

CONSIDERATION REGARDING THE PATRIMONIAL LIABILITY ADMINISTRATION ACORDING TO THE LAW NO. 544/2004 OF THE ADMINISTRATIVE LITIGATION

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Abstract: According to the provisions of Law on Administrative Litigation, the characteristics of the patrimonial responsibility for the damages caused to individuals implies the fulfillment of several legal conditions, i.e: the existence of an illegal administrative act, or the denial to meet right request, the existence of a patrimonial lesion, the existence of the causal relationship between the administrative act and the patrimonial damage, and the fault of the administrative authority.

If these distinctive features, that each of the afore-mentioned general conditions presents, are compared to the general conditions of civil and tort litigation, the basis of administrative liability for damages, caused by the public administration authorities arises.

Keywords: administrative contentious, patrimonial liability, public authority, illegal administrative act, damage/prejudice, unjustified denial.

Liability of public authorities is based on fault, under the conditions regulated by Administrative Contentious Law No. 554/2004.

According to the provisions of Law no. 554/2004 -art. 16, the claims in court may also be stated against the physical person who has elaborated, issued or concluded the act, or, as the case may be, the physical person who is guilty of the refusal to solve a request regarding to a subjective right or a legitimate interest, if compensation is claimed for the caused damage or for delay.

As established by republished Romanian Constitution (art. 73 par. 3 lit., art. 123, paragraph 5 and art. 125), administrative litigation courts have the judicature to resolve actions for damages caused by administrative acts of public authorities. The conditions and the limits of right exercise belonging to any person injured by a public authority and the right for repairs, are established by organic law, in accordance with art. 52 of republished Romanian Constitution. From a procedural point of view, the right for repairs may be exercised by means of a distinct action against the public authority, respectively, a distinct action against the civil servant, or by a concurrent action set against both public authority and the civil servant.

As constant jurisprudence approach, the jurisdiction of actions for damages, exercised on principale proceedings belongs to administrative litigation court, on basis of Law no.554 / 2004, Law of Administrative Contentious provisions (art.19), only if the court has ordered the annulment of the act, or after the court action in damages was admitted within one year, after the party has determined the damage, if the damage was not determined at the time of the trial. The conditions for admitting such an action consists of: the existence of an illegal administrative act annulled by the court, the occurrence of damage and the proof of causal conjunction between the illegal administrative act and the damage suffered by the applicant.

As regards the law issue under discussion, we share the opinion that the subject-matter of the action in the tax administrative litigation based on provisions No.92 / 2003 O.G consists of the decision to settle the litigation, in accordance with the provisions of art. 218 para 2 of this normative act. Or since the decision which abated the tax administrative act, namely the taxation decision, no longer produces legal effects, (an aspect that entitles us to consider that, in such a situation it is obviously inadmissible to appeal to the court of administrative litigation exclusively the taxing decision, whereby the taxpayer has established tax obligations), the legal relation between the taxpayer and the fiscal authority being exhausted at that moment, the non-existence of the prejudicial act means lack of one of the three imperative conditions, which represents legal basis of applicant action at the specialized court¹, in sense of art.19 - Law on Administrative Litigation.

In this regard, as far as the doctrine is concerned, we agree with the opinion expressed by Antonie Iorgovan, according to which the basis of establishing the patrimonial responsibility of the public administration lies with its culpability of illegal act issuance or in unjustified refusal of solving a claim regarding a right or legitimate interest.

The fault of the public authority, as a condition of the patrimonial administrative liability, can only be ascertained in the context of an action for the declaration of illegal character of an administrative act, or in context of public administration refusal, that is to say, in the context of an action for annulment under the conditions of the administrative litigation.

The Supreme Court, by its decision no. 4830 of December 12th, 2007, held that the entire regulation of the administrative litigation, subjectively speaking, leads to the idea that the action for patrimonial liability, even when formulated separately, proves to be a consequence of the action for annulment of the unlawful act, or against the refusal to resolve an application concerning a right or a legitimate interest.

