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GAARs AND JUDICIAL ANTI-AVOIDANCE

IN GERMANY, THE UK AND THE EU

Series on International Tax Law, Michael Lang (Ed)

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Univ.-Prof. Dr. Dr. h.c. Michael Lang (Editor)

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Markus Seiler

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Preface

This book is based on my doctoral thesis written at the Institute for Austrian and International Tax Law at the Vienna University of Economics and Business (WU Vienna) which I defended in February 2016 in Vienna.

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Vienna, May 2016 Markus Seiler

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List of abbreviations

Abs	Absatz (para)
AC	Law Reports: Appeal Cases (3rd series)
AEUV	Vertrag über die Arbeitsweise der Europäischen Union (TFEU)
AG	Advocate General
All ER	All England Law Reports
Anm.	Anmerkung (Comment)
AO	Abgabenordnung (Fiscal Code)
App.Cas.	Law Reports: Appeal Cases (2nd series)
APTB	Asia Pacific Tax Bulletin
BAO	Bundesabgabenordnung (Austrian Federal Fiscal Code)
BB	Der Betriebsberater
BEPS	Base Erosion and Profit Shifting
BerlinFG	Berlinförderungsgesetz (Berlin Promotion Act)
BFH	Bundesfinanzhof (Federal Fiscal Court)
BFH/NV	Sammlung nicht veröffentlichter Entscheidungen des BFH (collection of the decisions of the BFH which are not published officially)
BFHE	Sammlung der Entscheidungen des BFH (collection of decisions of the BFH)
BFIT	Bulletin for International Taxation
BGBl	Bundesgesetzblatt (Federal Law Gazette)
BRD	Bundesrepublik Deutschland (Federal Republic of Germany)
Bgin.	Beschwerdegegnerin (the party complained against)
BT	Bundestag (German Bundestag)
BTDrucks	Bundestagsdrucksache (Bundestag document)
BTR	British Tax Review
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court)
BVerfGE	Sammlung der Entscheidungen des BVerfG (collection of the decisions of the BVerfG)

CAA	Capital Allowances Act
CCCTB	Common Consolidated Corporate Tax Base
CFC	Controlled Foreign Corporation
CGT	Capital Gains Tax
Ch	Law Reports Chancery Division
CML Review	Common Market Law Review
COM	legislative proposals, and documents related
CTA	Corporation Tax Act
CTC	Canada Tax Cases
d.h.	das heißt (i.e.)
DB	Der Betrieb
DM	Deutsche Mark
DOTAS	disclosure of tax avoidance schemes
DRiZ	Deutsche Richterzeitung
DStR	Deutsches Steuerrecht
DStZ	Deutsche Steuerzeitung
DStZ/A	Deutsche Steuerzeitung Ausgabe A
DTA	Double Taxation Agreement
e.g.	example given
EBT	employee benefit trust
EC	European Community
EC Tax Journal	European Community Tax Journal
EC Tax Review	European Community Tax Review
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ed	editor
EEC	European Economic Community
EStG	Einkommensteuergesetz (ITA)
ET	European Taxation
etc	et cetera
EU	European Union
EuR	Zeitschrift Europarecht
EWCA Civ	England and Wales Court of Appeal Civil Division
EWHC	England and Wales High Court
FA	Finance Act

FCAFC	Federal Court of Australia Full Court
FG	Finanzgericht
FN	footnote
FR	Finanzrundschau
GAAR	General Anti-Avoidance (Abuse) Rule
GBP	Great Britain Pound
GITC	Gray's Inn Tax Chambers
GrEStG	Grunderwerbsteuergesetz (Real Estate Transfer Tax Act)
GrS	Großer Senat (Grand Senate)
GrStG	Grundsteuergesetz (Real Estate Tax Act)
HKCFA	Hong Kong Court of Final Appeal
HL	House of Lords Official Report
HM	Her Majesty
HMRC	Her Majesty's Revenue and Customs
i.e.	id est
i.V.m.	in Verbindung mit (in conjunction with)
ICTA	Income and Corporation Taxes Act
IFSC	International Financial Services Centre
IHTA	Inheritance Tax Act
IOM	Isle of Man
IRC	Inland Revenue Commissioners
IStR	Internationales Steuerrecht
ITA	Income Tax Act
JbFSt	Jahrbuch der Fachanwälte für Steuerrecht
jurisPR-SteuerR	juris PraxisReport Steuerrecht
JuS	Juristische Schulung
JStG	Jahressteuergesetz (Annual Tax Act)
JZ	Juristenzeitung
KB	King's Bench
KStG	Körperschaftsteuergesetz (CITA)
LIFO	last in first out
LLP	Limited Liability Partnership
LR	Law Reports
Ltd	Limited
MN	marginal number

MNE	Multi-National Enterprise
MP	Member of Parliament
NICs	national insurance contributions
No	number
Nr.	Nummer (number)
OECD	Organization for Economic Co-operation and Development
OECD-MC	OECD Model Convention
OFH	Oberster Finanzgerichtshof (Supreme Fiscal Court)
OJ	Official Journal
ÖStZ	Österreichische Steuerzeitung
p	page
para	paragraph
PSD	Parent-Subsidiary-Directive
Q.B.	Queen's Bench
QBC	qualifying corporate bonds
QC	Queen's Counsel
QCB	Qualifying Corporate Bonds
R & D	research & development
RAO	Reichsabgabenordnung (Reich Tax Code)
RDS	relevant discounted securities
Reg	Regulation
RFH	Reichsfinanzhof (Reich Fiscal Court)
RFHE	Sammlung der Entscheidungen des RFH (collection of decisions of the RFH)
RGBl	Reichsgesetzblatt (Reich Law Gazette)
RIE	recognised investment exchange
RM	Reichsmark
RStBl	Reichssteuerblatt (Reich Tax Gazette)
Rz	Randziffer (MN)
s	Section
S.C. (H.L.)	Session Cases (House of Lords cases, Scotland)
SAAR	Specific Anti-Avoidance (Abuse) Rule
Sch	Schedule
SDLT	Stamp Duty Land Tax
Sec	Section

SSCR	Social Security (Contributions) Regulations
SSRN	Social Science Research Network
StAnpG	Steueranpassungsgesetz (Fiscal Adjustment Act)
StÄndG	Steueränderungsgesetz (Tax Amendment Act)
StBJb	Steuerberaterjahrbuch
STC	Simon's Tax Cases
StuW	Steuer und Wirtschaft
SWD	Staff and joint staff working documents
SWI	Steuer und Wirtschaft International
TAAR	Targeted Anti-Avoidance (Abuse) Rule
TC	Tax Cases
TCC	Tax and Chancery Chamber
TCGA	Taxation of Chargeable Gains Act
TFEU	Treaty on the Functioning of the European Union
TIOPA	Taxation (International and Other Provisions) Act
TNI	Tax Notes International
UK	United Kingdom
UKFTT	United Kingdom First-tier Tribunal
UKHL	United Kingdom House of Lords
UKSC	United Kingdom Supreme Court
UKUT	United Kingdom Upper Tribunal
UNSW Law Journal	University of New South Wales Law Journal
US	United States
VAT	Value Added Tax
vs.	versus
VwGH	Verwaltungsgerichtshof (Austrian Supreme Administrative Court)
WBl	Wirtschaftsrechtliche Blätter
WLR	Weekly Law Reports

A. Introduction

1. Background

Taxation is at the core of the sovereignty of a country.[1] Money provided by taxation has been used by governments throughout history to carry out many functions. Taxes may be used to cover a state's own financial needs or they may be spent to build and maintain infrastructure, to enforce the law and public order, to protect property or to pay off the state's debt. Taxes are also an important tool for the redistribution of wealth.[2] As such, taxes may be passed on in the form of subsidies or they may be used to fund welfare and public services.

