GSP-PO, 2010, No. 1

I. Case-law reviews

Summary:
Appropriateness of an administrative decision is a function of both a proper interpretation of substantive provisions on which they are based and the administrative procedure properly conducted. Not surprisingly, the Supreme Administrative Court's and the provincial administrative courts' common concern in 2008 were not only the substantive provisions but also the rules of the Code of Administrative Procedure governing the process of application of the substantive administrative rules. Worth mentioning are in particular those decisions which refer to fundamental problems of administrative procedure, which, despite fifty years since the entry into force of the Code of Administrative Procedure, still raise doubts of public administration bodies conducting the proceedings. Certain issues raised by the administrative courts in 2008 should be particularly mentioned, i.e. the interpretation of general principles of the procedure, determination of administrative bodies' jurisdiction, the applications and the commencement of administrative proceedings, the exclusion of the public authority from the proceedings, the concept of the party to the proceedings and its right to participate actively in the proceedings, the rules of the social organization's participation in the proceedings being an entity as a party, the rules of effective service of documents, the reinstatement of the failed time-limit, the concept of an administrative decision, the rectification of administrative decisions and orders, the types of decisions of the appellate body, and, finally, the review of decisions in extraordinary administrative proceedings and the proceedings in which expiry of decision is declared. The judgments cited in the article show possible ways of the interpretation of doubts appearing in the context of the above-mentioned issues. Some views expressed in the judgments are a continuation of the well-established case-law, but some are an attempt of a new understanding of issues emerging in the process of application of the Code of Administrative Procedure.

II. Commentaries

ADMINISTRATIVE LAW AND PROCEDURE

Summary:
The commented judgment concerns conditions of limitation of commencement of disciplinary proceedings against a student. The court's assessment of the relevance of the criminal nature of a disciplinary offense for the expiry of the limitation period leaves room for doubts. The Author proves that the issue considered by the court is still actual against the current legal background and is partially critical to the court's interpertation produced in the judgment concerned.

Summary:
The commentary deals with the problem of transfer of rights stemming from a license for international road transport of goods from a company under transformation to a company transformed. In the study the Authors argue that the interpretation of The Road Transport Act should have in view the facilitation of taking various initiatives by economic operators, including those seeking changes in legal form. This interpretative guidance seems however to be contradicted by conclusions resulting from an interpretation of the Act made by judicial bodies applying the law in the case under consideration.

Małgorzata Sieradzka, Ph.D., lecturer at "ASESOR" College of Public Service, lawyer at "Rafał Kosmalski" Law Office

Public-law nature of the competition and consumer protection proceedings

Summary:
In the order under consideration the Supreme Administrative Court ruled on the substance of the proceedings in competition and consumer protection matters. In the context of the proceedings, the Court separated the administrative phase, which it called "the pre-trial", from the civil phase. In the first phase, what is involved, is the administrative proceedings, but the administrative procedure and the administrative court proceedings is excluded when setting aside of decisions is concerned. For the purposes of the consequences of the commented order it is also important to emphasize that, irrespective of the stage of the proceedings, the antitrust action is permanently public in nature.

5. Judgment of the Provincial Administrative Court in Warszawa of 21 May 2008 in Case I SA/Wa 1778/07

Radosław Skwarło, legal counsel, Wejherowo

Superior authority in the case concerning conversion of perpetual usufruct into real estate ownership

Summary:
In the commented judgment the Provincial Administrative Court in Warszawa took the view that the governor is an authority of higher-instance for the mayor of district ruling on the transformation of perpetual usufruct into real estate ownership under the Law of 29 July 2005. In the Author’s opinion such a conclusion is incorrect. The Supreme Administrative Court has repeatedly held that in such cases the authority of higher-instance to the mayor of district is the Self-Government Board of Appeal. The Provincial Administrative Court concerned wrongly applied the Land Administration Act by analogy, though the Code of Administrative Procedure indicates in a clear and unequivocal fashion the Self-Government Board of Appeal as an authority of higher-instance for the mayor, unless a specific provision provides otherwise.

CIVIL LAW AND PROCEDURE, COMMERCIAL LAW

6. Resolution of the Supreme Court of 22 May 2009 in Case III CZP 21/09

Anna Sylwestrzak, Ph.D., Lecturer at University of Gdańsk

Dissimulated annuity agreement

Summary:
Dissimulation of an annuity agreement under the cover of a contract of other type (e.g. under a simulated contract for the purchase of the immovable property) leads to nullity of the contract, because the notarial act does not contain its essential elements referred to in Article 908 § 1 of the Civil Code. By contrast, when the notarial act encompasses the annuity agreement and the sham nature of the agreement is limited only to the determination of a method of providing the vendor with the means of subsistence other than those indicated in the notarial act, the agreement remains valid and the nullity affects only those terms of the agreement which do not correspond to the real intention of the parties (the partial sham nature).