As regards lawfulness of administrative acts verification, the provisions of article 19 from Law on Administrative Litigation, provided that the administrative courts can not exercise this competence except under the law. Thus, administrative court is entitled to annul the administrative act whose unlawfulness it was determined, and, consequently, to award damages for the prejudice caused by that act.

In our opinion, we consider that the possibility of using the procedural way for unlawful administrative acts declaration, acts by which a subjective right has been inflicted, and as a consequence, the obligation of the fiscal authority issuing the administrative act to compensate is established in article 19 provisions. Therefore, according to the law no. 554/2004, we consider that legal provisions allows the injured person to address to the administrative litigation court, for damages, without demanding at the same time the annulment of the act.

According to article 19, paragraph 1, of Law no.554 / 2004 Administrative Litigation Law, when the injured person has requested the annulment of the administrative act, without claiming damages at the same time, the prescription period for damages claim, runs from the date on which one knew or ought to know the extent of the damage. The second paragraph provides that the action shall be addressed to the competent administrative court, within the one-year period stipulated in art. 11, 2-nd para.

The claim for damages caused by the issuance of an illegal administrative act, formulated on the basis of art. 19 of Law 554/2004 is conditioned on the cumulative fulfillment of the following conditions: the existence of an illegal administrative act annulled by the court, the occurrence of damage and the proof of the causal conjunction between the illegal administrative act and the damage suffered by the applicant.

In the absence of proving the causal conjunction between the issue of the act found to be illegal and the alleged damage, the patrimonial liability of the defendant public authority can not be

¹ Court of Appeal - Timisoara, Decision no. 230/5.07. 2010, pronounced by Contentious Administrative Litigation Division, File no. 1033/59/2010, unpublished

retained. These conditions are also to be found in the case of joint liability of public authorities and civil servants for damages caused by administrative contracts, which aim at capitalizing on assets from the public domain or, as the case may be, public services.

When causal conjunction between the issue of the act found to be illegal and the alleged damage, the patrimonial liability of the respondent public authority can not be retained.

The basis for determining the patrimonial liability of the public administration lies with its culpability in the issuance of an illegal act or in the unjustified refusal to solve a claim regarding a right or a legitimate interest.

The fault of the public authority as a condition of the patrimonial administrative liability can only be ascertained in the context of the illegal public administrative or in the context a public authority refusal of the public administration, hence in the context of an action for annulment under the conditions of the administrative litigation.

In case of distinct, separate action for patrimonial liability, proof of the illegal character of the administrative act or of the refusal must be made by a final and irrevocable court decision.

It also should be noted that the action for damages is accessory to the action for annulment.

Examination of the conditions of liability for damage caused by an administrative act or a refusal can not disregard the conditions of action for annulment itself, which is judged by rules applicable to the action for annulment.

It should be noticed that the main claim for compensation drawn according to Law no.554 / 2004, - Law on administrative litigation- article 19 is conditioned on the existence of a court decision through the action against the illegal administrative act, typical or assimilated, was admitted.

Reparation of the lesion caused to the injured party is an intrinsic aspect of the administrative litigation, otherwise the applicant can only resort to the common law for the tort liability of the public authority under the conditions stipulated by art. 998-999 of the previous Civil Code (now art. 1357 Civil Code).

When it comes to interpretation of article 19 of Law no. 554/2004, the Administrative Litigation Courts, courts jurisprudence rose divergent views on the extent and the conditions of application of these legal provisions.

According to first point of view regarding the material competence for resolving the claims referred to above, it has been suggested that it should belong to the administrative litigation court. This opinion is essentially based on the argument that the litigation has a fiscal administrative nature that opposes the taxpayer, on the one hand, and the fiscal administrative authority, issuing the tax administrative, on the other hand.

It has also been argued that the later advanced litigation started with the beginning of the pre-contentious administrative phase, by formulating the appeal in the administrative procedure (according to the provisions of Fiscal Code of Procedure -article 208). The procedure is completed by the annulment of the fiscal administrative act issued by the competent fiscal authority for solving the appeal².