When a state is levying taxes, it will inevitably interfere with the rights of its taxpayers.[3] For this to be justifiable, a tax system has to take into account many factors. A well designed tax code should be neutral, i.e. it should avoid distortions of the market.[4] Additional factors that need to be considered in the design of a tax code concern matters of administrative efficiency (i.e. the cost-yield ratio for a tax) and the principle of legal certainty.[5] Eventually, a tax code also has to ensure that equal taxpayers are equally affected.[6] This is because one core aspect of taxation is related to the fact that the tax burden should be distributed among the individuals (and businesses). It is therefore also for the tax law to protect individuals (and businesses) from having to disproportionately contribute to the financial needs of a State.[7]

Nonetheless, for as long as there have been taxes, persons have been trying to reduce their tax bills. This is where the phenomenona of "*tax evasion*", "*tax avoidance*" and "*tax mitigation*" come into play. From a government's perspective, tax avoidance and tax evasion are matters of concern as they nibble away the edges of the tax base, thus, reducing government revenue.[8] Whenever this is the case, it will inevitably cause problems as a legislative decision concerning the distribution

1 *Tiley/Loutzenhiser*, Revenue Law 10; *J. Lang* in *Tipke/J. Lang* 1 et seq.
2 *Tiley/Loutzenhiser*, Revenue Law 8.
3 *Nevermann*, Justiz und Steuerumgehung 47.
4 *Tiley/Loutzenhiser*, Revenue Law 11 et seq adds that the UK tax system has many rules which break the principle of neutrality.
5 *Davies*, Principles of Tax Law 6; *Tiley/Loutzenhiser*, Revenue Law 12 et seq; *Cagianut* in *Cagianut/Vallender* 18.
6 *Tiley/Loutzenhiser*, Revenue Law 11; *J. Lang* in *Tipke/J. Lang* 1 et seq.
7 *Davies*, Principles of Tax Law 6; *J. Lang* in *Tipke/J. Lang* 3; *Nevermann*, Justiz und Steuerumgehung 47.
8 *Tiley/Loutzenhiser*, Revenue Law 96.

of the tax burden is not put into practice. It should in this context be noted that the terms tax evasion, tax avoidance and tax mitigation are often used imprecisely or with varying meanings.[9] However, the precise nature of this problem depends on the precise definition of these terms.[10]

2. Terminology

2.1. Tax evasion

There seems to be substantial consensus about the term "*tax evasion*" ("*Steuerhinterziehung*"[11]).[12] Accordingly, both German as well as British scholars argue that tax evasion involves concealment of the facts.[13] Tax evasion concerns actions where taxpayers make false declarations, disguise or conceal facts with the result that tax authorities claim too little taxes from them. Accordingly, tax evasion implies criminal activity,[14] is illegal[15] and is synonymous with tax fraud:

> "*[T]he expression tax evasion should be deleted from the vocabulary as it is a euphemism which covers its true name, which is tax fraud. Tax evasion requires falsehood of some kind. Basically it requires either non-disclosure, or fabrication of a story which differs from the facts.*"[16]

2.2. Tax avoidance and tax mitigation

Taxpayers also have another possibility to frustrate the legislator's attempt of collecting the taxes. This is where the term "*tax avoidance*" comes into play. Tax avoidance is a concept that can be properly used with more than one meaning.[17] Accordingly, the meaning of the term must be derived from the context. In its general sense, tax avoidance refers to an activity aimed at the reduction of tax that is not criminal in nature.[18]

9 *Thuronyi*, Comparative Tax Law 154; *Eidenmüller* in *de la Feria/Vogenauer* 142; *Vogenauer* in *de la Feria/Vogenauer* 524 with numerous examples from the jurisprudence of the ECJ; *Tiley/Loutzenhiser*, Revenue Law 97; see also *Englisch*, Working Paper Series 11/13, 3 with further references.

10 See below next section A.2.

11 *J. Lang* in *Tipke/J. Lang* 182.

12 *Thuronyi*, Comparative Tax Law 155; *Alvarrenga*, BFIT 2013, 348. *Thuronyi* adds that what behaviour constitutes tax evasion depends, however, on the criminal laws of each country.

13 *Templeman* in *Shipwright* 1; *J. Lang* in *Tipke/J. Lang* 167 argues that "*Steuerhinterziehung*" ("*tax evasion*") only comes into question where the taxpayer disguises or conceals the facts; *Englisch*, Working Paper Series 11/13, 4.

14 *Thuronyi*, Comparative Tax Law 154; *Templeman* in *Shipwright* 1; *J. Lang* in *Tipke/J. Lang* 1151 et seq; *Englisch*, Working Paper Series 11/13, 4.

15 *Tiley/Loutzenhiser*, Revenue Law 96; *J. Lang* in *Tipke/J. Lang* 182.

16 *Thuronyi*, Comparative Tax Law 154 and *Gololobov*, The Yukos Case 223 refer to *Dilger* in *Shipwright* 12. See also *Eidenmüller* in *de la Feria/Vogenauer* 142.

17 *Thuronyi*, Comparative Tax Law 155; *Tiley/Loutzenhiser*, Revenue Law 96 et seq; *Nevermann*, Justiz und Steuerumgehung 49.

18 *Thuronyi*, Comparative Tax Law 155.

