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### Case-law commentaries:

#### ADMINISTRATIVE LAW AND PROCEDURE

1. Resolution the Supreme Administrative Court (composition of seven judges) of 7 December 2009 in Case I OPS 6/2009

Mariusz Bogusz, Ph.D., professor at the University of Gdansk

***Res iudicata* principle in the proceedings before administrative courts and revision of a final administrative decision in the procedure concerning validity of such a decision.**

#### Summary:

The commentary presents the analysis of the resolution of the Supreme Administrative Court which concerns the scope and effects of *res iudicata* of the administrative court judgment dismissing a complaint about the form of a public administration conduct. The Commentator approves of the new emerging case-law to the effect that *res iudicata* appears only with reference to the legal defects of the form of a public administration conduct that are directly referred to in the administrative court judgment dismissing the complaint, while *res iudicata* does not appear with reference to legal defects of the form of a public administration conduct other than covered by the court judgment.

2. Judgment of the Provincial Administrative Court in Poznan of 30 June 2010 in Case II SA/Po 151/10

Bartosz Majchrzak, Ph.D., lecturer at the Cardinal Stefan Wyszyński University of Warsaw, Warsaw Seminary of Administration Axiology

**Illegal construction and requirements of a development project for the adjoining plot of land.**

#### Summary:

In the light of conclusions drawn in the judgment it can be assumed that the notion of "adjoining developed plot of land" in Article 61(1)(1) of the Local Planning and Development Act does not include plots developed illegally as long as the illegality has been confirmed in the final deconstruction order. The fact that the authority deciding on the construction project cannot independently declare the construction on the adjoining plot illegal stems from legislative allocation of the said competence to the construction inspection bodies. The above-mentioned authority is under obligation to consider the fact of the illegal construction confirmed in a final decision, while this obligation is in particular the consequence of the democratic rule of law principle stating that unlawful conduct cannot bring any profits.

3. Judgment of the Provincial Administrative Court in Gdansk of 27 March 2008 in Case I SA/Gd 974/07

Bogumił Pahl, Ph.D., lecturer at the Warmia and Mazury University of Olsztyn

**Taxation of lamp posts located on road lanes of public roads owned by an entrepreneur.**

#### Summary:

Taxation of constructions located on road lanes of public roads raises numerous doubts in the practice of local tax authorities. One of the problems is the imposition of property tax on lamp posts. This issue was concerned by the Provincial Administrative Court in Gdansk in the judgment under consideration. The judgment is vital in the context of the requirements of tax exemption in Article 2(3)(4) of the Local Taxes and Charges Act. However, not every opinion of the Court is to be approved.

4. Judgment of the Provincial Administrative Court in Krakow of 14 April 2010 in Case II SA/Kr 1774/09

Diana Trzcińska, Ph.D., court clerk of the Provincial Administrative Court in Gdansk

**Notion of the ecological organization.**

#### Summary:

In the present commentary, the Author attempts to assess the correctness of the decision and the reasoning given in the judgment of the Provincial Administrative Court in Krakow of 14 April 2010 in Case II SA/Kr 1774/09. Two main issues were considered in the context of the judgment; firstly, the question of a substantive nature connected with the status of an ecological organization as a party to the proceedings before ordinary and administrative courts, namely the interpretation of the notion of the "ecological organization" given in the context of such a status; and secondly, the question connected with the procedural assessment of the court given with reference to the situation of the lack of the legal interest of the part of an ecological organization in the meaning of Article 50(1) of the Procedure before Administrative Courts Act as grounds for dismissal or

rejection of a complaint. The commentary deals in particular with the analysis of the notion of the "ecological organization" which has an immediate effect on the legal standing of the association and its status as a party in the proceedings before administrative courts.

