Opinion critical of the prevailing view the jurisprudence of the courts as regards the determination of the income from a rented agricultural holding as a criterion for granting family benefits

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Abstract

The study engages in polemics in the field of determining income from a leased farm for the purposes related to granting the right to family allowance. This problem is of significant importance due to the fact that the current way of interpreting the provisions in this respect by the courts leads to unequal treatment of persons applying for child benefit. Therefore, the article presents the proper, in the author's opinion, way to interpret the provisions in question. It would allow more people who are currently excluded to be covered. The paper also draws attention to a legitimate, in the author's opinion, change of position in one of the judgments.

Keywords: income, tenancy, family allowance.

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Introduction

The provisions on family benefits are a separate and specialised part of the broadly defined social welfare system[1]. However, as the authors of the Administrative Commentary note, the socio-economic purpose of family benefits should not be to support families, but rather to support a low-income, vulnerable child or adult family member. This is a well-established position in doctrine, where it is stressed that the socio-economic purpose of family benefits should focus on helping specific individuals, not families[2]. What else is important, family benefits, unlike social assistance benefits, have a claim nature and are not short-term forms of support enabling overcoming difficult situations. Their construction and thus their assumptions and objectives do not refer to the principle of subsidiarity, nor do they aim to activate their beneficiaries in order to improve their life situation thanks to their own resourcefulness. It follows that they are a type of aid granted by the State which is of a permanent nature and is intended to protect the family, multiple children and disability[3]. Therefore, if a family receives income below a certain limit[4], then, in case of filing an appropriate application and meeting additional conditions specified in the provisions of the law, he will receive the requested benefit. A decision to grant family benefits is not a discretionary decision, but a binding decision, and a finding that the circumstances set out in the Family Benefits Act are present determines whether it is justified to grant the benefit. It is therefore worth noting that in the case of family benefits there is no freedom of the authority to decide that despite not meeting the statutory requirements the benefit should be granted due to a difficult financial, social or e.g. legal situation of the party. Therefore, in the case of family benefits, even if the authorised body found that the financial situation of a family is in fact worse than it results from the adopted legal solutions, it cannot change the ruling in this respect. Family benefits are a form of state aid and can only be granted when the parents do not[5]. The existence of entitlement to family benefit does not, however, release persons having maintenance obligations from their duty to maintain the child and the family. In this connection, attention should be drawn to the purpose of the Family Benefits Act. Namely, it has been expressed in Article 4 Section 1 of the aforementioned Act on family benefits and in the provisions

1. I. Kamińska, J. Matarewicz, M. Rozbicka-Ostrowska, *Komentarz do spraw administracyjnych. Wybrane zagadnienia*, WK 2015 r., Lex 256303. Podobnie I. Sierpowska, *Ustawa o pomocy społecznej. Komentarz*, Kraków, Wolters Kluwer, 2007, p. 22.
2. J. Jończyk, *Świadczenia rodzinne* [in:] *Prawo zabezpieczenia społecznego*, Zakamycze 2006, p. 310 and 313.
3. I. Sierpowska, *Świadczenia rodzinne* [in:] *Prawo pomocy społecznej*, Oficyna 2008, p. 232.
4. Art. 5 Ustawy z 28 listopada 2003 r. o świadczeniach rodzinnych, Dz. U. 2020 poz. 111 ze zm.
5. See: Wyrok WSA w Warszawie z 19 marca 2009 r., I SA/Wa 50/09, LEX nr 533503.

of the Constitution of the Republic of Poland of 2 April 1997[6], the assumptions of which are implemented by the Act on family benefits. Pursuant to Article 4 par. 1 of the Act on Family Benefits, family allowance is aimed at partial coverage of expenses for the maintenance of a child. This means that child benefit is undoubtedly intended to be spent on the maintenance of the child, but that the function of providing for the maintenance of the family or even of the child cannot be attributed to that benefit[7]. However, it is necessary to ensure equal and fair access to these benefits, which are designed to help raise children. Due to differences in parental treatment, the acquisition of child benefit is often prevented for children who are in fact in a comparable income situation to the children for whom the benefit has been established.

