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THE EVOLUTION OF ELECTRONIC SERVICE OF DOCUMENTS IN (GENERAL, TAX AND ENFORCEMENT) ADMINISTRATIVE PROCEEDINGS

EWOLUCJA KOMUNIKACJI ELEKTRONICZNEJ W POSTĘPOWANIU ADMINISTRACYJNYM (OGÓLNYM, PODATKOWYM I EGZEKUCYJNYM)

Streszczenie
Analiza wprowadzonych do k.p.a. oraz o.p. rozwiązań w zakresie komunikacji elektronicznej pozwala na stwierdzenie, że proces informatyzacji postępowania administracyjnego ma charakter ewolucyjny. Na przestrzeni ostatnich 20 lat, począwszy od wprowadzenia pierwszej regulacji pozwalającej na kontaktowanie się z organem administracji za pomocą poczty elektronicznej, w postępowaniu administracyjnym zaszły daleko idące zmiany. Obecnie forma dokumentu elektronicznego oraz tradycyjna forma papierowa są równorzędnymi formami załatwiania spraw w postępowaniu administracyjnym i wywołują takie same skutki prawne.

Jednak, mimo że obecnie wszelka komunikacja między organem administracji a stroną odbywać się może przy użyciu środków komunikacji elektronicznej, a przesyłane dokumenty mogą mieć postać elektroniczną, wydaje się, że ustawodawca nie powiedział w tym zakresie ostatniego słowa. Nadal bowiem można dostrzec pewne braki w uregulowaniu omawianej problematyki. Za najpoważniejszy z nich należy uznać to, że w postępowaniu administracyjnym – inaczej niż w postępowaniu sądowoadministracyjnym – nie przewidziano dotychczas elektronicznego dostępu do akt sprawy.

Epidemia COVID-19 stała się swoistym katalizatorem zmian w sferze doręczeń elektronicznych i przyspieszyła planowane w tym zakresie zmiany prowadzące do przyznania prymatu elektronicznym doręczeniom pism zarówno w ogólnym postępowaniu administracyjnym (a co za tym idzie – również egzekucyjnym), jak i podatkowym.

Słowa kluczowe: postępowanie administracyjne, postępowanie podatkowe, postępowanie egzekucyjne w administracji, komunikacja elektroniczna, doręczenia

1. CLARIFICATION OF BASIC CONCEPTS: COMPUTERISATION, DIGITISATION

Computerisation is currently one of the key technological processes in the modern world. It consists in automation of information processing, which, as a result of numerous improvements and facilitations, leads to benefits in various areas of life[1]. A natural consequence of the digital development of the society was the entry of computerisation into legal solutions. The introduction of new technologies into the activities of public administration in Poland started already back in the 1990s. More broadly, they are referred to as *e-government.* An element of this phenomenon is the computerisation of administrative proceedings.

One of the concepts from the field of computerisation is 'digitisation'. J. Janowski means by it *digital coding of text, graphic or multimedia information* [which – E. Sz.] *provides for* [...] *its* [...] *availability, operability and functionality*[2]. In other words: it means conversion of information from an analogue to a digital form[3]. In fact, subjecting a document – e.g. an administrative decision – to the process of digitisation consists in scanning the document issued in a traditional paper form and saving it on an IT data carrier. In such a situation, the so-called digital replication takes place, consisting in converting a non-electronic document into an electronic one[4].

However, it should be stressed that documents drawn up in administrative proceedings, such as decisions or rulings, need to be signed. This essential element in relation to electronic documents is a separate component of a given document, subject to separate requirements. What is important, for such a document to be legally effective, it is not enough to digitise it, i.e. to convert it from an analogue to a digital form e.g. by scanning it. Digitisation does not allow to confirm the validity (correctness) of the issuer's signature by which the document is authenticated. Thus, digitisation makes it possible to archive a document which, as a result, does not have to be stored as a hard copy, but – without taking up additional space – can be stored in a digital form, e.g. in the so-called 'cloud'.