As arguments, the proponents of the afore-mentioned opinion invoked mainly, but not only, the provisions of article 19 - Law no. 554/2004, of the administrative litigation - which states that its provisions are also applicable and when the disputed action only requires lesion reforming and not the annulment of the act. The proponents add that this solution is imposed by the interpretation given to the legal rule, namely that according to paragraph 1, "when the injured person has demanded the annulment of the administrative act without demanding at the same time damages", the law does not specifically distinguish if the annulment of the administrative act is to be requested by direct action at the administrative court, or if it is sufficient for the injured person to

² Court of Appeal Timisoara, Civil Sentence no. 403 of November 25th, 2009, pronounced by the Fiscal Administrative Litigation Division, File no. 1162/59/2009, unpublished

prove the annulment of the administrative act by the issuing authority, in order to meet the legal condition for further compensation claim.

Although at first glance, the motivation given by the authors seems to correspond to the provisions of article 19 of the Administrative Litigation Law, if a more careful examination takes place, there can be noticed serious objections.

The first of the arguments does not subsist because the patrimonial liability of the public authority, in this case, the fiscal authority issuing the prejudicial act annulled in the administrative procedure, can be engaged before the court of administrative litigation only on the basis of art.19 of the Law no.554 / 2004. The logical and systematic interpretation of the provisions of art.8, art.18 and art.19 of Law no.554 / 2004 leads to the conclusion that within the administrative contentious process, the separate action for compensation is a subsequent step to main action directed against the prejudicial act, action which verified the proof of the unlawfulness of the administrative act or of the refusal of authority. In order to determine court jurisdiction, the special law in the matter, does not take into account the legal relation of administrative or fiscal administrative law, but the objectification of the respective report in the issuance of the act considered prejudicial or in the refusal to solve a request regarding a right or a legitimate interest³.

Nor the second argument can be taken into account, because in the fiscal administrative litigation the object of the action is the decision issued by the fiscal authority competent to resolve the complaint, filed by the taxpayer, against the basic fiscal act, according to the provisions of art.218 of the Fiscal Code of Procedure.

In this respect, it is noted that the High Court of Cassation and Justice - the Administrative Litigation Division - has constantly held that the object of the administrative litigation based on the Fiscal Code of Procedure is the decision on the appeal against the fiscal administrative act and not tax administrative act⁴.

Accordingly, in relation to the specified legal provisions, damages may be requested on the following procedural manners: together with the annulment petition or separately, by means of an action for damages, accessory demand, which must respect the solution delivered for main action, after act annulment, or after admitting the action, within one year since the injured person was aware of the lesion; in main action, in the case of government orders declared unconstitutional or along with unconstitutionality exception elimination; on main action, as a result of the admissibility of the action for nullity of the administrative acts that can not be revoked, on main action following the annulment of the normative administrative act canceled, as result of the action promoted by another person; in main proceedings before the ordinary courts, along with exception of the unlawfulness of the administrative act elimination, which became irrevocable by non-charging, whose action for annulment was dismissed, respectively the executed one; in main proceedings before the administrative litigation court in the case of delay in enforcement of the administrative litigation judgement.

The logical and systematic interpretation of the provisions of art.8, art.18 and art.19 of the Law no.554 / 2004 leads to the conclusion that in the administrative contentious process, viewed in a extensive sense, the separate action for compensation is a subsequent step of the main action against the prejudicial act, which verified the proof of the unlawfulness of the administrative act or the refusal to resolve a claim relating to a right or a legitimate interest.

However, as one of the conditions required by Law No.554 / 2004, so that its provisions are applicable, is that the prejudice should be caused by an unlawful administrative act, it becomes obvious that the administrative contentious court will is entitled to award damages, only if, first, the illegality of the act is proven. In fact this is the very element that generates the right to such damages.

³ Arad Court , Civil Judgement no.2048 / 10.11.2010, pronounced by the Department of Tax Administration, File. no.1162 / 59/2009, unpublished

⁴ I.C.CJ, Decision no.3986 / 2006, published in the Jurisprudence Bulletin, Hamangiu Publishing House 2006

If the administrative act generating damages was annulled by the issuing public authority, at the time the action is filed, compensation is no longer conditioned on the proving its unlawfulness under the law of the administrative litigation, so that the ordinary courts will be able to judge the claim for damages according to art. 998 and the following - Civil Code.