Analysis of the problem

Pursuant to Art. 3 point 1 letter c of the Act on family benefits, family income is considered to include income from an agricultural holding. It follows from the provisions of Art. 5 section 8 of the above mentioned Act, in turn, that in case of determining the income from an agricultural holding, it is assumed that 1 ha of calculation area yields a monthly income of 1/12 of the income announced annually by the President of the Central Statistical Office by way of a notice. Art. 5 sec. 8a item 1 of the aforementioned Act states that when establishing the family income from an agricultural holding, the area of the holding which constitutes the basis for assessment of the agricultural tax shall include the agricultural areas leased out, with the exception of a part or the entire agricultural holding held by the family under a lease agreement concluded pursuant to the provisions of the social insurance for farmers.

With this in mind, it should be noted that in accordance with the provisions on family benefits, the legislator has adopted a presumption that an agricultural holding generates income regardless of whether it is operated or leased out personally. Thus, the legislation in question does not refer to the income actually earned from agricultural activity, but contains an assumption that the amount resulting from the calculation provided for therein is the monthly income used to establish entitlement to family allowances. The view, according to which the legislator adopted a presumption that income is obtained from an agricultural holding, was already expressed by the Supreme

6. Ustawa z 8 września 2006 r. o zmianie Konstytucji Rzeczypospolitej Polskiej, Dz. U. 2006 nr 200 poz. 1471; Ustawa z 7 maja 2009 r. o zmianie Konstytucji Rzeczypospolitej Polskiej, Dz. U. 2009 nr 114 poz. 946.
7. W. Maciejko, *Świadczenia rodzinne. Komentarz*, Warszawa 2014, p. 94.

Administrative Court in many judgments[8]. An exception, however, is the situation where an agricultural holding has been leased under a tenancy agreement concluded in accordance with the provisions of social insurance for farmers. In the Act of 20 December 1990 on social insurance of farmers[9] lease agreements are referred to in Articles 28(4)(1), 38(1) and 117. As regards the latter, it is a lease agreement concluded on the basis of provisions previously in force with respect to social insurance for farmers, namely the Act of 14 December 1982 on social insurance for individual farmers and members of their families[10]. It follows that the latter lease agreement, due to the fact that it was entered into on the basis of provisions no longer in force, is of marginal significance and, although it is an agreement entered into pursuant to the provisions on social insurance for farmers, it is a different type of lease agreement from the current ones referred to in Article 28(4)(1), article 38(1) of the Act on Social Insurance of Farmers. At this point it is important to answer the question of how to treat the two other lease agreements referred to in Articles 28(4)(1) and 38(1) of the Act on social insurance for farmers – whether they are the same agreement, or whether they are two different types of lease agreements and concluded for different purposes, albeit in accordance with the provisions on social insurance for farmers.

Analysing the jurisprudence of the courts[11], it should be stated that there is a well-established position in this regard. According to this position, the provisions of the above mentioned Law on family benefits introduce the rule that the lease of agricultural land in accordance with the provisions of the social insurance of farmers relates only to a situation where a pensioner ceases to carry out agricultural activity when he leases his agricultural holding to a person who is not his spouse, descendant or stepchild and who does not remain in a common household with him. The term of the lease should be at least 10 years and the agreement concluded in writing must be certified by the head of the village which has jurisdiction over the location of the leased property (Article 28(4)(1) of the Act on Social Security for Farmers). It follows that in accordance with the provisions of the social insurance of farmers, a lease agreement may be concluded by a person who is a pensioner, which involves the cessation of agricultural activity and the loss of potential income from

8. Judgments of the Supreme Administrative Court of: 14 December 2007, ref. files I OSK 321/07; 15 December 2008, ref. i OSK 50/08 and of 23 June 2009, sygn. files I OSK 1290/08.
9. Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z 22 stycznia 2021 r. w sprawie ogłoszenia jednolitego tekstu ustawy o ubezpieczeniu społecznym rolników, Dz. U. 2021 poz. 266.
10. Dz. U. 1998 poz. 133 i 190 oraz Dz. U. 1990 poz. 90 i 198.
11. Judgments of the Supreme Administrative Court of: 27 October 2006, sygn. files I OSK 601/06; 5 November 2008, ref. files I OSK 1930/07 and I OSK 1929/07; 23 June 2009, ref. oSK 1290/08; 3 September 2009, ref. files I OSK 3/9; 18 February 2010 ref. files I OSK 1425/09; 3 February 2011 ref. act. I OSK 1712/10; 9 March 2011 ref. files I OSK 1922/10, 4 February 2015, sygn. files I OSK 1906/13.