2. WRITTEN DOCUMENT VS. ELECTRONIC DOCUMENT – ACCORDING TO THE CURRENT LEGAL STATUS

The requirement of written form of the general administrative procedure and the tax procedure is expressed respectively by: Art. 14(1) of the Act of 14 June 1960 – Code of Administrative Procedure[5] and Art. 126 of the Act of 29 August 1997 – Tax Ordinance. Under both these regulations (according to the legal status in force until June 30, 2021), administrative matters – including tax matters – are handled 'in writing[6] or in the form of an electronic document'. In both the Code and

1 J. Janowski, *Trendy cywilizacji informacyjnej. Nowy technototalitarny porządek świata*, Warsaw 2019, p. 17.
2 Ibid, p. 139-140.
3 Ibid, p. 32.
4 P. Pietrasz [in:] *Ordynacja podatkowa. Komentarz aktualizowany*, LEX/el 2019 – commentary on Art. 144a TO. Consolidated text: JoL 2020, item 1325, hereinafter: TO or Ordinance.
5 Consolidated text: JoL 2021, item 735, hereinafter: CAP or Code.
6 The legislator did not use the term 'written form of a document' or 'traditional form of a document', limiting itself to the juxtaposition of 'form of an electronic document' with 'form other than the form of an electronic document' – see Art. 39[1] CAP and Art. 144a(1b) TO.

the Ordinance, the current form of the document – which has been used since both acts were in force and which in legal language could be referred to as 'traditional' (while the current method of service could also be called 'traditional'[7]) – was defined as a *form other than the form of an electronic document*[8]. Although these provisions recognized the form of the electronic document alongside the written form, using a non-exclusive disjunction, they cannot be treated as completely separate forms. In fact, the form of an electronic document is also written, with the only difference that in case of the traditional form, the letter is recorded as a 'hard copy', i.e. in the analogue form, while in the electronic version we also deal with a letter, at least in a digitally recorded version that can be reproduced both by its author and by its recipient. An electronic document was not a separate document from a written document. It should contain exactly the same content as the written document, except that, as mentioned, it is recorded using a different technique but allowing its reproduction in the same form as the document produced on paper. As of October 5, 2021 the regulations Art. 14 (1a) of the Act of 14 June 1960 – Code of Administrative Procedure and Art. 126 of the Act of 29 August 1997 – Tax Ordinance stipulate that matters should be settled in writing recorded in paper or electronic form[9].

An electronic document takes the form of a text file created using a specific computer software (e.g. WORD). It allows you to save it and then retrieve it. Incidentally, in the same administrative case, a traditional 'paper' decision could be issued in respect of one of the parties and in respect of another party – who so wishes – in the form of an electronic document.

The provisions of CAP and TO made it possible to assert that a document in paper form and in electronic form are equivalent in terms of legal effect. The form of an electronic document shall not be regarded as an exception to the paper form[10].

The provision included in Art. 3(35) of Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services understands the concept of an electronic document even more broadly[11], defining it as *any content stored in electronic form, in particular text or sound, visual or audiovisual recording*. For quite obvious reasons, in administrative proceedings an electronic document may appear in the first of the above-mentioned forms – i.e. text form – because a sound, visual or audiovisual recording cannot be equipped with an electronic seal. Consideration would have to be given to whether it would be possible to send a recording reflecting the oral settlement of the case (Art. 10(2) CAP) with the simultaneous recording of this activity in the form of a text-based electronic document certified with an electronic seal.

3. ELECTRONIC MAILBOX

As of 11 August 2014, by adding paragraph 1a to Art. 16 of the Act of 17 February 2005 on Computerisation of Entities Performing Public Tasks[12], each public entity was obliged to make available

7 The Act of 17 June 1966 on Enforcement Proceedings in Administration (consolidated text: JoL 2019, item 1438, hereinafter: AEPA) in Art. 63a provides for service 'in paper form'.

8 For example, this term was used by the legislator in Art. 39^1(1d) CAP and in Art. 144a(1b).

9 JoL 2020, item 2320.

10 R. Kędziora, *Kodeks postępowania administracyjnego. Komentarz*, LEX/el 2017 – commentary on Art. 14 CAP.

11 OJ EU L 257, 28.8.2014, p. 73.

12 JoL 2019, item 700. The aforementioned paragraph 1a was added to Art. 16 by the Act of 10 January 2014, JoL 2014, item 183.

and operate an electronic mailbox, in accordance with the standards defined by the minister in charge of administration. According to this provision, *the public entity shall make available an electronic mailbox which meets the standards defined and published on the ePUAP platform by the minister in charge of computerisation, andshall make sure that it is operated*. Thus, the legislator left no choice for public administration bodies to use electronic communication and possibly replace it with traditional means of communication. This means that, for 6 years now, these authorities have been required to communicate with anyone concerned by electronic means whenever the latter so wishes.