5. Judgment of the Provincial Administrative Court in Olsztyn of 28 October 2008 in Case II SA/OI 737/08  
Piotr Uziębło, Ph.D., lecturer at the University of Gdansk

**Legislative initiative of municipality residents.**

**Summary:**

The Author disapproves of the justification given in the judgment under consideration, since the Provincial Administrative Court has acknowledged the absolute inadmissibility of the initiative of the municipality residents with the view to the enactments of the local law. The Author is of the opinion that this conclusion cannot be approved as in any case the Local Government Act does not object to the regulation of the issue on the statute level, thus leaving to the municipalities as such the role of a decision-maker as to who can exercise this right. However, the Author agrees with the opinion of the Court that local councillors cannot be obliged to bring as their own the initiatives proposed by a group of residents.

6. Judgment of the Supreme Administrative Court of 8 June 2010 in Case II OSK 642/10  
Katarzyna Właźlak, Ph.D., lecturer at University of Lodz

**Organisational independence of local government units.**

**Summary:**

The commentary fully approves of the standpoint of the Supreme Administrative Court expressed in the judgment of 8 June 2010. The limitation in the scope of the statute is to stem directly from the legislative act, while infringements following from the provisions of this act cannot be presumed or established by analogy. The regulation of the procedure followed by committees, including the revision committee, can be different to the procedure followed by the district council and board. The fact that in the case of an undecided vote the statute attributes the deciding vote to the chairman of the committee does not infringe Article 19 in conjunction with Article 16(2) of the District Government Act and it is not contrary to the equality before the law principle.

7. Judgment of the Provincial Administrative Court in Olsztyn of 2 March 2010 in Case II SA/OI 19/10  
Piotr Brzozowski, legal trainee in Olsztyn

**Form of refusing authorization to gain access to public information.**

**Summary:**

The commentary is of critical nature and the Author proves that inconsistency in the case-law of administrative courts makes it problematic for the bodies under obligation to give access to public information to apply legal forms of refusing the authorization to gain access to such information. The Commentator holds against the Court that it has not quashed a decision that had been issued without legal grounds. In the opinion of the Author, under no circumstances may the Court leave in force a decision that is burdened with a gross legal defect. It is unacceptable even with the view to presumed benefits an individual can gain in the proceedings as the individual legal interest cannot outweigh the interest of the rule of law.

**CIVIL LAW AND PROCEDURE, COMMERCIAL LAW**

8. Judgment of the Appeal Court in Bialystok of 22 April 2010 in Case I ACa 140/10  
Bartłomiej Gliniecki, Ph.D., lecturer at the University of Gdansk

**Legal status of the land development contract.**

**Summary:**

The commentary disapproves of the establishment of the legal status of the land development contract that combines obligations particular to different types of contracts. Divergent opinions stem from the qualification of the land developer obligation according to which the developer has to construct a particular building for remuneration. This obligation can be regarded similar to the substance of a specific work contract, a construction contract, or an investment agency contract. Depending on the approach, each of the qualifications gives different effects in terms of the rights and obligations of the party to the land development contract.

9. Judgment of the Supreme Court of 15 July 2010 in Case IV CSK 33/10  
Anna Sylwestrzak, Ph.D., lecturer at the University of Gdansk

**Legality of contractual regulation of the delay in rent payments on the part of the lessee.**

**Summary:**

Parties to the lease contract can regulate the effects of the delay in rent payments on the part of the lessee differently to the regulation of Article 703 of the Civil Code and, therefore, the sanction for the delay can be stricter. Lessee, in the relationship with the lessor, is not to be regarded as a weaker party.

10. Judgment of the Supreme Court of 15 June 2010 in Case II CNP 8/10

Emilia Wiczorek, Ph.D., lecturer at the College of Management of Gdansk

**Extraordinary meeting of the shareholders of a limited liability company.****Summary:**

In the context of the judgment under consideration, the key issue is the answer to the question whether the failure to call an extraordinary meeting of the shareholders gives rise to civil law consequences justifying damage claims against the company. It can be concluded that the answer is negative unless the obligation to call extraordinary meetings on every request of the shareholders empowered to make such a requirement follows from the manager contract concluded with the board member. As a consequence, the board member who does not call the extraordinary shareholders meeting risks only the loss of the shareholders' confidence which goes in pair with his or her dismissal or non-appointment for the next term.