"*Tax avoidance*" also needs to be distinguished from "*tax mitigation*" (which is synonymous with "*tax planning*" or "*tax minimization*").[19] Scholars from both the UK and Germany emanate from such a distinction. *J. Lang* distinguishes, in the context of German tax law, between two concepts: "*Steuerumgehung*" is supposed to be legal as it involves conduct what British lawyers would probably refer to as "*tax mitigation*", "*tax planning*" or "*tax minimization*".[20] The term "*Steuervermeidung*" stands for the second concept and addresses issues what lawyers from the UK would typically refer to as "*tax avoidance*". Lord *Nolan*, in *IRC v Willoughby*, summarises the distinction:

> "*The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hallmark of tax mitigation, on the other hand, is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option.*"[21]

"*Tax avoidance*" ultimately involves a concept that corresponds to the idea of what certain civil law jurisdictions would consider "*abuse of law*".[22] The concept of abuse is invoked in diverse areas of civil law and in many legal systems to serve a variety of purposes.[23] Its origins may be traced back to Roman law.[24] Abuse of law is about correctly applying the law to a specific set of facts.[25] Abuse of law must therefore be distinguished from "*abuse of rights*", which is concerned with the excessive exercise of an individual right that causes harm to another person without good reason.[26] It should be noted that courts (particularly the ECJ) have not always been consistent in distinguishing between abuse of rights and abuse of law. Sometimes, the ECJ used concepts of "*abuse of rights*" and "*abuse of law*" synonymously.[27]

19 Also *Thuronyi*, Comparative Tax Law 155 or *Tiley/Loutzenhiser*, Revenue Law 97 distinguish between these concepts.

20 *J. Lang* in *Tipke/J. Lang* 182; see also *Thuronyi*, Comparative Tax Law 155; *Tiley/Loutzenhiser*, Revenue Law 97.

21 *IRC v Willoughby* [1997] 1 WLR 1071, 1079. See also *Tiley/Loutzenhiser*, Revenue Law 97.

22 See also *Englisch*, Working Paper Series 11/13, 4 or *Zimmer* in Cahiers 42 et seq.

23 *Thuronyi*, Comparative Tax Law 158 et seq.

24 *Tridimas* in *de la Feria/Vogenauer* 169 referring to "*Nullus videtur dolo facere, qui suo iure utitur*" Gaius, Digest 50.17.55.

25 *Eidenmüller* in *de la Feria/Vogenauer* 142.

26 *Tridimas* in *de la Feria/Vogenauer* 169; *Englisch*, Working Paper Series 11/13, 22 referring to ECJ 12. 5. 1998, C-367/96, *Alexandros Kefalas and Others*, para 20; ECJ 23. 3. 2000, C-373/97, *Diamantis*, para 33.

27 One example is *Kofoed* (ECJ 5. 7. 2007, C-321/05, *Kofoed*). In para 38, the Court declared for the first time that there is a general Community law principle that "*abuse of rights*" is prohibited. However, the matter was actually one of "*abuse of law*". See also ECJ 22. 12. 2010, C-277/09, *RBS Deutschland*, para 52; ECJ 27. 10. 2011, C-504/10, *Tanoarch*, para 51; ECJ 20. 6. 2013, C-653/11, *Newey*, para 46 and *Tridimas* in *de la Feria/Vogenauer* 171; *Vogenauer* in *de la Feria/Vogenauer* 524; *Pistone*, Intertax 2007, 535. See also below section B.4.5.

Abuse of law concerns the proper interpretation of a particular legal provision. Abuse of law seeks to prevent a person from deriving benefits which, although it may result from formal compliance with a measure, pursues ends which lie beyond its objectives.[28] Abuse of law is therefore an issue of having to ascertain the scope of a provision. Account has to be taken of the various means of interpretation. A civil law lawyer would typically interpret the respective statute within the light of its wording, its telos, its historical background and its systematic integration within the tax system and would also use the methods of analogy and teleological reduction.[29] Common law lawyers would typically refer to "*purposive interpretation*" of the respective statute.[30] Ultimately, it is about having to assess whether the facts of a case answer the questions asked by the relevant (taxing) statute. Accordingly, the expressions "*tax avoidance*" and "*tax mitigation*" are merely labels that describe the outcome of interpretation. Accordingly, it should be noted that the author uses the expression "*tax abuse*" synonymously with "*tax avoidance*".

3. Scope of the study

3.1. Point of departure

It has already been described above that the phenomenona of "*tax avoidance*" ("*Gestaltungsmissbrauch*") and "*tax evasion*" ("*Steuerhinterziehung*") are a cause of concern for governments.[31] Quite obviously, tax avoidance and tax evasion leads to less tax revenue. No legislature can allow taxpayers to arrange their affairs in such a way that the tax system becomes voluntary or that government revenue falls short of what is needed.[32] Accordingly, the legislator has a multitude of possibilities to fill these tax gaps:

Governments may simply fill the tax gap by way of cutting expenditure (e.g. cutting the military budget). On the other hand, governments may also want to hire additional staff, thereby hoping to better enforce the existing (tax) laws. It is also conceivable that the legislator may want to sanction tax evasion under criminal law, thus hoping to discourage taxpayers from evading taxation. Governments may also decide to accrue additional revenues by introducing new taxes or by shifting and increasing the tax burden on less mobile activities, such as labour. Another possibility to fill the tax gap consists in broadening the tax base. Accordingly, the legislator could abolish benefits or could introduce measures which

28 *Tridimas* in *de la Feria/Vogenauer* 171.
29 *Larenz*, Methodenlehre[5] 298 et seq, 365 et seq; *Bydlinski*, Juristische Methodenlehre[2] 472 et seq.
30 *Barak*, Purposive Interpretation 85 with further references. When analysing various cases decided by UK courts, this study will also show that the term "*purposive interpretation*" is not used synonymously with the civil law concept of "*teleological interpretation*". There are cases where courts from the UK applied, under the guise of "*purposive interpretation*" methods that a lawyer coming from a civil law country would probably refer to as historical or contextual means of interpretation.
31 See above section A.1.
32 *Tiley/Loutzenhiser*, Revenue Law 99.

prohibit the deduction of certain expenses. Furthermore, the legislator could also introduce rules particularly aimed at dealing with the phenomenon tax avoidance. Accordingly, the legislator could introduce SAARs, TAARs or GAARs (special, targeted or general anti-avoidance rules):

SAARs thereby follow a 'sniper approach'.[33] They are provisions which are aimed at identifying, with precision, the type of transaction to be dealt with and prescribe, with precision, the tax consequences of such a transaction. A typical feature of UK legislation is that it also includes TAARs. These rules are wider than SAARs as they are formulated in terms of countering 'avoidance' within the framework of a whole set of (newly introduced) provisions.[34] Last but not least, legislators may also want to introduce GAARs.[35]

3.2. Bringing GAARs into play

There is a wide spectrum of definitions of a GAAR.[36] In most countries, a GAAR takes the form of a statutory rule, albeit with an extremely large range of constructions.[37] For a rough orientation, it can be pointed out that authors seem to agree that a GAAR is a broad and typically principle-based rule designed in way to empower courts and tax authorities to challenge transactions which are aimed at tax avoidance and which violate the statutory requirements of the applicable tax law.[38]

It should be noted that this study is going to deal with the GAARs as implemented in Germany, the UK and as suggested by the EU.[39] As GAARs try to establish the borderline between "*abuse*" and "*use*" of a law, this study therefore deals with issues involving tax avoidance (tax abuse) and tax mitigation (tax planning or tax minimization).[40] This study does therefore not deal with tax evasion.[41] Last but not least, it should also be noted that the abbreviation "*GAAR*" stands for "*General Anti-Avoidance Rule*" or "*General Anti-Abuse Rule*", whatever the reader prefers.[42]