The electronic mailbox is a nationwide ICT platform which is a publicly available means of electronic communication[13]. It is used to transmit an electronic document to a public body. It is part of the ePUAP system[14].

It should be stressed that sending the application by the interested party to the public administration body by electronic means to any e-mail address of the body concerned is not the same as submitting a letter via an electronic mailbox[15]. Art. 63(1) CAP and Art. 168(1) TO requires the submission of letters in electronic form *via* ePUAP. This excludes the possibility of transmitting the document in another way, e.g. by handing it over to a public authority on a data carrier (CD)[16]. Therefore, the public administration body contacts the party by sending letters to any e-mail address indicated by the latter, while the effectiveness of sending a letter to the public administration body by the party depends on whether it will use its profile on the ePUAP platform.

4. ELECTRONIC SERVICE OF DOCUMENTS IN GENERAL ADMINISTRATIVE PROCEEDINGS ACCORDING TO THE CURRENT LEGAL STATUS UNTIL 30 JUNE 2021

As a result of the amendment of CAP in 2017[17], the legislator, by virtue of Art. 39^2 of the Code, introduced a very important rule absent from the previous Code solutions, according to which the service of letters between public administration bodies tooks place by electronic means, without the need to obtain their prior consent to deliver letters using this technique. This means that documents served between the authorities in the traditional manner should be regarded as ineffective.

However, pursuant to Art. 39^1(1) of the Code, service of letters upon the parties and other participants to the proceedings should be effected electronically in the following cases:

1. where a party or another participant to proceedings submitted an application in the form of an electronic document *via* the electronic mailbox of the authority;

13 More on the ICT system used by a public entity to perform public tasks, cf. K. Chałubińska-Jentkiewicz, M. Karpiuk, *Prawo nowych technologii. Wybrane zagadnienia,* Warszawa 2015, p. 425-428, LEX.

14 The ePUAP system is also connected with other solutions within e-government, e.g. CEPIK or obywatel.gov.pl.

15 In earlier solutions, the Code provided for the possibility of sending an application to an e-mail address of a public administration body. Currently, due to the changes introduced to Art. 63(1) CAP in 2010, it is legally ineffective – Art. 2 of the Act of 12 February 2010 onamending the Act on Computerisation of the Activity of Entities Performing Public Tasks and certain other Acts, JoL 2010 No. 40, item 230.

16 See J. Wegner [in:] W. Chróścielewski, Z. Kmieciak (eds), *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2019, p. 331 and quoted jurisprudence.

17 The Act on the Amendment of the Act – Code of Administrative Procedure and certain other Acts, JoL 2017, item 935.

2. if such an entity requested service of letters in the form of an electronic document by electronic means of communication;
3. if a public administration authority effectively requested a party or participant to the proceedings to serve letters in that form.

The categorical wording of the discussed provision meant that the fulfilment of any of these conditions obliges a public authority to deliver letters to a party by electronic means of communication and at the same time excludes delivery of letters in the traditional manner. A party may request that letters be sent to it by electronic means of communication at any stage of the proceedings during the *lis pendens*. The authority in charge of the proceedings shall be bound by the party's request as soon as it has been received. For the party, therefore, the simplest way to request the use of this method of service was to send *via* ePUAP an application in the form of an electronic document to a public administration body.

At the same time, a party could at any time resign, withdrawing its consent / request for service of letters by electronic means, or declared that it does not wish to be served by electronic means in the further course of the proceedings (Art. 39^1(1d) CAP). Consequently, even if a party submits an application via electronic communication, the public administration body delivered the letters in the 'traditional' form, as defined in Art. 39 of the Code.