FINANCIAL LAW

7. Judgment of the Provincial Administrative Court in Opole of 26 September 2008 in Case SA/Op 268/08

Damian Cyman, lecturer at University of Gdańsk

Liability for spouse's tax debts

Summary:
The commented judgment refers to the conditions of execution concerning the taxpayer's spouse’s joint property. It examines in detail current legislation, pointing out with what assets the debtor’s spouse is liable, the extent of that liability and the possibility of its enforcement, including the issue of writ of enforcement indicating the debtor’s spouse. Given the high probability of the occurrence of factual situations similar to the facts relating to the judgment concerned, it deserves particular attention.

8. Judgment of the Supreme Administrative Court of 24 January 2008 in Case II FSK 1629/06

Przemyslaw Panfil, lecturer at University of Gdańsk

Taxation of income from compensation for loss of profits

Summary:

The interest on pecuniary debts awarded under the court's judgment should be considered as compensation. It compensates the creditor for the income which he lost not being able to benefit from its financial resources. Thus, the interest refers to the loss of benefits and is excluded from the tax exemption introduced by Article 21 paragraph 1 point 3b of the Personal Income Tax Act. The contrary solution would lead to an unjustified differentiation of the taxpayers' status, depending on whether they would achieve the benefits directly or by way of compensation.

CRIMINAL LAW AND PROCEDURE

9. Order of the Supreme Court of 29 July 2009, I KZP 11/09
Sylwia Żochowska Durczak, Ph.D., judge of the District Court in Bydgoszcz
Issue of laissez-passer and other criminal proceedings

Summary:
If the accused, residing abroad, makes a statement that he/she would appear in the court or before the prosecutor within a prescribed period of time provided he were released pending trial, the court may issue the laissez-passer to him. The accused cannot be arrested only in the proceeding in which the laissez-passer was issued; however he/she can be arrested when he/she committed a new crime after returning home or when his/her another offense is revealed. Therefore, as the Supreme Court rightly found, ensuring that the accused would remain at large in the light of Article 282 § 1 of the Code of Criminal Procedure applies only to the proceedings in respect of which the laissez-passer was issued and does not extend to other proceedings.

10. Order of the Supreme Court of 5 May 2009 in Case IV KK 427/08
Jacek Potulski, Ph.D., lecturer at University of Gdańsk
Collective entity's culpability

Summary:
The Author agrees with the Supreme Court's interpretative approach concerning various provisions of Law on Liability of Collective Entities for Acts Prohibited under Penalty. Worthy of approval is in the Author's view particularly relying by the Supreme Court on the principle of legality in the situation of defective amendment of the Act which restricted significantly the scope of its deterrence. The Author agrees with the Supreme Court's position that the provisions of the Law currently in force do not provide for the collective entity's liability for its managers' acts.

11. Order of the Supreme Court of 29 April 2009, I KZP 6/09
Wojciech Zalewski, Ph.D., lecturer at University of Gdańsk
About "attempted incitement"

Summary:
Attempted incitement is one of the most controversial issues of criminal law. The Author of the commentary is trying to collect arguments against the thesis of the judgment at issue that attempted incitement in Polish law is punishable without exception, and that the only issue requiring consideration is the formal problem concerning proper legal qualification of the act involving the attempted incitement.

12. Judgment of the Supreme Court of 9 May 2007, II KK 39/07
Marcin Kokoszczyński, Judge of the District Court Gdańsk-Południe in Gdańsk
Admissibility of modification of the application for sentencing without a hearing pending the trial and the preservation of the injured's rights

Summary:
The Author refers essentially approvingly to the position adopted by the Supreme Court in the judgment under consideration. He evaluates with disapproval, however, the laconic reasoning given in the judgment concerned. Moreover, the Author considers that if the prosecutor encloses a request for a conviction without a hearing with the bill of indictment, the aggrieved party should be instructed that the court recognizing the need for change or completion of the request, may suggest such a solution to the parties, and if the court obtains their permission in this regard, it may give a judgment without a hearing. In the absence of such instruction the court should inform the aggrieved party of the modification of the request and, if necessary, set another meeting date.

