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Should Tax Law Be Interpreted? Is It Right to Interpret Tax Law?

ABSTRACT

The absurdity of law interpretation is even stronger in public law, especially in tax law. It is not right to interpret tax law, because it is dangerous. It is wrong to interpret tax law, because it is impossible to predict how the written text of the law will be interpreted later. Interpretation excludes voluntary compliance with tax law because the taxpayer does not know what the interpreted content of the law is, and it is unfair to impose sanctions for non-compliance with a law if its meaning is only determined later.

However there is a need of interpretation, which became more difficult with constitutionalisation, europeanisation of law and increasing relevance of fundamental rights. Lawyers have to fight with lack of theoretical structures, methodological uncertainty, and are faced with different tax professionals with opposing and competing interests. We have to point out the dominant position of the tax authority, absence of genuine methodological debates, bad traditions. The author gives practical examples, how jurisprudence can solve these dilemma.

KEYWORDS: *praeter legem* and *contra legem* law developing interpretation, reverse hierarchy of legal norms, retrospective tax inspection, discrimination, reliable ('well-behaved') taxpayers, content overrules form, unlawful exercise of taxpayer's rights

I. INTRODUCTION

It is not right to interpret tax law, because it is dangerous. It is wrong to interpret tax law, because it is impossible to predict how the written text of the law will be interpreted later. Interpretation excludes voluntary compliance with tax law because the taxpayer does not know what the interpreted content of the law is, and it is unfair to impose sanctions for non-compliance with a law if its meaning is only determined later.

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II. WHAT MAKES OUR JOB DIFFICULT?

In seeking to answer the question of whether we should or should not interpret tax law, reality cannot be ignored. And the reality is that in Hungary no legal norm can be applied without interpretation. Hence, the answer to the above question is yes: we should interpret tax law, even if interpretation is wrong in principle, as it makes compliance with the law more difficult. In examining the reasons that make it difficult for us to determine the genuine content of tax law, the following factors can be specified.

1. Constitutionalisation, increasing relevance of fundamental rights

Tax law, similarly to other specialised fields of law, is becoming increasingly influenced by constitutional law, and a fundamental rights-based approach is becoming increasingly prevalent in the field of tax law. I would like to mention two examples. First, which tax lawyer would think that tax law sanctions need to be compared with criminal law sanctions so that the proportionate tax law sanction can be determined? Well, as the most recent international practice demonstrates, the *ne bis in idem* principle must be interpreted, by taking several fields of law into consideration; that is, it is not sufficient to apply tax law provisions and sanctions by themselves: in applying the *ne bis in idem* principle: due regard must be paid to other sanctions already imposed – for example, for criminal or administrative offences.

The prohibition of double sanctioning applies where three conditions are met: the facts, the violator and the protected legal interest are the same. According to the most recent case law of the Court of Justice of the European Union, this principle – which is acknowledged by both the EU Charter of Fundamental Rights and the European Convention on Human Rights – may be limited for the purpose of protecting the financial interests and financial markets of the EU but only to the extent necessary to achieve those objectives. In its judgments delivered in cases C-524/15 and C-537/16, the Court has concluded that a possible duplication of criminal proceedings and penalties and of administrative proceedings and penalties of a criminal nature against the same person concerning the same facts is not inconceivable. Such limitations of the *ne bis in idem* principle do, however, require justification in conformity with the requirements of EU law; that is, the limitations must pursue an objective of general interest acknowledged by the Union, must contain clear and precise rules, and must provide for rules making it possible to ensure that the severity of all the penalties imposed is limited to what is strictly necessary in light of the seriousness of the offences committed.¹

¹ Source: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180034en.pdf> (Last accessed: 31 December 2018).

The other principle which became embedded in tax law due to the impact of constitutional law and which appears, as will be presented below, in several provisions of the new Act on the Rules of Taxation (hereinafter: 'ART') and in the Act on Tax Administration Procedure (hereinafter: 'ATAP'), is the principle of equal treatment. The consistent application of the principle of equal treatment results in multipolar legal relationships under tax law. As German tax law practice demonstrates, there may arise so-called competing actions; namely, where the tax authority remits the tax debt of a business company or decides not to impose a fine on the company, a competitor may file a lawsuit against the decision alleging that the tax authority has thereby granted an unauthorized competitive advantage for the company that failed to pay its tax debt.