The delivery of letters in administrative proceedings is connected with a very important act of confirming this fact by the recipient, which determines the effectiveness of the delivery. Pursuant to Art. 46(4) CAP, in order to serve a letter in the form of an electronic document, a public administration authority was sending a notice to the addressee's electronic address indicating that the addressee may collect the letter, specifying the electronic address from which the letter was collected and where the acknowledgement of receipt must be made. At the same time, the authority instructed the addressee of the letter in particular on the method of identification at the indicated electronic address in the authority's IT system, and indicated the requirement to sign the official statement in the prescribed manner. Failure to collect the letter within 7 days imposed an obligation on the public administration body to notify the possibility of collecting the letter again for another 7 days (Art. 46(5) CAP). If the letter is not received, it was deemed to have been served fourteen days after the first notification (Art. 46(8) CAP). In such cases, pursuant to Art. 46(8) of the Code, the public administration authority give the addressee access to the content of the letter within three months from the date on which the letter in the form of an electronic document is deemed to have been delivered, and to information about the date on which the letter is deemed to have been delivered and about the dates on which notices of the possibility to collect the letter from the ICT system are sent.

A decision of a party (proxy or representative) to use the electronic form of delivery of letters resulted in the obligation to notify the public administration body of a change of its electronic address (Art. 41(1) CAP). If this obligation is neglected, the delivery of the letter at its current address would have legal effect (Art. 41(2) CAP).

A welcome solution should be considered that provided for in Art. 40(4) *in fine* CAP, pursuant to which if a party does not have a domicile or habitual residence or registered office in the Republic of Poland, another EU Member State, the Swiss Confederation or an EFTA Member State and has not appointed an attorney to manage a case residing in the Republic of Poland, it does not have to appoint an attorney for service if delivery was effected by means

of electronic communication. As a result, the party did not have to use assistance of another person in the form of an attorney for service and can communicate with Polish administrative authorities at any time from any place in the world.

5. ELECTRONIC SERVICE OF DOCUMENTS IN TAX PROCEEDINGS ACCORDING TO THE LEGAL STATUS UNTIL 5 OCTOBER 2021

Regulation of the institution of service in tax proceedings differs in many ways from the solutions adopted in CAP[18]. One of the differences is that under Art. 144(3) TO, the legislator allowed for the traditional method of service of a letter if there are technical problems which make it impossible for the tax authority to deliver the letter by electronic means of communication. There was no such solution in the Code. In general administrative procedures, the legislator did not grant a derogation from electronic service in favour of traditional service, irrespective of the circumstances which would make the former difficult to apply.

Another significant difference was introduced to Art. 144(5) of the Ordinance. Since 1 January 2016, this provision has introduced a rule according to which service of letters to a professional proxy in the person of an advocate, legal counsel or tax advisor is done by means of electronic communication[19]. In these cases, therefore, the application of Art. 144a TO – which is the equivalent of Art. 39^1 CAP – was excluded and there was no need for a professional proxy to fulfil any condition from this provision. Another way of delivering letters to a professional proxy is allowed by the legislator in Art. 144(3) TO by way of exception, in case of technical problems[20]. However, the tax authority must demonstrate that it has attempted to deliver the correspondence over the Internet and that it was not possible to do so. The history of IT system errors or failures must be evidenced[21].

The obligation to serve letters by electronic means of communication was also introduced by the legislator with respect to a proxy residing abroad who has not indicated an address for service in Poland (Art. 145(2a) TO).

6. ELECTRONIC DELIVERY OF LETTERS IN ENFORCEMENT ADMINISTRATIVE PROCEEDINGS ACCORDING TO THE LEGAL STATUS UNTIL 5 OCTOBER 2021

The Act of June 1966 on Enforcement Proceedings in Administration[22] does not, in principle, include separate regulations with regard to the institution of service. In this respect, on the basis of the reference made in Art. 18 AEPA, the provisions of the CAP on service shall apply

18 I am not going to explore in more detail here the notion of a 'tax portal' used in tax proceedings and not known in the general administrative procedure. However, the importance of the tax portal is limited, as the account opened at it may be used to deliver letters from the head officers of tax offices on matters concerning only selected taxes (§ 1(4) of the Ordinance of the Minister of Finance on defining the types of matters which may be handled using the tax portal).

19 Amendment introduced by the Act of 10 September 2015 on the Amendment of the Tax Ordinance Act and certain other Acts, JoL 2015, item 1649.

