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Contesting the Legality of the Measures Established by the Decision of the County Chamber of Accounts, the Material Competent Court in Judging the Litigation

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CONTESTING THE LEGALITY OF THE MEASURES ESTABLISHED BY THE DECISION OF THE COUNTY CHAMBER OF ACCOUNTS, THE MATERIAL COMPETENT COURT IN JUDGING THE LITIGATION

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Abstract:

We submit here for consideration the establishment of the material competence of the courts in judging the complaints against the measures established by the Court of Accounts in performing its financial control activities. In this meaning, we have as reference the jurisprudence in this area, namely: Decision No 499/02 February 2012 of the High Court of Cassation and Justice (HCCJ), the section for contentious administrative; Decision No 271/22 January 2013 of the High Court of Cassation and Justice, the section for contentious administrative.

Keywords:

the material competent, contentious administrative, the financial-fiscal litigations.

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According to Art 43 of the Law No 94/1992 on the organization and operation of the Romanian Court of Accounts[2], "Based on its findings, the Court of Accounts shall establish: *a)* suspension of the implementation of measures that infringe legal regulations in the financial, accounting and fiscal domain; *b)* locking the budget or special funds, whenever it is found that they have been used illegally or ineffectively; *c)* removing irregularities found in the examined financial-accounting or fiscal activity". Specifically, these measures are taken according to the Regulation approved by the plenum of the Court of Accounts by its Decision No 130/2010[3], adopted based on Art 11 Para 2 of the Law No 94/1992.

Law No 94/1992 does not state regarding the jurisdiction of the litigations generated by these measures, leaving this issue to the Regulation. Thus, according to Art 204 and 228 of this Regulation are established:

- *An administrative mean of attack* – the administrative complaint, in the competence of the Commission for Solving the Complaints of the Court of Accounts; according to Art 204 of the Regulation "against the measures established by decision, within 15 calendar days from the date of receipt, the manager of the entity subjected to control may submit/send a complaint to the local Court of Accounts that issued the decision".

The complaint is solved by a formal act, named "conclusion", by which the complaint is admitted or rejected. Under this aspect, the practice of the courts is unitary, the quoted provisions being interpreted in a single manner.

- *A legal mean*, traversing a double degree of jurisdiction. According to Art 228 of the Regulation, the competence in solving the action initiated by the manager of the entity subjected to control against the conclusion issued by the Commission for Solving the Complaints belongs to the section for contentious administrative and fiscal business of the Court of Appeal in whose area is located

[2] Republished in the Official Gazette, No 282/29 April 2009.

[3] The Decision to approve the Regulation on the organization and operation of the Court of Accounts, as well the capitalization of the acts resulted from these activities, Official Gazette, No 832/13 December 2010.

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the economic entity, according to the Law No 554/2004[4] on administrative litigations.

In jurisprudence, the material competence of the courts for contentious administrative regarding the financial-fiscal litigations is determined according to the Law No 554/2004 on administrative litigations, as common law in this area. Thus, according to Art 10 of this law "(1) Disputes regarding administrative decisions issued by *the local and county public authorities*, as well as disputes arising from tax, charges, dues, customs duty and such other accessory revenues to the budget in the worth of up to 1.000.000 RON shall be settled, on the merits, by the administrative and tax courts, while disputes arising from administrative decisions issued by *the central public authorities*, as well as disputes arising from tax, charges, dues, customs duty and such other accessory revenues to the budget in excess of 1.000.000 RON shall be settled, on the merits, by the administrative and tax sections of the Courts of Appeals, unless otherwise provided by special law". The law settled here two criteria for establishing the material competence: the place occupied by the authority which issued or concluded the act, criterion applicable for the litigations subjected to our analysis; the amount of the litigation arising from tax and charges, dues, customs and such other accessory revenues, inapplicable here.

Interpreting Art 10 Para 1 of the Law No 554/2004, the courts have stated the illegality of Art 228 of the Regulation, pre-quoted, which established the material competence of the Court of Appeal, illegality argued differently by the jurisprudence.