2. Europeanisation

The next factor is Europeanisation. We clearly see that, in these days, Hungarian tax law, in respect of certain tax types, cannot be interpreted without a sound knowledge of EU law. We may mention the value-added tax (VAT) Directive, since, in the related cases, we must determine the contents of a service and must determine which services are only ancillary to the principal service in the light of the case law developed under the Directives. Without being familiar with the respective EU Regulations, we are unable to determine even the tariff heading under which a given commodity falls.

3. Lack of theoretical structures

Another factor that makes our job difficult is that tax law is primarily practice-oriented, a finance and accountancy-related discipline, in which area law keeps playing catch-up with practice. It is sufficient to recall how tax law endeavours to react continuously to the ever-changing methods of tax planning, or to point out the impossibility of placing the OECD Model Convention in the hierarchy of legal sources, of determining its legal nature, and of resolving the problem of retroactive application of the related Commentaries.²

² According to the Protocol to the Agreement between the Federal Republic Of Germany And the Republic Of Hungary for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, signed on 28 February 2011 in Budapest, Articles 5 and 7 of the Agreement shall be applied and explained, and especially any dispute shall be resolved subject to the Commentaries on Articles 5 and 7 of the OECD Model Convention in force. In case of any future revision of the Commentaries by OECD, Articles 5 and 7 of this Agreement shall be explained in light of the revised Commentaries, that is, according to the updated version, provided that they are in accordance with the text of the Agreement.

4. Methodological uncertainty

Tax law also suffers from methodological uncertainty. This uncertainty results, on the one hand, from the fact that classic public-law doctrines need to be applied to a specific field of law while due regard is to be paid, in the interpretation of tax law, to very important public finance interests. On the other hand, the precise delineation of the boundaries between criminal law and tax administration also poses a problem, and the practice that has evolved in the past years awaits important discoveries in this respect.

5. Two professions with opposing and competing interests

In interpreting tax law, our job is made more difficult by the fact that two professions face each other: tax advisors and tax inspectors interpret tax law along lines that reflect clearly understandable interests. Of course, those lines are very different.

6. Dominant position of the tax authority; absence of genuine methodological debates; bad traditions

The possibility of tax law interpretation is also distorted by the dominant position of the tax authority in tax administration proceedings. Another distorting effect is the absence of genuine and meaningful debates among legal scholars about the methodology of tax law; our bad tax law traditions – including traditional Hungarian resistance to paying taxes in the fashion of the ‘Kuruc’ (17th century anti-Habsburg) rebellion – are also distorting factors. Hungarian tax morals can be described as typically Eastern European.

III. DOES JURISPRUDENCE OFFER ANY HELP?

Does jurisprudence offer any help in the correct interpretation of tax law? Well, we must start from the actual situation and must state that no one may question the binding force of valid laws. The content of such laws, however, must be established by analysing them, and the content thus established will then become binding. The question is, who is entitled to give an authentic interpretation of the laws? There can be no doubt that only a judge may determine a legal dispute, based on the interpreted, specific content of the applicable law. As to the methods of law interpretation, jurisprudence obviously enjoys much greater leeway, for example in determining the objectives of the law and the interests sought to be protected by the law, and in compiling the list of values and principles which support the interpretation of tax law.

IV. METHODS OF DETERMINING THE APPLICABLE LAW

Among the methods of interpretation, we can find the classic methods defined by Friedrich Carl von Savigny: grammatical, systematic, historical and teleological. In our modern world, however, interpretation in conformity with the constitutional standards, EU law, and international law is also indispensable. Moreover, in a world of global tax competition, the method of comparative law cannot be ignored, either. I am sure that no one would take the risk of accepting an interpretation that is regarded in other parts of the world as ridiculous. Therefore, the use of comparative method is becoming increasingly prevalent.

Another question is the extent to which the interpretation of tax law is suitable for developing the law. Legal theory makes a distinction between *praeter legem* and *contra legem* law-developing interpretations. It must be noted that, under Hungarian tax law practice, the borderline between these two methods is almost entirely unclear and, in view of the Hungarian Constitutional Court's recent decisions, it can be stated that this body limits the leeway allowed for law developing interpretation to an even greater extent than what is common under international trends.