20 L. Etel [in] L. Etel (ed.) *Ordynacja podatkowa. Komentarz*, LEX/el 2020 – commentary on Art. 144(9).

21 See judgment of the Supreme Administrative Court of 22 March 2019, II FSK 937/17, CBOSA.

22 Consolidated text: JoL 2019, item 1438.

accordingly. The only novelty is provided for in Art. 63a AEPA, which lays down the principle of service of letters between enforcement authorities and between the enforcement authority and the court bailiff by electronic means of communication, subject to service on paper if it proves impossible to use electronic means of communication for technical reasons.

7. ELECTRONIC SERVICE OF DOCUMENTS IN (GENERAL, TAX AND ENFORCEMENT) ADMINISTRATIVE PROCEEDINGS ACCORDING TO THE CURRENT LEGAL STATUS UNTIL 30 JUNE 2021

A review of the above arrangements for the institution of electronic delivery of letters in different administrative procedures led to the conclusion that the solutions adopted are not uniform. Even on the *prima facie* basis, one could be seen that in tax proceedings the legislator 'went further' than in general administrative and enforcement proceedings, by formulating the rule that tax authorities should serve the documents to professional proxies by means of electronic communication. However, regulations within a single 'family' of administrative procedures could be expected to provide greater uniformity of similar legal solutions.

The lack of sufficient consistency of technical solutions for electronic communication in administrative proceedings seems to was recognised also by the legislator. On the website of the Chancellery of the Prime Minister information can was found that *a homogeneous ICT solution enabling effective – alternative to the traditional form – exchange of correspondence by electronic means with acknowledgement of receipt has not been created and made available to the public yet*[23]. The legislator's actions in this area so far have been very chaotic. Introduction to both the CAP (Art. 63(3a)(1)) and the TO (Art. 168(3a)(1)) of the solution, according to which an application submitted to a public administration body may bear a personal signature remained a rule that could not be applied in practice for several months. One can even say that in this case the technology has not kept up with the law. The utility of this solution was *de facto* very low. The ePUAP platform has implemented the possibility of logging in with a personal signature, but it has not been possible to affix a personal signature to an electronic document. Another barrier was that in order to use a personal signature, you need to have an NFC reader for the e-ID card and install the appropriate software to operate it on your computer. A remedy for bridging the gap between individual procedures may be provided by proposed changes stipulated in the Act on Electronic Service of Documents[24]. The Act introduces changes in relation to electronic communication in a wide range of acts, including CAP, TO, AEPA and many other. The solutions introduced to CAP serve as a kind of 'prototype' of solutions introduced to other procedures – tax and enforcement proceedings. This may allow to achieve a high degree of uniformity of these solutions. The purpose of the proposed changes is to unify the rules of communication between an individual and public administration bodies by introducing electronic delivery – initially as a default, and ultimately as a basic channel for circulation of correspondence between public and private entities. The Act regulates the creation of a register in the form of a database of electronic addresses. Entering an address for electronic service of documents into this database will oblige

23 *Projekt ustawy o doręczeniach elektronicznych*, https://www.gov.pl/web/premier/projekt-ustawy-o-doreczeniach-elektronicznych [accessed: 27.08.2022].

24 JoL 2020, item 2320, hereinafter: 'Act'.

public authorities to deliver any letters to that address. Currently, each entity using the ePUAP platform colud have multiple e-box addresses, often created for circulation of correspondence in individual cases. According to the Act assumptions, natural persons may be able to use a single delivery address which can be used in transactions with all other entities using electronic delivery. Furthermore, professional proxies (advocates, legal counsels, tax advisors, reorganisation advisors, patent attorneys) are required to have an address for electronic delivery, entered in the database of electronic addresses, related to the service of registered electronic service of documents. Electronic delivery is complemented by a public hybrid service. It allow public entities to send their correspondence in a default electronic form. Individuals who will not yet be ready to exchange correspondence electronically, thanks to the hybrid service will be able to receive a traditional letter, consisting in that a letter in an electronic form will be directed to a post office, where it will be printed out (obviously under conditions of confidentiality) and delivered to the addressee in paper form. As a result, the 'digitally excluded' will still be able to send their correspondence to public administration bodies in the traditional (paper) form, and the content of letters sent by these bodies will reach these addressees via the post office by converting electronic content into the paper one.

