok Wojewódzkiego Sądu Administracyjnego we Wrocławiu z dnia 19 czerwca 2006, I SA/Wr 604/05). The last two issues depicted above (remuneration of excess payment as an element of a decision on excess payment and a resolution on remuneration of excess payment by a separate decision complementing transfer of excess payment as part of financial-technical actions) should be found relevant when a tax authority has no intention of transferring remuneration of excess payment, or intends to transfer such consideration but in the amount that may evoke taxpayer's controversy.

Accepting the above presented opinions referring to situations when it is relevant to issue resolutions in the scope of remuneration of excess payments, it should be emphasized, nevertheless, that such resolutions are necessary solely when the legislator made the existence of interest dependent on specified circumstances whose ascertainment should be made by a tax authority. Under the Tax Ordinance Act, such a prerequisite exists in three provisions. The first situation occurs with regard to excess payment that arose in effect of the issue of a decision on a change, reversal or ascertainment of invalidity of tax decisions. In such cases excess payment is subject to refund together with interest as of the day the excess payment arose unless a tax authority has not contributed to the arising of the prerequisite of a change or reversal of the decision. The second situation occurs when a tax authority fails to issue a tax decision on ascertainment of excess payment within 2 months from the day an application for ascertainment of excess payment together with a corrected tax return was submitted. In this case excess payment is subject to interest as of the day the application for ascertainment of excess payment together with the corrected tax statement (tax return) was submitted unless a taxpayer, remitter or collector contributed to the delay of the decision's issue. The third situation occurs when excess payment is not returned within 2 months from the day a tax statement together with a corrected tax return with the revealed excess payment of tax was submitted. In this case excess payment is subject to interest from the day an application

for ascertainment of excess payment together with the corrected tax statement (tax return) was submitted unless a taxpayer, remitter or collector contributed to the delay of the excess payment's refund.

It results from the analysis of the above-mentioned situations that a tax authority should refer to the issue of lack of remuneration of excess payment by way of a decision before the refund of excess payment in two cases indicated below.

The first situation accounting for justification by way of a decision on transfer of excess payment without interest occurs when excess payment arose in effect of the issue of a decision on a change, reversal or ascertainment of invalidity of tax decisions. A solution that should be adopted as relevant implies that in such as case a tax authority should undertake actions aiming at the analysis whether the tax authority has contributed to the arising of the prerequisite of a change or reversal of a tax decision. This authority should refer to this prerequisite by indication of its existence or lack of existence. Such actions will be justified when a tax authority will return excess payment paid directly on the basis of the reversed decision, or the decision whose invalidity has been ascertained. Moreover, such an action will be necessary when excess payment will be returned after the issue of a new decision. In this case excess payment is refunded in the amount equaling a difference between the tax paid and the tax resulting from this decision. Verification of the fact whether a tax authority has contributed to the arising of the prerequisite of a change or reversal of a tax decision in the first of the above-mentioned cases will occur as part of a separate proceeding concerning remuneration of excess payment. It will be necessary if a tax authority will not see any bases for transfer of interest as of the day the excess payment arose. In the second case, after the issue of a new decision, a tax authority should at the same time determine the amount of excess payment based on Art. 74a of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.), which is a difference between the amount paid and the amount resulting from the issued decision, as well as refer to the issue of interest mentioned in Art. 78 § 3 point 2, particularly if it decides it will be undue. In other words, a tax authority should prove in such a case that there is lack of interest in connection with the fact that the tax authority has not contributed to the arising of the prerequisite of a change or reversal of the decision. It is reflected in the subject literature, where it is indicated that a settlement in the scope of the refusal to transfer remuneration of excess payment does not have be done in a separate decision. It may be one of the points of resolution of a case on excess payment in a decision on ascertainment or determination of excess payment. (Etel, 2011).

The second situation when a tax authority should refer to by way of a decision on lack of remuneration of excess payment occurs when excess payment arises in connection with an application for ascertainment of excess payment submitted together with a corrected tax return. This obligation will exist if within 2 months (from the day the above-mentioned application was submitted) a tax authority does not issue a decision on ascertainment of excess payment, or does not refund the amount of excess payment a taxpayer has been applying for within this period of time.

An element which constitutes protection of the taxpayer's right to receive remuneration of excess payments should be a possibility to demand initiation of proceeding in the matter of determination of interest. Jurisdiction draws attention to such a possibility emphasizing the fact that a taxpayer has the right to apply to a tax authority for a payment of correctly calculated remuneration of excess payment. If, however, a tax authority refuses to pay it, it is obliged to issue an administrative decision, which is subject to an appeal in the course of instance. (I SA/Kr 520/07). Nevertheless, a taxpayer should be entitled to this right after fulfilling two basic conditions. First of all, when a taxpayer has not received the amount of interest he or she is entitled to. Secondly, when the award of remuneration of excess payment depends on the circumstances of evaluation specified in Tax Ordinance Act. They are presented in the introductory part of this study. Nevertheless, one can come across contrary opinions in the light of which a taxpayer is not entitled to claim remuneration of excess payment in due amount in separate proceeding. (wyrok Naczelnego Sądu Administracyjnego z dnia 15 czerwca 2011, I FSK 894/10). Such an opinion is justified by the fact that in the case of a dispute between a tax authority and taxpayer on the amount of remuneration of excess payment, it will be crucial to refer to the legal basis of the decision awarding this amount, which could lead to an abortive statement according to which when making a decision on remuneration of excess payment, the authority would have a possibility of determining a different basis of its ascertainment or amount than in the decision on excess payment itself. It appears, however, that there are not any formal obstacles to claim consideration a taxpayer is eligible to within separate proceeding on remuneration of excess payment. Nevertheless, it is important to connect the basis of such a claim with the settlement concerning excess payment that has been issued before.

One may also come across opinions admitting a possibility of using other legal measures which a taxpayer may use when claiming remuneration of excess payment. The first one can regard a taxpayer raising the issue of lack of interest or transfer of this consideration in the amount lower than the

due one in an appeal against the decision determining or ascertaining the amount of excess payment through raising the charge of non-determination or wrong determination of the period of excess payment's remuneration. (Etel, 2011). The second possibility can be questioning of the accuracy of calculated remuneration of excess payment also in a proceeding on counting any amounts paid in excess towards past due or current tax liabilities since, as a rule, excess payment together with interest, by way of a decision one is entitled to complain about, are counted towards past due or current tax liabilities – Art. 76 and 76a § 1 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.). Therefore a decision on counting excess payment should contain a decision on the amount of remuneration of excess payment. (I SA/Kr 520/07) The third possibility can be a request to complement a decision on excess payment under Art. 213 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) since it is indicated that when issuing a decision on excess payment of tax, a tax authority is also obliged to include interest thereto despite the fact that a taxpayer has not indicated it in the application. If a tax authority has failed to do it, it should complement the decision on the amount of calculated interest in the decision ascertaining excess payment. (wyrok Naczelnego Sądu Administracyjnego z dnia 8 listopada 2011, II FSK 833/10). What is more, it is emphasized that if a party rightly claims ascertainment of the acquisition of the right to remuneration they have acquired under the law according to principles specified in Art. 78 § 1 and § 3 point 3 letter b and § 4 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) from the organs, irrespective of the fact whether a tax authority knows the amount of interest or not, it is obliged to adjudicate about it, i.e. articulate that the ascertained excess payment will be subject to interest. Thus, if a tax authority has not itself contained a settlement confirming that the taxpayer will be refunded excess payment together with interest in the decision, the party has the right to demand completion of the decision issued towards them under Art. 213 § 1 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) as a case not concluding the entire administrative case. (wyrok Wojewódzkiego Sądu Administracyjnego w Gdańsku z dnia 16 maja 2012, I SA/Gd 200/12).

It should be emphasized that in some situations a taxpayer is entitled to a complaint about inaction or idleness of a tax authority in the matter of failure to transfer remuneration of excess payment. It refers to cases where such an obligation results from the force of law where there is no possibility of making any evaluation by a tax authority. A mechanism of the complaint about inaction or idleness is also applied when in the above-mentioned circumstances a tax authority transfers excess payment to a taxpayer but in the amount lower than the due one.

Remuneration of excess payment that arose in effect of the issue of a decision on a change, reversal or ascertainment of invalidity of tax decisions

Excess payment that arose in effect of the application of extraordinary courses of verification of tax decisions is, as a rule, subject to interest as of the day the excess payment arose, that is, inter alia, from the day tax was paid on unduly or in the amount higher than the due one. This mechanism should be treated as a basic principle with, however, an important exception the legislator has introduced to it. It is applied when a tax authority has not contributed to the arising of the prerequisite of a change or reversal of a decision. In such a case, a tax authority returns excess payment without interest unless it fails to transfer it in due time.[2] It means that when a tax authority has not contributed to the arising of the prerequisite of a change or reversal of a decision, remuneration of excess payment is due solely if there is a delay in the transfer of excess payment. In the case of the delayed transfer thereof, a taxpayer is eligible to interest for the period from the issue of the decision on a change or reversal of the decision to the day of the refund of the due amount to the taxpayer.

Taking the above into consideration it should be stated that in the case of excess payment that arose in effect of the issue of a decision on a change, reversal or ascertainment of invalidity of tax decision, it is a rule to return excess payment together with interest as of the day the excess payment arose. Whereas a burden of proof to indicate that a tax authority has not contributed to a change, reversal or ascertainment of invalidity of tax decisions burdens this authority. It is reflected in the legal interpretation of Art. 78 § 3 point 1 in connection with point 2 of Tax Ordinance Act. (Dz. U. z 2012, poz. 749 j.t.).

The question to be answered here regards understanding the prerequisite saying that a tax authority has not contributed to the arising of the premise of a change or reversal of a decision, as well as a way of its existence. Such contribution should be explained as a situation where a tax authority, even partially, bears responsibility for the issue of a faulty decision.[3] At the same time, tax authority's liability for decision's defectiveness does not have to be exclusive. We should agree with the opinion according to which the contribution by a tax authority should be in the scope greater than other subjects participating in tax proceedings concluded with the issue of a faulty decision.[4] What is more, such liability does not depend on the fault, or its lack, of the employees of the authority conducting the proceeding concluded by the issue of a defective decision. What is essential here is that either ac-

tions or omission of the authority had a direct or indirect impact on the issue of the resolution which is then changed, reversed, or subject to ascertainment of invalidity. The jurisdiction depicts that the prerequisite referred to in the above-mentioned provision is not connected with protraction of tax proceeding (one cannot refer to this circumstance in the scope of a dispute regarding the amount of remuneration of excess payment). Moreover, this premise is connected with defects of a tax decision excess payment resulted from and not duration of the proceeding in this matter (wyrok Naczelnego Sądu Administracyjnego z dnia 13 sierpnia 2009, II FSK 425/08).

It seems that such situations may occur, most of all, when a decision is reversed during revived or reopened proceeding, or when its invalidity is ascertained. In the first situation, the contribution of a tax authority to the arising of excess payment may occur if the following circumstances were the bases for the decision's reversal: the decision was issued in result of a crime committed by an employee of the tax authority, or the decision was issued by an employee or tax authority which is subject to exclusion under Art. 130–132 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.), or the party did not participate in the proceeding not through their fault, or new important factual circumstances relevant to the case will be revealed, or new evidence the tax authority issuing the decision has not known about the existence of on the day the decision was issued will be revealed, or the decision was issued without obtaining an opinion of another body that is required by the law. If invalidity is ascertained, remuneration of excess payment may be due to a taxpayer particularly if the bases to issue such a settlement are situations when the decision was issued in breach of regulations on competence, or the decision was issued without legal grounds, or it was issued in gross violation of the law, or it regards the case that was already settled before by another final decision, or the decision was directed at a person that is no longer a party to the case, or the decision was unenforceable on the day it was issued and its unenforceability is of a permanent nature.

Conclusion

Considerations presented above confirm observations presented in the introduction therein related to the functioning of Polish tax law. Legal interpretation of this law is a complicated process. The interpretative process must frequently include paralinguistic mechanisms. In this context, it is important to establish correct system connection between the analyzed legal regulations and other provisions, often contained in other legal acts. More-

over, it seems necessary to refer to the purpose-oriented interpretation of the law. Only then a chance for a satisfactory final result of the provision's legal interpretation can be guaranteed. What is more, such an effect will create an element being a part of a logically composed and arranged unity.

NOTES

[1] In the judgment of Provincial Administrative Court in Bydgoszcz (Wojewódzki Sąd Administracyjny, WSA) (wyrok WSA w Bydgoszczy z 26 stycznia 2010, I SA/Bd 923/09) –, it was indicated that in the light of the Tax Ordinance Act provisions, remuneration of excess tax payment arises under the law itself, nevertheless, ascertaining excess payment, a tax authority is obliged to adjudicate about the interest thereon irrespective of the fact whether a taxpayer contained an application for remuneration of excess payment in the application for ascertainment of excess payment.

[2] Pursuant to art. 77 § 1 point 1 and § 3 of Tax Ordinance Act – (Dz. U. z 2012, poz. 749 j.t.), excess payment must be returned within 30 days from the day a decision on a change, reversal or ascertainment of invalidity of the decision was issued, or within 30 days from the day a new decision in this case was issued.

[3] It is confirmed in the linguistic meaning of the notion "to contribute", which is explained as being partly a cause of something, or influencing something.

[4] In the wyrok WSA w Białymstoku z 19 stycznia 2012, I SA/Bk 468/11, it was indicated that in Art. 78 § 3 point 2 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) the legislator did not reserve that contribution of a tax authority to the arising of the prerequisite of a change or reversal of a decision determining the amount of tax liability should be exclusive in nature. Therefore even when in the specified factual state a taxpayer himself could also have contributed to the arising of such a premise to some extent, for a final decision settling a case whether he or she is entitled to interest it is of crucial importance whether the tax authority has not mainly contributed to the arising of this premise of a change or reversal of a decision determining the amount of tax liability.

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VERSITA

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 33 (46) 2013

DOI: 10.2478/slgr-2013-0013

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EVOLUTION OF THE RULES PERTAINING TO THE ISSUING OF 'OFFICIAL' INTERPRETATIONS OF TAX LAWS IN POLAND

Abstract. Interpretations of the tax law (currently referred to as general and individual interpretations), issued by tax authorities, are a fairly new institution in Poland. They were introduced into the legal system by the Tax Ordinance Act of 29 October 1997. From that time these regulations were deeply changed three times. Now it seems that Polish legislator has finally succeeded in elaborating an appropriate model for binding interpretation of tax law that protects the interests of taxpayers. However, discussed regulations seem to need some other amendments. The objective of this article is to present the evolution of the provisions pertaining to the issuing of the so-called official interpretations of tax law and to point at certain shortcomings of the present regulations.

1. Introduction

Interpretations of the tax law (currently referred to as general and individual interpretations), issued by tax authorities, are a fairly new institution in Poland. They were introduced into the legal system by the Tax Ordinance Act of 29 October 1997 (ustawa z 29 sierpnia 1997 – Ordynacja podatkowa (Dz. U. z 2012, poz. 749 t.j.)). Despite the fairly short period of their application, the regulations pertaining to the issue of such interpretations have been amended several times in a rather profound manner. The objective of this article is to present the evolution of the provisions pertaining to the issuing of the so-called official interpretations of tax law and to point at certain shortcomings of the present regulations.

2. Official interpretations in the years 1997–2002

Originally, official interpretations of tax law were regulated only in art. 14 of the Tax Ordinance Act (Dz. U. z 2012, poz. 749 t.j.). The ar-

ISBN 978-83-7431-377-3 ISSN 0860-150X

ticle authorized the Minister of Finance and the tax authorities to issue interpretations of tax law. Interpretations made by the Minister of Finance were to be published in the Fiscal Bulletin of the Ministry of Finance (Biuletyn Skarbowy Ministerstwa Finansów) and their objective was to ensure uniform application of tax regulations by the tax authorities. Even though the Act did not expressly state that the tax authorities would be bound by the interpretations of the Ministry, in practice they (in particular those subordinated to the Ministry) often complied with the interpretations.

A separate type of interpretations was information on the scope of application of tax laws in individual cases, issued by the tax authorities. The tax authorities were required to issue such interpretations (referred to as information) only upon request of taxpayers, payers, and collectors (thus, the group of persons authorized to request such interpretations was limited). The interpretations pertained to existing factual states. What this meant was that the requesting person could not demand interpretation regarding a future (hypothetical) state and was only limited to the existing state. The disadvantage of this was that it was not possible to request the opinion of tax authorities regarding events that would take place in the future, and the requesting person could not learn the consequences of his future actions. The interpretations could not be issued if a fiscal proceeding or a fiscal audit had been initiated in the case to which the request pertained.

As for the guarantee of protection of the persons who complied with the interpretations, the legislator only stated that "compliance by the taxpayer with the official interpretation of tax law may not be detrimental to him." However, the Act was not clear on what such lack of detrimental effects would mean. In particular, it was not certain whether, for example, compliance with an erroneous interpretation concerning a lack of duty to pay a tax would enable the taxpayer to effectively avoid paying the tax. For unknown reasons, the guarantee was limited to taxpayers only, even though payers and collectors were also allowed to request interpretation from tax authorities. Of note is also the fact that the Ordinance Act did not provide for a time limit for the issue of interpretations.

Interpretations issued in individual cases had no specific form as the Act did not provide that they should have the form of an official decision or disposition. The only requirement was that they had to be issued in writing. As a result, there was no procedure for challenging the interpretations: no appeals or complaints to an administrative court were provided for.[1]

3. Changes introduced in the Act of 12 September 2002

(ustawa z 12 września 2002 r. o zmianie ustawy – Ordynacja podatkowa oraz o zmianie niektórych innych ustaw. (Dz. U. z 2002 Nr 169, poz. 1387))

On 1 January 2003 certain changes became effective regarding the rules for the issuing of official interpretations of tax law. Art. 14 of the Tax Ordinance Act (Dz. U. z 2002 Nr 169, poz. 1387) precisely defined the nature of the interpretations issued by the Ministry of Finance. Such interpretations were to pertain to "general problems of the tax law," and the Ministry was prohibited from issuing interpretations in individual cases (which were restricted to the tax authorities). The Ministry's interpretations were to be binding on the tax authorities and the tax audit authorities. Also, the legislator clarified the essence of the guarantee of protection of persons complying with the Ministry's interpretations. It was provided that compliance of a taxpayer, payer, or collector[2] with interpretations of tax law may not be detrimental to him, but does not exempt him from the duty to pay the tax. The legislator guaranteed that in the scope resulting from the compliance with an interpretation, proceedings would not be initiated in cases regarding fiscal crimes or fiscal misdemeanors (and proceedings that had been initiated in such cases would be discontinued), interest for delays would not be charged, and additional (punitive) VAT payments would not be imposed. The Act also provided that a taxpayer's, payer's, or collector's compliance with interpretations of tax law may constitute grounds for remittance of overdue taxes, if the overdue payments were the result of their compliance with such interpretations. It should be emphasized, however, that the legislator used the word 'may' and did not require remittance of overdue tax payments in such cases but only suggested that the tax authorities consider this possibility.

The express provision that the tax authorities are bound by the interpretations issued by the Ministry of Finances could be interpreted as a violation of the principle of two-instance tax proceedings, since authorities of both the 1st and the 2nd instance were required to adopt the same interpretation of tax law. This problem was raised in a complaint filed with the Constitutional Tribunal (Trybunał Konstytucyjny, TK). In its verdict of 11 May 2004, the Tribunal found that art. 14 (2) of the Tax Ordinance Act (in the part providing that the tax authorities are bound by the Ministry's interpretations) violated art. 78 and 93 of the Constitution of the Republic of Poland. (Dz. U. z 1997 Nr 78, poz. 483). Thus, the relevant provisions were no longer valid. Paradoxically, the reason for implementing this change (which was questioned by the Constitutional Tribunal) was to ensure uni-

form application of law by the tax authorities: the legislator wanted the taxpayers to be sure that in similar situations the tax authorities in the entire country would make identical decisions.

In individual cases the official interpretations (still referred to as information) were to be issued by the tax authorities of the 1st instance. The persons authorized to request such interpretations were to be taxpayers, payers, and collectors, provided that the interpretations pertained to existing factual states.[3] Tax authorities were not allowed to issue interpretations pertaining to future (hypothetical) events. Thus, requests for interpretations in cases where tax proceedings, tax audits, or proceedings before administrative courts had been initiated were not allowed. The Act did not provide for any negative consequences of delays in the issue of interpretations by the tax authorities.