The conflict-of-law rules and the principles under which the interpretation of tax law could be carried out are not always applicable. In this respect I wish to mention two examples. To tax lawyers, the reverse hierarchy of legal norms is a familiar concept, the essence of which is that the lowest ranking norm is the one applicable, because the lowest ranking norm, guideline or National Tax and Customs Administration (NTCA) opinion is the most detailed and the most understandable for taxpayers. The other example is related to the question of valid and binding legal norms. Namely, tax law contradicts the general rule that only legal norms in force may be applied because, in conducting a retrospective tax inspection with regard to the preceding five years, the tax authority must apply tax law provisions already repealed by the legislature but in force at the material time. In determining the applicable law, careful consideration and the use of the methods of logical argumentation are indispensable.

V. OTHER FACTORS HAVING AN IMPACT

Other factors also have an impact on tax law. Such factors include, among others, circumstances that in practice function as preliminary restrictions; such a restriction occurs, for example, upon an advance tax ruling, which is a special procedural law institution allowing the tax authority to determine in advance the tax liability of a given transaction.

The protection of a legitimate expectation or the principle of equal treatment may also have an impact on a given tax liability.

These days, empirical legal studies pay increased attention to the cognitive and decision-making processes, therefore the vast amount of American empirical literature

that deals with the distortive effects of those processes cannot be ignored in the interpretation of tax law, either. The traditional approach of Hungarian legal theory emphasises the importance of enforcing the principles of material justice, legal certainty, and effectiveness in the interpretation of tax law.

VI. WHERE DO WE EXPECT FURTHER HELP FROM JURISPRUDENCE?

Where do we expect further help from the jurisprudence with the interpretation of tax law? We have no reliable methods to ensure the compatibility of contradicting values, and we cannot precisely reflect in the interpretation of tax law the application of tax rules, which application is constantly adjusted to changing life circumstances. Tax law interpretation and jurisprudence are powerless *vis-à-vis* value changes, too.

In searching positive law for methodological rules orienting us in the interpretation of tax law, the inventory that can be made is rather deficient. Positive law, naturally, specifies the objective of the law and sets forth the obligation of exercising the rights in conformity with the purpose of authorisation – which rule refers back to the legislature's will as an aspect to be taken into consideration in interpreting the law – but, in addition to these rules, only the prohibition of discrimination appears in various respects in the texts of the tax laws, and the taxpayer's 'good behaviour' may have an impact on tax cases. At this point, I would like to raise some concerns: Is granting certain statutory benefits to reliable ('well-behaved') taxpayers compatible with the prohibition of discrimination? When the tax authority applies the principle of actual content, namely, the economic outcome of the transaction; that is, when content overrules form, what are the limits of the authority's scope of action? From the existing practice, instances can be recalled when the tax authority treated independent contractor agreements as employment contracts, and this practice was accepted by the courts, too. Moreover, the tax authority treated lease-purchase agreements with so-called 'head-weighted' payment structure (where at least 70 percent of the purchase value is paid at the beginning of the lease period) as purchase agreements, and reclassified onerous contracts as gratuitous contracts, and vice versa. As such, the question arises: Where are the doctrinal limits of classifying contracts according to their genuine content? For the tax authority, a similarly fundamental issue is the principle of equitable procedure – what can be the consequences of such a procedure?

VII. EXAMPLES FROM THE CURIA'S TAX JURISPRUDENCE

Let me give a few examples as an illustration. In a case related to the lawful exercise of rights, company employees who were authorised to accept official documents 'hid' in

the company's office building from the tax authority employee who was empowered by the law to serve official documents in person. In its judgment, the Curia found that the company's conduct amounted to abusive exercise of rights. The Curia went against the grammatical interpretation of the positive law when it concluded that although the decision had not been actually served it should be regarded as having been duly served.³

The other example concerns equitable procedure. What requirements are to be met by the tax authority under the principle of equitable procedure? In a recent judgment, the Curia found that if a tax authority decision is taken more than one year after the expiration of the statutory time limit, no sanction can be imposed on the taxpayer.⁴ A similar legal consequence is prescribed in the new ART, namely where a taxpayer acts in compliance with the information provided on the website of the NTCA and the information later proves to be erroneous, no sanction can be imposed on the taxpayer.⁵