11. Resolution of the Supreme Court of 23 September 2010 in Case III CZP 57/10

Sebastian Wojdył, legal counsel in Gdansk

**Application to an arbitration court for declaration of validity of an act in law.****Summary:**

The commentary is partly critical about the decision of the Supreme Court concerning the determination of the dispute on the existence of a legal relation before an arbitration court. Having shared this opinion, the commentary refers to the inconsistent reasoning underlying the resolution of the Supreme Court, in particular the issue of the effects that substantive provisions have on the analysis of the civil procedure regulations. While the justification appears to give priority to the procedure, it also indicates that it is necessary to take into consideration the disposability of the subject of the dispute under civil law. The Author is of the opinion that this conclusion is not justified and the issue of arbitration capacity is to be assessed only on the basis of the procedural regulations.

**FINANCIAL LAW**

12. Judgment of the Provincial Administrative Court of 4 February 2010 in Case I SA/Łd 768/09

Wojciech Jasiński, Ph.D., lecturer at the University of Wrocław

**Legal nature of the amounts ordered under the Law on complaints about a breach of the right to the determination of a case in the preliminary proceeding conducted or supervised by a public prosecutor or the right to a trial within a reasonable time.****Summary:**

The commentary deals with the issue of the legal nature of the amounts ordered under the Law on complaints about unreasonable length of proceedings and the consequences it brings in the sphere of the tax law. The standpoint of the Provincial Administrative Court in Łódź has been disapproved of, as the Court stated that such amounts are neither compensation nor satisfaction which makes them a taxable income. However, a profound analysis of the nature of such amounts leads to a conclusion that they are a kind of satisfaction and thus they are not to be taxed.

**CRIMINAL LAW AND PROCEDURE**

13. Judgment of the Appeal Court in Katowice of 8 April 2009 in Case II AKa 63/09

Piotr Gensikowski, Ph.D., judge of the District Court in Grudziądz

**Clause prohibiting accumulation in the criminal trial compensatory decisions under Article 415(5) second sentence of the Criminal Procedure Code and probation obligation under Article 72(1)(8) of the Criminal Code.****Summary:**

In the commented judgment of 8 April 2009 the Appeal Court in Katowice is of the negative opinion on the issue whether the clause prohibiting accumulation in the criminal trial compensatory decisions provided for in Article 415(2) second sentence of the Criminal Procedure Code prevents from imposing on the perpetrator the obligation, under Article 72(1)(8) of the Criminal Code, to perform a previous compensatory ruling. The assessment of this standpoint in the present commentary required, at first, defining the nature of the obligation provided for in Article 72(1)(8) of the Criminal Code. Defining the nature of this obligation made it possible to consider the issue whether imposition of this obligation on the perpetrator is excluded by Article 415(5) second sentence of the Criminal Procedure Code.

14. Order of the Supreme Court of 30 September 2010 in Case I KZP 16/10

Jacek Potulski, Ph.D., lecturer at University of Gdansk

**Company board member as a person performing public functions.**

**Summary:**

The commentary refers to the deliberations of the Supreme Court on penalization of corruption in companies in which the State Treasury is a stakeholder or a stockholder. The commentary critically analyses the argumentation of the Supreme Court. The Author refers to the previous case-law on the matter of public agents. However, this does not mean that the order under consideration does not come in line with the earlier case-law; to the contrary, it is a situation of divergences between the case-law and the legal doctrine, in particular with the reference to the dispute on the qualification of a board member of a state-owned company as a person performing public functions.

15. Judgment of the Constitutional Court of 18 November 2010 in Case P 29/09

Krzysztof Woźniewski, Ph.D., lecturer at the University of Gdansk

***Ne bis in idem* rule in the context of appropriate legislation.**

**Summary:**

The commented judgment considers the issue of the obstacle of the *ne bis in idem* principle in the criminal procedure (Article 17(1)(7) of the Criminal Procedure Code) in relation to the decision of the Social Insurance Fund, issued on the basis of Article 24(1) of the Social Insurance System Act, on the additional charge due to the lack of payment or underpayment of social insurance or health insurance contributions. Such a conduct of the contributions payer raises the issue of its criminal aspect as only the acts prescribed by the criminal legislation can be bound with the *ne bis in idem* principle. The Constitutional Court stated that the additional charge is a legal measure of a repressive (criminal and administrative) nature and its application is to be assessed in the light of the *ne bis in idem* principle. While imposing excessively repressive measures under the same or even similar facts should be avoided, the Author of the commentary is of the opinion that there are, however, serious doubts as to including decision imposing additional charge on the contribution payer into the scope of the *ne bis in idem* principle.