the farm. This is the purpose of regulation of Article 5(8a)(1) of the Family Benefits Act in conjunction with Article 28(4) of the Act on Social Insurance of Farmers[12]. Therefore, in a situation where a person applying for family allowance leased a farm, it should first be examined whether the lease agreement meets the requirements set out in Article 28(4) of the Act on Social Security for Farmers, and it follows from the wording and purpose of that provision, read in conjunction with Article 5(8a)(1) of the Act on Family Benefits, that it is concluded only between the entities mentioned in those provisions, according to which the lessor is always the pensioner. Therefore, taking this line of reasoning, a person who is not entitled to an agricultural pension or an agricultural allowance cannot conclude a contract for the lease of agricultural land under the provisions of the social insurance of farmers. This means that the subjective condition of concluding a lease agreement was not fulfilled. Thus, the lump-sum income from an agricultural holding leased out by a person who is not a pensioner shall be added to the income earned by that person from other sources. It is difficult to find the ratio legis of such a solution, where the income of mostly young people, who often need help in connection with bringing up their children, includes the flat-rate income from a leased farm, which is actually received by the tenant of the farm. In turn, the tenant's income is reduced by the rent from the lease (Article 5(8b) of the Family Benefits Act). Retired farmers, most of whom are no longer in need of child-raising support, are exempted under the Family Benefits Act from the obligation to add income from their leased farm to their income for family allowances. This raises doubts as to whether the creation of such a non-transparent solution was not aimed at achieving a purely fiscal effect, but at the expense of children, who often may not receive the assistance due to them simply because the flat-rate income from the leased farm is added to their family income. Probably a more transparent solution would be to add the rent from the farm to the family income.

It should be noted, however, that Article 38(1) of the Act on Social Insurance of Farmers refers to the cessation of agricultural activity, and it should be stressed that this regulation does not refer only to pensioners of agricultural origin. In the Act on social insurance of farmers the legislator has clearly defined the conditions to be met in order to be subject to social insurance of farmers. The owner of an agricultural holding with an area exceeding 1 conversion ha, after meeting the other conditions laid down in Articles 7 and 16 of the Act on Social Insurance of Farmers, is subject to that insurance by virtue of law, which, however, does not exclude such a farmer from compulsory insurance if the interested party rebuts the presumption arising from Article 38(1) of that Act. Compulsory social insurance for farmers is based on a presumption

12. Wyrok NSA w Warszawie z 9 marca 2011 r., sygn. akt I OSK 1922/10.

of actual agricultural activity, which may be rebutted in the course of evidence proceedings. In this way the legislator explicitly verbis – in the issue of being subject to social insurance of farmers – gave priority to the factual state before the ownership state, which cannot be noticed in the provisions regulating the payment of pension benefits, namely in relation to Article 28 Section 4 point 1 of the above mentioned Act on social insurance of farmers. Pursuant to that provision, a pensioner is deemed to have ceased agricultural activity if neither he nor his spouse is the owner (co-owner) or holder of an agricultural holding within the meaning of the provisions on agricultural tax and does not carry out a special section, not including land leased under a written agreement concluded for at least 10 years and certified by the head of the district, the competent authority for the place where the object of the trade is located:

(a) the spouse of a pensioner,

(b) his descendant or stepchild,

(c) a person living in the same household as the pensioner,

(d) the spouse of the person referred to in point (b) or (c).