Specifically, by its conclusion no 62/27 July 2011, the Commission for Solving the Complaints of the Romanian Court of Accounts, rejected the complaint submitted by the entity subjected to control – Vâlcea Sanitary-Veterinary and Food Safety Department (S.V.F.S.D) – against the Decision No 21/29 June 2011 issued by the Vâlcea County Court of Accounts. Next, the Vâlcea S.V.F.S.D attacked the above mentioned conclusion at the Pitesti Court of Appeal. By Decision No 455/23 November 2011, the Pitesti Court of Appeal, 2nd civil section, for contentious administrative and fiscal business maintains the solution issued by the above mentioned conclusion, the plaintiff being

[4] Official Gazette No 1154/7 December 2004.

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subjected to the adjustment (refund), with the state budget, of the existing amounts as exceeding his budget at the end of the year.

Notified by the appeal submitted against the civil decision no 455/23 November 2011 issued by the Pitesti Court of Appeal, the High Court of Cassation and Justice notes the presence of Art 304 Point 3 of the Code of Civil Procedure[5], and by the Decision No 271/22 January 2013, the section for contentious administrative upheld the appeal and quashed the attacked decision, referring the cause to the competent court in solving the substance of the litigation, in this case Valcea County Court.

In ruling this decision, the court considered only the criterion of the position of the authority who issued the attacked act; the summons's object being the annulment of an administrative act – the decision for measures no 21/29 June 2011 issued by the Valcea County Court of Accounts – local public authority. Based on this reason, the High Court of Cassation and Justice considered illegal the decision no 455/23 November 2011 issued by the Pitesti Court of Appeal, as well as on the provisions of Art 228 of the Regulation, which states the material competence of the Court of Appeal.

We note here the trend to create a unitary practice of the HCCJ regarding this aspect, based on the application of the legal criterion stated by Art 10 Para 1 of the Law No 554/2004 on administrative litigations – namely, the positioning of the issuing authority in the public administration system, in this case the structure for control of the Court of Accounts, who issued the contested administrative act[6]. As a consequence, according to the HCCJ jurisprudence, the courts with material competence in solving the litigations arising from control documents issued by the structures of the Court of Accounts are: the tribunal, as court of first instance, regarding the actions against the conclusions issued in solving the complaints; the court of appeal, as body of appeal, regarding the sentence issued by the tribunal.

In the case subjected to analysis, the HCCJ did not considered the position of the authority issuing the conclusion for solving a complaint – a central authority, by hypothesis, even if it is also the subject of the

[5] Stating the competence, nowadays abrogated, but also stated by the New Code of Civil Procedure.

[6] We may also invoke the HCCJ Decision No 4522/2011, the section for contentious administrative, available at *http://legeaz.net/spete-contencios-inalta-curte-iccj-2011/decizia-4522-2011*

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summon, together with the decision of measures issued by the structure of control. In other words, it is considered that the litigation gravitates around the administrative act establishing the measures for financial liability of those subjected to the control of the Court of Accounts.

In this context, Art 228 of the Regulation approved by the plenum of the Court of Accounts is contrary to Art 10 Para 1 of the Law No 554/2004 on administrative litigations, containing different criteria in order to determine the material competence of the courts.

Sometimes, in isolated cases, the argumentation of the material competence of the contentious administrative courts has been different. In this regard we consider the Decision of the HCCJ No 499/02 February 2012, the section for contentious administrative. In order to state regarding the competent court of contentious administrative and fiscal business – tribunal or court of appeal, as court of first instance, body of appeal or the High Court of Cassation and Justice, as recourse courts, the HCCJ invoked as reference (argument) the *solution* stated by the conclusion of the Commission for Solving the Complaints – to admit or to reject the complaint; finally, it considered as criterion (argument) the act with legal effects, which "generates, modifies or extinguishes legal relations" (here, the act which must be performed), differing based on the issued solution (to admit or to reject the complaint).