4. Official interpretations of tax law in the laws in force after 1 January 2005

The Act of 2 July 2004 (ustawa z dnia 2 lipca 2004 r. Przepisy wprowadzające ustawę o swobodzie działalności gospodarczej (Dz. U. z 2002 Nr 169, poz. 1387)) introduced further changes to the rules regarding the issuing of official interpretations of tax law. In those changes, the legislator introduced significant protective measures of the taxpayers' interests.

The principle that compliance with interpretations may not be detrimental was extended to cover, in addition to taxpayers, payers, and collectors, also legal successors of taxpayers and third parties liable to cover taxpayers' overdue taxes. Thus, it can be concluded that only since 2005 the protective measures related to interpretations of tax law have applied to all entities required to pay taxes.

The scope of the protection was significantly increased. The provision that compliance with interpretations did not exempt one from paying the tax was removed. In the scope resulting from compliance with interpretations, tax authorities were no longer allowed to impose taxes for the period prior to cancellation or change of the interpretation. Thus, the tax authorities were allowed to impose a tax in a way that was not compliant with the interpretation only if the interpretation was changed and such tax would apply only to the period after the change. Also (the same as before), the tax authorities were not allowed to impose additional (punitive) VAT tax, to initiate proceedings in fiscal crime or misdemeanor cases (and were required to terminate proceedings that had been initiated) and to

impose any other sanctions resulting from provisions of tax law and penal fiscal law.[4]

The separation of the competences of the Ministry of Finance and the tax authorities was maintained. The Minister was authorized to issue interpretations pertaining to general problems of the tax law,[5] while the tax authorities (heads of tax offices,[6] heads of customs offices, heads of communes, mayors, presidents of cities, district heads, and province marshals) would issue interpretations in individual cases.[7]

Individual interpretations could be issued not only upon request of taxpayers, payers, or collectors, but also upon request of legal successors of taxpayers as well as the so-called third parties liable to pay taxpayer's overdue taxes. Eventually, the legislator regulated the form of the individual interpretations. The legislator provided that they would take the form of dispositions and would be subject to complaints. Complaints would be considered by an appeal body who would issue a relevant decision. In its decisions, the appeal body could change or repeal individual interpretations if the relevant complaints were found to be justified or if the interpretation was in flagrant conflict with the verdicts of the Constitutional Tribunal or the European Court of Justice. Decisions of the appeal body could be appealed against in an administrative court.

Individual interpretations issued by the tax authorities were not binding on the persons who requested them but were binding on the tax authorities and the tax audit authorities. Consequently, decisions imposing a tax had to be compliant with the current interpretations issued to taxpayers, payers, or collectors.

A new provision in the law was the introduction of a 3-month time limit for the issue of individual interpretations, starting from the date of receipt of the relevant requests by the tax authorities. In complicated cases, the time limit could be extended to 4 months. If a tax authority failed to issue an interpretation by the deadline, the statute provided that the tax authority would be bound by the position of the person requesting the interpretation expressed in the application. Such situations were often referred to as 'silent interpretations' (Kosikowski, 2011, p. 179) whereby the requesting person was authorized to conclude that he had received an interpretation that was fully conformant to his position expressed in the application. In order to impose a tax, the tax authorities were required to issue a decision changing such a 'silent interpretation', if such a tax would be in contradiction to the taxpayer's position.

5. The reform of the rules regarding official interpretations of tax law introduced in the Act of 16 November 2006 (ustawa z dnia 16 listopada 2006 r. o zmianie ustawy – Ordynacja podatkowa oraz o zmianie niektórych innych ustaw (Dz. U. z 2006 Nr 217 poz. 1590))

On 1 July 2007, new changes to the regulations pertaining to official interpretations of tax law issued by tax authorities became effective. In the amended Tax Ordinance Act, interpretations of tax law are the subject of a dedicated chapter (1a).

Interpretations were expressly divided into two categories: general and individual. General interpretations are issued only by the Ministry of Finance in order to ensure uniform application of tax laws by tax authorities and tax audit authorities.[8] General interpretations are required to take into account court verdicts as well as verdicts of the Constitutional Tribunal and the European Court of Justice.

One of the most important changes was that state tax authorities (heads of tax offices and customs offices) would no longer be authorized to issue individual interpretations). According to the new law, individual interpretations pertaining to taxes collected by tax offices and customs offices would be issued by the Ministry of Finance and individual interpretations pertaining to taxes collected by local authorities would still be issued by commune heads, mayors, presidents of cities, district heads, and province marshals. Because the Ministry of Finance is unable to consider all requests (from the entire country) for individual interpretations, the new law authorized the Minister to delegate the power to issue individual interpretations on the Minister's behalf to bodies subordinated to the Ministry. The Minister has taken advantage of this possibility and authorized the directors of 5 tax chambers (Bydgoszcz, Katowice, Poznań, Łódź, and Warsaw) to issue individual interpretations.[9]

Another important change was the enlargement of the scope of interpretations. Individual interpretations may pertain not only to existing factual states but also to future events. This provision enabled the requesting persons to obtain interpretations that are binding to the tax authorities and pertain to the fiscal consequences of future actions. Consequently, the group of persons who are authorized to request individual interpretations includes all persons whose actions have consequences in the area of tax law.

Applications must contain the applicants' positions regarding the legal evaluation of the factual state presented, and the authorities issuing the interpretations are required to evaluate such positions and find them

to be correct or present their own positions (different from those of the applicants).

In the new law, the legislator abandoned the previous form required in the case of individual interpretations, namely the form of disposition. Also, the provisions giving the requesting persons the right to complain against interpretations were repealed. The applicants who do not agree with individual interpretations may call on the authority to eliminate the breach of law (this is a special institution provided for in the regulations pertaining to proceedings before administrative courts). After an ineffective call to eliminate the breach of law, the applicant may appeal against the interpretation in an administrative court.

Interpretations can be changed, *ex officio*, by the authorities that have issued them. However, compliance of applicants with individual interpretations before they are changed must not be detrimental to them, which means that in the scope covered by the interpretation, penal fiscal proceedings against the applicants cannot be initiated (and proceedings that have been initiated must be terminated) and interest for delayed payments cannot be charged. The issue of exemption from a tax was regulated in the new law in a rather innovative manner: The legislator identified two types of situations in this regard:

1) if the applicant is asking about consequences of an event that has taken place and has lead to some fiscal consequences (e.g. the requirement to pay a tax) before the interpretation is delivered, then an advantageous interpretation (one that confirms that there is no duty to pay the tax) does not constitute an exemption from the duty to pay the tax if it is later replaced with a disadvantageous interpretation (one that confirms the duty to pay the tax);

2) if the request pertains to an event that will have fiscal consequences in the future, after the interpretation is delivered, then an advantageous interpretation (which confirms that there is no duty to pay the tax) will be a basis for exemption from the tax, even if it is later replaced with an interpretation that is disadvantageous to the applicant.

The new law maintained the institution of the so-called 'silent interpretation'. If an individual interpretation is not issued within 3 months of the date of receipt of the application by the authority, then it is considered that on the day following the day on which the deadline for the issue of the interpretation expired an interpretation is issued that fully confirms the position of the applicant.

6. Conclusions

An analysis of the amendments to the regulations on official interpretations of tax law leads to the conclusion that the Polish legislator has finally succeeded in elaborating an appropriate model for binding interpretation of tax law that includes protection of the interests of taxpayers.[10] However, the model is not free of shortcomings. Nevertheless, they can be eliminated without another deep reform of the rules governing the issue of interpretations. It appears that small changes to the Tax Ordinance Act would suffice. Below are some issues that the legislator has so far failed to eliminate:

1. In the theory of law there is a widespread opinion that interpretation of law is just one stage of application of law. The process of application of law consists of the following stages: selection of the regulation that constitutes the basis of a decision, interpretation (determination of the meaning of the regulation), collection of evidence pertaining to facts with which the legal consequences provided for in the regulation are to be related, subsumption (qualification of the case to match a behavior described in the regulation), and determination of the consequences of the fact qualified as the behavior described in the regulation. (Nowacki, Tabor, 2012). Thus, an allegation regarding violation of a law may pertain to an action by an administration body consisting in implementation of law. An administration body may violate a law by issuing a decision (an act of application of law) that is not in compliance with relevant regulations. Interpretation of regulations cannot be analyzed from the point of view of compliance with law and the reasoning of an entity applying law can be neither compliant nor not compliant with law. This observation leads to a rather negative opinion of the regulations that enable complaints against individual interpretations of tax law. Administrative courts exercise control over individual interpretations with respect to observance of law. A body issuing an official interpretation could risk the allegation of violation of law only if it violated the procedure pertaining to the issue of interpretations (which is defined in the Tax Ordinance Act). Nevertheless, administrative courts study not only the procedure but also the essential contents of the interpretations issued by the tax authorities.[11] The control of the essential contents of the decisions made by tax authorities should only pertain to decisions regarding the values of imposed taxes, as opposed to interpretation of regulations that are to be applied for the purpose of issuing such decisions.

2. The Tax Ordinance Act gives the Minister of Finance the authority to issue individual interpretations pertaining to taxes charged by the bodies that are subordinate to the Minister and the authority to issue general

interpretations pertaining to all taxes. There are some doubts regarding the authority to decide about the interpretation of regulations pertaining to taxes collected by local authorities. The idea of self-government and financial independence of local authorities are the foundation of the principle that communes are responsible for collecting their own taxes.[12] It is quite feasible that the Minister of Finance could be wrong in his reasoning; such an error (incorporated in a general interpretation) would affect the tax revenue of all communes in Poland.

3. The institution of 'silent interpretation' needs to be defined in detail. The legislator gives tax authorities only 3 months to issue individual interpretations. If the interpretation is not issued within this time limit, the position of the applicant is considered to be correct. So far it has not been clearly decided what date constitutes the deadline for issue of interpretations. There are three possible solutions:

a) the date of issuing of an interpretation is the date of its preparation (signing) shown on the letter sent by the administrative body (wyrok Naczelnego Sądu Administracyjnego z dnia 14 grudnia 2009, II FPS 7/09);
b) the date of issuing of an interpretation is the date of sending of the letter to the applicant (wyrok Wojewódzkiego Sądu Administracyjnego w Białymstoku z dnia 10 października, SA/Bk 364/07);
c) the date of issuing of an interpretation is the date of delivery of the letter to the addressee (Wyrok Naczelnego Sądu Administracyjnego z dnia 2 listopada 2008, I FPS 2/08).

It appears that the second solution is the most appropriate. The best date of issuing of the interpretation is the date on which the letter is sent. The first option may lead to allegations of backdating of letters by tax authorities. The last option, on the other hand, may lead to 'silent interpretations' becoming effective due to the delays in the delivery of the letters by the postal service operator.

NOTES

[1] In its verdict of 2 December 1998 the Supreme Administrative Court (Naczelny Sąd Administracyny, NSA) (Wyrok NSA z dnia 2 grudnia 1998, I SA/Ka 16/98) stated that information on the scope of application of tax law regulated in art. 14 of the Tax Ordinance Act are not actions in the scope of public administration that can be appealed against in an administrative court.

[2] Thus, the protection also covered payers and collectors.

[3] The right to request interpretations was not granted to legal successors of taxpayers and the so-called third parties liable to pay the taxpayers' overdue taxes.

[4] This protection pertains to individual interpretations and interpretations issued by the Ministry of Finance.

[5] The Act of 30 June 2005 (Dz. U. z 2005 Nr 143, poz. 1199) on amending the Tax Ordinance Act and on amending certain other statutes, as of 1 September 2005, extended the powers of the Minister of Finance. From that day on, he could also issue individual interpretations pertaining to agreements on avoidance of double taxation and other ratified international agreements pertaining to taxes.

[6] As of 1 September 2003, tax offices are no longer tax authorities, their place was taken by the heads of tax offices.

[7] Only in this amendment did the legislator decide to call "information on the scope of application of tax law" as "interpretations regarding the scope and way of application of tax law."

[8] Since 1 January 2012, general interpretations have been issued also upon request. However, public administration bodies cannot be the applicants.

[9] Regulation of the Minister of Finance of 20 June 2007 concerning authorization to issue interpretations of tax law. (Dz. U. z 2007 Nr 112, poz. 770 z późn. zm.).

[10] The rules regarding the issue of official interpretations of regulations pertaining to other levies are regulated in the Act of 2 July 2004 on the freedom of economic activity (Dz. U. z 2010, Nr 2010, poz. 1447 j.t.).

[11] Initially, in their verdicts, administrative courts limited their considerations to whether law was violated in the process of issue of interpretations (e.g. whether the interpretations were issued in the required form, if all the elements of the factual state described in the applications have been considered, etc.). However, in its resolution of 8 January 2007 the NSA (uchwała siedmiu sędziów NSA z dnia 8 stycznia 2007, I FPS1/06) stated that control of courts should also cover correctness of the essential contents of interpretations.

[12] Commune-level tax authorities collect real estate tax, farmland tax, forest tax, and means of transport tax. The other three taxes that constitute a source of revenue of communes are collected by the tax offices subordinated to the Minister of Finance.

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Wyrok Naczelnego Sądu Administracyjnego z dnia 2 grudnia 1998, I SA/Ka 16/98, LEX nr 35098.

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VERSITA

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 33 (46) 2013

DOI: 10.2478/slgr-2013-0014

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A HEARING IN THE TAX PROCEEDING APPEAL – INTERPRETATION OF THE RULES BY THE TAX AUTHORITIES

Abstract. The purpose of this article is to analyze the powers of tax appeal authorities and their interpretation of the Tax Ordinance Act governing tax hearings.

The tax hearing is part of the tax appeal proceeding and takes place within an additional procedure to supplement the evidence and materials on the case. This means that article 229 of Tax Ordinance Act is the limit of the hearing conducted by the tax body. Tax trial/hearing should be treated as a form of activity in gathering evidence, which operates next to the cabinet proceedings. In the literature, the current forms were considered to be equivalent.

The decision to perform additional procedures to supplement the evidence and materials should always be on that tax appeal authority. The phrase "can perform" should be interpreted by the authority as an obligation to conduct, at least as an order to make a positive or negative assessment of the need for additional evidence.

In the Author's opinion, there are no objections to carry out certain types of evidence. The appeal tax authority is recognizing the case *de novo* and is evaluating the facts in a way it is required to assess the completeness of the collected evidence, and the same to determine whether all of the facts have been proven.

The limits of the powers of the tax appeal authority to conduct current investigation determines the content of articles 229 and 233 § 2 of Tax Ordinance Act. The competence of the appeal body, which is not subject to challenge, is to complement the evidence to draw additional conclusions, but not to change the basic findings. It may hear witnesses, appoint experts and confront their opinions, carry out documentary evidence, as necessary to carry out a visual inspection, provided that these activities are within the limits of additional evidence and conduct supplementary materials in the case. All of this evidence can be carried out during the tax hearing ordered by the tax appeal authority.

1. General Remarks

The purpose of this article is to analyze the powers of tax appeal authorities and their interpretation of the Tax Ordinance Act (ustawa z 29 sierpnia

ISBN 978-83-7431-377-3 ISSN 0860-150X

1997 – Ordynacja podatkowa Dz. U. z 2012, poz. 749 j.t.), governing tax hearings. Institution of the tax hearing was introduced on January 1, 2007 and it is described by the articles of Tax Ordinance Act 200a–200d (Dz. U. z 2012, poz. 749 j.t.) and can be used only in case of appeal. It is treated as a part of the explanatory proceedings, although the acquisition of evidence takes place in the proceedings carried out by the first instance.

The implementation of the principle of two instances in tax proceedings (Article 127 of Tax Ordinance Act – (Dz. U. z 2012, poz. 749 j.t.)), however, requires that the tax issue must be recognized twice by two different tax authorities, in the second instance by the higher level. On appeal, the tax authority should conduct a fair assessment of the evidence and then resolve the tax issue. Often it turns out that the evidence contains gaps and the authority body faces the dilemma of whether to perform additional procedures to supplement the evidence and materials in question. Broad understanding of "evidence" as any mean allowed by the law, which may help to clarify the matter, causes that during the procedure the need to supplement the evidence may arise, explaining the circumstances of the case, and even confronting the participants of the case. These operations are supported by the institution of tax hearing.

2. Guidelines for interpretation of the rules governing the tax hearing by tax authorities

The tax hearing is part of the tax appeal proceeding and takes place within an additional procedure to supplement the evidence and materials on the case. (Presnarowicz, 2011, p. 993; Presnarowicz, 2007, p. 97). This means that article 229 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) is the limit of the hearing conducted by the tax body. Tax trial/hearing should be treated as a form of activity in gathering evidence, which operates along the cabinet proceedings. In the literature, the current forms were considered to be equivalent. (Zbrojewski, 2012, p. 1231; Łaszczyca, Martysz, Matan, 2003, p. 575). However, the scope of the hearing is much more limited. The tax appeal authorities carry out additional investigation in the form of cabinet proceeding more frequently, avoiding tax hearing. On the one hand, it seems obvious. The first of these cases is less formal. It can be done during the same operation as gathering evidence at the hearing. However, the main advantage of the tax hearing is to assemble in one place and time all the parties who carry out specific process steps verbally and directly. (Dawidowicz, 1962, p. 154).

The construction hearing in tax proceedings was based on contradictory elements, through the introduction of an authorized officer of the first instance, from whose decision the appeal was filed. (Adamiak, 2010, p. 220). The term used in art. 200c § 3 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) "participating in the trial/hearing" means that the party is involved in the activities of the trial/hearing, including the submission of related explanations, asking questions to witnesses and cannot be reduced to assist operations undertaken by the other participants in the hearing. (Pietrasz, Teszner, 2010, p. 169, Adamiak, 2007, p. 39; otherwise Strzelec, 2008, p. 32). The hearing allows you to confront the positions and arguments of the first instance and the parties of the proceedings, though of course there could be no question of a classic adversarial. Employee of the first instance does not become party in the proceedings, and the body/tax authority is not the arbiter.

Preliminary studies carried out in the framework of the research project Nr 2011/01/N/HS5/02599: "The use of a hearing by the institutions of public administration in tax proceedings", funded by the National Science Centre, show that tax authorities rarely carry out a hearing ex officio. In the period since 1 January 2007 to 30 September 2012, 83 tax authorities conducted a total of 52 tax hearing appeals. In proceedings held in treasury chambers 30 hearings were conducted, and the government appeal councils – 22.[1] Tax hearings were not carried out by the Minister of Finance or the Directors of the Customs Chambers. Interesting results were noted during the analysis of the number of applications brought by taxpayers demanding a hearing. The treasury chambers noted 536 applications, of which 502 were refused, while to the customs chambers taxpayers have submitted 197 applications for tax hearing and all of them were refused.

Very rare cases of evidence gathering by the tax bodies in the form of a tax trial/hearing are surprising in the context of the construction of art. 200a of Tax Ordinance Act. (Dz. U. z 2012, poz. 749 j.t.). This article describes the order of tax hearing being carried out in certain situations. It must be admitted that tax hearing limits the tax authority in carrying out the process of the selection and gathering of supplementary evidence. Obligatory conduct of the tax hearings means that the authority cannot demand additional proceeding carried out and additional supplement evidence and materials from the authority that issued the decision in the first instance. Managing tax hearing, the appeal tax authority waives cassation decision according to article 233 § 2 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) or transfer the case back to first instance to be recognized

again. But you cannot deny the authority the power at a later stage, depending on the results of the case proceeding. During the assessment, it may be that there is a need to gather further evidence, for example, as a consequence of the disclosure of irregularities in the proceedings at first instance, or the lack of evidence would not be repaired by the appeal tax authority, because such activities go beyond the additional supplementary proceedings. In this case, the body will have no alternative but to revoke the decision of the first instance on the basis of art. 233 § 2 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) and refer the case for reconsideration. (Strzelec, 2008, p. 33).

The tax authorities conduct a hearing *ex officio*, or it can be performed at the request of the parties or their attorney. Based on the art. 200a § 1 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) there can be distinguished the following principles of a tax hearing on authorities' own initiative, i.e.:

- there is a need to clarify the relevant facts of the case with the participation of witnesses;
- there is a need to clarify the relevant facts of the case with the participation of experts;
- there is a need to clarify the relevant facts of the case by inspection;
- there is a need to clarify the legal arguments presented by a party in the proceedings.

This is a closed list of cases and in the event of even one of them the tax body is obliged to hold a tax hearing. The tax appeal authority recognizing the issue should re-assess the evidence gathered every time. If it finds that there is a need to supplement the material or to clarify the relevant facts with witnesses, experts, or by visual inspection, it should hold a tax hearing. The literature emphasizes that the trial/hearing cannot be a form of explaining basic facts of the case concerned, and the scope of its admissibility in order to explain the relevant facts cannot violate the principle of two instances, as one of the fundamental rights of the procedural safeguards.