In connection with the above, the role of art. 28 section 4 point 1 of the above mentioned act is construction of the legal norm concerning suspension of payment of the supplementary part of the agricultural pension benefits in case of possession of an agricultural holding after obtaining the right to these benefits, which, according to this provision, is understood as conducting agricultural activity. It is worth noting that in the case of applying for the right to the so-called early retirement pension, the cessation of agricultural activity, pursuant to Article 6 point 3 of the above mentioned Act[13], was a prerequisite for establishing the right to that benefit, which meant that it was required to dispose of the ownership of an agricultural holding. In addition, a farmer applying for early retirement was not a pensioner, since the decision to grant that benefit was constitutive in nature and not, like a decision establishing entitlement to a pension on reaching retirement age, declaratory in nature. Therefore, a person who ceased agricultural activity in connection with applying for early retirement and for that purpose leased an agricultural holding with the simultaneous entry of that agreement in the land and buildings register did not meet. The conditions referred to in Article 28(4)(1) of the above mentioned Act on social insurance for farmers. In this case, Article 38(1) of that Act should have been cited as the basis for the lease agreement. Having all that in mind one may additionally state, interpreting literally Article 28 (4) (1) of the above mentioned Act on

13. Within the meaning of Article 6(3) of the above-mentioned Act on Social Insurance of Farmers, agricultural activity means activity within the scope of plant or animal production, including gardening, horticulture, beekeeping and fishing.

social insurance of farmers, that the legislator is silent about the actual conducting of agricultural activity in the issue of pension benefits and leaves the issue of conducting or not conducting agricultural activity aside as irrelevant for the payment of the supplementary part of the benefit. Consequently, the main purpose of this provision is the generational replacement of farm managers and not the cessation of farming activities by those entitled to a pension. Consequently, it would be possible to put forward a thesis that the regulation contained in Article 38(1) of the Act on social insurance of farmers refers to being subject to social insurance of farmers, which was defined by the legislator by the use of the phrase "it shall be presumed in determining whether a person is subject to insurance..." in this provision. Indicating the differences between these provisions, it can be stated that according to Article 38(1) of the Act on Social Insurance of Farmers, it does not matter who the lessor is, i.e. it can be an active farmer as well as a pensioner. Thus, the differences between the lease contract referred to in Article 38(1) of the above-mentioned Law and the lease contract referred to in Article 28(4)(1) of the above-mentioned Law, for which specific solutions have been laid down, conditioning the possibility of payment of the supplementary part of agricultural pensions, and whose aim is that the land of pensioners should pass into the hands of new farmers able to carry out agricultural activity effectively, and not the mere fact of ceasing to carry out such activity.

The justification of the thesis about the different nature and the need to distinguish between lease agreements is further confirmed by § 11 paragraph 1 point 2 of the Regulation of the Minister of Regional Development and Construction of 29 March 2001 on land and building registration[14], according to which the land and buildings register includes data on land that is subject to lease agreements, and on tenants of these lands, reported to the register in connection with the provisions of article 28 paragraph 4 point 1, article 38 point 1 and article 117 of the Act of 20 December 1990 on social insurance for farmers. The subject wording of this provision was given by the Ordinance of the Minister of Administration and Digitisation of 29 November 2013 amending the Ordinance on the land and buildings register[15]. Until this change, the wording of § 11(1)(2) of the regulation on the land and buildings register was limited in such a way that the register contained data on persons and organisational units that administer land under lease agreements, hereinafter referred to as "tenants", reported in the register pursuant to art. 28(4)(3) of the Act

14. Obwieszczenie Ministra Inwestycji i Rozwoju z 3 stycznia 2019 r. w sprawie ogłoszenia jednolitego tekstu rozporządzenia Ministra Rozwoju Regionalnego i Budownictwa w sprawie ewidencji gruntów i budynków, Dz. U. 2019 poz. 393.
15. Rozporządzenie Ministra Administracji i Cyfryzacji z 29 listopada 2013 r. zmieniające rozporządzenie w sprawie ewidencji gruntów i budynków, Dz. U. 2013 poz. 1551.

of 20 December 1990 on social insurance for farmers. In the justification of the above-mentioned project of amending the regulation regarding the register of land and buildings it was stated that "The proposed amendment to § 11 sec. 1 clause 2 (§ 1 clause 7 letter a of the project of the regulation) results from the fact that this provision, in its current wording, did not take into account all legal regulations that make the acquisition of respective rights by the owner of leased land dependent on the disclosure of the lease agreement regarding this land in the register".