33 *Tiley/Loutzenhiser*, Revenue Law 99.
34 *Tiley/Loutzenhiser*, Revenue Law 99 argues that Sec 16A of the TCGA 1992 is a TAAR.
35 See below section A.3.2.
36 *Krever* in *Lang/Rust/Schuch/Staringer/Owens/Pistone* 1.
37 *Zimmer* in Cahiers 37 et seq; *van Weeghel* in Cahiers 22 et seq. *Krever* in *Lang/Rust/Schuch/Staringer/Owens/Pistone* 2 adds that in some countries lacking a statutory rule, a doctrinal approach based only on judicial interpretation might also be considered a GAAR.
38 *van Weeghel* in Cahiers 22; *Zimmer* in Cahiers 45 et seq; *Krever* in *Lang/Rust/Schuch/Staringer/Owens/Pistone* 4 et seq.
39 Regarding the reasons for this 'selection', see below section A.4. Also note that main section C is entirely devoted to an analysis of the various requirements inherent in the respective GAARs.
40 Regarding the concept of tax avoidance (tax abuse), see above section A.2.2.
41 Regarding the concept of tax evasion, see above section A.2.1.
42 The reader should also be reminded at this point that the UK GAAR is referred to as "*General Anti-Abuse Rule*". However, this is nothing but a political message. It does not come with any substantial changes when compared with a "*General Anti-Avoidance Rule*". See also below in more detail section C.2.2.2.3.

4. The comparative approach and the research question

> "*[N]o other feature of a tax law provides a better insight into a nation's tax psyche than its anti-avoidance rules. The intersection of general anti-avoidance rules (GAARs) […] with operative provisions of tax laws reveal so much about all aspects of a country's tax system: citizens' tax morale, judicial perspectives on taxation and legal interpretation, drafters' inclinations for technical or principled drafting, legislators' willingness to confront politically sensitive issues or their inclination to delegate the tough decisions to administrators and courts. A comparative analysis of the role of GAARs in tax systems (or the lack of any GAAR) can thus offer unique perspectives on tax law across jurisdictions.*"[43]

A reason for conducting comparative studies in tax law is the "*eye-opening*" effect that leads to a better understanding of one's own legal (and tax) system in disclosing structures that are conceded if looking from the traditional point of view of the national doctrine.[44] In this sense, comparison leads to a better understanding of one's own tax law. Comparative studies are also highly relevant from a scientific and practical point of view.[45] Not only will there be more and more tax practitioners confronted with rules of foreign tax law but also will legislators have to acknowledge that other countries are often facing the same or at least similar problems they are dealing with.[46] Comparing different answers to the same questions or problem may therefore not only bring about to a better understanding of the effects of each solution but may also help to improve the own system by adopting the foreign solution.[47]

This study aims at comparing the GAARs of Germany, the UK and the EU[48]. This selection is inspired by the general framework as set out by comparative law scholars, who divided countries into several legal families to indicate broad similarities in legal traditions.[49] *Thuronyi* thereby distinguishes between (i) common law families, (ii) civil law families and (iii) the EU.[50] Choosing to compare the GAARs of Germany, the UK and the EU already takes into account that each GAAR falls within one legal family (i.e. common law for the UK, civil law for Germany and the EU as a separate legal family).

Dealing with tax avoidance from both the perspective of common law and civil law takes the two dominant legal traditions of the Western World into account.[51]

43 *Krever* in *Lang/Rust/Schuch/Staringer/Owens/Pistone* 1.
44 *Glendon*, Washington and Lee Law Review 1996, 973.
45 *Mössner* in *Sacchetto/Barassi* 14.
46 *Mössner* in *Sacchetto/Barassi* 20.
47 *Zitelmann*, Deutsche Juristen-Zeitung 1900, 329; *Mössner* in *Sacchetto/Barassi* 14.
48 Point of departure will be the GAAR as recommended to the Member States in the Commission Recommendation on Aggressive Tax Planning, C (2012) 8806 final, 6 December 2012 (which the author refers to as "EU GAAR").
49 *Thuronyi*, Comparative Tax Law 7, 23 et seq; *Zweigert/Kötz*, Introduction to Comparative Law 73 et seq.
50 *Thuronyi*, Comparative Tax Law 43 et seq.
51 *von Mehren*, The U.S. Legal System: Between the Common Law and Civil Law 1 et seq.

Much has been said about the difference between common law and civil law in general.[52] Lord *Cooper*, who is as a high Scottish judge familiar with both common law and civil law put forward:

> "*The civilian naturally reasons from the principles to instances, the common lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents; the first silently asking himself as each new problem arises, 'What should we do this time?' and the second asking aloud in the same situation 'What did we do last time?'. […] The instinct of the civilian is to systematize. The working rule of the common lawywer is solvitur ambulando.*"[53]

However, something more must be said when it comes to tax law: There is a fundamental similarity between the UK and the German tax law and that is that both tax systems are codified.[54] Other differences, such as the drafting style of the taxing statutes,[55] the autonomy of tax law from other branches of law,[56] the rules on the burden of proof[57] or the proceedings before a court[58] are therefore still important, but they may not hide the fact that judges from both jurisdictions will decide tax cases in light of a codified taxing statute.

The author's selection of the three legal families also finds support in *Thuronyi's* further recommendation, whereas a comparative study should focus on Germany and the UK.[59] Apparently, the German and the UK tax system are "*archetypes for the basic concepts [of tax law] and have been leaders in influencing the tax laws of other countries in numerous aspects*".[60] Hence, a comparison of the German and UK legal system "*will reveal most of the basic contrasts that would arise from including other countries in the study*"[61] and will also be beneficial for other jurisdictions. Additionally, it also needs to be considered that both Germany and the UK are Members of the EU. In this context, it must be noted that *Gassner* already in

52 *Zweigert/Kötz*, Einführung in die Rechtsvergleichung 250 et seq; *Merryman/Pérez-Perdomo*, The Civil Law Tradition 3 et seq, 27 et seq, 150 et seq; *von Mehren*, The U.S. Legal System: Between the Common Law and Civil Law 1 et seq; *Jones* in *Maisto* 31 et seq; *Riesenhuber*, Utrecht Law Review 2011, 117 et seq.

53 *Cooper*, Harvard Law Review 1950, 470 et seq.

54 See also *Krever* in *Achatz* 355 et seq who elaborates on the taxation laws of civil code and common law jurisdictions.

55 *Diplock*, The Courts as Legislators 10 et seq; *Nevermann*, Justiz und Steuerumgehung 307 et seq; *Popkin*, BTR 1991, 285; *Hoffmann*, BTR 2005, 205; *McCarthy*, BTR 2011, 286; *Gammie*, BTR 2013, 589.