Administrative hearing as evidence of the appeal is limited based on article 200a § 1 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) and by the evaluation of legitimate use of that evidence (wyrok Naczelnego Sądu Administracyjnego z dnia 23 kwietnia 2010 r., II FSK 2164/08; wyrok Wojewódzkiego Sądu Administracyjnego w Poznaniu z dnia 2 września 2010 r., I SA/Po 381/10). In the appeal proceeding, it is the tax appeal authority's responsibility to examine whether in the light of the circumstances of the case there are reasons to hold a tax hearing. If so, the tax authority cannot evade from this obligation.

There is no doubt that the interpretation of art. 200a § 1 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) by the tax appeal authority in a specific case is made in the application of the law. It takes place in the individual case pending tax. This is particularly evident in the case of recognition of the parties' request for a tax hearing, resolved in the form of provision. The tax appeal authority interprets in operative way, which is understood not as a reconstruction of the entire rule of law, but it boils down to the reconstruction of the rule of law, understood as the basis for final decision. (Leszczyński, 2004, p. 115). It is therefore to restore the base to the situation.

However, some questions are asked about the way of interpretation and rationale determining the tax hearing proceeding. The answer is not clear.

The legislature uses plural for evidence listed in the construction of premises for the hearing, i.e.: "with the participation of witnesses or experts" and that brings doubts whether the obligation to carry out a tax hearing is created when there is a need to interview at least two witnesses, or at least two experts, or whether it can be carried out in order to hear one witness or hear one expert.

In my opinion, it is not possible to use in this case argumentum *a maiori ad minus*. (in contrast: Presnarowicz, 2011, p. 984). I agree with the interpretation and the nature of the institutions taking into account the hearing, which should aim to focus and implement evidence based on rate proceedings. Thus, the trial/hearing should be carried out in any situation where there is a need for more evidence, such as witness and expert hearing of at least two witnesses, two experts, a witness and inspection. (similarly: Zbrojewski, 2012, p. 1233). Surveys indicate a different behaviour of the tax authorities. Some of them used language interpretation of art. 200a § 1 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) and do not carry out a tax hearing if there is no need to use at least two means of evidence. There were also cases where the trial/hearing was carried out for the tax hearing of one witness, or to make an inspection of the tax base.

Regarding inspection, I do not think that at the hearing, only the inspection of goods and documents can be carried out. (similarly: Zbrojewski, 2012, p. 1232). The rules governing the tax hearing by the tax appeal authority do not pose any restrictions as to the place of activity, i.e., to the seat of the Appellate Body. Worthy of approval is the view expressed by S. Presnarowicz (2011, p. 989) that if necessary, the hearing may be conducted in the office of the party or the place of their business, especially if there is a need to clarify the relevant facts of the case with the participation of witnesses in connection with visual inspection of the property.

The hearing may be conducted at the request of a party, but it should be duly justified. Party should justify the need for a hearing, specify the circumstances that should be explained, and what steps should be taken in evidence gathering at the tax hearing. If the request for a formal hearing meets the requirements, and it would be subject to the relevant circumstances of the case, you need to consider a positive decision by setting a tax hearing date, and it will be carried out. (wyrok Wojewódzkiego Sądu Administracyjnego z dnia 10 listopada 2010, I SA/Ke 514/10). There can be no doubt that the request for the tax hearing should be ordered positively if the circumstances under which it will carry out are the same, as in the case of a tax hearing conducted by the authority itself. There are other factors which are of paramount importance to the case as evidence from the party hearing, expert evidence, evaluation of source documents gathered that strengthen the need for a proceeding by the appeal tax authority in the form of tax hearing. (Dauter, 2011, p. 830).

The tax party may apply for tax hearing conducted by the tax appeal authority. The parties described in the article 200a § 1, point 2, and § 2 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) are the same as parties referred to in articles 133 and 133a of Tax Ordinance Act. Therefore it must be concluded that the parties that can request a tax hearing are: the taxpayer, the payer, collector, their successor, as well as third parties referred to in article 110–117a of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) responsible for tax arrears of others. Among the latter, there are: the divorced spouse of the taxpayer, taxpayer's family member, the customer enterprise or its organized part, single-capital company created by the transformation of the entrepreneur as an individual, firmant (the one who represents the owner), the user of objects or property rights, property's real estate tenant, partner in a civil company, a public member of the board and general partner of a limited liability company and a joint stock company, a member of the managing body of another legal entity, the acquiring legal person, a legal entity created by the division, the guarantor. In addition, requesting for a tax hearing may delegate parties and social organization involved in the proceedings as a party.

It is assumed that the tax authority is not bound by the application, which means that it may refuse to hold a tax hearing. But this decision is not taken freely by the tax authority.[2] The art. 200a § 3 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) shows that the tax authority may refuse to hold a tax hearing in only two cases, i.e. when the subject of the hearing is not relevant to the circumstances of the case, or the circumstances are confirmed by other evidence. No other reasons or evidence justify

a refusal to hold a tax hearing by the appellate body. (similary: wyrok Wojewódzkiego Sądu Administracyjnego w Olsztynie z dnia 18 marca 2010, I SA/Ol 869/09). It can be said that the obligation to hold a tax hearing by the tax appeal authority will be performed whenever the taxpayer reports the application of well founded merits, demonstrating the need to examine the facts having a significant meaning to the case, and indicating the steps that should be taken in gathering the evidence at the tax hearing. The general "just-in-case" applications cannot be approved, submitted only to provide explanations or presenting the request, even though the individual elements of the facts have been established and confirmed by other evidence.

The question arises of how the tax authority, refusing to hold a tax hearing should interpret premise "These circumstances are confirmed by other evidence." This is important in the context of the results of the study, indicating a significant number of refusals to carry out the tax hearing. In my opinion, a request for a hearing should always be granted when a party requests to carry out certain evidence at the hearing of arguments different than proven (proof to the contrary). The facts that have been found sufficient by other evidence may be a prerequisite to reject the request for a tax hearing if the request relates to the circumstances already stated on the benefit of the party. (Strzelec, 2008, p. 30).

Analysing the evidence for a basis of refusing to hold a tax hearing it can be noted that it is practically identical, as set out in article 188 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) and the refusal of evidence. It should therefore be followed fairly strictly by the administrative courts especially in a situation where the tax authorities unreasonably refused to hold a tax hearing. This refusal, in the case of the actual existence of circumstances justifying a tax hearing, will be a violation of the provisions of tax proceedings that may have a significant impact on the outcome of the case. To determine whether a violation of art. 200a § 1 – § 4 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.), could have a significant impact on the outcome of the case, it is necessary to determine whether in the circumstances of a particular, ongoing proceedings there was a legitimate need, within the limits imposed by law, for the authority to conduct the tax hearing. (wyrok Naczelnego Sądu Administracyjnego z dnia 21 października 2010, FSK 1885/09; wyrok Wojewódzkiego Sądu Administracyjnego w Gliwicach z dnia 10 lipca 2008 r., I SA/GL 453/07).

Date of the tax hearing by the tax appeal authority set at the request of a party shows that the authority did not use the right to refuse to hold a tax hearing. However, even if the authority has exercised this power, and

issued an order refusing to hold a tax hearing on the basis of art. 200a § 3 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) there are no formal obstacles to the circumstances of the case, for the appeal body overturned its own decision and held a tax hearing. It may indeed prove that holding a tax hearing can be justified, if the subject would be an explanation of circumstances that are important for the case. (Dauter, 2011, p. 831).

In the design of the institution of the appeal tax hearing, in a special way the powers of parties were underlined. Based on art. 200d of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.), the party may provide explanations, submit requests, suggestions and complaints, and to present evidence in support thereof. In addition, the party has the right to speak about the results of the evidence. This is important in the context of the purpose of tax hearing, the more so if it is important to clarify the facts with the participation of witnesses or experts, or by visual inspection. This does not mean, however, that new evidence reported by the party, such as the appointment of new witnesses or new expert, must be considered as positive evidence made at the hearing. Any new evidence needs to be assessed due to the whole of the evidence gathered in the case. In addition, consideration should be given the complementary nature of the investigation because of the limits set by the article 229 of Tax Ordinance Act. (Dz. U. z 2012, poz. 749 j.t.).

3. Tax hearing as a "dead body" of supplementary proceedings

The art. 229 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) shows that the tax appeal authority during proceedings can order an additional proceeding to complete material and evidence in the case. It may also order the first instant authority, which issued the decision, to carry out this procedure for the tax authorities. Additional procedures to supplement the evidence and materials may be performed both on-demand and ex officio. However, it should do so after careful consideration and analysis of the objections raised in the appeal against the decision and requests submitted by a party, as well as the evidence justifying it. Only re-examination of the case, together with the merits of the allegations and claims referred to in the appeal will enable the review authority to assess for completeness of the evidence and materials in the case.

Studies have demonstrated that the appeal institutions very rarely carry out a tax hearing ex officio, even though they are the basis for this under the statutory grounds set out in article 200a § 1 point 1 of Tax Ordinance

Act. (Dz. U. z 2012, poz. 749 j.t.). It was indicated that there was no need to clarify the relevant facts of the case with the participation of witnesses or experts, or by visual inspection. At the same time to the question of whether the body interrogated witnesses, experts or carried out the survey – the authorities responded positively. This demonstrates the free interpretation of this provision and even evasion of the institution.

The appellate authorities answering the question of how to gather additional evidence relied on the use of art. 229 of Tax Ordinance Act. (Dz. U. z 2012, poz. 749 j.t.). The additional supplementary proceedings were often carried out to supplement the evidence and materials on the case or the proceedings were commissioned to the first instance authority. Certain authorities were responsible for abusing power to decide appeals in accordance with art. 233 § 2 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.), treating them as the only effective instrument leading to supplement the evidence, with a total ignorance of art. 200a and 229 of Tax Ordinance Act at the same time. (Dz. U. z 2012, poz. 749 j.t.).

The decision to perform additional procedures to supplement the evidence and materials should always be on the tax appeal authority. The phrase "can perform" should be interpreted by the authority as an obligation to conduct (Presnarowicz, 2011, p. 1081, Adamiak 1998, p. 52), or at least as an order to make a positive or negative assessment of the need for additional evidence. (Dzwonkowski, 2012, p. 1314). In this assessment authority shall take into account all the circumstances of the case, in particular the demand side and pointing to specific evidence to justify a demand that cannot be ignored if the party reports it. In the course of the appeal the party shall have the right to submit new evidence that the tax authority should carefully consider. (wyrok Wojewódzkiego Sądu Administracyjnego w Łodzi z 11 lipca 2006, I SA/ Łd 600/06). The Supreme Administrative Court (Naczely Sąd Administracyjny, NSA) has emphasized that if the taxpayer acted according to the obligation resulting from art. 222 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) and pointed out important evidence for the outcome of the case, the refusal to consider it is a violation of the art. 229 of Tax Ordinance Act. (wyrok Naczelnego Sądu Administracyjnego z dnia 17 marca 2003, I SA/Ka 130/02).

The purpose of the additional proceeding has been clearly formulated. It is to complement the evidence and materials in the case. The art. 229 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) is strictly giving it the status of supplementary investigation/proceeding. This means significant tightening of the extent of additional investigation, which is only ancillary to the proceedings conducted in the first instance. At the same time the tax

authority cannot perform the procedure correctly, but only to supplement and material evidence in the case. (Kabat, 2011, p. 887).

At this point, it is reasonable to place the question of the limits of supplemental proceedings. The question is, when the proceeding is complementary, and when beyond the complementary, and what factors decide upon it. The case of administrative law indicates that to determine the answer to this question it requires reference to a specific situation. The finding that there is only the supplementary proceeding must be associated with the assessment of the evidence gathered in the case so far (in the first instance) and that is reflected in the records of the case and the determination of the authority, which activities in the area of evidence should be taken. Then, it is necessary to reference and compare the evidence so far collected by the authority of the first instance and activities made by appellate body. (wyrok Naczelnego Sądu Administracyjnego z dnia 7 października 2010, I GSK 682/09). In other situations courts decided that the assessment whether gathering of evidence will only be a complement to already carried out, or whether it will be carried out in large part, depends on the circumstances of the case. The most important is not the amount of evidence carried out in the course, but the range of facts that are the subject of the case. (see: wyrok Naczelnego Sądu Administracyjnego z dnia 29 stycznia 2010, I FSK 662/09; wyrok Naczelnego Sądu Administracyjnego z dnia 21 sierpnia 2009, II FSK 455/08; wyrok Naczelnego Sądu Administracyjnego z dnia 12 września 2008, II FSK 885/07). There can also be distinguished sentences indicating the limit of an additional procedure (article 229 of Tax Ordinance Act – (Dz. U. z 2012, poz. 749 j.t.)) by 2 factors, such as having to disclose an inquiry in whole or in substantial part, object recognition by appeal body, which is the case with the decision of the first instance, in other words, the identity of the case. (wyrok Wojewódzkiego Sądu Administracyjnego w Lublinie z dnia 18 marca 2008, I SA/Lu 788/07; wyrok Wojewódzkiego Sądu Administracyjnego z dnia 23 kwietnia 2008, I SA/Lu 789/07).

Similar factors defining the limit of supplemental proceedings are highlighted in the literature. In particular, the view of Z. Kmieciak (2011, p. 88) is worth noting, according to which the meaning of contained in the article 229 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) word "additional" must be determined in regard to the specific factual, legal and investigative potential scale. "Thus, even in the case of obvious negligence of the first instance assessed as not the case, you can fix this error on appeal if the evidence and supplement of the evidence would amount to simple, not requiring much effort the Appellate Body actions and circumstances of the case would indicate the merits of the appeal". Other words also should be interpreted

extensively, as used in the art. 229 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) and art. 136 of Administrative Proceeding Code (ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego (Dz. U. z 2013 poz. 267 t.j.)), phrases "additional conduct" and "to make up evidence and materials", making it possible to carry out all the necessary evidence by the Appellate Body.[3]

The above considerations are consistent with the position expressed Provincional Administrative Court in Opole (Wojewódzki Sąd Administracyjny, WSA) in its judgment of 28 January 2009 (wyrok Wojewódzkiego Sądu Administracyjnego w Opolu z dnia 28 stycznia 2009, I SA/Op 345/08) stating that the need for proof or some evidence (e.g. expert consultation and hearing several witnesses) is in the competence of the appeal body for investigation and a supplement. The same court in another judgment stressed that the authority collecting the expert evidence is acting consistently with the article 229 of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) and proves unfounded allegation of infringement of two instances of proceeding. (wyrok Wojewódzkiego Sądu Administracyjnego z dnia 25 listopada 2009, I SA/Op 134/09).

It should be considered whether the tax authority in the appeal may allow new evidence and consider new facts, or whether it should recognize the case based on already collected material and supplementary interview of the same witnesses and carry out supplementary evidence from the interview of the same experts. I am in favour of the first of these positions. A similar conclusion was made by the WSA in Lublin stating in its judgment of 6 November 2009 (wyrok Wojewódziego Sądu Administracyjnego z Lublinie z 6 listopada 2009, I SA/Lu 422/09) that in evidence proceeding at the appeal stage, the exclusion does not apply to the admissibility of new evidence and new facts, or any prohibition of their consideration. Directly from the principle of objective truth, taking into account new evidence by the tax appeal authority can be derived, provided that they do not go beyond the boundaries of the identity of the case. It is because there are situations when a party of tax proceedings only in the final stage of the appeal reports some evidence, such as civil-law agreement.

The appeal body may itself carry out further investigation and evidence supporting materials on the case, or have this procedure carried out by the authority which issued the decision in the first instance. The decision in this regard, that is the choice of the form of the proceedings, falls within the exclusive competence of the appeal body. Authority of the first instance cannot replace the Appellate Body in the supplemental proceedings, but its role is limited only to legal aid.

4. Conclusion

To summarize the above considerations in the interpretation by the tax authorities of the rules governing appeal tax hearing, it should be noted that there are no objections to carry out certain types of evidence. The appeal tax authority is recognizing the case *de novo* and is evaluating the facts in a way it is required to assess the completeness of the collected evidence, and the same is true when determining whether all of the facts have been proven.

The limits of the powers of the tax appeal authority to conduct current investigation determines the content of articles 229 and 233 § 2 of Tax Ordinance Act. (Dz. U. z 2012, poz. 749 j.t.). The competence of the appeal body, which is not subject to challenge, is to complement the evidence to draw additional conclusions, but not to change the basic findings. It may hear witnesses, appoint experts and confront their opinions, carry out documentary evidence, as necessary to carry out a visual inspection, provided that these activities are within the limits of additional evidence and conduct supplementary materials in the case.

All of this evidence can be carried out during the tax hearing ordered by the tax appeal authority. It seems that because of assambly of participants in the appeal at the same time and place, there is a need of more frequent use of the tax hearing by the tax authorities. The appellate authorities in the event referred to in article 200a of Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) justifying the tax hearing, cannot evade from this duty.

NOTES

[1] Information has been obtained on the basis of surveys with the tax authorities.

[2] (Presnarowicz, 2011, p. 986) Contrary to claims that the authority may decide in this case, on the basis of choice.

[3] This was pointed out by Zimmermann, J. (1986). *Administracyjny tok instancji.* Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 92.

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VERSITA

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 33 (46) 2013

DOI: 10.2478/slgr-2013-0015

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JUDICIAL INTERPRETATION OF THE TAX LAW PROVISIONS AND PROTECTION OF THE SUBJECTIVE RIGHTS OF TAXPAYERS – IN THE LIGHT OF ART. 153 OF THE ACT ON PROCEEDINGS BEFORE ADMINISTRATIVE COURTS IN POLAND

Abstract. This article refers to the issues associated with the crucial significance of the interpretation of tax law provisions made by administrative courts in the course of the judicial inspection of tax decisions, within the context of protecting the subjective rights of taxpayers. The analysis in that regard has been prepared based on the provisions of art. 153 of the Act of 25 July 2002 on Proceedings before Administrative Courts, which expresses the important rule of binding the court and the administrative authority, whose act was the subject of an appeal, with a legal assessment and instructions regarding the further proceedings described in the decision of the administrative court.

As a result of this rule, a decision of an administrative court exerts the results exceeding the scope of judicial administrative proceedings, while its effect also covers the future tax proceedings. If the legal assessment made by the court refers to the regulations that affect the subjective rights of a taxpayer, it means that the administrative court imposes the effects of "its" interpretation of those provisions on a tax authority. In turn, the tax authority is obliged to respect those rights in accordance with the opinions of the court, which usually affects the final resolution of a tax case.

It should be borne in mind that a taxpayer, by submitting an appeal against a tax decision to an administrative court, demands not only an inspection of the acts of tax administration, but also – which should be emphasized – demands the execution of its rights, including its subjective rights. Therefore, we should not forget the crucial role of the administrative courts in the protection of the substantive rights of taxpayers. The instrument that allows the administrative courts to guard the subjective rights of taxpayers, consists in the procedural regulations included in the provisions on proceedings before administrative courts, and in particular art. 153 of the Act on Proceedings before Administrative Courts in Poland.

ISBN 978-83-7431-377-3 ISSN 0860-150X

1. Introduction

The aim of this study is to turn the attention to the issues associated with the crucial significance of the interpretation of tax law provisions made by administrative courts in the course of the judicial inspection of tax decisions, within the context of protecting the subjective rights of taxpayers. The analysis in that regard has been prepared based on the provisions of art. 153 of the Act on Proceedings before Administrative Courts (ustawa z dnia 25 lipca 2002 r. o postępowaniu przed sądami administracyjnymi (Dz. U. z 2012 r., poz. 270 j.t.)) which expresses the important rule of binding the court and the administrative authority, whose act was the subject of an appeal, with a legal assessment and instructions regarding the further proceedings described in the decision of the administrative court.

2. Judicial interpretation of tax law provisions – general remarks

As for the doctrine, the interpretation of the law consists in the activities and reasoning leading to the reconstruction of a legal standard from the specific standard-setting facts. (Leszczyński, 2003, p. 109). In the process of applying the law, also in the course of court and administrative proceedings, the interpretation of the law consists solely in a reconstruction of the legal standard necessary to solve the given case. (Leszczyński, 2003, p. 115; Mastalski, 2008, p. 70).

The interpretation of the legal provisions, while making the decision on applying the law, is called operational interpretation. The application of the law and its (operating) interpretation takes place in the course of court and administrative proceedings as a result of the court inspection of the acts of public administration authorities. Although the decision of an administrative court regarding the inspection of the acts of public administration authorities, and in particular of their decisions, doubtlessly refers to the essence of the case, it does not provide a definitive settlement of the administrative (tax) case. It is because the court does not take over the administrative (tax) case for solving and it does not apply the law with the effect of determining or specifying the legal situation of the party to the administrative (tax) proceedings. The decision on the essence of an administrative (tax) case results from applying the substantive and procedural law. However, the administrative courts do not participate in the process that includes the following four activities, i.e. in determining the contents of the legal standard, in determining the factual state, in performing the

subsumption and in determining the legal consequences of the factual state based on the legal standard applied. However, the above observation does not entitle us to state that the administrative courts do not apply the law and do not interpret it.