It follows that in the Regulation[16] on land and building registration distinguishes between three independent grounds for concluding a tenancy agreement, which are concluded in accordance with the provisions on social insurance for farmers and are shown in the land and building register. Consequently, assuming that under Article 38(1) of the above mentioned Law on social insurance for farmers the lessor may be a person who wishes to demonstrate that he has ceased agricultural activity and thus be excluded from the obligation to be covered by social insurance for farmers, he should be entitled not to have the flat-rate income from his agricultural holding included in the income required for the acquisition of family allowances, even though he is not an agricultural pensioner. A lease agreement concluded pursuant to Article 38(1) of the above Act, in accordance with the provision in question of the Regulation on the registration of land and buildings, is registered in the land and buildings register without any additional requirements as to the entities between which it is concluded. Thus there is no justification as to why such an interpretation should not accompany the application of the provisions on family benefits, namely Article 5(8a)(1) of that Act.

At this point, it is worth noting that an analogous issue occurs under the provisions of the Act of 11 February 2016 on state aid in raising children[17]. In that Act, too, we were dealing with the interpretation, well established in case law[18], formed against the background of an identically formulated provision of Article 7 Section 6 as in Article 5 Section 8a of the Family Benefits Act of 28 November 2003[19], where the lease agreement, pursuant to the provisions of the social insurance scheme for

16. As a side note, it should be noted that this regulation is valid until July 31, 2021. This is due to the fact that as of 31 July 2020, the Act of 16 April 2020 on amending the acts – Geodetic and Cartographic Law and certain other acts, Journal of Laws 2020, item 782 (Ustawa z 16 kwietnia 2020 r. o zmianie ustaw – Prawo geodezyjne i kartograficzne oraz niektórych innych ustaw, Dz. U. 2020 poz. 782) came into force. The act in question introduced changes in the provisions on social insurance of farmers. Until the introduction of the amendment in question, in accordance with the provisions of the social insurance of farmers, the agreements referred to in Article 28(4)(1) and Article 38(1) were registered in the land and buildings register, and after the amendment they are confirmed by the head of the village which is competent as to the location of the subject of the lease.
17. Ustawa z 24 czerwca 2021 r. o zmianie niektórych ustaw związanych ze świadczeniami na rzecz rodziny, Dz. U. 2021 poz. 1162.
18. Wyrok Wojewódzkiego Sądu Administracyjnego w Lublinie z 27 września 2018 r., II SA/Lu 683/17.
19. Dz. U. 2020 poz. 111 ze zm.

farmers, is concluded exclusively between operators, under which the lessor is always the pensioner. In the above context, the sentence of the Voivodship Administrative Court in Poznań is worth noting[20], in which the court did not share the view that only a farm lease agreement, in which the lessor is a pensioner, exempts from the obligation to take income (calculated in a lump sum) into account when determining family income in the proceedings for granting child care benefit. The provision of Article 7(6)(1) of the Act on State Aid for Raising Children, analysed by the court in the wording "leased on the basis of a lease agreement concluded in accordance with the provisions of the social insurance of farmers", does not, in the court's view, indicate that the reference refers to the subject party of the agreement indicated in the provisions of the social insurance of farmers. For it expressly refers to the definition of a contract and not to the person who may enter into such a contract. As the court noted, a party to such an agreement is certainly a member of the family whose income is determined for purposes of the child-rearing benefit. The remainder of the provision refers to the leasing out of part or all of an agricultural holding owned by the family. Therefore, there is no justification for holding that only a pensioner can be a lessor. The Act on Social Insurance of Farmers does not contain a separate definition of such an agreement. However, its necessary elements are provided for in this law. The fact that Article 28 (4) (1) of the Act on Social Insurance for Farmers indicates a pensioner as a lessor does not mean that in the light of Article 7 (6) (1) of the Act on State Aid for Child Rearing, only a pensioner is to be a lessor. Since Article 28(4) of the Act on Social Insurance of Farmers regulates situations in which a pensioner is deemed to have ceased agricultural activity, it is clear that the pensioner is indicated. This does not mean, however, that in the light of the cited Article 7 (6) (1) of the Act on State Aid for Child Rearing, only a pensioner concluding a tenancy agreement in writing for 10 years with a stranger can be exempted from including income from a farm leased in this way. It should be noted that Article 7. 6. 1 of the Act on State Aid for Raising Children refers to the provisions of the social insurance of farmers, and not only to Article 28. 4 of the Act on Social Insurance of Farmers. That law does not regulate only the situation of pensioners, nor is there any justification, even in view of the addressees of child-raising benefits, for referring only to pensioners to the extent under consideration. With regard to the issue of presumption of agricultural activity and cessation of such activity, the Act on social insurance of farmers is not limited only to pensioners. Section 32 of the Act appropriately directs that section 28(4) be applied to an adult (the provision relates to the payment of a survivor's pension). For this reason alone, limiting the interpretation