56 *Thuronyi* in *Thuronyi* xxviii; *Jones* in *Maisto* 31.

57 *Jones* in *Maisto* 32.

58 *Jones* in *Maisto* 32.

59 *Thuronyi*, Comparative Tax Law 9. *Thuronyi* also adds the US as a third country. However, it should be noted that the US does not employ a GAAR. See therefore *Menuchin/Brauner* in *Lang/Rust/Schuch/Staringer/Owens/Pistone* 763 with further references; *Avi-Yonah/Pichhadze*, SSRN, 4. However, it should at least be noted that on March 30, 2010 President Obama signed the Health Care and Education Reconciliation Act which includes a provision (Sec 1409) that codified the so called economic substance doctrine in Sec 7701(o) Internal Revenue Code.

60 *Thuronyi*, Comparative Tax Law 9.

61 *Thuronyi*, Comparative Tax Law 9.

1995 'invited' future generations of lawyers to carry out comparative research in the field of tax avoidance.[62] The author gladly accepts this invitation.

A comparison of the German, UK and EU GAAR is also interesting if one considers the fact that Germany has a long-lasting history with its GAAR (its roots can be traced back to the year 1919). The UK and the EU GAAR, on the other hand, were only introduced or recommended quite recently in a 'BEPS-world'. However, the topic of tax-avoidance is not entirely new in the UK or the EU. On the contrary, the UK has a long-lasting history of judicially developed anti-avoidance concepts. Similarly, the ECJ has also been alluding to abuse and abusive practices in its rulings for more than thirty years. Nonetheless, there are yet no cases which are decided on grounds of the UK GAAR. With respect to the EU GAAR, its practical importance should not be underestimated. Although it merely has the status of a recommendation, several Member States already adopted a GAAR into their tax code which is similar to the EU GAAR.[63] The EU GAAR, in turn, can be found in similar terms in legislative amendments made to secondary union law (e.g. the amendment made to the Parent-Subsidiary Directive).[64] Furthermore, it will be highly interesting from a comparative point of view to examine thesimilarities and differences between the various legal families and to analyse what one jurisdiction might learn from the experiences made in another jurisdiction.

It can safely be said that there is barely a topic in tax law that has been more controversially discussed than that of tax avoidance. The developments in a BEPS-world show that these discussions will very likely continue. This study aims at contributing to these discussions by entering new lands and by comparing the fundamental issues underlying the phenomenon of tax avoidance in Germany, the UK and the EU. Comparing statutory GAARs as well as the judicial approaches towards tax avoidance is not only important for scholars or practitioners but also for the legal culture. Eventually, this study aims at answering the following research question:

What is the value of the GAARs as implemented in the German and UK tax system and as suggested by the European Commission in terms of their effectiveness to counteract tax avoidance when compared with the judicially developed approaches against tax avoidance and their compatibility with the principles of a sophisticated legal culture?

62 *Gassner* in *Cagianut/Vallender* 89 writes: "*[D]ie europäische Integration eröffnet eine weitere Dimension meines Themas, nämlich die wirtschaftliche Betrachtungsweise und den Gestaltungsmissbrauch im Gemeinschaftsrecht, die über den deutschen Steuerrechtskreis hinaus eine rechtsvergleichende Betrachtung der diversen europäischen Steuerrechtsordnungen notwendig macht: eine Aufgabe für viele Juristengenerationen mehr als jene, die sich bisher in der Schweiz, in der BRD und in Österreich diesem Thema aus der Sicht ihrer jeweiligen Rechtsordnung gewidmet haben!*".

63 Greece and Italy. Poland is currently considering implementing a GAAR patterned after the EU GAAR. See also below section C.2.3.2.3.

64 Regarding the Member States' approach in implementing the Parent-Subsidiary-Directive, see also below section C.2.3.2.4.

5. Structure of the study

This study is divided into three main sections: Section B lays the ground for the further analysis. It will deal with the approaches against tax avoidance as developed by German, UK and European courts. This is crucial, as a GAAR can only be properly understood and valuated if one also understands the judicially developed anti-avoidance concepts.

Accordingly, section C will comprehensively deal with the statutory GAARs. In doing so, the GAARs will be compared on the basis of their conditions for application. Irrespective of their different drafting style and their distinct historical background, it is nonetheless observable that the respective GAARs pursue similar ideas and have a similar core understanding. Accordingly, the comparison will be structured along the various elements of the GAARs. Each GAAR asks whether an "*arrangement*" triggers a "*tax*" that is covered by the GAAR. Additionally, each GAAR employs objective and subjective tests, requires the finding of a tax advantage and provides for measures to counteract the abusive results.

Eventually, section D is aimed at thinking this topic through to the end. After all, the value of a statutory anti-avoidance rule (i.e. the GAAR) can only be carved out when it is compared with the already existing judicial approaches against avoidance. Accordingly, the section will first of all compare the judicially developed anti-avoidance doctrines. A proper comparison will thereby emanate from the idea that the judicially developed approaches against tax avoidance in Germany and the UK had a common starting point. Analysing and putting together the jurisprudence of approximately 100 years on issues involving tax avoidance, this section aims at identifying and explaining similarities, differences as well as the consequences of the courts' approach against tax avoidance. This analysis will thereby also bring the EU law developments into play. Eventually, section D aims at putting the judicially developed approaches in relation with the statutory GAARs. In doing so, the reasons for introducing (or suggesting) GAARs become visible. As a result, this will enable the author to draw a conclusion concerning the value of the GAARs as implemented by Germany and the UK and as suggested by the Commission.

B. Judicial anti-avoidance

1. Introduction

This first main section is devoted to an analysis of the judicial anti-avoidance approaches as pursued by German, UK and European courts. This section will thereby lay the ground for the remaining two main sections. Key aspect of this first main section thereby lies in the task of analysing how courts dealt (and deal) with issues involving tax avoidance. This is because an understanding of the judicially developed approaches in matters concerning tax avoidance is crucial: A GAAR can only be properly understood if one also understands the judicially developed anti-avoidance concepts. Furthermore, an understanding of the judicially developed approaches to counteract abuse will also shed a light on the value of GAARs.

As a preliminary remark, it needs to be asked where the case law in matters of tax avoidance begins and where it ends. Bearing in mind that "*tax avoidance*" and "*tax mitigation*" are merely labels for a problem that involves having to ascertain the scope of a provision, there will be an endless amount of cases that could be potentially examined. After all, whenever a court denies the deduction of expenses or deems a flow of income to be taxable or interprets a provision included in a Directive, it will typically do so without even mentioning the expressions "*tax avoidance*" or "*tax mitigation*". These cases are then 'merely' ones where courts establish the scope of the respective (tax) provision. However, there will also be 'borderline cases', i.e. cases that involve arrangements that courts believe to show some specific characteristics which can be used to distinguish them from 'genuine' transactions. This is where tax avoidance comes into play.