The administrative courts apply the administrative law and tax law, but they do so indirectly, in a sense, that is within the inspection of the application of that law by the public administration authorities. (Leszczyński, 2010, p. 306). That view has been confirmed also in the judicial decisions of the Supreme Administrative Court (Naczelny Sąd Administracyjny, NSA). The resolution of the complete composition of the NSA of 26 October 2009, (wyrok Naczelnego Sądu Administracyjnego (pełen skład) z dnia 26 października 2009, I OPS 10/09) emphasized the specific application of the law by an administrative court, consisting in making a legal provision for inspecting the legality of an administrative decision. It was indicated that that kind of "verification-based" application of a legal standard, consisting in applying it as a model for assessing the legality, does not necessarily have to be treated as an act other than the application of the law.[1]

In the doctrine it has been indicated that the application of the tax law within the proceedings associated with performing the tax obligations occurs in two stages. In the first stage, the entities that apply that law are the passive entities of the legal-tax relationship, especially the taxpayers and tax withholding agents. In turn, the second stage consists of the classical application of the law, because that application is performed by the tax administration authorities and – what is crucial – also by the administrative courts. (Mastalski, 2008, p. 39; Mastalski, 2011, p. 274).

The interpretation of the law is indispensably associated with applying it. The interpretation by an administrative court is performed for inspection reasons, associated with assessing the operational interpretation of the provisions of the law which had been applied by an administrative authority while making a specific decision. (Leszczyński, 2012, p. 210).

3. Binding with a legal assessment expressed in a decision – remarks against the background of art. 153 of the Act on Proceedings before Administrative Courts (Dz. U. z 2012 r., poz. 270 j.t.)

Under the provisions of art. 153 of the Act on Proceedings before Administrative Courts (Dz. U. z 2012 r., poz. 270 j.t.), the legal assessment and instructions as to the further acts expressed in the court decisions, are

binding for the court or authority whose act or failure to act was the subject of an appeal.

As the legislator has failed to equip the administrative courts with the instruments that would allow them to directly particularize the legal situation of the administrative entities, it has been necessary to introduce the concept of binding the administrative authority with opinions of administrative courts, and the legal influence of the court decisions on the activities of public administration, both past and future. The legal assessment refers mainly to the past, i.e. to the previous acts of the authorities in specific cases. The court, while testing the compliance with the law of the appealed act of a tax authority, takes into account the factual and legal state of the case existing on the day of making it, i.e. in the past. However, in a sense the legal assessment also affects the future. It is closely associated with the instructions regarding further acts. (Woś, 1989, p. 177). In turn, the instructions regarding further acts refer solely to the future.

That is because they set the manner of behaviour of a tax authority in the tax proceedings which will be held in the future. (Pietrasz, 2010, p. 251 and next).

The idea of binding the tax authority with the opinion of the administrative court expressed in the judgment, boils down to the fact that that authority must follow the opinions of that court regarding the particular case, and it must respect them. The obligation to submit to the assessment and to the instructions regarding the further acts presented by the court, has been legally sanctioned. The potential disobedience by the authority may lead to a sanction in the form of elimination of its decision, in which the court assessment or instruction was ignored, from the legal transactions. Therefore, the tax authorities may not challenge the legal assessments made by the courts or their instructions regarding further acts. Naturally, binding of the public administration authorities does not preclude the possibility for that authority to appeal against the decision of the court of first instance and to submit a cassation appeal to the National Administrative Court. Therefore, a failure by that tax authority to appeal against the judgment of the administrative court of first instance constitutes the approval of the opinions of that court. (Pietrasz, 2010, p. 251 and next).

The contents of art. 153 correspond to art. 141 § 4 of the Act on Proceedings before Administrative Courts (Dz. U. z 2012 r., poz. 270 j.t.) which determines the requirements for justifying court judgments. As per the contents of that provision, the justification of a decision should include, among others, the legal basis for that decision and its explanation – which corresponds to a legal assessment. Moreover, if, as a result of allowing the appeal,

the case is to be retried by the administrative authority, the justification should include the recommendations for further acts.

The legal binding of an administrative authority with a legal assessment and instructions regarding further acts, illustrates the so-called rule-making function of administrative courts. (Zimmermann, 2005, p. 497). As has already been noted, an administrative court that inspects the appealed decisions of administrative authorities, does not, as a rule, issue the decisions that would resolve the essence of the administrative (tax) case. Instead, it interprets the legal provisions applicable to the given case, within the inspection of the functioning of public authorities. Therefore, the administrative courts derivatively formulate the standards of the second level, through which they influence their own future judicial decisions, as well as the manner of resolving the cases by public administration authorities. From that point of view, art. 153 of the Act on Proceedings before Administrative Courts (Dz. U. z 2012 r., poz. 270 j.t.) makes the judicial decisions become one of the basic unorganized sources of the law that apply only to one concrete (incidental) case. (Zimmermann, 2005, p. 497).

The legal assessment, referred to in art. 153 of the Act on Proceedings before Administrative Courts (Dz. U. z 2012 r., poz. 270 j.t.), is universally understood as the explanation of the crucial contents of legal provisions and of the manner of applying them in the examined case. That includes both the criticism of the manner of applying the legal standard in the appealed act, as well as the explanation of why the application of that standard, by the authority that had performed that act, was considered incorrect. (Hanausek, 1986, p. 318; Żukowski, 2002, p. 271). The binding legal assessment must refer to the proper application of a specific provision, or to its correct interpretation in reference to the very specific decision made in the given case. As a result, such an assessment may not disregard the specific factual and legal state which exists in the case. Moreover, it must be in logical reference to the contents of the decision of an administrative court in which it was formulated. The legal assessment constitutes the presentation of the court's opinion on a legal issue, which opinion will have to be taken into account by the administrative authority during the review of the case. (Pietrasz, 2010, p. 251 and next). In one of the recent decisions, a court has indicated that the notion of "legal assessment" within the understanding of art. 153 of the Act on Proceedings before Administrative Courts (Dz. U. z 2012 r., poz. 270 j.t.) comprises only the position of the court regarding the meaning of the legal provisions and manner of applying them in the case, which has been presented in the justification of the decision. (wyrok Naczelnego Sądu Administracyjnego z dnia 15 marca 2012, II OSK 2562/10).

The binding of an administrative authority with a legal assessment refers to the specific elements of the justification of the judgment made. That is because, despite the use of the word "decision" in art. 153 of the Act on Proceedings before Administrative Courts (Dz. U. z 2012 r., poz. 270 j.t.), it refers not only to the judgment, but also to the justification. The justification contains the reasoning that led the court to draw the specific legal conclusion. The analysis of the contents of the judgment justification also allows to make the scope of the subject of assessment more precise, i.e. to determine what the court had taken into account while allowing or dismissing the given appeal. (wyrok Naczelnego Sądu Administracyjnego z dnia 7 grudnia 2009, I OPS 6/09). These assessments always result from building the so-called relative phrases concerning the compliance or lack of compliance of the appealed acts of the public administration authorities, with the legal standard. (Wróblewski, 1969, p. 3 and next). The court assesses and evaluates the act, including the position of the tax authority in the case, at various stages of the application of that law by that authority. If the position of the tax authority differs from the opinions of the court in the given case, that court will verify the appealed legal act – from the point of view of compliance with the legal order – and thus has the power to challenge the position of the authority and indicate its own legal assessment of the specific case. (Kamiński, 2008, p. 66).

The assessment referring to the application of the law by the tax authority covers both the substantive law, and the procedural law. In turn, the tax authority is not bound with the assessment of the factual findings. (wyrok Naczelnego Sądu Administracyjnego z 4 września 2007, I FSK 1130/06). It has been indicated in the doctrine that the assessment associated with the application of substantive law may include the instructions that the given legal provision does not apply to the given case; in turn, if that provision does apply, the court will indicate the incorrect determination of the meaning of the legal standard, an error in the subsumption or an incorrect determination of the legal effect by determining the consequences which are not provided by the legal standard, and within those limits the court will determine the interpretation of that provision. In turn, in reference to the procedural law provisions, in its legal assessment the court indicates the incorrect application of the provisions and provides the instructions on how they should be applied correctly, e.g. it assesses the whole evidence material, and not only the selected evidence, and assesses the need to examine the evidence as to the specific facts. (Adamiak, 1999).

The administrative court of the first instance, in a judgment allowing the appeal as justified, should clearly indicate that, apart from the noted

faults presented in the justification, no other violations of the substantive law were noted, which violations might affect the result of the case, or violations of the law providing the basis for reinitiating the administrative proceedings, or finding a decision invalid, or another violation of the procedural provisions which might affect the outcome of the case in a significant manner. It should be emphasized that such formulation also comprises an element of the legal assessment of the appealed decision, which should be included in the contents of the justification of the judgment, under the provisions of art. 135 of the Act on Proceedings before Administrative Courts (Dz. U. z 2012 r., poz. 270 j.t.). Lack of such formulation raises doubts as to the performance by the administrative court of the rule of not binding the court of first instance with the limits of the appeal. However, it should be noted that if the factual findings are questioned due to a violation of the procedural provisions, it is premature to conduct a substantive analysis of the allegation associated with violating the provisions of substantive law. (I FSK 518/07). That remark refers mainly to the allegation of an incorrect application of substantive law. Therefore, in such a situation, the legal assessment from a court should not refer to the substantive law that was applied as a result of an incorrect factual finding.

The judicial decisions of administrative courts indicate that the lack of the position of the court regarding some issue, resulting from failure to notice the problem, should never be understood as the issuing by that court of a legal assessment within the meaning of 153 of the Act on Proceedings before Administrative Courts. (Dz. U. z 2012 r., poz. 270 j.t.). (wyrok Naczelnego Sądu Administracyjnego z dnia 25 stycznia 2007, OSK 213/06). It is inadmissible for the authority to conjecture the intention of the court dismissing the decision or the legal assessment presented in the decision. On the other hand, the lack of unequivocal instruction as to what the violation of provisions consisted in, in fact deprives the authority of the guidelines as to the further acts. (wyrok Naczelnego Sądu Administracyjnego z dnia 16 stycznia 2009, I GSK 151/08).

In turn, the instructions as to further acts, aimed at the administrative authority, are considered as the obligatory element of justifying the sentence taking into account the appeal, what follows from art. 141 § 4 sentence two of the Act on Proceedings before Administrative Courts. (Dz. U. z 2012 r., poz. 270 j.t.). (wyrok Naczelnego Sądu Administracyjnego z dnia 16 września 2008, II OSK 1082/07). They usually comprise the consequences of the legal assessment, forming certain instructions from an administrative court. They refer to the manner of acting in the course of reviewing the case and their purpose is to avoid the mistakes already made and to indicate the

direction in which the future proceedings should be taken in order to avoid the faults, for example in the form of shortages in the evidence material or other procedural infringements. (Haunasek, 1986, p. 319). Therefore, an administrative court may not only criticize the decisions of tax authorities, but also impose on that authority the specific manner of proceeding which will eliminate the infringements and doubts that occurred while examining the case. The instructions of an administrative court aimed at a tax authority are of imperative nature. (Woś, 1989, p. 178).

The opinions of a court as to the further manner of proceeding may not include a priori solution to the problems associated with the contents of a future decision, and may not breach upon the rule of free assessment of evidence, which means that they may not restrict a tax authority in the process of assessing that evidence. (Woś, 2009, p. 624). Otherwise, the acts of an administrative court would enter the area reserved for the administrative authorities. While reviewing the case, a tax authority is bound by the legal assessment and instructions as to the further manner of proceeding, i.e. to the direction which it should take. Binding instructions may also refer to the necessity to conduct the assessment of specific evidence, but it does not mean that the tax authority may not examine or assess any other evidence while reviewing the case. (Pietrasz, 2010, p. 251 and next).

The effectiveness of the judicial inspection of the public administration authorities, performed by administrative courts, requires the formulation of the instructions addressed at the authorities, whose acts were overruled, which instructions are adequately precise, consistent with the circumstances of the case, and especially – verifiable (subjected to an objective assessment) and enforceable. The failure to meet that obligation makes that inspection illusory, by destroying the results of initiating the mechanism of making judicial decisions by administrative courts, which mechanism is, as a rule, cassation-oriented. (wyrok Naczelnego Sądu Administracyjnego z dnia 20 maja 2008, II FSK 455/07).

Like the legal assessment, also the instructions from a court should refer to the particular case. Therefore, they may not be abstract in nature.

4. The issue of taxpayers' subjective rights (from the substantial-legal and procedural points of view)

The basic aim of taxation is to obtain the resources to cover the public spending. In the tax law doctrine it has been assumed that the structure of the tax system should lead towards a compromise between the fiscal,

economic and social aims. (Mastalski, 2000, p. 43). The tax system should be rational, and based on the legal system in effect in the given state. One of the necessary elements of a rational tax system is the establishment and compliance with the tax law regulations while applying the law. The compliance with tax regulations guarantees the lawfulness in the application of tax law and provides the taxpayers and other parties to the tax-legal relationship with legal protection. (Dumas, 2011, p. 26).

Within the doctrine, the notion of subjective rights includes a set of rights rather than a single right, which a subject is entitled to. With substantive rights, the legal entities have the possibility to freely make the decisions as to their behavior, to the performance of undertaken activities, and have the possibility to demand that the other entities also perform the obligations imposed on them by the legal standards which are necessary for that right to be performed. (Stawecki, Winczorek, 2003, p. 75 and next).

First and foremost, the tax law provisions impose duties on a taxpayer, and only then provide it with specific rights. Therefore, there exists the necessity to balance the taxpayer's tax obligations with effectively protected rights, which necessity has been widely commented on in the doctrine. The literature (Brzeziński, 2005, p. 13 and next; Szczurek, 2008, p. 2) emphasizes that currently there is no cohesive and uniform category of taxpayers' rights, just like there is no cohesive and uniform category of means of protecting those rights. The first attempts at classifying the taxpayers' rights regarding the relationships between the taxpayers and the tax administration have already been undertaken – the relationships which follow not only from the domestic legal provisions, but also from the international and EU legal provisions. The definition and classification of "taxpayers' rights" existing in the Polish tax literature assumes the division of those rights into the taxpayers' rights that are the commonly accepted standards of relationships between the taxpayers and the state with its tax administration, and the taxpayers' rights that include the more or less specific legal solutions that execute, as fully as possible, the taxpayers' rights and that appear wherever the taxpayers have at their disposal the legal means to protect their own interests. (Brzeziński, 2005, p. 9 and next). The taxpayers have at their disposal the rights guaranteed to them as human beings and citizens (taxpayers' rights in the general sense) and the rights guaranteed to them as parties to tax-legal relationships (taxpayers' rights in the narrow sense).The determination of the mechanisms for protecting those rights should be considered crucial.

The substantive rights of taxpayers may be violated, in the systematic sense, on two levels. First – at the stage of determining the tax law. Second – at the stage of implementing the tax law. At the second stage, the

crucial problems are the determination of the factual basis for resolving an individual tax case, the respect for the standards of directives included in the literature, and the respect for the legal order associated with the EU achievements.

The sources of the rights to which the taxpayers' are entitled and of the system of protecting them should at first be looked for in the Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 hereinafter referred to as Polish Constitution (Dz. U. z 1997 Nr 78, poz. 483), and in particular in Chapter I "The Republic" and in Chapter II "The freedoms, rights and duties of human beings and citizens." Some of the rules are expressed directly in the provisions of the Polish Constitution – the rule of lawfulness, the rule of exclusivity of statutory regulation in tax law. Most of the rules were interpreted from the rule resulting from art. 2 of the Polish Constitution – the rule of the democratic state of the law – such as the rule of trust of the citizens to the state and to the law, and the rule of proper legislation.

The judicial decisions of the Constitutional Tribunal have emphasized that the exclusivity of the statutory pathway in imposing the taxes serves to create a stronger procedural protection of taxpayers' rights from the public authorities, and the order, included in art. 217 of the Polish Constitution, to specify in the acts the crucial elements of the tax obligation, should be understood as the order to apply special precision while specifying the subjects of taxation, objects of taxation, and tax rates. In the light of the judicial decisions of the Constitutional Tribunal, art. 217 of the Polish Constitution (Dz. U. z 1997 Nr 78, poz. 483) specifies, within the tax obligation, the rule of definite character of the law which is a part of the rule of trust of the citizens in the state and the law.[2] (In practice, however, it is not possible to regulate all the issues of tax law in tax statutes. This raises the necessity to use in the statutes the statutory authorizations – in the scope not excluded by art. 217 of the Polish Constitution.) (Dz. U. z 1997 Nr 78, poz. 483). The regulation of the tribute law, reserved only for the statutes, must be supplemented with art. 92 subpar. 1 of the Polish Constitution (Dz. U. z 1997 Nr 78, poz. 483) which includes the instructions regarding the issuance of the acts of basic nature.

Another crucial tax principle from the Polish Constitution is the rule of reliability and stability of tax law, associated with the rule of trust of the citizens to the governing and administrative authorities. (Dumas, 2011, p. 28 and next). The necessity to comply with that rule in the process of applying the law is often mentioned in the judicial decisions of the Constitutional Tribunal. The reliability of the law and the associated rule of legal protection has the crucial importance in the law regulating the public

tributes, as has been indicated by the Constitutional Tribunal. The reliability of the law means not the stability of the legal provisions, but rather the conditions for the possibility to predict the acts of the state authorities and the citizens' behaviours associated with them. The reliability of the acts of the state understood in that manner guarantees the trust in the lawmaker and in the laws made by it. (wyrok Trybunału Konstytucyjnego z dnia 27 lutego 2002, K 47/2001). The crucial lack of precision of tax law provisions which results in their ambiguity, often leads to a lack of definite character of those provisions, because no precise legal standards may be constructed on their basis. The vagueness of provisions and lack of precision of legal norms leads to various interpretations and undermines the trust of the citizens to the state and to the law introduced by it. The Constitutional Tribunal has often emphasized the significance of violating art. 2 of the Polish Constitution (Dz. U. z 1997 Nr 78, poz. 483) in connection with the tax law. The Tribunal has been justifying that the order of precision and explicitness of the wording and of legislative correctness, originating from these rules, is especially important for tax law, especially in the cases where it provides for the obligation to calculate taxes on one's own. The rule of reliability obliges the lawmaker to take into account the factual and legal consequences which will affect the recipients of the specified legal norms upon the introduction of the new regulations. It obliges to make and apply the law that respects the "ongoing interests". (Dumas, 2011, p. 32 and next). The basic feature of the rule of stability and reliability of the law is equipping the taxpayers and other entities (e.g. withholding agents, collectors) with an uncomplicated, clear and cohesive tax law system, so that they have the opportunity to meet their tax obligations. The reliability of the law means not the absolute stability of the legal provisions, but rather the possibility to predict the acts of the state authorities that apply the tax law.

Another important rule providing the taxpayer with a "safety guarantee" is the rule of equality under law. The Constitutional Tribunal (Trybunał Konstytucyjny, TK) has often indicated that the rule of equality under law means that "all the subjects of the law, possessing a given feature that is important at the same level, are to be treated equally, i.e. in accordance with the same measure, without differentiation that is either discriminating or in somebody's favour. The equality under law also consists in the legitimacy of choosing one, and not the other, criterion for differentiating between the subjects of the law." (wyrok Trybunału Konstytucyjnego z dnia 6 maja 1998, K. 37/97; wyrok Trybunału Konstytucyjnego z dnia 20 października 1998, K. 7/98; wyrok Trybunału Konstytucyjnego z dnia

z dnia 17 maja 1999, P. 6/98; wyrok Trybunału Konstytucyjnego z dnia 21 września 1999, K. 6/98; wyrok Trybunału Konstytucyjnego z dnia 4 stycznia 2000, K. 18/99; wyrok Trybunału Konstytucyjnego z dnia 18 grudnia 2000, K. 10/00; wyrok Trybunału Konstytucyjnego z dnia 21 maja 2002, K. 30/01; wyrok Trybunału Konstytucyjnego z dnia 9 maja 2005, SK 14/04). The selection of premises for differentiating between the taxpayers' legal situation, which selection is unjust and not motivated in rational terms, on its own violates the rule of equality under law. The differentiation of the taxpayers' situation based on the manner of the occurrence of the obligation is arbitrary and unjust – that regulation violates art. 32 subpar. 1 of the Polish Constitution (Dz. U. z 1997 Nr 78, poz. 483).