It is therefore necessary to conclude that, if a public authority is required to pay material and moral damages based on article 19 of Law no. 554/2004, but which is not preceded by an administrative litigation formulated and settled on the basis of article 1 of the same law, the object of such action being purely patrimonial, even if the tax authority annulled the administrative act against which the appeal was filed according to the provisions of article 205 of the Fiscal Code of Procedure, the jurisdiction lies with the ordinary law court.

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It should be noticed that the main claim for compensation drawn according to Law no.554 / 2004, - Law on administrative litigation- article 19 is conditioned on the existence of a court decision through the action against the illegal administrative act, typical or assimilated, was admitted.

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It has also been argued that the later advanced litigation started with the beginning of the pre-contentious administrative phase, by formulating the appeal in the administrative procedure (according to the provisions of Fiscal Code of Procedure -article 208). The procedure is completed

by the annulment of the fiscal administrative act issued by the competent fiscal authority for solving the appeal⁶.

As arguments, the proponents of the afore-mentioned opinion invoked mainly, but not only, the provisions of article 19 - Law no. 554/2004, of the administrative litigation - which states that its provisions are also applicable and when the disputed action only requires lesion reforming and not the annulment of the act. The proponents add that this solution is imposed by the interpretation given to the legal rule, namely that according to paragraph 1, "when the injured person has demanded the annulment of the administrative act without demanding at the same time damages", the law does not specifically distinguish if the annulment of the administrative act is to be requested by direct action at the administrative court, or if it is sufficient for the injured person to prove the annulment of the administrative act by the issuing authority, in order to meet the legal condition for further compensation claim.

Although at first glance, the motivation given by the authors seems to correspond to the provisions of article 19 of the Administrative Litigation Law, if a more careful examination takes place, there can be noticed serious objections.

The first of the arguments does not subsist because the patrimonial liability of the public authority, in this case, the fiscal authority issuing the prejudicial act annulled in the administrative procedure, can be engaged before the court of administrative litigation only on the basis of art.19 of the Law no.554 / 2004. The logical and systematic interpretation of the provisions of art.8, art.18 and art.19 of Law no.554 / 2004 leads to the conclusion that within the administrative contentious process, the separate action for compensation is a subsequent step to main action directed against the prejudicial act, action which verified the proof of the unlawfulness of the administrative act or of the refusal of authority. In order to determine court jurisdiction, the special law in the matter, does not take into account the legal relation of administrative or fiscal administrative law, but the objectification of the respective report in the issuance of the act considered prejudicial or in the refusal to solve a request regarding a right or a legitimate interest⁷.

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The logical and systematic interpretation of the provisions of art.8, art.18 and art.19 of the Law no.554 / 2004 leads to the conclusion that in the administrative contentious process, viewed in a extensive sense, the separate action for compensation is a subsequent step of the main action against the prejudicial act, which verified the proof of the unlawfulness of the administrative act or the refusal to resolve a claim relating to a right or a legitimate interest.

However, as one of the conditions required by Law No.554 / 2004, so that its provisions are applicable, is that the prejudice should be caused by an unlawful administrative act, it becomes obvious that the administrative contentious court will is entitled to award damages, only if, first, the illegality of the act is proven. In fact this is the very element that generates the right to such damages.

If the administrative act generating damages was annulled by the issuing public authority, at the time the action is filed, compensation is no longer conditioned on the proving its unlawfulness under the law of the administrative litigation, so that the ordinary courts will be able to judge the claim for damages according to art. 998 and the following - Civil Code.

It is therefore necessary to conclude that, if a public authority is required to pay material and moral damages based on article 19 of Law no. 554/2004, but which is not preceded by an administrative litigation formulated and settled on the basis of article 1 of the same law, the object of such action being purely patrimonial, even if the tax authority annulled the administrative act against which the appeal was filed according to the provisions of article 205 of the Fiscal Code of Procedure, the jurisdiction lies with the ordinary law court.

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