13. Resolution of the Supreme Court of 17 December 2008 in Case I KZP 27/08
Tomasz Snarski, doctoral student at University of Gdańsk

About forgotten prepositions and their role in the interpretation of criminal law - "violence against a person" under Article 280 § 1 of the Criminal Code and "doing violent assault to a person" under Article 130 § 3 of the Code of Administrative Offences

Summary:
The commentary is critical of the linguistic interpretation made by the Supreme Court in the judgment concerned, paying particular attention to the omission of the language context of the analyzed phrases. In the Author's opinion the Supreme Court ignored in its consideration the importance of prepositions used by the legislature. The Author disagrees with the identical understanding of the concepts of "violence against a person" and "doing violent assault to a person". In closing remarks he raises the problem of the reasonableness of giving the resolutions of the Supreme Court the effect of principles of law.

LABOUR LAW

14. Resolution of the Supreme Court of 8 July 2008, I UZP 2/08
Alina Wypych-Żywicka, Dsc, University of Gdańsk professor
Determination of the amount of widow's pension

Summary:
The primary problem with the survivor's pension is to determine which of the breadwinner's retirement benefits – acquired and confirmed by the pension agency's decision or acquired but not confirmed by an appropriate document – is the basis for its calculations. Since the amount of these benefits may be different, indication of the rule determining the basis for the calculation of a pension is of significant importance. Indeed, it determines the amount of the means of substinence for the deceased breadwinner's members of the family. The solution of this issue should be searched in the text of Articles 21 and 73 of the current Pension Law.

15. Resolution of the Supreme Court (extended composition of seven judges) of 19 November 2008 in Case II PZP 11/08
Magdalena Rycak, Ph.D., lecturer at the Institute of Legal Sciences, Polish Academy of Sciences, and at R. Łazarski College of Commerce and Law in Warszawa, Department of Labour Law
Driver's business trip in international transport

Summary:
In the resolution of 19 November 2008, the Supreme Court concluded that an international transport driver travelling in the course of contracted work and in the territory specified in the contract as a place to work is not on a business trip within the meaning of Article 77^5 § 1 of the Labour Code. Analysis of the factual situation of the case and of the current provisions of labour law allows, in essential, to share this view. The Author is drawing attention to the shortcomings of the current legislation and making proposals *de lege ferenda* which could contribute to a uniform interpretation of the concerned provision.

MISCELLANEOUS

16. Judgment of the European Court of Human Rights of 19 June 2006 in Case 350014/97
Piotr Lewandowski, Ph.D., lecturer at College of Business and Administration in Gdynia
The principle of fair balance

Summary:
The commented judgment of the European Court of Human Rights (ECHR) in the case known as the Hutten-Czapska v. Poland concerned so called special lease scheme in the context of infringement of property rights by the Polish State. The Court found that in the case an excessive burden of the costs of the transformation of the housing market was imposed on one social group only, which was unacceptable, regardless how important the interest of another social group or of society as a whole seemed to be. The Court held that the Polish State did not keep a fair balance between the general interest and the protection of property rights, and found a violation of Article 1 of Protocol No. 1 to the European Convention of Human Rights.

17. Judgment of the Supreme Administrative Court of 2 October 2009 in Case I OSK 495/09
Grzegorz Wierczyński, Ph.D., lecturer at University of Gdańsk
The impact of the replacement of the public authority authorized to adopt a regulation on the validity of this regulation

Summary:
The Author criticizes the Supreme Administrative Court's judgment, in which the Court held that the replacement of the public authority indicated in the provision entitling the authority to adopt an implementing act should not affect the validity of that act. He argues that the provisions being a legal basis for the regulations must at least be statutory in nature and that § 32 paragraph 3 of the Regulation of the Prime Minister of 20 June 2002 on "Rules of legislative technique", on which the Court relied, lacks this requirement. The Author considers this provision to be inconsistent with the Constitution, and thus harmful for the purposes of functioning of the legal system.

18. Judgment of the European Court of Justice of 6 October 2009 in Case C-133/08

Arkadiusz Wowerka, LL.M., lecturer at University of Gdańsk

Interpretation of the Rome Convention on the Law Applicable to Contractual Obligations

Summary:
The commentary refers to the judgment of the Court of Justice of the European Communities of 6 October 2009 in Case C-133/08 concerning the interpretation of Article 4 of the Rome Convention on the Law Applicable to Contractual Obligations. The Author, sharing the Court’s view, analyses the content of the system introduced by the Rome Convention in the light of the judgment. In his considerations the Author refers also to the system introduced by the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), which replaces the Convention at issue and whose foundations were laid by the Convention.