Many provisions of the tax, procedural and substantive law refer to the rule of taxpayers' trust to the state and to the law. From the provisions of procedural law, we should mention the ones which formulate the general rules of tax behavior, i.e. the manner of conducting the proceedings in the manner that evokes the trust to tax authorities – art. 121 § 1 of the Tax Ordinance Act (ustawa z 29 sierpnia 1997 – Ordynacja podatkowa (Dz. U. z 2012, poz. 749 j.t.)), the rule of providing the parties to the proceedings with information, and the rule to provide them with explanation expressed in art. 124 of the Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.) the rule of active participation of the parties to the tax proceedings resulting from art. 123 of the Tax Ordinance Act ((Dz. U. z 2012, poz. 749 j.t.), and the rule of making the case files available to the parties resulting from art. 178 of the Tax Ordinance Act. (Dz. U. z 2012, poz. 749 j.t.). The provisions associated with the interpretation of the tax law, performed by the Minister of Finance (art. 14 a – 14 p of the Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.)) are included in the scope of the provisions of substantive law (Szczurek, 2008, p. 70 and next).

The Supreme Administrative Court (NSA) has indicated in its many decisions that the rule of trust to tax authorities, expressed in art. 121 § 1 of the Tax Ordinance Act (Dz. U. z 2012, poz. 749 j.t.), may not be treated solely as an abstract demand from the authorities, but as a legal standard which should be applied precisely in practice. Surprising a party with a new interpretation and imposing high fees for the previous years devastates the economic assumptions made by the party and must be regarded as a glaring violation of art. 121 § 1 of the Tax Ordinance Act. (Dz. U. z 2012, poz. 749 j.t.). A change in the interpretation of legal provisions may not cause negative consequences for the taxpayer who acts in good faith and who trusts the contents of the interpretation received. (wyrok Naczelnego Sądu Administracyjnego z dnia 26 marca 2002, III SA 3390/00). The vari-

ability of decisions made by tax authorities in such a factual and legal state, violates the rule expressed in art. 121 § of the Tax Ordinance Act. (Dz. U. z 2012, poz. 749 j.t.).

The standards of protecting the rights of taxpayers implicate the introduction of the standards of resolving the disputes between them and the public authorities. The standards understood in that way are associated with the requirements to provide the citizens with unhindered access to courts, reasonable time of examining the dispute, just and open examination of the case, impartiality and independence of judicial decisions, and the feeling of legal protection of the applicant. (Chrościelewski, Kmieciak, Tarno, 2002, p. 32). Under art. 175 subpar. 1 of the Polish Constitution (Dz. U. z 1997 Nr 78, poz. 483), the administrative courts uphold the system of justice in the Republic of Poland next to the Supreme Court (Sąd Najwyższy, SN), common courts and military courts. The competences of the administrative courts have been specified in art. 184 of the Polish Constitution (Dz. U. z 1997 Nr 78, poz. 483), under which the Supreme Administrative Court (NSA) and other administrative courts exercise, within the scope specified by the statutory law, the supervision over the acts of public administration authorities. Under the right to court access, there should be emphasized the right to expect that the court will apply the law, while providing the basis for its decision, in the manner that is correct and timely. Apart from the right to independent and impartial court, there is the right of a party to have its case examined within a reasonable time limit. (Mudrycki, 2007, p. 49). From the general rule included in art. 7 of the Act on Proceedings before Administrative Courts (Dz. U. z 2012 r., poz. 270 j.t.) there follows the instruction to settle the case in a fast manner. The administrative courts should undertake the activities aimed at settling the cases fast, and should endeavour to settle them at the first session. The regulations of the Act of 17 June 2004 (ustawa z dnia 17 czerwca 2004 r. o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki (Dz. U. 2004 Nr 179, poz. 1843 z późn. zm.)) on a complaint against the violation of the party's right to have a case examined without undue delay in judicial proceedings allow the party to submit a complaint against the protracted duration of the proceedings, and to receive the compensation from the State Treasury and the decision ordering the performance of proper acts by the court that examines the essence of the case.

The constitutional rights need to be supplemented and developed in the regular statutory law. The tax law provisions that determine the taxpayers' rights and entitlements regulate their legal situation directly, allowing them

to effectively demand that the tax authorities respect and protect the taxpayers' rights in the process of applying the law. The tax law doctrine lists two groups of taxpayers' rights. (Szczurek, 2008, p. 159). The basic taxpayers' rights include the right to a court and to judicial and tax proceedings consisting of two instances, the right to protection of privacy, the right to protection of ownership, the right not to be discriminated against and the right to have the damage, caused by the unlawful acts of public authorities, redressed. In turn, the group of taxpayers' rights that are specific to the area of tax law comprises the taxpayers' rights to demand the return of overpayments with interest, the right to correct a tax declaration and the right to information.

Within the context of the above deliberations, it should be stated that the notion of "taxpayers' rights" is a consolidated category that includes the taxpayers' rights and entitlements that are different as to their source and nature. Similarly, the scope of means of protection of taxpayers' rights is diverse. A rational tax law system should be consistent with the Polish Constitution, synchronized with other branches of the law, providing the protection of taxpayers' and guaranteeing the respect of their subjective rights. The guarantees of taxpayers' subjective rights consist in respecting the tax rules by the tax authorities. In the tax proceedings the tax authorities are obliged to act based on the law by applying the provisions of the substantive and procedural law while examining and settling the cases, as well as while making individual interpretations of the tax law provisions. The administrative courts are obliged to inspect the legality of the appealed acts issued by tax authorities.

In 2011 (http:/www.dzienpodatnika.pl, retrieved November 29, 2012) an initiative was introduced for the purpose of introducing a Declaration of Taxpayer Rights for the experts and practitioners of tax law in Poland, which would constitute a list of the rights that should be effective in the Polish tax system. The purpose of the initiators of the establishment of that Declaration is to improve the tax system, mainly by making the public authorities acknowledge the Declaration, and by expanding the awareness among the taxpayers. The declaration includes ten basic taxpayers' rights resulting from the Polish Constitution, i.e.: I – the right to good tax law, II – the right to pay the tax at the level resulting from the tax statutory law, III – the right to participate in the tax proceedings that are conducted in a reliable manner, IV – the right to be treated properly by tax administration authorities, V – the right to judicial protection in tax cases, VI – the right to information on tax-related cases, VII – the right to assess the tax law, VIII – the right to assess the work of tax administration, IX – the right

to respect the rule of presumption of innocence, and the rule of commensurability and individual character of the penalty for violating the tax law, X – the right to have the damage made by a decision of public authorities redressed.

5. The effect of binding the authorities and courts to the interpretation resulting from the justification of a judgment, on the taxpayers' subjective rights

There should exist a proper relationship between the law regulating the social relations, and the relations themselves – the relationship of conformity. (Brzeziński, 2011, p. 39 and next). The history of changes of the law was presented by M. Zirk – Sadowski (2004, p. 9 and next) in the article devoted to the issue of interpreting the tax law from the point of view of the general directions of law transformation. The author indicated the possibility to differentiate between the three stages of development of legal systems. The criterion of differentiation is associated with the character of the relationship between the authorities and the society. The first stage is repressive law, the second – autonomous law. The third stage is the stage of responsive law that is more inclined towards the social needs, rather than the authorities' "own" needs. It is characterized by the increasing cooperation between the participants to legal relationships, the light manners of conflict solving (mediation, conciliation, arbitration), the flexibility of applying the law in particular situations. Coercion is limited to the necessary cases. The significance of the general clauses and of legal rules increases, as well as the role of purpose-related interpretation. B. Brzeziński has indicated that there exist sufficient premises to assume that the legal systems are entering the phase of responsive law. The tax system is oriented towards the cooperation between the taxpayers and the tax authorities through the exchange of information, elements of negotiations, and increase of the level of mutual trust. The tax systems demonstrate a higher flexibility, for example through the possibility for the taxpayer to select its form of income taxation.

In accordance with the Declaration of Taxpayer Rights (http:/www.dzienpodatnika.pl/, retrieved November 29, 2012), the right to judicial protection of the rights in tax cases is exercised through the following:

1. The taxpayer has the right to initiate a court inspection of the tax decision affecting it, through an impartial and independent court, in the course of a two-instance, just, reliable, fast and open trial.

2. The lack of resources to cover the costs of proceedings may not restrict the taxpayer's right to court access.
3. Each taxpayer has the right to reliable judicial proceedings.
4. Taxpayers' cases are examined in open judicial proceedings, and the exclusion of their open character may only occur in specially justified cases.
5. The courts of both instances examine the taxpayers' cases without unjustified delay, and in the event of their protracted duration, the taxpayers are entitled to proper redress and compensation.
6. The courts exercise the obligation of the authorities to hold the positions regarding the substance, in response to appeals and cassation appeals.
7. The court notifies the minister responsible for the issues of public finances about each glaring violation of taxpayers' rights noted in tax proceedings.
8. In their judicial decisions, the courts should apply the prohibition of the *in dubio pro fisco* interpretation.
9. The justifications of a court decision contain not only the arguments supporting the decision, but also the exhaustive assessment of the opposing arguments, especially in the case of dismissing an appeal or a cassation appeal.

As has already been indicated, the legal assessment, referred to in art. 153 of the Act on Proceedings before Administrative Courts (Dz. U. z 2012 r., poz. 270 j.t.), should be understood as the explanation of the crucial contents of legal provisions and the manner of applying them in the particular instance associated with the case. This is because the legal assessment included in the justification of a judgment is especially associated with interpretation of the law. That assessment may refer both to substantive and procedural legal provisions. Both an administration authority and a court that reexamine a case, are obliged to apply the assessment included in the justification of the judgment previously issued. That binding refers also to the instructions as to the further conduct in the case of revocation of the previous decision due to a breach of the procedural provisions in the scope associated with explaining the factual state of the case.

The legal assessment, referred to in art. 153 of the Act on Proceedings before Administrative Courts (Dz. U. z 2012 r., poz. 270 j.t.), expressed in the judgment allowing the appeal, binds the authority by creating an absolute obligation to take it into account in the next administrative proceedings which will end with the issuance of the next decision. In turn, binding an administrative court with the legal assessment, referred to in art. 154 of the Act on Proceedings before Administrative Courts (Dz. U.

z 2012 r., poz. 270 j.t.), expressed in the previous decision allowing the appeal, creates an obligation, in the case of another appeal against that act, to conduct the judicial inspection of the legality of the next decision issued as a result of allowing the appeal. That inspection consists in the verification whether the authority complied with the obligation to apply the legal assessment and the instructions included in the revoking decision, and is within the limits of the case examined by an administrative court, within the meaning of art. 134 § 1 of the Act on Proceedings before Administrative Courts (Dz. U. z 2012 r., poz. 270 j.t.). Also, the administrative court of the first instance, by examining the appeal against a decision issued as a result of repeated administrative proceedings, may not formulate the assessments different from the ones that have been clearly indicated in the previous judgment. (wyrok Naczelnego Sądu Administracyjnego z dnia 11 marca 2008, II FSK 16/07).

The procedural significance of justification of a judgment is shown in the fact that it is supposed to guarantee that the court will exercise due diligence while making the decision, to allow the court of the higher instance to assess whether the premises, which provided the basis for the decision of the court of lower instance, are accurate, and in case of doubt, to allow the determination of the limits of the *rei iudicatae* and other legal effects of the judgment. With such procedural significance of the justification of a judgment, it is not sufficient to just quote the legal provisions or invoke their literal wording, or the general views presented in the doctrine. It follows from the contents of art. 153 of the Act on Proceedings before Administrative Courts (Dz. U. z 2012 r., poz. 270 j.t.) that whenever the given case (until a final and valid conclusion) is subject to examination by that court, it will always be bound by the legal assessment (just like the authority) expressed in that decision, if it is not revoked and if the provisions do not change. (wyrok Naczelnego Sądu Administracyjnego z dnia 14 kwietnia 2008, II FSK 90/07).

From the point of view of protecting the taxpayers' rights, another significant issue is the determination of the relationships between the judgments of administrative courts associated with inspection of particular tax interpretations, and the judgments associated with inspection of tax decisions. The legal literature emphasizes that, due to the constitutional rule of right to court access, confronted with the character of the act of an individual negative tax interpretation, the view should be assumed that the court inspecting the tax decision associated with the level of tax obligation is not bound by the legal assessment expressed in a final and valid judgment of the inspecting court that "upholds" the negative interpretation issued

before. What should be especially emphasized is that neither the upheld negative interpretation, nor the final and valid decision that denies the appeal from the taxpayer, comprise a prejudication which might, in a certain way, affect the judicial proceedings in which the inspection is performed with regard to the tax decision associated with the level of the tax obligation. The above does not violate the rule of the binding force of a final and valid decision expressed in art. 170 of the Act on Proceedings before Administrative Courts. (Dz. U. z 2012 r., poz. 270 j.t.). (Pietrasz, Sawczuk, 2010, p. 13 and next).

The failure to bind with the limits of the appeal means that the court has the right, and the obligation, to assess the compliance with the law of the appealed administrative act even if the given allegation has not been presented in the appeal. The limits of examining the appeal by the Court are provided on the one hand by the criterion of legality of the activities of public authorities, and on the other – only by all the legal aspects, and only by the administrative-legal relationship that is included in the appealed decision. (wyrok Naczelnego Sądu Administracyjnego z dnia 17 marca 2006, II FSK 509/05).

What should also be indicated is the position, assumed in judicial decisions, that even if the cassation court does not address the essence of the allegations made due to defects in the cassation appeal, then by dismissing the appeal in the part appealed by the party it made the decision of the court of first instance become final and valid in that part, on the date of issuance of the judgment, and bound both the tax authority, and later – the court. The binding of the authorities and of the court continues to have effect as long as the factual state of the case does not change. It should be emphasized that the violation of the rule of binding with a legal assessment, constitutes a disqualifying fault that results in the decision being found invalid in the next proceedings. The court expresses its assessment in the addressed scope so that the scope of that assessment is not subject to examination during the next examination of the case. (wyrok Naczelnego Sądu Administracyjnego z dnia 15 lutego 2007, II FSK 274/06).

6. Conclusions

The idea of binding a public administration authority (tax authority) with a legal assessment and with the instructions from an administrative court, functions on the verge of two separate procedures, i.e. the administrative (tax) procedure and the court-administrative procedure.

The structure included in art. 153 of the Act on Proceedings before Administrative Courts (Dz. U. z 2012 r., poz. 270 j.t.) includes a guarantee that the court instructions will be performed and that the administration authorities will be bound by the interpretation of the legal provisions made by that court. As a result, a decision of an administrative court exerts the results exceeding the scope of judicial administrative proceedings, while its effect also covers the future tax proceedings. By conducting the tax proceedings after the former cassation decision of an administrative court, a tax authority acts in a different legal situation in comparison with the situation under the supervision of a court. Apart from the procedural solutions included in the tax regulations, that authority must also act subject to the provisions of art. 153 of the Act on Proceedings before Administrative Courts (Dz. U. z 2012 r., poz. 270 j.t.), and as a result, also to the opinions of a court. As a result, the judicial decisions of an administrative court are, in a sense, law-making. However, that law-making refers only to a specific case, because a court does not create abstract standards. In other words, the legal assessment and the instructions are made with regard to a specific tax case. The legal assessment expressed in the sentence of an administrative court, comprises a special element of the legal status of the case, because it includes a statement on the compliance of the inspected act with the law. As a result, both the legal assessment and the court instructions must be invoked in the justification of a tax decision made in the proceedings conducted after the prior inspection from the administrative court.

If the legal assessment made by the court refers to the regulations that affect the subjective rights of a taxpayer, it means that the administrative court imposes the effects of "its" interpretation of those provisions on a tax authority. In turn, the tax authority is obliged to respect those rights in accordance with the opinions of the court, which usually affects the final resolution of a tax case.

It should be kept in mind that a taxpayer, by submitting an appeal against a tax decision to an administrative court, demands not only an inspection of the acts of tax administration, but also – which should be emphasized – demands the execution of its rights, including its subjective rights. Therefore, we should not forget the crucial role of the administrative courts in the protection of the substantive rights of taxpayers. The instrument that allows the administrative courts to guard the subjective rights of taxpayers, consists in the procedural regulations included in the provisions on proceedings before administrative courts, and in particular art. 153 of the Act on Proceedings before Administrative Courts (Dz. U. z 2012 r., poz. 270 j.t.).

NOTES

[1] From the justification of the resolution of the NSA of 26 October 2009, (I OPS 10/09).

[2] Judgment of the Constitutional Tribunal of 11 May 2004 (wyrok Trybunału Konstytucyjnego z dnia 11 maja 2004, K 4/03); see also: Sokolewicz, W. (2005). Uwagi do art. 217. In L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 4, (pp. 12–19). Warszawa: Wydawnictwo Sejmowe.

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VERSITA

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 33 (46) 2013

DOI: 10.2478/slgr-2013-0016

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SELECTED PROBLEMS OF ENACTING AND INTERPRETATION OF LOCAL LAW AT THE LEVEL OF LOCAL SELF-GOVERNMENT IN POLAND

Abstract. This article presents crucial problems of enacting and interpretation of local law. According to the Constitution acts of local law are the source of universally binding law in the territory of the organ issuing such enactments. Enacting of local law by the local self-government is the exercise of its law-making function, derived from statutory authorization. Law-making of the local self-government does not have an autonomous character in regard to legal acts. Enacting of local law by local self-government is its duty. The interpretation of the law enacted by the local self-government has its own specifics. Law which is legislated in such way is likely to be corresponding with the expectations of the local community.

Introduction

Constant changes of law, inconsistency of legal regulations and defective legislation techniques are the main challenges for the recipients of law. Above mentioned challenges concern mostly administrative law, which is especially prone to changes. (Kijowski, 2012). Therefore organs that enact and interpret local law play especially important role, in order for the law, which is closest to the citizen, to be comprehensible and clear. Interpretation of law is the consequent process against enactment of law. We can state that problems of interpretation of law can be derived in large part from defective legislation. The aim of this article is to present crucial problems of enacting and interpretation of local law.

1. Comprehension of local law

According to the Polish Constitution (Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 Dz. U. z 1997 Nr 78, poz. 483), organs of local

ISBN 978-83-7431-377-3 ISSN 0860-150X

government and territorial organs of government administration can enact acts of local law on the basis and within the boundaries of empowerment contained in the act. Acts of local law are the source of universally binding law in the territory of the organ issuing such enactments (art. 87 and art. 97 of Polish Constitution Dz. U. z 1997 Nr 78, poz. 483).

The concept of universally binding rules applies to those that have the following attributes:

- are addressed at and bind certain general categories of entities, regardless of the legal and organizational ties connecting them with issuer of enactment,
- clarify the rules for the behavior of certain categories of entities – define the rights and responsibilities,
- are repetitive in the sense, that they are used repeatedly for entities that meet the conditions stated in the rule,
- the state guarantees operation of the universally binding rules with sanction. (Dąbek, 2004, p. 58).

Therefore enactments of local law are law for everyone, who is placed within the situation specified by the act. (Ochendowski, 1991, p. 24). Territorial scope of application of local laws may not overlap closely with the area of operation of the given local self-government unit. They can be enacted for smaller areas, components of the given unit of local self-government. In art. 89 par. 1 of the Act on Voivodeship Self-government (ustawa z dnia 5 czerwca 1998 r. o samorządzie województwa Dz. U. z 2013, poz. 596 j.t.) legislator has specifically stated that the voivodeship council enacts the legal enactments applicable in the voivodeship or part thereof. On the other hand in art. 41 of the Act on District Self-government (ustawa z dnia 5 czerwca 1998 r. o samorządzie powiatowym (Dz. U. z 2013, poz. 595 j.t.)), this principle was explicitly expressed in relation to acts of ordinal character – district organs can enact the rules in the area of the district, bigger than the area of one borough.

In the Act on Borough Self-government (ustawa z dnia 8 marca 1990 r. o samorządzie gminnym (Dz. U. z 2013, poz. 594 j.t.)), the principle is not expressed, it is assumed, however, that the enactments of local law enacted on this level of local self-government can cover an area smaller than the whole borough. In practice, the act of local law enacted by the borough council, which covers the area usually smaller than the whole borough, is local plan of spatial development, enacted on the basis of the procedure provided in the act on spatial planning and development.

One of the conditions of legality of the basic act is the issue of the act, on the basis of explicit statutory authorization, within the boundaries outlined

in the authorization. Authorization to issue sub-act cannot be presumed, and the possible inaccuracy of authorization to issue such an act should be regarded as lack of legislative permission, as according to the rules of interpretation, the presumption of competence of the organ is not acceptable. (Wyrok Trybunału Konstytucyjnego z dnia 4 listopada 1997, U 3/97).