If the complaint is admitted, implicitly the annulment/abrogation of the decision stating the contested measures, it has been appreciated that the act generating legal effects is the *conclusion which admitted the complaint*, the court stating that "it is subscribed to the decision of the county structure". Because (the conclusion which admitted the complaint) it is issued by an administrative structure (the Commission for Complaints of the Court of Accounts), by hypothesis, central, the competence for solving the litigation which attacked it belongs to the Court of Appeal, the section for contentious administrative and fiscal business, in accordance to Art 10 Para 1 of the Law No 554/2004.

In the case subjected to our attention, regarding the rejection of the complaint by a conclusion, implicitly, maintaining the decision of measures which has been contested, by Decision No 449/02 February 2012, the HCCJ, the section for contentious administrative, admitted the appeal submitted by the Public Service for Printing the Romanian Official Gazette of the Satu Mare County, quashed the decision no 93/08 April 2011 issued by the Oradea Court of Appeal, the section for commerce

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and contentious administrative and fiscal, the litigation being sent for "competent ruling" to the Satu Mare Tribunal, the section for contentious administrative and fiscal business[7]. The criterion applicable in this case is the same as that from the above mentioned case (HCCJ, Decision No 271/29 January 2013, the section for contentious administrative) – the position of the authority which issued the attacked act or the criterion of the position held by the issuing authority in the public administration system.

Conclusions

Art 228 of the Regulation approved by the plenum of the Court of Accounts is contrary to Art 10 Para 1 of the Law No 554/2004 on administrative litigations, containing different criteria in order to determine the material competence of the courts.

We do not share the motivation of the second decision. While the Regulation does not state any criteria in determining the material competence of the courts, the Law No 554/2004 clearly states two criteria, undeniable in practice or theory: the value of the object in the financial-fiscal litigation subjected to judgment; the position of the authority whose administrative act is attacked in a court – local/county public authority or central public authority, applicable in our case.

The criterion of the act generating legal effects is not found in the law and *splits* the issue of the material competence of the courts. In other words, according to jurisprudence – the HCCJ Decision No 499/02 February 2012, though the stated solution – the conclusion to "admit", namely to "reject" the complaint – is given by the same structure (the Commission for Complaints, central structure) and aims the same act (the

[7] Specifically, the Public Service for Publishing the Romanian Official Gazette in Satu Mare County requested contradictory with the defendant, the Romanian Court of Accounts – Satu Mare County Chamber of Accounts, the total annulment of the conclusion no VI. 32/01 February 2011, and to admit the complaint against the Decision No 21/2010 and of the Minute No 254/2001 of the Satu Mare County Chamber of Accounts, as well as the suspension of the performance of the fiscal administrative act until the definitive solution of the litigation. By Decision No 93/08 April 2011, the Oradea Court of Appeal, the section for contentious administrative and fiscal business rejected the plaintiff's request, the decision being attacked by recourse by the Public Service for Publishing the Romanian Official Gazette in Satu Mare County. By Decision No 499/02 February 2012, the HCCJ, the section for contentious administrative rejected the recourse invoking in this case the material incompetence of the court of appeal, arguing the criterion of the legal act generating effects in the case subjected to trial.

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decision for measures attacked, given by a county structure), the competence in solving the litigation belongs to several different courts: the tribunal, for the conclusion to reject the complaint; the Court of Appeal for the conclusion to admit the complaint. We consider that due to the fact that we refer to the same act subjected to judicial control – the disclaimer decision of measures adopted by the authority subjected to control, it must be used a unitary criterion, identified also by the law – that of the issuer of the administrative act subjected to legal jurisdiction.

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Law No 554/2004 on administrative litigations, Official Gazette No 1154/7 December 2004.

HCCJ, Decision No 499/02 February 2012, the section for contentious administrative.

HCCJ, Decision No 271/29 January 2013, the section for contentious administrative.

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