The cases dealt with in the following subsections tend to be such 'borderline cases'. They have been selected because they openly discuss the issue of tax avoidance. As far as this is possible, the author decided to only deal with decisions issued by the highest courts of each legal family, i.e. the BFH (which will in the further course be referred to as "Federal Fiscal Court"), the House of Lords (from September 2009 the UKSC, i.e. the United Kingdom Supreme Court) and the ECJ.

In order to better understand the rationale behind the cases dealt with in this study, it should also be mentioned that the style of the judgments given by judges sitting in courts in Germany, the UK and the EU deviates quite substantially. Roughly speaking, decisions issued by courts in the UK tend to be very lengthy in terms of the amount of words used. This is partly owed to the fact that the Law

Lords (from September 2009 UKSC Justices) often gave (or give) separate speeches as they decide cases by a simple majority. This is different from the decisions passed by the Federal Fiscal Court or the ECJ, which pass one uniform decision. Accordingly, the decisions passed by the House of Lords (UKSC) are somehow comparable with the Opinions delivered by the Advocate Generals at the ECJ or with (partly) dissenting opinions given by judges sitting in the ECHR. Another factor that needs to be borne in mind is that judges in the UK have to operate within a very complex tax system. This is owed to the fact that a 'typical' UK tax statute is very detailed in nature, being rule based rather than building on principles.[65] A 'typical' German tax statute, in turn, tends to build on principles and tends to be drafted in an open-ended way.[66] Also the ECJ typically works in a legal environment with principle-based statutes (above all, the fundamental freedoms).

2. Judicial anti-avoidance in Germany

2.1. Introduction

The origins of the German GAAR can be traced back to the early 20th century. Section B.2.2. illustrates that the traditional view in those days was that civil law prevails over tax law and that tax law is naturally connected with criminal law. Consequently, taxing statutes were interpreted literally and formally. Section B.2.3. then explains that this condition needed to change drastically. In order to overcome the aftermaths of the First World War, the legislator had to enact a major tax reform to raise more revenue. In the end, nothing was as it was before. Law-making bodies were replaced, new courts were established and a new tax system was introduced. In this context, the legislator also introduced a GAAR and the concept of the so called "*economic perspective*" ("*wirtschaftliche Betrachtungsweise*").[67] Eventually, the tax reform was successful. Abuse was typically dealt with using methods of interpretation. The GAAR did not play an important role in the early years of its existence.

65 *Freedman* in *Lang/Rust/Schuch/Staringer/Owens/Pistone* 745.

66 *Thuronyi*, Comparative Tax Law 18.

67 The author admits that it is difficult to translate the expression "*wirtschaftliche Betrachtungsweise*" into the English language without losing content. *Thuronyi*, Comparative Tax Law 147 tried to translate the expression with "*economic construction*". However, this translation might suggest to a common law (tax) lawyer that the concept of the "*wirtschaftliche Betrachtungsweise*" is a *separate* method of statutory *construction*. However, this is what it is not. Rather, it is merely a form of teleological interpretation (which could be again confused with the expression "*purposive interpretation*", as typically used by a common law lawyer). The "*wirtschaftliche Betrachtungsweise*" being a form of teleological interpretation, it can also not be translated with "*substance-over-form approach*" (see in this respect *Gassner* in Cahiers 120, 147 and below section D.2.3.4.2). Eventually, the author seeks to strike a balance between a concept that has been given its own meaning over decades of discussions and the language barrier by translating the expression into the English language but by adding the German expression in brackets.

Section B.2.4. then deals with the further developments. Hereby it will be shown that principle-based statutes in combination with the concept of the economic perspective turned out to be a powerful tool in the fight against tax avoidance. Judges and tax authorities also started to apply the GAAR more frequently since the 1970s. These were also the times where scholars began to critically scrutinise the courts' jurisprudence from a methodological point of view. Finally, section B.2.5. deals with these considerations and introduces the reader into the concepts of the so called "*Innentheorie*" and "*Außentheorie*".[68] These two theories describe the controversy with regard to the legal relevance of the GAAR. It is up to now contentious whether the GAAR is actually needed to counteract abuse.

2.2. The traditional view: Formal and literal interpretation

The traditional approach in interpreting tax law in Germany has its roots in the beginnings of the 20th century. With not many taxes, charges or duties in force, the tax burden back then was rather low.[69] Tax law was seen as a 'follow-up law' of civil law. There was the widely held view that civil law prevailed over tax law.[70] Statutes triggering tax liability were therefore also linked to civil law.[71] Courts having to deal with tax law oriented towards the case law employed in civil law cases.[72] Also, the then prevailing view considered tax law to be naturally connected with criminal law.[73] As a consequence, legal terms used in taxing statutes were interpreted literally and formally.[74] Taxpayers therefore had considerable room for manoeuvre to program the tax consequences resulting from the arrangements they entered into.[75]

Mitropa,[76] a case that gained considerable recognition, illustrates this traditional view quite vividly.[77] It concerned a case where the Reich Fiscal Court ("*Reichs-*

68 One could try to translate Innentheorie with "*inside theory*" and Außentheorie with "*outside theory*". However, just like the expression "*wirtschaftliche Betrachtungsweise*", also these two theories cannot be translated without losing content. However, the author believes that it is not particularly relevant for a non-German speaker whether one speaks of Innentheorie (or inside theory) and Außentheorie (or outside theory). Accordingly, the author prefers to stick to the German expressions.

69 *Bühler/Strickrodt*, Allgemeines Steuerrecht 42 et seq who present a detailed list of all the taxes and levies applicable at that time. See also *Terhalle in Gerloff/Neumark/Wilhelm* 278 et seq; *Lütge* in *Lütge* 593 et seq.

70 *Fischer* in *Hübschmann/Hepp/Spitaler*, AO § 42 MN 2; *Lion*, Vierteljahresschrift für Steuer- und Finanzrecht 1927, 132; *Osterloh* in *Amatucci* 87.

71 *Ball*, Steuerrecht und Privatrecht 63; *Böckli* in *Höhn/Vallender* 292.

72 *Gassner*, Interpretation 17, 131 et seq; *Fischer*, SWI 1999, 79.

73 *Hensel* in *Krüger* 231, 246, 288.

74 *Becker*, StuW 1924, 160; *Fischer* in *Hübschmann/Hepp/Spitaler*, AO § 42 MN 2; *Lion*, Vierteljahresschrift für Steuer- und Finanzrecht 1927, 133; *Gassner*, Interpretation 17.

75 *Becker*, StuW 1924, 155; *Fischer* in *Hübschmann/Hepp/Spitaler*, AO § 42 MN 3.