Sub-act cannot be contrary to the legal act on the basics of which the authorization to issue sub-act was given, to other legal acts, and the Polish Constitution with other universally binding legal acts. Any regulation of procedure in sub-act must be consistent with the provisions of the legal act. Moreover, the area of human rights and freedoms which, in accordance with the Constitution, belongs to a statutory matter, cannot be regulated by the sub-act. (Dąbek, 2004, p. 59).

Normative character of an act of local law lies in the fact, that it contains directive statements outlying the recipients specific behavior, that is, determining interdictions, orders, rights. To acknowledge that a particular act is normative, it is sufficient to establish that at least one statement contained within the act is of a directive character. For example, not all of the statements contained in the local plan of spatial development are of a directive character.

The essence of the local development plan is that it contains evaluative statements, postulates, but also directive statements – indicating orders or interdictions regarding certain development of the given area. General nature of the norm is that it determines the recipient, indicating his attribute or attributes, or by using the name of the type or general name of the recipient. The abstract nature of the norm signifies that it applies to repetitive behaviors (occurrences) of a particular type. The attribute that distinguishes the normative general act from the individual act (for example: administrative decision) is the method of regulation of the legal relation between the individual and organ. The general normative act contains a legal norm regulating specific social relation of the given sort, that may be created between the organ and the indeterminate category of entities that are in a situation regulated by this norm. However, individual act is directed to a specific recipient or specific recipients and determines their rights and responsibilities.

Enactment of local law differs from the normative act of the internal management considering the fact, that the first resolves, in a commanding manner the rights, and responsibilities of entities not bound by the relation of subordination to organs of local self-government community, while the second defines the duties and responsibilities of individuals and units remaining in relation of organizational or official subordination to each other.

Normative act of internal management is binding only within a specific organizational system. (wyrok Naczelnego Sądu Administracyjnego z dnia 30 sierpnia 2000, I SA 721/00). This means that not every ruling of the legislative organ of the local self-government unit carries the attribute of the enactment of local law.

The norms specified in the enactments of the local law may be the ground, or one of many grounds for the issue of administrative decision (for example, the provisions of the decision of the borough council, issued on the grounds of art. 40 par. 8 and 9 of the Act on Public Roads, (ustawa z dnia 21 marca 1985 r. o drogach publicznych (Dz. U. z 2007 Nr 19, poz. 115 j.t.)) which sets the fees for occupation of the traffic lane, which is administered by the prefect of the borough, constitute the legal basis for the issue of administrative decision, which allows the occupation of the traffic lane and sets the fee for occupation of the lane; this kind of decision is issued when, for example, some entity wants to place an advertisement within the traffic lane).

Authorization contained in the legal act enabling the issue of an enactment of local law has a higher level of liberalism compared with the authorization to issue a regulation. According to the Constitution (art. 94 par. 1 – Dz. U. z 1997 Nr 78, poz. 483), the statutory authority to issue a regulation by the central organ of public administration must be specific, define the scope of matters to be regulated by the regulation, as well as provide guidelines concerning the content of the regulation. With regard to the authorization to issue enactments of local law, according to constitutional regulation, contents of enactments of local law do not require guidelines (Bogusz, 2008, p. 14–15).

2. Grounds for enacting law at the local level

Among the reasons for delegating the competence of enacting universally binding law to local authorities are the following circumstances:

- the necessity to take into account the specifics of the local conditions, which can be better considered by the local self-government organs;
- ensuring the fast legislative action in the event of emergencies requiring immediate response at the local level,
- the necessity to consider the specific issues in the legal regulation – the task is met by the local enactments as sub-acts,
- delegation of legislative authority to local organs is justified by the rationality of the division of administrative tasks,

- in some cases, local law (ordinal rules) can fill gaps in the legal system,
- law enacted by the local self-government is constituted with the help of the public (local community representatives), which should increase the acceptance of the law, resulting in it being more effective,
- certain tasks are carried out by the local self-government better and more effectively than by the central administration. (Dąbek, 2004, p. 85–87).

Enacting of local law by the local self-government is the exercise of its law-making function, derived from statutory authorization. Law-making of the local self-government does not have an autonomous character in regard to legal acts. Enacting of local law by local self-government is its duty. That may be an unconditional obligation, when the statutory authorization imposes obligation to enact an act of local law regulating certain categories of social relationships (i.e., the act on local taxes and fees – the borough council will issue a resolution on property tax rates), and also have a form of authorization for optional enacting of an act of local law (for example, under art. 15 par. 7 of Act on Transportation, (ustawa z dnia 6 września 2001 r. o transporcie drogowym (Dz. U. z 2012 r. poz. 1265 j.t.)) the borough council may introduce the requirement for the use of supplementary indications and additional technical equipment for the taxi cabs).

3. Types of local law enactments

Enactments of local law can be divided into acts bearing different character: executive, ordinal and systemic-organizational. Executive enactments are issued on the basis of specific statutory authorization within the limits specified by the act. System norms, indicating categories of tasks belonging to a certain level of local self-government, do not provide sufficient grounds for the issue of enactments. Resolutions issued on the basis of specific authorization regulate different categories of social relations – according to statutory regulation and authority contained therein. These enactments cannot outstretch the object of regulation beyond the scope of statutory authorization, they also cannot modify or extend the interdicts contained within legal acts.

Enactments of systemic-organizational character include the statutes of local self-government units, auxiliary units of boroughs, municipal associations, as well as acts regulating the rules of local government units' property management. Legitimacy to enact statutes of local self-government units results directly from the art. 169 par. 4 of the Polish Constitution.

(Dz. U. z 1997 Nr 78, poz. 483). Statute does not constitute "sub-act" law in the same meaning as for the other acts of local law. (Dąbek, 2005, p. 423–424). The mere possibility of constitution of the statute of the local self-government unit is independent of the common legislation, since the constitution of an act of local law determining the internal organization of local self-government unit does not require a statutory basis in the system regulations. Systemic legal acts, on the other hand, do limit the content of the abovementioned acts. (Szewczyk, 2001, p. 710). In the area of statute regulations local self-government is left with some freedom. For example, in accordance with art 23 par. 2 Act on Borough Self-government (Dz. U. z 2013, poz. 594 j.t.) councilors can create councilors' clubs working on the principles described in the statute of the borough. The subject of statute regulation may be the issues concerning the determination of the minimum composition of the councilors' club and the detailed rules for its operation. (wyrok Naczelnego Sądu Administracyjnego z dnia 8 lutego 2005, OSK 1122/04, wyrok Naczelnego Sądu Administracyjnego z dnia 23 maja 2005, OSK 1616/04)).

The third group of local law enactments – are the so-called ordinal rules, which are issued at the level of borough self-government, as well as the district self-government. At the level of voivodeship only organs of government administration are authorized to issue ordinal rules. Authorization for enacting results from the general authorization contained in the systemic legal acts. Systemic legal acts point to three conditions required to enact legal ordinal rule:

- existing threat to the goods specified in the systemic legal acts,
- lack of regulations for the protection of the goods,
- indispensability of enacting of the ordinal rules to remove the threat to the goods specified in the systemic legal acts.

Art. 40, par. 3 Act on Borough Self-government (Dz. U. z 2013, poz. 594 j.t.) lists life or health of citizens and maintaining public order, peace and safety as protected goods. In art. 41 par. 1 Act on District Self-government (Dz. U. z 2013, poz. 595 j.t.) besides the goods specified in Act on Borough Self-government property of citizens, and environmental protection has been mentioned.

Ordinal rule enacted by the local self-government must fill so-called objective loophole (Dobosz, 2004, p. 275), meaning the lack of regulation of specific situations (occurrences), and should not change the legal regulations already in force. Organ enacting the ordinal rules must therefore determine whether a particular type of behavior is not already regulated, and secondly if the lack of regulation is not intended by the legislature.

4. Legislative omission

The subject of enacting of local law is related to the issue of legislative omission of local self-government units. Omission occurs when: organ of the local self-government does not issue a resolution despite statutory authorization or does not re-issue the regulation as a result of its annulment by the supervisor or administrative court; when the given act of local law does not contain all the elements of regulation required by legal act, or when issued resolution has not been publicized, and its publication is required for it to enter into force. (Stahl, 2006, p. 5). Among the examples of legislative omission we can point out: lack of regulation of the issues concerning the retirement of auxiliary units in the statute of the borough, or not issuing a resolution on liquidation or change of the form of the financial management of independent public health office, due to a negative financial result by that office – art. 60 par. 1 and 3 of the act of 30 August 1991 on health care (ustawa z dnia 30 sierpnia 1991 r. o zakładach opieki zdrowotnej (Dz. U. z 1991 Nr 91, poz. 408 ze zm.)).

Act – law on Proceedings Before Administrative Courts (ustawa z dnia 30 sierpnia 2002 r. – Prawo o postępowaniu przed sądami administracyjnymi (Dz. U. 2012, poz. 270)) does not provide the possibility to sue for inactivity resulting in the omission to issue the resolution by the local self-government organs – article 3 § 2 Act – Law on Proceedings Before Administrative Courts (Dz. U. 2012, poz. 270).

5. Other problems of interpretation of the law

It is a truism to say, that the rules of interpretation of local law are similar to the rules of interpretation of acts of another level. However, the characteristics of this law, such as the binding force in the particular area, or executive nature of most normative acts also point to the specificity of the interpretation of the law. Firstly, it boils down to the fact that the subject which enacts and interprets are the organs of local self-government; secondly the possible elimination of any such provisions due to their non-compliance with other norms standing higher in the hierarchy of sources of law takes place under different rules. In the case of other universally binding laws, their compliance or non-compliance with the Constitution or other legal acts is subject to evaluation of the Constitutional Tribunal. Regarding the regulations issued on the basis of the legal act, all public courts are constitutional in a way, because they can ignore the provision of the regulation

inconsistent with legal act or the Constitution. However, the evaluation of legality of local law is substantially made on a different level, as it is performed by the supervising organs and administrative courts. The court's decision on the legality of the act of local law is also an interpretation of this act, as a court ruling is a consequence of earlier interpretation of the act. Administrative court evaluating the legality of an act of local law should make pro-constitutional and pro-legal interpretation. However, the interpretation procedure must comply with the assumption that understanding of a particular expression accepted as consistent with the Constitution or the legal act lies within the so-called possible linguistic meaning. (Spyra, 2006, p. 39). The boundary of pro-constitutional and pro-legal interpretation is therefore admissible linguistic meaning of interpreted expression or provision.

Administrative organs, as well as administrative courts repeatedly have doubts as to the legal nature of many categories of resolutions of organs of local self-government, namely whether the enactments bear the character of the local laws or not. It is important if only because of the obligation to publish a local enactment in the voivodeship official journal. In jurisdiction this problem is visible on the background of the resolutions on the establishment of the budgetary unit. We can find the rulings of the administrative courts where it is assumed that the resolution on establishment of a budgetary unit is an act of local law – ruling of Provincial Administrative Court in Wrocław (wyrok Wojewódzkiego Sądu Administracyjnego we Wrocławiu, z dnia 5 czerwca 2008, III SA/Wr 125/08; wyrok Wojewódzkiego Sądu Administracyjnego we Wrocławiu z dnia 6 lutego 2005, IV SA/Wr 830/04), and in other rulings they are denied normative character. (wyrok Naczelnego Sądu Administracyjnego z dnia 12 października 2005, II OSK 134/05). According to M. Stahl (2006), "Supreme Control Chamber study shows that local self-government organs have difficulty in classifying many acts enacted by themselves as local laws or other acts". The task is not made easier by the legislator, as he inconsistently uses certain terms. I mean the indications in some legal acts pointing to certain resolutions of organs of local self-government being local law. On the other hand, in relation to other acts which, according to judicature and scientific papers are acts of local law, the legislator is mute. This would suggest that only the resolutions named by the legislator as a local law bear the character, but in reality it is not the case. Undoubtedly, the Rules of legislative drafting play organizing role in both the regulation process and in the process of interpretation. They are legislative guidelines for the creation of laws that should be taken into account by law-making entities. In

the literature, it is pointed out that lifting the Rules of legislative drafting to the rank of regulation expresses the belief of the legislator, that they fulfill an important role in achieving a good state but it does not change their character; according to their nature they remained the rules of constructing correct normative acts and reliably making amendments, but not the rules of construction of "important" normative acts. (Wronkowska, 2004, p. 20). The Rules of legislative drafting do not express typical legal norms, but technical directives (purpose). (Wronkowska, 1990, p. 7). Technical Directive (purpose) is an expression similar to the norm of conduct, which sets out, in a conditional manner, the obligation of particular recipients' behavior, which can be reduced to linguistic pattern: "If you want to achieve objective C, you should behave in a manner S". (Bator, 2006, p. 78).

The literature and jurisdiction repeatedly pointed to the importance of justification of a normative act. According to art. 143 in connection with art. 131 par. 1 of the Rules of legislative drafting – (rozporządzenie Rady Ministrów 20 czerwca 2002 r. w sprawie zasad techniki prawodawczej (Dz. U. z 2002 Nr 100, poz. 908)), legal enactments of local law shall include a justification. In judicature we can meet different views on the importance of the possible lack of justification of a normative act. There is a firm position that the lack of justification of the draft of resolution of local self-government unit justifies the invalidity of such an act. There is also a different view that the Rules of legislative drafting are a set of directives addressed at the legislator, showing how to properly express legal norms in legal acts and how to group them in normative acts. However, they do not serve the assessment of the validity of the standing law. (Wyrok Naczelnego Sądu Administracyjnego z dnia 5 maja 2011, I OSK 1059/10).

In summary the interpretation of the law enacted by the local self-government has its own specifics. This is due to the following circumstances: high level of details in regulation resulting from the executive character of the local law, decentralization of law-making process – authorization of legislative organs of units of local self-government to enact, which means that the number of entities enacting the law is expressed in thousands. Such a large number of law-making entities must lead to noticeable differences in the regulations, what is also an advantage of local law. Law which is legislated in such way is likely to be corresponding with the expectations of the local community. On the other hand, it may be on the wrong legislative level. Therefore, the Rules of legislative drafting undoubtedly have an important role to fulfill – they should be treated as a standard of conduct for local legislators.

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VERSITA

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 33 (46) 2013

DOI: 10.2478/slgr-2013-0017

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PURPOSIVE INTERPRETATION OF THE TERM "UNDERTAKING" AS DEFINED UNDER POLISH ANTITRUST LAW – SOME OBSERVATIONS

Abstract. This paper assesses whether the purposive (functional) interpretation of the term "undertaking" is used by decision-makers in antitrust cases. This article presents a short summary of this research regarding cases related to the abuse of a dominant position. As a rule, priority must be given to the direct meaning of a text. There are, however, important exceptions to the supposed rule. A concise examination of the jurisprudence shows that purposive interpretation is used where the provision in question is open to several interpretations. This article relates in some form to the problems that arise from the EU-oriented purposive interpretation of the term "undertaking" as defined under Polish antitrust law. The article considers some of them.

1. Introduction

Polish antitrust law of the interwar period obviously was not applied after World War II in socialist Poland, even though it was not formally repealed by the legislature. (Rzepliński, 1999, p. 18). Interrupted Polish story of antitrust law[1] was continued by the Act of 1987 on counteracting monopolistic practices in the national economy, (ustawa z 28 stycznia 1987 o przeciwdziałaniu praktykom monopolistycznym w gospodarce narodowej (Dz. U. z 1987, Nr 3, poz. 18)), which was replaced by the Act of 1990 on counteracting monopolistic practices and protection of consumer interests (ustawa z 24 lutego 1990 o przeciwdziałaniu praktykom monopolistycznym (Dz. U. z 1990 Nr 14, poz. 88 z późn. zm.)). (More: Skoczny, 2003, p. 351). The latter was replaced by the Act of 2000 on competition and consumer protection (ustawa z 15 grudnia 2000 r. o ochronie konkurencji i konsumentów (Dz. U. z 2000 Nr 122, poz. 1319 z późn. zm.)). As the years went by more and more legal provisions came into being for the purpose of protecting both competition and consumers.

ISBN 978-83-7431-377-3 ISSN 0860-150X

On February 16, 2007 the new Act on competition and consumer protection (Ustawa z 16 lutego 2007 r. o ochronie konkurencji i konsumentów (Dz. U. z 2007 Nr 50, poz. 331 z późn. zm.)) – hereinafter referred to as CCP Act[2] was passed. It has provided for equally high level of competition and consumer protection as law of the European Union (EU). But the application of the CCP Act has not been free of problems.

However, the body of case law under the CCP Act (and its predecessors) seems now more and more considerable. It consists of decisions of the President of the Office of Competition and Consumer Protection (Urząd Ochrony Konkurencji i Konsumentów, UOKiK) and ordinary courts.[3] These decision-makers continue to exert an influence on how provisions of the CCP Act are understood. Many problems in connection with the CCP Act naturally remain unsolved. One can hardly believe that six years have already passed since the adoption of the CCP Act and it has not been substantially revised to clarify its unclear language, resolve the lacunas in the legislation, exclude its weaknesses and enhance the strengths of the public antitrust enforcement. Ultimately, it is decision-makers who must take responsibility for how they interpret provisions of the CCP Act. They take into consideration various aspects of legal interpretation.

This article discusses two issues: first, are any examples of purposive (functional) interpretation of the term "undertaking" to be found in decisions by decision-makers we have mentioned so far and, if so, is purposive interpretation used in favour of parties suspected of the anticompetitive conduct or against them? Second, do decision-makers refer to purposive (functional) interpretation in notes (justifications) of decisions?

The first question is much more difficult than it was in earlier years for while we must begin our search for examples of purposive interpretation, case law may well be unapproachable. I do not mean decisions of the UOKiK President (Prezes Urzędu Ochrny Konkurencji i Konsumentów) as they are presented in the internet database.[4] But there appears to be no exhaustive, exact information as to the courts' case law. The last-mentioned database contains only "orders" and not "notes" of court decisions.[5] Pursuant to Article 32 of the CCP Act (Dz. U. z 2007 Nr 50, poz. 331 z późn. zm.), the UOKiK President shall issue the Official Journal of UOKiK (Dz. Urz. UOKiK) and judgments of courts may be published therein. However, they have not published any single judgment in the Official Journal since April 2011. Moreover, the UOKiK President drafted and the Council of Ministers sent to the Seym (*Sejm*) the draft bill to amend the CCP Act and the draft proposes not to publish the Official Journal at all. Other sources of courts' case law on antitrust are rather

poor. A detailed survey of case law on the antitrust issues needs first to ask courts to help us obtain their relevant judgments because we can build up only approximate picture of the courts' case law on antitrust from published databases as well as from published records of the UOKiK President.

The answer to the second question is simple (in as much as it is assumed that case law is accessible), for apart from a few decisions, one is unable to find any references to the type of legal interpretation referred to in my questions.

2. Legal interpretation in general

This concise survey must be preceded by an explanation of the basic types of legal interpretation together with an outline of their characteristics, advantages and disadvantages.

Among the interpretive activities occurring in courts and other public domains, the most important is determination of the direct meaning of the legal provisions. This concept has traditionally occupied the central position in the Polish system of legal interpretation (Wróblewski, 1991, p. 23) and could be found in virtually every European country.

However, systems of legal interpretation go far beyond any direct meaning of a text. When the "literal" meaning is unclear (not plain enough) in a given situation, then as an inevitable consequence, one must use the interpretive directives, i.e. the rules which channel interpretive behaviour and/or are used for justifying the interpretive decision. (Wróblewski, 1991, p. 23–24). They are two-dimensional (their orders may be called the dimensions; or, perhaps more appropriately, levels). The first level of the interpretive directives concerns determination of the elements of the semantically relevant contexts of legal rules that will play an important part in subsequent interpretive processes. There are three contexts of legal rules considered as semantically relevant, namely linguistic, systematic (systemic) and purposive (functional). In this respect there are three types of legal interpretation: linguistic, systematic (systemic) and purposive (functional) ones. (Jabłońska-Bonca, 2004, p. 178–181).

In the ideal situation, the results of each type of legal interpretation coincide with one another. In other words, there is unity and agreement among them. If there appears to be no common meaning of the interpreted provision shared by all three versions of interpretation, then one has to use the second level interpretive directives that provide for resolution of any

conflicts among the results of different types of legal interpretation. These directives determine how to choose between the conflicting versions and how to justify this choice.