The unquestionable benefits of a systemic, comprehensive introduction of the above solutions – as can be predicted – will include real effects related to environmental protection. The mass scale of electronic service of letters in administration will save paper and fuel used by the post or courier companies for traditional delivery of documents. This will lead to savings in both time and natural resources. The average citizen will be able to correspond effectively and free of charge with all public administration bodies using one address.

8. BENEFITS AND RISKS OF DIGITISING ADMINISTRATIVE PROCEDURES

A feature of the global civilisation, based on automated information processing techniques, is its worldwide and mental reach and its irreversible (unrestrained) and rapid advancement. New opportunities in the area of digitisation of administrative procedures should be seen not only in terms of benefits but also risks. In this context, it seems that due to the currently optional nature of citizen's communication with the administration by electronic means (and, from 1 July 2021 proposed hybrid solution) in the Polish system of procedural administrative law there is no danger of excluding a part of the society from participation in administrative proceedings due to the lack of access to electronic communication.

The analysis of electronic communication solutions introduced to the CAP and TO allows us to conclude that the process of computerisation of administrative proceedings is evolving. Over the last 20 years, since the introduction of the first regulation allowing contact with an administrative authority by e-mail, far-reaching changes have taken place in administrative proceedings. Nowadays, the form of an electronic document and the traditional paper form are equivalent forms of handling administrative matters and have the same legal effects[25].

25 P. Ruczkowski, *Komunikacja elektroniczna w polskim i niemieckim postępowaniu administracyjnym w ujęciu komparatystycznym* [in:] I. Niżnik-Dobosz (ed.), *Zastosowanie idei public governance w prawie administracyjnym*, Warszawa 2014, p. 307.

However, although at present all communication between the administration body and the party can be done by electronic means and the documents can be transmitted in electronic form, it seems that the legislator has not said the last word in this respect. There are still some shortcomings in the regulation of the discussed problem. As the most serious of these should be considered the fact that (unlike in administrativecourt proceedings[26]) electronic access to the case file still has not been provided for. This means that essentially the only way to read the case file is to visit the seat of the public administration authority. Although in Art. 73(3) CAP and Art. 178(4) TO, the legislature provided for a party to have access to the case file by making it available in an ICT system, it should be stressed that a public administration body is not obliged to make it available in this form. In practice, this most often depends on whether the authority keeps the case files in a way that makes this possible at all. Practical experience of the author of this study indicates that it is only very sporadically that such a possibility exists. The discussed regulation may not be used as a basis for a party to request from a public administration body that their file be sent to it by electronic means[27]. According to the jurisprudence, it is only in exceptional cases, after the party has demonstrated its important interest, that the authority is obliged to send to it certified copies of the case file[28]. However, providing a party with electronic access to the case file would undoubtedly help to increase access to the authority and the administrative procedure itself.

9. POSITIVE ASPECT OF STANDARDIZING ELECTRONIC SERVICE OF LETTERS IN ADMINISTRATIVE PROCEEDINGS (GENERAL, TAX AND ENFORCEMENT) FROM 5 OCTOBER 2021

The consequence of the changes introduced by the Act on electronic deliveries was the introduction of relevant changes in the matter of deliveries to CAP and TO. As a result, the institutions of service were standardized in both of these acts, as a result of which, from 5 October 2021, the use of electronic service became the rule. Pursuant to Art. 39 § 1 CAP and Art. 144 § 1a TO the public administration body shall deliver letters to the address for electronic delivery, unless the service takes place at the seat of the authority. If delivery to the address for electronic delivery is not possible or if the delivery could not take place at the seat of the authority, then the public administration authority shall deliver the letters against receipt by the deliverer of their choice, namely: 1) the operator designated using the hybrid public service, or 2) its employees or by other authorized persons or bodies.

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26 The files of administrative court cases can be viewed on the Internet at the PASSA portal. To do so, one needs only have an electronic signature or a trusted profile and submit the application. Once access is granted, it is possible to view the subsequent files as well.

27 Judgment of the Voivodship Administrative Court in Warsaw of 5 December 2011, II SA/Wa 1934/11, CBOSA.

28 See J. Wegner [in:] W. Chróścielewski, Z. Kmieciak (eds), *Kodeks...*, p. 293 and quoted jurisprudence.

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