76 RFH 16. 7. 1919, II A 142/19, RFHE 1, 126.

77 *Fischer* in *Hübschmann/Hepp/Spitaler*, AO § 42 MN 1; *Fischer*, FR 2003, 1278; *Becker/Riewald/Koch*, Reichsabgabenordnung 666; *Palm* in *Brown* 174.

finanzhof") applied a formal way of thinking and did not consider any underlying statutory purpose. A stock company ("*Aktiengesellschaft*") was founded in 1905. Initially, the company operated in the field of mining industry. A couple of years later, the shareholders changed the name of the company and relocated its seat. They also changed the company's field of business and decided that it would engage in the acquisition and operation of trains. The tax authorities argued that these events amounted to a new foundation of a company as the company founded in 1905 allegedly remained to exist only for form's sake. Accordingly, they wanted to levy a stamp duty. However, the Reich Fiscal Court argued that a stamp duty will only be due according to tariff number 1 A of the Reich Stamp Duty Act ("*Reichstempelgesetz*"), where certain documents have been provided and where certain formalities have been complied with. Since these formal requirements were not met (there was no formal new foundation), the Reich Fiscal Court ruled that no stamp duty was due.

2.3.Major tax reform

2.3.1. Adoption of the "economic perspective" and introduction of a GAAR

The German tax system required for a drastic change due to (the end of) the First World War.[78] In order to overcome the aftermaths of the war and due to the terrible financial situation of the State, the tax burden needed to be raised significantly.[79] The legislator therefore had to dissolve tax law from civil law. It had to make sure that tax authorities (and courts) could rely on a less formal tax system, so that they would interpret the laws more broadly. This fundamental paradigm shift towards an independent economic view was achieved through the implementation of the Reich Tax Code ("*Deutsche Reichsabgabenordnung*") of 13 December 1919.[80] This reform replaced the lawmaking bodies, established new courts, created a sustainable, unified national tax system and brought the main duties on a new basis.[81] A modern Income Tax Act (strictly following the comprehensive economic concept of income) and a Corporate Income Tax Act were introduced.[82] In connection with this change, the legislature dissolved the new laws to a great extent from civil law.[83] *Becker*, the drafter of the Reich Tax Code, argued that Sections 4 and 5 Reich Tax Code would help so that the taxing statutes are applied in touch with reality.[84]

78 *Gassner*, Interpretation 19; *Beisse*, StuW 1981, 4; *Schön* in *Ault/Arnold* 65.
79 *Bühler/Strickrod*t, Allgemeines Steuerrecht 42 et seq; *Terhalle in Gerloff/Neumark/Wilhelm* 278 et seq; *Lütge* in *Lütge* 593 et seq; *Kruse*, JbFSt 1975/76, 36.
80 RGBl 1919, 1998.
81 *Gassner*, Interpretation 18 et seq.
82 *Schön* in *Ault/Arnold* 65.
83 *Becker*, StuW 1924, 166 et seq; *Gassner*, Interpretation 18; *Osterloh* in *Amatucci* 87.
84 *Becker*, StuW 1924, 147; *Gassner*, Interpretation 18.

Sec 4 Reich Fiscal Code contained the concept of the so called "*economic perspective*" ("*wirtschaftliche Betrachtungsweise*"):[85]

> **Sec 4 Reich Fiscal Code**
> *When interpreting tax legislation, its purpose, its economic significance and developments in circumstances are to be taken into account.*[86]

This short sentence laid the foundation for an unprecedented development of the German tax system.[87] *Becker*, the 'father' of the Reich Fiscal Code was already of the opinion that combating tax avoidance is actually a question of statutory interpretation.[88] *Becker* therefore also argued that a GAAR, i.e. "*Sec 5 [Reich Fiscal Code] is unnecessary*".[89] However, legislative materials reveal that the members of National Assembly were of the opinion that a GAAR, serving as a deterrent, was indispensable.[90] Hence, it seems as if Sec 5 Reich Fiscal Code was incorporated into the reform for symbolical and political reasons.[91]

Sec 5 Reich Fiscal Code had the following wording:

> **Sec 5 Reich Fiscal Code**
> *(1) Where tax legislation is circumvented by abusing legal options, taxes are to be levied in such a way as if the economic situation had been brought about in its appropriate legal structure.*[92]
> *(2) An abuse within the meaning of para 1 is given*
> *1. in cases, where the law subjects economic activities, facts and measures in their appropriate legal structuring to a tax, though for tax avoidance an inappropriate, unusual legal form has been chosen or legal arrangements have been carried out, and*
> *2. given the circumstances and the kind of how it is proceeded or how it should be proceeded, all the involved actors economically achieve essentially the same outcome which would have been achieved had a legal structure appropriate to the economic activities, facts and measures been chosen, and further*

85 "*Wirtschaftliche Betrachtungsweise*" is a civil law concept *similar* to the common law concept of "*substance-over-form*". See also *Gassner* in Cahiers 120, 147 and see also below section D.2.3.4. where these two concepts are compared by way of giving examples.

86 Sec 4 Reich Fiscal Code: "*Bei der Auslegung der Steuergesetze sind ihr Zweck, ihre wirtschaftliche Bedeutung und die Entwicklung der Verhältnisse zu berücksichtigen*".

87 *Nevermann*, Justiz und Steuerumgehung 229.

88 *Becker*, StuW 1924, 154; *Becker*, StuW 1924, 441 et seq; see also *Ball*, Steuerrecht und Privatrecht 130 et seq, 151; *Kruse*, JbFSt 1975/76, 37 et seq; *Fischer* in *Hübschmann/Hepp/Spitaler*, AO § 42 MN 2.

89 *Becker*, StuW 1924, 154 ("*[…] ich persönlich hielte den § 5 [RAO] für entbehrlich*"); *Becker*, StuW 1924, 441; *Fischer* in *Hübschmann/Hepp/Spitaler*, AO § 42 MN 2.

90 *Becker/Riewald/Koch*, Reichsabgabenordnung 666; *Fischer* in *Hübschmann/Hepp/Spitaler*, AO § 42 MN 1.

91 *Schenke*, Rechtsfindung 410 who derives from the legislative materials that the inclusion was largely influenced by a personal intervention made by *Matthias Erzberger* (he was a German politician and Reich Minister of Finance from 1919 to 1920).

92 Sec 5 (1) Reich Fiscal Code: "*Wird ein gesetzlicher Tatbestand zur Umgehung eines Steuergesetzes unter Missbrauch von Rechtsgestaltungsmöglichkeiten vermieden, so sind die Steuern so zu erheben, als ob die wirtschaftliche Lage in der ihr angemessenen rechtlichen Gestaltung herbeigeführt worden wäre*".