VIII. METHODOLOGICAL DEBATES

What methodological debates do the above questions of law interpretation generate? In establishing the economic content of a transaction, the dilemma is that business transactions are not one-way transactions. Taxpayers, even those entering into a transaction for tax evasion purposes, pay attention to ensuring that their transactions have multiple/various contents and can be approached from various directions. Can it be stated in such cases that the transaction was aimed at, exclusively or primarily, tax evasion? If the affirmative, on the basis of what facts? Can, in such cases, the method of typification of contracts be applied? How should the private law and contract law-related open concepts that arise in connection with this issue be treated?

As to the taxpayer's obligation to exercise their rights lawfully and in good faith, we have no guidance as to whether it is an objective or a subjective requirement and whether the lawfulness of the exercise of a right is to be inferred from objective circumstances, or can/should circumstances related to the state of mind also be taken into account? What facts may give rise to a finding of unlawful exercise of such rights?

³ Decision of the Curia No. Kfv. I. 35.008/2017/6, Reasoning Part [36]: 'In the course of personal delivery of a document issued by the tax authority, the denial of receipt can be effected not only by an express declaration but also by implicit conduct depending on the assessment of the circumstances of delivery.'

⁴ Judgment of the Curia No. Kfv. I. 35.080/2017/6, Reasoning Part [31]: 'Considering the above, the Curia examined in the given case to which extent the exceed of the deadline by 528 and, respectively, 538 days – which was also acknowledged by the defendant – influenced the plaintiff in performing its obligation of proof and, consequently, the establishment of the unlawful exercise of the right to VAT refund.'

⁵ Section 247, subsection 1 of Act CL of 2017: No sanction may be imposed on the taxpayer if it has proceeded in accordance with any information material published by the tax authority on its website, on the specific surface created for this purpose.

Tax law uses many generic and uncertain legal concepts, such as ‘costs of living’ or ‘credible evidence’. The meaning of these concepts is rather ambiguous if we focus only on the text of the laws. And, finally, the biggest question for law application is the extent to which the deficiencies and loopholes of tax legislation can be eliminated and filled. Practice has given controversial answers to this question. Is it allowed to establish content that is contrary to the grammatical meaning? I have mentioned the example related to the service of a decision, where the Curia accepted a content contrary to the grammatical meaning. I could, however, mention other cases, in which the Curia did not resort to such practice, or resorted to such practice but, in ensuing proceedings, the Constitutional Court established that, in applying the law, the Curia had exceeded its powers. To what extent may the courts interpreting tax law develop law? This question is not answered, and in general, it cannot be answered. Can the extent of law-developing interpretation depend on whether the interpretation is in favour of or against the taxpayer?

Well, these methodological debates continue to exist in the new legal environment, too: a careful reading of the new Act on Tax Administration Procedure and of the new Act on the Rules of Taxation reveals no substantial changes.

IX. CONCLUSIONS: CONTINUITY AND OPENNESS IN THE INTERPRETATION OF THE LAW

As a conclusion, I wish to emphasise the following: if we wish to make progress in the interpretation of the law in an acceptable manner, two requirements must be fulfilled simultaneously: one is continuity, the other is openness. The tension between continuity and openness may be reduced by the consistent enforcement of the following aspects. We should foster the special features of our national legal system, should reinforce the tendencies developed in Hungarian tax law, give effect to general principles of legal theory, and should endeavour to make judicial law development and its traditions more accepted and welcomed. Naturally, tax law depends on the economic situation. Therefore, no acceptable tax law interpretation is possible without balanced economic development and reasonable legislation. In a different context, a similar conclusion was reached by T. S. Eliot, who summarised the artistic combination of these two aspects as follows:

It is not enough to understand what we ought to be unless we know what we are, and we do not understand what we are unless we know what we ought to be. The two forms of self-consciousness, knowing what we are and what we ought to be, must go together.⁶

⁶ T. S. Eliot, *Religion and Literature*, in *Essays Ancient and Modern*, (Harcourt, Brace and Company, New York, 1936) 92–115.