16. Judgment of the Appeal Court in Lublin of 13 November 2008 in Case II AKa 166/08

Karolina Irczyc-Cholewska, doctoral student at the University of Gdansk

**Complicity and participation in an organized criminal group.**

**Summary:**

The commentary presents the issue of distinguishing complicity, as a form of committing a criminal act, from participation and acting within an organized criminal group in the light of the requirements listed in Article 258(1) of the Criminal Code as well as the issue of cooperation with the group, understood as a separate construction additional to complicity and acting within an organized criminal group.

17. Judgment of the Appeal Court in Gdansk of 17 September 2009 in Case II AKa 181/09

Mikołaj Małecki, doctoral student at the Jagiellonian University

**Three problems with the continuous criminal act.**

**Summary:**

The Appeal Court in Gdansk has formed several controversial opinions concerning the subjective aspect of the continuous criminal act (Article 12 of the Criminal Code) and the requirement of the "homogeneity" of behaviours that it consists of. The commentary discusses and corrects deficiencies of the argumentation of the Appeal Court. The Author of the commentary is of the opinion that conducts that appeared within the continuous criminal act do not have to be "homogeneous". Moreover, "premeditated intent" is a factual question. Existence

of such an intent depends on establishing how many types of criminal acts the perpetrator fulfilled by his conducts.

## **LABOUR LAW**

18. Judgment of the Supreme Court of 16 March 2010 in Case I PK 203/09

Helena Szewczyk, Ph.D., lecturer at the Silesia University in Katowice

### **Substance of the notion of mobbing.**

#### **Summary:**

Proving the effects of mobbing in the form of health deterioration is not necessary in order to establish whether there has been a situation of mobbing in the meaning of Article 94<sup>3</sup> of the Labour Code. While the conduct of the mobber is usually undertaken with the purpose described in the definition of mobbing and thus the intentional guilt or the gross negligence of the offender can be proven, in order to qualify a particular behaviour as mobbing it is not necessary to make finding that the perpetrator acted to achieve a particular purpose (intent) connected with the intentional guilt as all unlawful behaviours of the mobber, including unintentional ones, can be regarded as mobbing.

19. Order of the Supreme Court of 9 June 2009 in Case II PZP 5/09

Maciej Nawrocki, judge in the District Court for Poznan - Grunwald and Jezyce in Poznan

### **Civil claims in the separate proceedings in labour law cases.**

#### **Summary:**

In the judicial practice of labour courts it is very common that the claimant, arguing that he or she was an employee, applies for establishing the work relationship, remuneration for work, and at times raises other claims granted by the provisions of labour law. The proceedings in a case which accumulates such claims deals with several procedural problems connected, among others, with the composition of the trial court (Article 47 of the Civil Procedure Code). However, the determination of a case in by a court in composition contrary to the law is sanctioned with invalidity of the proceedings (Article 379(4) of the Criminal Procedure Code).

20. Judgment of the Supreme Court of 25 February 2009 in Case II PK 186/08

Agnieszka Uzdowska, doctoral student at the University of Gdansk

### **Protection of stability of fixed-term work contracts.**

#### **Summary:**

The present commentary deals with the protection of stability of fixed-term work contracts. The analysis of the commented judgment points to three major problems, namely: establishing the admissibility conditions for concluding long-term contracts for a definite period of time, termination of fixed-term work relationships with a two-week notice, and reasonableness of the compensation in the case of establishing that the termination of a fixed-term work contract was contrary to the social and economic nature of the right and rules of social coexistence.