20. Wyrok Wojewódzkiego Sądu Administracyjnego w Poznaniu z 18 lipca 2019 r., II SA/Po 186/19.

of the provision of Article 7(6)(1) of the Act on State Aid for Child Rearing to the content of Article 28(4) of the Act on Social Insurance of Farmers is not justified. It is also worth noting the content of Article 38 of the Act on social insurance of farmers, according to which the presumption of conducting agricultural activity on agricultural land includes the owner of the land or the lessee of such land, if the lease is registered in the register of land and buildings. In the Act on social insurance for farmers, art. 117 states that lease agreements concluded pursuant to art. 2. 6. b of the Act referred to in art. 122, i.e. the repealed Act of 14 December 1982 on social insurance for individual farmers and members of their families (Dz. U. 1989 no. 24, item 133) are subject to registration in the land and buildings register. Pursuant to Article 2(6)(b) of the Law of 14 December 1982, this is the lease of land forming part of an agricultural holding to a person who is not the farmer's spouse, descendant or descendant's spouse and who is not in common household with the farmer under a lease agreement concluded for a period of at least 10 years. According to the court, since the applicant proved that the agreement she concluded meets these conditions and constitutes an agreement referred to in Article 7(1)(6) of the Act on State Aid for Child Rearing concluded pursuant to the provisions of the Act on Social Insurance for Farmers, it is not the income from the leased farm, but the lease rent that should be included in the income when determining the income criterion.

Thus, the court found in the judgment that the competent authorities, by adding the income from an agricultural holding, had breached Article 7(6)(1) of the Act on State Aid for Child Rearing and therefore the decisions had to be annulled. When establishing the income criterion, taking into account the interpretation of Article 7(6)(1) of the Act on State aid for the upbringing of children set out in this judgment, this should be done taking into account the lease rent and not the flat-rate farm income. This is in line with the approach already presented, which has not yet gained widespread acceptance[21], but they should be pointed out as appropriate, so that those who should count on receiving the child-rearing benefits due can obtain them in accordance with the current legislation, which is still largely not properly interpreted. While it is true that the court used additional arguments in the judgment at issue, beyond those in the position presented in the article, it should be considered that they are not contradictory, but merely provide additional rationale for the accuracy of the view discussed in the article.

21. E. Nasternak, *Ustalanie dochodu dla celów związanych ze świadczeniami rodzinnymi w stosunku do osób, które wydzierżawiły gospodarstwa rolne*, "Ubezpieczenia w Rolnictwie. Materiały i Studia" 2017, nr 62.

Summary

In view of the above, it is justified to change the interpretation of the provisions in question on family benefits so as to avoid that a person who is not a pensioner but who owns an agricultural holding which has been leased out pursuant to Article 38(1) of the Law on Social Security for Farmers is added to the lump-sum income from the leased agricultural holding when applying for family benefits. The reason for this is that, having regard to, for example, the above-mentioned Regulation on land and building registration, the conclusion of a lease agreement on agricultural land – in accordance with the provisions on social insurance for farmers – does not apply only to pensioners. Consequently, lump-sum income from an agricultural holding leased out by a person who is not a pensioner should not be added to the income earned by this person from other sources which determine the acquisition of, for example, a family allowance, which is one of the benefits granted under the provisions of the above mentioned Act on Family Benefits. Alternatively, as indicated above, the lease rent in the amount resulting from the lease contract should be added to income, which would make it possible to grant family benefits on the basis of a properly established personal, family, income and asset situation of individuals or families.

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