About the choice and the justification thereof there may be different opinions depending on ideology of legal interpretation: the static ideology or the dynamic ideology. Essential to this differentiation is a classification of theories of legal interpretation into the subjective theory of legal interpretation and the objective theory of legal interpretation. The subjective theory (static ideology) revolves around the assumption that the meaning of the legal text is the will of the historical lawmaker and the opposing theory (dynamic ideology) suggests that the meaning of the legal text is independent of the historical lawmaker and may change according to many factors, e.g. the will of the current lawmaker, or some teleological, sociological and/or axiological features ascribed to the legal text in the process of interpretation. (Dascal, 2003, p. 355).

The subjective theory of legal interpretation seems unattractive. According to the subjective theory, legal interpretation has little power of development. This is partly because the purposive interpretation is relegated to an only secondary role and is referred to the historical lawmaker (while at the same time the subjective theory does not deny the leading part played in legal interpretation by the linguistic and systematic interpretations).

While performing a systematic interpretation, one interprets a legal text as part of:

- the legal system as a whole,
- components of the legal system such as a branch of law,
- a normative act,
- any other set of legal rules or even a single legal rule.

No one can deny the validity of the linguistic and systematic contexts of legal rules[6] but legal interpretation without the purposive context referring to the current lawmaker seems to be only partial.

On the other hand, the objective theory employs such a purposive (functional) context. While performing a purposive (functional) interpretation, one has to identify the current fundamental values of the legal system, the purposes (aims, objectives) of the legal rule and, drawing upon this work, select the meaning of the legal text that best fulfils these values and purposes. (Jabłońska-Bonca, 2004, p. 180–181). Apart from these, one should also assess how the current lawmaker would behave and if there can be seen any peculiar attitude of the lawmaker toward the subject. If the current lawmaker wrote legal provisions on the same subject matter, what would they be like?

At any rate, such an "objective" interpretation can let the interpreter reveal a very complex mixture of values and purposes at stake. It would seem logical therefore, that the interpreter should choose values and purposes considered by him/her as playing the most important part in this "mixture". But the relationship between values and purposes of law may be more complex than that. Partly this is because of the need to interpret national laws of EU Member States in such a way as to fulfil the purposes of the EU law (formerly EC law). (Jabłońska-Bonca, 2004, p. 180–181). The most striking feature of a generally pro-EU interpretation of laws is that functional interpretation rather than linguistic one should have priority. (Kalisz-Prakopik, 2007, p. 174 and next).

This article briefly exemplifies these issues through a selective analysis of the body of case law that is developing in the area of Polish antitrust law.

3. "Undertaking" under the CCP Act

There are several excellent examples of purposive (functional) interpretation to be found in the case law on antitrust that refer to the word "undertaking" (*przedsiębiorca*). But we must remember that the term "undertaking" has a special meaning under the CCP Act (and had it under the predecessor of 2000). Pursuant to its Article 4(1), for the purposes of the CCP Act (Dz. U. z 2007 Nr 50, poz. 331 z późn. zm.) "undertaking" shall mean, in the first place, an undertaking in the meaning of the provisions on freedom of business activity (i.e. a natural person, a legal person or an organisational unit without a legal status to which legislation grants legal capacity, conducting economic activity on its own behalf; economic activity shall mean profit-making activity related to manufacturing, construction, trading, provision of services and prospecting, identification and extraction of minerals, as well as professional activity conducted in an organised and continuous fashion).[7]

By the word "undertaking" as has already been mentioned above, the CCP Act implies not only those persons and units that are covered by the term "undertaking" in the meaning of the provisions on freedom of business activity, but, as well:

a) natural and legal person as well as an organisational unit without a legal status to which legislation grants legal capacity, organising or rendering public services, which do not constitute business activity in the meaning of the provisions on freedom of business activity,

b) natural person exercising a profession on its own behalf and account or carrying out an activity as part of exercising such a profession,
c) natural person having control, in the meaning of Article 4(4) of the CCP Act (Dz. U. z 2007 Nr 50, poz. 331 z późn. zm.), over at least one undertaking, even if the person does not carry out business activity in the meaning of the provisions on freedom of business activity, if this person undertakes further actions subject to the merger control, referred to in Article 13 of the CCP Act (Dz. U. z 2007 Nr 50, poz. 331 z późn. zm.);
d) associations of undertakings – for the purposes of the provisions on competition-restricting practices and practices infringing collective consumer interests.

The above definition adds "extraordinaries" to the ordinary pattern of definition of "undertaking". (More: Etel, 2012, p. 247 and next; Krasnodębska-Tomkiel, Szafrański, 2010, p. 110–111). Legislators tend to regard such a broad definition of the term as congenial to the modern antitrust, typically centred on the wide range of market participants. Which organisations and/or institutions would fit inside these boundaries (not too strict)? From time to time, the UOKiK President and competent courts referred to purposive interpretation as an argument supporting that the term "undertaking" included organisations and institutions such as the National Health Fund (Narodowy Fundusz Zdrowia), the National Chemical and Agricultural Station (Krajowa Stacja Chemiczno-Rolnicza) and the Union of Stage Artists and Critics (ZAiKS) as a collective management organisation.

4. Different outcomes of pro-EU purposive interpretation of the term "undertaking"

This section focuses on purposive interpretation of the term "undertaking" that led decision-makers to different outcomes in cases regarding the abuse of a dominant position. Under the provisions of 2000 legislation the UOKiK President recognised the National Chemical and Agricultural Station as an "undertaking" pointing out that the legal interpretation used in the case bore a resemblance to the case law of the European Court of Justice – hereinafter referred to as ECJ (decision of December 29, 2008, RBG-45/2008, p. 22). In the analysed decision the UOKiK President quotes from the text of judgment of the Polish Supreme Court (Sąd Najwyższy, SN) – of May 29, 2001 (wyrok Sądu Najwyższego z dnia 29 maja

2001, I CKN 1217/98). According to the Supreme Court, if there is any doubt over the status of an organisation or institution as an "undertaking" then such doubts should be removed by purposive interpretation in order to achieve an outcome consistent with the objective pursued by the EU law. The Supreme Court emphasised that such a consistency could be obtained by referring not only to the letter of the law (legislation) but also to the EU case law.

The analysed decision by the UOKiK President was appealed against to the Court of Competition and Consumer Protection (Sąd Ochrony Konkurencji i Konsumentów, SOKiK) and its judgment was appealed to the Appeal Court (Sąd Apelacyjny, SA) in Warsaw. The Appeal Court tone was one of scepticism to purposive interpretation. In its judgment of May 24, 2011 (VI ACa 1394/10)[8] the Appeal Court stated that the term "undertaking" included organisations and/or institutions organising public services and decided that the National Chemical and Agricultural Station could be classified as such provided that it had been involved in economic relations. But, to the contrary, the Station was involved in exercising public powers. The court stated that antitrust law did not apply to functions and activities relevant to public authorities. Its purposes do not extend to diagnosing compatibility of the exercise of public powers with competition rules. (Piszcz, 2012, p. 72–73). The courts set aside the decision issued by the UOKiK President. This conclusion was as advantageous to the alleged violator as it was possible to be.

The same could not be said to be true of other pieces of scrutinised case law such as decisions adopted in the ZAiKS case. In the decision of July 16, 2004 (RWA-21/2004), the UOKiK President referred to the above mentioned well known judgment of the Supreme Court of May 29, 2001 (I CKN 1217/98) concerning purposive interpretation. The UOKiK President tried to decide what Polish interpreter performing a pro-EU purposive interpretation should choose – values and purposes of Polish antitrust law or EU antitrust law. Should values and purposes of Polish antitrust law be treated as a means to attain other "greater" end for which EU antitrust law is designed? The UOKiK President reminded parties to the proceedings:

- of the principle crystallised in the EU case law under which EU Member States are obliged to apply domestic laws in compliance with the EC Treaty[9] purposes;
- but not of the ends which EU antitrust law is supposed to serve.

The CCP Act comprises two various elements which each have a separate function within the overall system: competition (antitrust) law and consumer law. Not only Article 1 of the CCP Act stipulates it (Dz. U.

z 2007 Nr 50, poz. 331 z późn. zm.), but even the title of the CCP Act itself – the Act on competition and consumer protection (ustawa o ochronie konsumenta) suggests it. However, not only consumer law, but also antitrust law safeguards consumer interests. Polish antitrust law is primarily concerned with protection of competition (increasing economic efficiency) and protection of consumers as ends in themselves. On the other hand, purposes of EC antitrust law (currently EU antitrust law) have related, in turn, to partially different values. It has served two masters – not only competition but also the functioning of the internal market. (Jones, Sufrin, 2007, p. 42). This has distinguished it from national competition laws. In the 1990's consumer protection has joined these purposes.

Referring to the ECJ's judgment in case *Walt Wilhelm*,[10] the UOKiK President clarified that EU Member States were not allowed to apply their national competition laws to the extent that the activities prohibited by EC antitrust law (currently EU antitrust law) could be legalised. According to the decision-maker's viewpoint, in practice, exclusion of collective management organisations from the scope of the term "undertaking" would protect such organisations from subjecting their activities to the regime of antitrust. It would mean *ex ante* legalisation of their activities from an antitrust point of view and would violate the obligations of Poland as EC (now EU) Member State. The analysed decision was confirmed by the SOKiK and the judgment of the latter was confirmed by the Appeal Court in Warsaw in its judgment of November 29, 2006 (wyrok Sądu Apelacyjnego w Warszawie z dnia 29 listopada 2006, VI ACa 504/06). The Appeal Court referred to the same Polish courts' case law regarding pro-EU purposive interpretation. The Court also mentioned some decisions by the European Commission.

The decision of the UOKiK President of July 10, 2009 (RWA-9/2009) reflects, in some sense, the other side of the coin. In this decision, on one hand, the UOKiK President referred to its own decision issued in the ZAiKS case and confirmed that interpretation of the personal scope of the prohibition of practices restricting competition (horizontal agreements and/or concerted practices, vertical agreements and/or concerted practices, abuse of a dominant position) should be in line with *acquis communautaire*. On the other hand, the UOKiK President stated that, undoubtedly, such a pro-EU legal interpretation could not lead to an interpretation *contra legem*. In other words, the obligation to interpret national law in conformity with *acquis communautaire* cannot serve as the basis for an interpretation of national law *contra legem* and EU law cannot compel the national decision-maker to give an interpretation against the law. In the UOKiK President's opinion, even if under EC Treaty (currently TFEU) the National Health Fund did

not have the attributes of an undertaking (which is not obvious because neither the European Commission nor the EU courts have assessed it so far), under Polish antitrust law the Fund would be regarded as an undertaking due to Article 4(1)(a) of the CCP Act. (Dz. U. z 1997 Nr 50, poz. 331). This provision clarifies that an undertaking is a person or an organisational unit that organises public services. The Fund organises such services, therefore it is an undertaking.

In the closing lines of this section, I would like to mention the problem of interpretation of the term "joint undertaking" (*wspólny przedsiębiorca*) which has not been scrutinised and resolved by Polish antitrust case law to this day. This term appears in Article 13(2)(3) of the CCP Act (Dz. U. z 2007 Nr 50, poz. 331 z późn. zm.), referring to the merger control and identifying the types of mergers. Traditional forms of legal interpretation urge us to direct our focus toward a definition of "undertaking" contained in general provisions of the CCP Act. On the other hand, a pro-EU purposive interpretation may lead us in a much different direction, that is, toward a European notion of "joint venture".[11] In my opinion, interpreting the term "joint undertaking" through the lens of a definition of "joint venture" would be *contra legem*. (See also: Błachucki, 2012, p. 104–106). The economic independence is essential to the term "joint venture" while the term "joint undertaking" – in particular when construed in conjunction with Article 4(1) of the CCP Act – includes legally independent entities. (Dz. U. z 2007 Nr 50, poz. 331 z późn. zm.). Therefore, these two notions only partially overlap and this is one of the reasons why interpretation of the Polish notion cannot even supplementarily refer to the European one.

5. Conclusions

A final area of this analysis concerns some conclusions. Purposive interpretation has been sketched above in terms of the current fundamental values of law and the purposes of a given legal rule. So, the purposes of antitrust law influence the way the law in books becomes the law in action. (Miąsik, 2008, p. 34). The differences in the purposes of antitrust laws may result in identical or very similar rules being applied differently in different jurisdictions, for instance Polish jurisdiction and EU jurisdiction.

The first conclusion which I draw from the above concise review of Polish case law is that from time to time decision-makers refer to purposive (functional) interpretation in notes (justifications) of decisions. Frequently, it is pro-EU purposive interpretation of national antitrust law. Such an

interpretation seems to have two dimensions: a good as well as a bad influence on interpretation of the term "undertaking" as defined under Polish antitrust law. Its good influence can be seen from the decision-makers' perspective in that it allows to "seal" the personal scope of the prohibition of anticompetitive practices. It is mainly due to the prohibition of legalising activities prohibited by EU antitrust law. Perhaps this concept could be proclaimed a masterpiece of antitrust enforcement but in undertakings' eyes this would seem an over-statement because the concept does not work both ways. Even if under EU antitrust law activities were legal, under Polish antitrust law they could be illegal (pursuant to the EC Regulation 1/2003, Member States are allowed to adopt and apply on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings – stricter than Article 102 TFUE[12]). But one can get the impression that Polish competition authority more frequently uses purposive (functional) interpretation of unclear national provisions against parties suspected of the anticompetitive conduct than in favour thereof (like in case of the National Chemical and Agricultural Station).

The alternative is to appeal the decision to courts. They seem to have a much more common sense approach to purposive interpretation, in particular if severe fines, amounting to 10% of an undertaking's annual turnover, await the alleged violator or other adverse effect on his/her financial interests may result from the decision. In this context, it is worth remembering the outcome of the *Telekomunikacja Polska S.A.* (TP S.A.) case in 2008. In 2005, during the course of proceedings regarding the abuse of a dominant position, the UOKiK President decided to adopt an interim measures decision for the specified period (decyzja Prezesa Urzędu Ochrony Konurencji i Konsumentów z dnia 10 października DOK-127/05). In 2006 the decision-maker adopted a further decision (decyzja Prezesa Urzędu Ochrony Konurencji i Konsumentów z dnia 10 marca 2006 DOK-19/2006) amending the first decision and extending its validity for a further period, which was appealed by TP S.A. The courts of lower instances adopted the formula that the case initiated by the appellant should have been discontinued just after the UOKiK President had issued a decision on the merits of the case in relation to the abuse of a dominant position (decyzja Prezesa Urzędu Ochrony Konkurencji i Konsumentów z dnia 30 maja 2006 DOK-53/06). It was the Supreme Court who valued systemic and purposive interpretation above everything else and brought fresh ideas as well as new thinking into the case (postanowienie Sądu Najwyższego z dnia 14 listopada 2008, III SK 11/08). It took into account both the place of a rule allowing the extension of an interim measures within legislation and the purpose of this rule. The Supreme

Court ruled that the lower courts should not have discontinued proceedings because the extension decision could have adverse effect on financial interests of TP S.A.

Such an approach deserves wider application. But on the other hand it is inexplicable why anyone should be convinced that antitrust law could be reformed just by reforming its interpretation. I do not deny its capacity for constant development but amendments to the CCP Act are obviously needed. The draft bill to amend the CCP Act shows that an amending act is going to cover only chosen issues and not a comprehensive reform of antitrust rules. The vast majority of the drafted amendments are apparently to the benefit of decision-makers and do not contribute to supporting the rights of parties to antitrust proceedings. We enjoy decision-makers' own enjoyment of crossing Polish boundaries by EU law which allowed them to use EU-oriented purposive interpretation of antitrust law. But this pro-EU purposive interpretation has the disquieting feature of being used against the alleged violators. I would rather suggest more frequent search for a compromise between the methods of purposive interpretation and legitimate interests of undertakings (or alleged undertakings) instead of using it only in the public interest.

NOTES

[1] I have adopted the convention that by antitrust laws are meant areas of public laws protecting competition other than state aid regulation (an EU-style convention). The European Commission has in the last years started using the term "antitrust" alongside the traditional term "competition law"; (Wils, W., P., J., 2007). Is Criminalization of EU Competition Law the Answer? In Ehlermann, C. D., Atanasiu, I. (Eds.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, p. 278. According to an American-style convention, by antitrust laws are meant areas of laws protecting competition other than merger control and state aid regulation.

[2] English version at: www.uokik.gov.pl/download.php?plik=7624, accessed November 27, 2012.

[3] The Court of Competition and Consumer Protection (17th Division of the Regional Court in Warsaw), the Appeal Court in Warsaw and the Supreme Court. More (Piszcz, 2011, p. 2011, 51–52).

[4] From http://www.uokik.gov.pl/decyzje_prezesa_uokik3.php, accessed November 27, 2012.

[5] The order sets out the court's decision (conclusion) and the note (justification) shows how and why the court came to that decision.

[6] Some researchers consider systematic interpretation as occupying a position that is both privileged and in some way grounding, in relation to the different particular methods of interpretation; see (Kerchove, Ost, 1994, p. 3).

[7] The same term is defined in different ways in various legal acts; see (Molski, 2008, p. 235).

[8] Not yet reported.

[9] Renamed as Treaty on the Functioning of the European Union (as of December 1, 2009), hereinafter referred to as TFEU.

[10] ECJ judgment of February 13, 1968, C-14/68, Walt Wilhelm et al. v. Bundeskartelamt, European Court reports 1969, p. 00001.

[11] See Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation); OJ L 2004, No 24, p. 1; Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C 2008, No 95, p. 1).

[12] Council Regulation (EC) No. 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 2003/1/1.

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VERSITA

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 33 (46) 2013

DOI: 10.2478/slgr-2013-0018

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ACQUISITION AND LOSS OF THE PUBLIC LAW STATUS OF ENTREPRENEUR – INTERPRETATION PROBLEMS OF PUBLIC COMMERCIAL LAW IN POLAND

Abstract. The obligation of the legalization of entrepreneurial activity from Article 14 of The Act of July 2, 2004 on the freedom of entrepreneurial activity caused deliberations regarding constitutive or declarative character of the legalization entry and as a result, created a problem with indication of the moment when the public law status of an entrepreneur is acquired (or respectively – lost). The answer to the question whether Central Register and Information of Entrepreneurial Activity or the register of entrepreneurs of the National Court Register have also the creation function incites many controversies and is subject to discussions, in the process of which two main standpoints were formed. It is also important to note that the resolution of the discussed issue not only holds scientific value, but above all, it has significant importance in practice. Therefore, it is necessary and even essential. Furthermore, it is typical for this issue that concerns related thereto and arguments raised during the discussion have their basis in the legislation in force and in fact, encapsulate the favoured path of its interpretation.

1. Introduction – the essence of the problem

The Act on the Freedom of Entrepreneurial Activity (ustawa z 2 lipca z 2004 o swobodzie działalności gospodarczej (Dz. U. z 2010 Nr 220, poz. 1447 t.j.)) stipulates the rules of undertaking, engaging in and terminating entrepreneurial activity on the territory of the Republic of Poland. Under Article 14 of this Act (Dz. U. z 2010 Nr 220, poz. 1447 t.j.), the basic obligation of the entrepreneur is the legalization of entrepreneurial activity, which takes place by a registration entry in the appropriate register – Central Register and Information of Entrepreneurial Activity (Centralna Ewidencja i Informacja o Działalności Gospodarczej, CEIDG) or the Na-

ISBN 978-83-7431-377-3 ISSN 0860-150X

tional Court Register of Entrepreneurs (rejestr przedsiębiorców Krajowego Rejestru Sądowego, KRS). In addition, Article 14 of Act on the Freedom of Entrepreneurial Activity (Dz. U. z 2010 Nr 220, poz. 1447 t.j.) decides registers applicability based on personal criterion. It indicates that CEIDG, regulated in detail by Articles 23–39 of Act on the freedom of entrepreneurial activity (Dz. U. z 2010 Nr 220, poz. 1447 t.j.), is applicable in regard to legalization of natural persons' entrepreneurial activity. At the same time, the National Court Register hereinafter (Krajowy Rejestr Sądowy, KRS) register of entrepreneurs, structured according to the (ustawa z 20 sierpnia 1997 – o Krajowym Rejestrze Sądowym. (Dz. U. z 1997 Nr 121, poz. 769 ze zm.)). Act on the National Court Register hereinafter is deemed applicable to the legalization of entrepreneurial activity of legal persons and of entities that do not have a legal personality but are granted legal capacity by an act of law.

In this way, typical for the so called "constitution of entrepreneurial activity", Act on the freedom of entrepreneurial activity determines the coexistence on Polish territory of two registers applicable for the legalization of entrepreneurial activity. (Stawecki, 2004, p. 31 and next).

It is necessary to emphasize that, despite differences in the normative structure, CEIDG and the KRS register of entrepreneurs have identical functions: they serve to legalize entrepreneurial activity, which ensures (or at least intends to ensure) access to information about entrepreneurial activity and entrepreneurs, thus these registers indirectly secure proper performance of functions of the state in the economy. (Kosikowski, 2010, p. 117–203). The legal rationale for the obligation of legalization of entrepreneurial activity (equated with the register entry) expressed in this way does not raise any concerns and is commonly accepted in the public commercial law jurisprudence.

The above does not mean, however, that the issue of legalization of entrepreneurial activity is free of any doubt. On the contrary, the obligation from Article 14 of Act on the Freedom of Entrepreneurial Activity (Dz. U. z 2010 Nr 220, poz. 1447 t.j.) caused deliberations regarding constitutive or declarative character of the legalization entry and as a result, created a problem with indication of the moment when the public law status of an entrepreneur is acquired (or respectively – lost). The answer to the question whether, apart from the abovementioned functions, CEIDG and the KRS register of entrepreneurs have also the establishing function – in other words, does the registration entry into CEIDG or into the KRS register of entrepreneurs create the entrepreneur – incites many controversies and is subject to discussions, in the process of which two main standpoints were formed.

It is important to note that the resolution of the discussed issue not only holds scientific value (jurisprudential and academic), but above all, it has significant importance in practice.[1] Therefore, it is necessary and even essential. It is typical for this issue that concerns related thereto and arguments raised during the discussion have their basis in the legislation in force and in fact, encapsulate the favoured path of its interpretation.

2. Declarative character of the registration entry into CEIDG and into the KRS register of entrepreneurs

The first standpoint, indicating a declarative character of the registration entry into CEIDG and into the KRS register of entrepreneurs, is based on the literal interpretation of the systemic legal definition of the term "entrepreneur".

According to Article 4 of Act on the Freedom of Entrepreneurial Activity (Dz. U. z 2010 Nr 220, poz. 1447 t.j.) an entrepreneur is a natural person, legal person or entity that is not a legal person but it is granted legal capacity by a separate act of law, who engages in entrepreneurial activity in its own name. It is not difficult to notice that the scope of the meaning of the term "entrepreneur" in Article 4 of Act on the Freedom of Entrepreneurial Activity (Dz. U. z 2010 Nr 220, poz. 1447 t.j.) is indicated by describing the criteria decisive for identification. These are: 1) personal criterion – indicating the categories of entities that may be recognized as entrepreneurs,[2] 2) subjective criterion – describing the activity of an entrepreneur,[3] 3) functional criterion – providing that only a natural person, legal person or entity that does not have legal personality but is granted legal capacity by a separate act of law, which engages in entrepreneurial activity in its own name, may be classified as an entrepreneur. (Gronkiewicz-Waltz, 2009, p. 216).

Referring to the criteria described in Article 4 of Act on the Freedom of Entrepreneurial Activity the supporters of the first standpoint claim that the fulfilment of the criteria indicated in the legal definition, which is, above all, engaging in entrepreneurial activity in one's own name, determines the acquisition of the status of an entrepreneur. Consequently, they deem the registration entry into CEIDG or into the KRS register of entrepreneurs to have only declarative character. This is because they believe that it does not create an entrepreneur, as it only constitutes a condition to undertake entrepreneurial activity, which confirms that status, and allows engagement in entrepreneurial activity.

The above presented view, which seemed to be dominant in the jurisprudence of the public commercial law (Katner, 2003, p. 60–61; Szydło, 2005, p. 101–104; Czepita, Kuniewicz, 2007, p. 62; Gronkiewicz-Waltz, Jaroszyński, 2009, p. 285; Pawełczyk, 2007, p. 39–40; Zamojski, 2009, p. 250–251; Pawełczyk, 2005, p. 38–39), is also confirmed by the judicial decisions.[4] Its correctness is reflected by the idea that the lack of registration entry in CEIDG or in the KRS register of entrepreneurs should not free the entities actually engaged in entrepreneurial activity from the requirements imposed by the law on entrepreneurs (Walaszek-Pyzioł, 1999, p. 5), or that the lack of registration entry does not mean that the entity is not an entrepreneur, when it does in fact engage in entrepreneurial activity but it does not register it. (wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie z dnia 7 listopada 2007, VI SA/Wa 1852/05).

In this context, the view regarding the declarative character of legalization entry has a normative justification (the wording of Article 4 of Act on the Freedom of Entrepreneurial Activity – Dz. U. z 2010 Nr 220, poz. 1447 t.j.) and ensures desired effects in practice. For the purpose of classifying an entity – one that engages in entrepreneurial activity in its own name, but without a registration entry in CEIDG or the KRS register of entrepreneurs – as an entrepreneur is to enforce restrictions that constrain all entrepreneurs (and given entrepreneurial activity).

3. Constitutive character of the registration entry into CEIDG and into the KRS register of entrepreneurs

However, it is important to note that the issue of the character of the registration entry into CEIDG or into the KRS register of entrepreneurs – and as a result the issue of acquisition and loss of the public law status of an entrepreneur – is also interpreted differently. According to the second standpoint, the legalization entry has a constitutive character.[5] It means that it creates an entrepreneur and it should be identified with the moment of acquisition of the public law status as an entrepreneur. (Katner, 2003, p. 60). Also this statement is supported normatively – it takes its base from Article 4 of Act on the Freedom of Entrepreneurial Activity (Dz. U. z 2010 Nr 220, poz. 1447 t.j.) read with Article 14 and Article 6 of that Act.

Article 6 section 1 of Act on the Freedom of Entrepreneurial Activity,[6] while referring to the constitutionally guaranteed principle of the freedom of entrepreneurial activity,[7] indicates that this freedom should be perceived in three stages i.e. undertaking, engaging in and terminating entrepreneurial

activity, which even though inseparable (focusing on consecutive scopes of economic freedom), can be interpreted independently. (Walaszek-Pyzioł, 1994, p. 36–48; Kosikowski, 2011, p. 63). Considering the above, it is then important to note that Article 14 of Act on the freedom of entrepreneurial activity, by stipulating the legalization obligation, forms the stage of undertaking the activity,[8] whereas Article 4 of the Act on the Freedom of Entrepreneurial Activity, by forming a legal definition of an entrepreneur, already refers to the freedom of engaging in entrepreneurial activity.[9] Consequently, the entity engaging, in its own name in entrepreneurial activity Article 4 of Act on the Freedom of Entrepreneurial Activity – (Dz. U. z 2010 Nr 220, poz. 1447 t.j.) is an entrepreneur, where *sine qua non* condition of legally engaging in the activity is to previously legally undertake the activity, which was made dependant on prior acquisition of the appropriate registration entry in CEIDG or in the KRS register of entrepreneurs – Article 14 of Act on the Freedom of Entrepreneurial Activity (Dz. U. z 2010 Nr 220, poz. 1447 t.j.). It means that if the fundamental restriction of engaging in entrepreneurial activity is engaging in it in accordance to the law in force (i.e. by the legalization entry), then the public law status of an entrepreneur is acquired by an entity at the moment of the acquisition of the entry.[10]

Also, this standpoint (similar to the first of the ones described) is confirmed by judicial decisions. The courts decided that the status of an entrepreneur is obtained by an entity through meeting the criteria indicated by Article 4 and Article 2 of Act on the Freedom of Entrepreneurial Activity (Dz. U. z 2010 Nr 220, poz. 1447 t.j.), however, it is also essential to meet a formal condition, which is to acquire legalization entry, as it is the entry that creates the entity and without it the existence of the entrepreneur remains, in principle, without legal significance.[11] This conclusion is not contradicted by the fact that the entry does not always equal actual engagement in entrepreneurial activity, but it only constitutes a legal possibility of engagement and substantiates the engagement.[12] It is important to remember that it is the entry that has the decisive significance from the perspective of certainty and security of legal transactions – therefore, as an obligation it constitutes a priority for any entity interested in engaging in entrepreneurial activity.[13]

Recognizing the constitutive character of the registration entry in CEIDG or in the KRS register of entrepreneurs is also supported by the legal construction of suspension of entrepreneurial activity. In the light of Article 14a of Act on the Freedom of Entrepreneurial Activity (Dz. U. z 2010 Nr 220, poz. 1447 t.j.), an entity that is not in fact engaged in entrepreneurial

activity, but refraining from engagement therein,[14] does not lose this status and is still treated as an entrepreneur.[15]

At the same time, it is necessary to note that the thesis regarding constitutive character of the registration entry may incite doubts. On one hand, the obligation of legalization does not include everyone entitled to and engaged in entrepreneurial activity,[16] or as a matter of law accepts situations when an entity engaged in entrepreneurial activity is subject to registration entry in any register.[17] On the other hand, entities that are not engaged in entrepreneurial activity are obligated to acquire a registration entry and (based on the obligatory entry) are *ex lege* classified as entrepreneurs.[18] Furthermore, material and personal exemptions from the categories: entrepreneurial activity and entrepreneur, provided by the law, lead to a situation where it is possible not to be an entrepreneur, despite engaging in entrepreneurial activity in one's own name or a type of entrepreneurial activity may not match all the relevant characteristics from Article 2 of Act on the freedom of entrepreneurial activity (Kosikowski, 2010, p. 230). The situation is additionally complicated by the fact that CEIDG and the KRS registers of entrepreneurs are not the only registers that may determine legality of the engagement in entrepreneurial activity. (Sowiński, 2007, p. 225 and next). Moreover, in practice there are often instances when an entity which is displayed in the register is not, in fact, engaged in entrepreneurial activity.[19]

4. Conclusions – creation and application of the law

The abovementioned constitute the basis of the argument for rejecting the view on the constitutive character of the registration entry in CEIDG and in the KRS register of entrepreneurs. At the same time, they confirm the correctness of the standpoint, which acknowledges the criteria indicated in the legal definition of Article 4 of Act on the Freedom of Entrepreneurial Activity (Dz. U. z 2010 Nr 220, poz. 1447 t.j.) as determining.

However, it is important to note that, when deciding on the issue of the public law status of an entrepreneur, the main assumption of the statement regarding the determining role of the criteria included in the legal definition of Article 4 of Act on the Freedom of Entrepreneurial Activity (Dz. U. z 2010 Nr 220, poz. 1447 t.j.) is classifying an entity, which engages in entrepreneurial activity in its own name but without a registration entry in CEIDG or in the KRS register of entrepreneurs, as an entrepreneur.[20] Thus this statement has important significance in practice but in fact does

not resolve the issue of acquisition or loss of the public law status of an entrepreneur. It is a consequence of ambiguity, contradiction and lack of precision that characterize this branch of national law.

It is also important to emphasize that this statement is a result of the literal interpretation of Article 4 Act on the Freedom of Entrepreneurial Activity (Dz. U. z 2010 Nr 220, poz. 1447 t.j.). However, it is necessary to remember that, even though during the process of interpretation of the law the literal interpretation takes priority (Oliwniak, 2007, p. 126), this priority is not absolute. Despite the supplementary (complementary and supporting) function attributed to the systemic and functional interpretation, they play a significant role. They resolve doubts that arise from the language base, they allow a choice between two different results of the literal interpretation, modifying these results by taking into account the character of the legal system and the intentions of the legislator (legal rationale), and even justify deviation from the literal meaning.[21]

Considering the above, in particular the intended reasons for constituting the obligation of legalization of entrepreneurial activity in the light of Article 14 Act on the Freedom of Entrepreneurial Activity (Dz. U. z 2010 Nr 220, poz. 1447 t.j.), the correct result of interpretation is the recognition of the binding role of the registration entry in CEIDG or the KRS register of entrepreneurs. Firstly, it is supported by the wording of the applicable norms, in other words, it is a result of literal interpretation. Secondly, it takes into account the goals intended by the legislator and character of the legal system in the broadest way, that is, it corrects the result of the literal interpretation by referring to functional and systemic values.

This conclusion is not denied by the flaws or lacks of the law that specifies the rules for undertaking, engaging in and terminating entrepreneurial activity. They only confirm a significant conclusion, according to which legislation should be a conscious and well considered process. The fundamental duty of the legislator is then to create good law, which means making resolutions that are essentially appropriate and expressing them in a precise and communicative way in the legal acts creating a clear and coherent system. (Wronkowska, Zieliński, 2004, p. 7). For good law is a fundamental condition for the correct interpretation of legal norms.[22]

Summing up, it may be concluded that the problem of acquisition and loss of the public law status as an entrepreneur is mainly the result of the activity of irrational legislators, who by their actions in the sphere of law making, considerably impede and at times, even render correct interpretation and application of the law. Resolution of the issue discussed in this study cannot be limited to the creation, acceptance or defense of a cer-

tain concept but should consist in modernization of the rules of legalization of entrepreneurial activity. It is particularly crucial, when the flaws of the current legislation in force have been recognized.

NOTES

[1] Resolving the issue of acquisition and loss of the public law status of an entrepreneur is directly connected with the enforcement by the state and its institutions of the obligations provided by the law and imposed on entrepreneurs. For it is clear that the obligations imposed on entrepreneurs should only be enforced on entrepreneurs and not on entities that do not have their status.

[2] According to Article 4 of Act on the Freedom of Entrepreneurial Activity (Dz. U. z 2010 Nr 220, poz. 1447 t.j.) only a natural person, a legal person or an entity that does not have legal personality but it is granted legal capacity by a separate act of law can be classified as entrepreneurs.

[3] According to Article 4 of Act on the Freedom of Entrepreneurial Activity (Dz. U. z 2010 Nr 220, poz. 1447 t.j.) it is the entrepreneurial activity in the meaning of Article 2 of that Act. According to Article 2 of Act on the Freedom of Entrepreneurial Activity entrepreneurial activity is a manufacturing, construction, commercial, service activity or activity that consist in seeking, recognizing and extracting mineral deposits as well as professional activity directed at achieving profit, conducted in an organized and continuous way.

[4] See sentences of (wyrok Naczelnego Sądu Administracyjnego z dnia 25 października 2006, II GSK 179/06), see (wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie z dnia 7 listopada 2006, VI SA/Wa 1852/05), (wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie z dnia 21 marca 2006, VI SA/Wa 2215/05), (wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie z dnia 4 grudnia 2007, VII SA/Wa 1578/07, wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie z dnia 20 listopada 2007, VII SA/Wa 1444/07), (wyrok WSA w Warszawie z dnia 9 listopada 2007, (VII SA/Wa 1394/07)).

[5] It is important to emphasize that the entry is not an administrative decision but constitutes a perfunctory action. Contrary to the previous legal regulation, in current state of legislation the entry does not grant the entrepreneur a right to engage in entrepreneurial activity nor does it lift a general ban of engaging in entrepreneurial activity. See (Niezgódka-Medkova, 1990, p. 112–116); (Kozioł, 2009, p. 35–49); (Waligórski, 2006, p. 112); (Kosikowski, 2010, p. 149); (Szydło, 2004, p. 167–168); (Powałowski, 2007, p. 126); (Zdyb, 1997, p. 367–368); (Powałowski, 2006, p. 91–97); (otherwise: Pater, 1989, p. 86–88).

[6] According to Article 6 section 1 of Act on the Freedom of Entrepreneurial Activity (Dz. U. z 2010 Nr 220, poz. 1447 t.j.) undertaking, engaging in and terminating entrepreneurial activity is free for everyone on equal legal terms, providing that the requirements stipulated by the law are kept.

[7] In this respect it duplicates the content of the Constitution of the Republic of Poland of 1997 (Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 (Dz. U. 1997 Nr 78, poz. 483 ze zm.)); see Article 20 read with Article 22 of the Polish Constitution.

[8] According to Article 14 of Act on the Freedom of Entrepreneurial Activity (Dz. U. z 2010 Nr 220, poz. 1447 t.j.) the entrepreneur can undertake entrepreneurial activity on the day (...).

[9] According to Article 4 Act on the Freedom of Entrepreneurial Activity (Dz. U. z 2010 Nr 220, poz. 1447 t.j.) an entrepreneur is (...) engaged in entrepreneurial activity in its own name.

[10] (Kosikowski, 2010, p. 230); See wyrok Naczelnego Sądu Administracyjnego z dnia 10 października 2006, II GSK 140/06), which states that "the actions of the public administration institution of entering an entry into the register creates a legal possibility of engaging in entrepreneurial activity, which is a condition of its undertaking".

[11] (Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie z dnia 22 stycznia 2008, VI SA/Wa 1957/07); (wyrok Sądu Okręgowego w Białymstoku z dnia 15 stycznia 2009, VII GC 116/08; compare (Szanciło, 2005, p. 6).

[12] Compare (wyrok Naczelnego Sądu Administracyjnego z dnia 21 czerwca 2007, II GSK 70/07), (wyrok Naczelnego Sądu Administracyjnego z dnia 10 października 2006, II GSK 140/06), (wyrok Naczelnego Sądu Administracyjnego z dnia 25 października 2006, II GSK 179/06), (wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie z dnia 21 marca 2006, VI SA/Wa 2215/05), (wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie z dnia 28 stycznia 2009, VII SA/Wa 1374/08), (wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie z dnia 4 grudnia 2007, VII SA/Wa 1578/07), (wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie z dnia 20 listopada 2007, VII SA/Wa 1444/07), (wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie z dnia 9 listopada 2007, VII SA/Wa 1394/07)).

[13] Lack of information about termination of entrepreneurial activity creates a presumption that the activity is still conducted and that the entity is still an entrepreneur; see the (wyrok Sądu Najwyższego z dnia 20 października 2005, II CK 120/05), (wyrok Naczelnego Sądu Administracyjnego z dnia 12 stycznia 1994, III SA 835/93), (wyrok Naczelnego Sądu Administracyjnego z dnia 22 października 1998, II SA 645/98), (Bieniek-Koronkiewicz, Sieńczyło-Chlabicz, 2002, p. 15–24).

[14] After meeting material and procedural conditions which were stipulated to determine the possibility of suspending entrepreneurial activity.

[15] The lack of actual engagement in entrepreneurial activity does not affect the public law status of an entrepreneur, which confirms the fact that the status is dependent on the registration entry in CEIDG or entry in the KRS register of entrepreneurs.

[16] According to Article 3 of Act on the National Court Register (Dz. U. z 1997 Nr 121, poz. 769 ze zm.) the register covers entities, which are required by a provision of law to acquire a registration entry into this register. Consequently, *inter alia* church legal persons, universities, cultural institutions and healthcare enterprises, which are registered outside of the National Court Register system, are not bound by the obligation to acquire a registration entry into the KRS register of entrepreneurs even when they engage in entrepreneurial activity; (Kosikowski, 2001, p. 63–65), (Kosikowski, 2010, p. 231), (Skubisz, Trzebiatowski, 2002, p. 8–21).

[17] It pertains to a corporation in the process of formation, which, as the Article 14 section 4 of Act on the Freedom of Entrepreneurial Activity (Dz. U. z 2010 Nr 220, poz. 1447 t.j.) clearly states, may undertake entrepreneurial activity before the acquisition of the entry.

[18] The obligation of registration in the KRS register of entrepreneurs binds different categories of entities, while all of the entities indicated in Article 36 of Act on the National Court Register (Dz. U. z 1997 Nr 121, poz. 769 ze zm.) are deemed entrepreneurs by the law, even if in practice they do not engage in entrepreneurial activity in their own name. In particular this pertains to commercial law corporations and research institutes, which may or may not have entrepreneurial activity as their subject of operations. Allowing for the possibility to engage in entrepreneurial activity does not equal the actual engagement; See (Kosikowski, 2001, p. 60–61), (Pawełczyk, 2005, p. 39–40). Otherwise (Zamojski, 2009, p. 250–251).

[19] This entity is characterized by the status of an entrepreneur and does not lose it until the moment of deletion from register, even though it does not match the conditions indicated in the legal definition. See (Kosikowski, 2010, p. 231).

[20] Due to the necessity (obligation) to enforce obligations imposed on entrepreneurs and connected with entrepreneurial activity.

[21] See more in (Morawski, 2010, p. 70–71). Compare the (orzeczenie Sądu Najwyższego z dnia 15 stycznia 2003, III PZP 20/02, uchwała siedmiu sędziów Sądu Najwyższego z dnia 21 maja 2004, I KZP 42/03), (wyrok Sądu Apelacyjnego w Warszawie z dnia 21 września 2004, II AKa 344/04).

[22] (Morawski, 2010, p. 24). See (uchwała Sądu Najwyższego z dnia 20 stycznia 2000, I KZP 48/99), (wyrok Sądu Najwyższego z dnia 15 maja 2000, V KKN 88/00), (wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie z dnia 21 grudnia 2004, III SA/Wa 1874/04).

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ISBN 978-83-7431-377-3

ISSN 0860-150X