3. possible legal disadvantages that the chosen legal structure brings with it, actually have no or only little importance.[93]

2.3.2. Consequences of the reform

2.3.2.1. Counteracting abuse using the GAAR

In the early years of its existence, the GAAR seems to have played an unimportant role in counteracting abuse. *Hensel* pointed out that the the Reich Fiscal Court only applied the GAAR seven times in the first three years of its existence.[94] As if that were not enough, *Hensel* also illustrated that five out of these seven cases could have been encountered without having to invoke the GAAR:[95] Apparently, three cases were related with land transfer taxes and should have been counteracted by making use of a SAAR included in the Land Transfer Tax Act ("*Grunderwerbsteuergesetz*") or by holding that the transactions were sham.[96] Two cases had, according to *Hensel*, been wrongly decided: One case was actually a sham transaction and the other one was not abusive and hence, should not have been covered by Sec 5 Reich Fiscal Code.[97]

There remain two cases where the tax would not have been due, hadn't the Reich Fiscal Court invoked the GAAR. One case concerned a hidden distribution of profits via an interposed corporation.[98] The rejection of the so called "*GmbH & Co KG*"[99] is

93 Sec 5 (2) Reich Fiscal Code: "*Ein Missbrauch im Sinne des Abs. 1 liegt vor*
1. in Fällen, wo das Gesetz wirtschaftliche Vorgänge, Tatsachen und Verhältnisse in der ihnen entsprechenden rechtlichen Gestaltung einer Steuer unterwirft, zur Umgehung der Steuer ihnen nicht entsprechende, ungewöhnliche Rechtsformen gewählt oder Rechtsgeschäfte vorgenommen werden, und
2. nach Lage der Verhältnisse und nach der Art, wie verfahren wird oder verfahren werden soll, wirtschaftlich für die Beteiligten im wesentlichen derselbe Erfolg erzielt wird, der erzielt wäre, wenn eine den wirtschaftlichen Vorgängen, Tatsachen und Verhältnissen entsprechende rechtliche Gestaltung gewählt wäre, und ferner
3. etwaige Rechtsnachteile, die der gewählte Weg mit sich bringt, tatsächlich keine oder nur geringe Bedeutung haben".

94 *Hensel* in *Krüger* 282. In RFH 16. 7. 1920, II A 187/20, RFHE 3, 212, the Reich Fiscal Court claimed that Sec 5 Reich Fiscal Code cannot be applied retroactively for claims that have become due already before the reform came into force.

95 *Hensel* in *Krüger* 283.

96 In RFH 26. 4. 1921, II A 412/20, RFHE 5, 247, the court claimed that the obligation of having to pay property transfer tax cannot be based on Sec 3, 6 and 7 Land Transfer Tax Act "*Grunderwerbsteuer*", but possibly on Sec 5 Reich Fiscal Code. In RFH 24. 6. 1921, II A 64/21, RFHE 6, 118 the court held that the tax might be due for two reasons: either there is a sham transaction or Sec 5 Reich Fiscal Code is used. In RFH 13. 12. 1922, VI A 155/21, RFHE 11, 112 the court held that Sec 5 Reich Fiscal Code cannot be applied for the benefit of the taxpayer when the taxpayer made a mistake and did not achieve the intended result of circumventing the law.

97 RFH 7. 2. 1922, V A 266/21, RFHE 8, 163; RFH 26. 9. 1922, V A 373/22, RFHE 10, 205.

98 RFH 12. 11. 1920, I A 36/20, RFHE 4, 113.

99 There are basically two forms of partnerships in Germany: the OG ("*Offene Gesellschaft*") and the KG ("*Kommanditgesellschaft*"). In the OG, all partners are fully liable for the partnership's debts, whereas in the KG there are general partners with unlimited liability ("*Komplementär*") and limited partners whose liability is restricted to their fixed contributions to the partnership ("*Kommanditisten*"). The GmbH & Co KG tries to combine the advantages of a partnership with those of the limited liability of a corporation ("*Gesellschaft mit beschränkter Haftung*"). In order to do so, the sole general partner is a limited liability company and the limited partner is the natural person.

the other example:[100] A taxpayer wanted to create a company by combining two different legal forms of companies. With the help of Sec 5 Reich Fiscal Code, the Reich Fiscal Court argued that the combination of the advantages of a partnership with those of the limited liability of a corporation is "*unusual*" and only chosen for tax avoidance purposes. The Reich Fiscal Court also held that the structure had no commercial sense apart from saving taxes. However, taxpayers still kept combining those two legal forms and became more creative in finding arguments supporting the commercial justification of this legal form.[101] Soon the usage of a "*GmbH & Co KG*" was 'established practice' and hence, no longer "*unusual*". Accordingly, the Reich Fiscal Court changed its case law and held that the implementation of a "*GmbH & Co KG*" was no longer abusive.[102]

Sec 5 Reich Fiscal Code has also almost not been used by the Reich Fiscal Court after *Hensel's* publication in 1923. Eventually, there was another case dealing with the "*GmbH & Co KG*"[103] and a case where the Reich Fiscal Court held that Sec 5 Reich Fiscal Code might be used in exceptional cases, where all the elements of the provision are fulfilled.[104] In a third case, the Reich Fiscal Court held that the application Sec 5 Reich Fiscal Code is not unconditional and that taxpayers do not necessarily have to go the route that is most beneficial for the revenue.[105]

2.3.2.2. Counteracting abuse by way of interpretation (and other means)

The vast majority of cases dealing with abuse were decided in light of Sec 4 Reich Fiscal Code. Of fundamental importance was the "*imprecise, but functioning*" concept of the economic perspective ("*wirtschaftliche Betrachtungsweise*").[106] Essentially, the finding of abuse has thereby been made a question of interpretation. Numerous cases aptly show that the Reich Fiscal Court made use of the whole range of available techniques of interpretation, when dealing with tax cases.[107] In most cases, the Reich Fiscal Court focused on a teleological interpretation of the respective statutes:

> "*According to Sec 4 AO, a provision may only be interpreted under consideration of its purpose.*"[108]

100 RFH 30. 6. 1922, II A 132/22, RFHE 10, 65. See also *Hensel* in *Krüger* 283; *Nevermann*, Justiz und Steuerumgehung 239 et seq.
101 *Walz*, Steuergerechtigkeit 323 et seq.
102 Beginning with RFH 13. 3. 1929, I A 174-176/28, RStBl 1929, 329 and eventually with RFH 18. 2. 1933, I A 422/30, RStBl 1933, 375. See also *Hofbauer*, Die GmbH & Co. KG 18; *Walz*, Steuergerechtigkeit 323 et seq; *Nevermann*, Justiz und Steuerumgehung 239.
103 RFH 24. 2. 1927, I B 83/26, RFHE 21, 92.
104 RFH 15. 7. 1925, I A 24/25, RFHE 17, 109.
105 RFH 3. 12. 1925, VI e A 188/24, RFHE 16, 15.
106 *Walz*, Steuergerechtigkeit 214, 223; *Nevermann*, Justiz und Steuerumgehung 235.
107 For an overview see *Crezelius*, Steuerrechtliche Rechtsanwendung 43 et seq.
108 RFH 13. 3. 1925, II A 134/25, RFHE 16, 25: "*Eine Vorschrift darf gemäß § 4 AO nur unter Berücksichtigung ihres Zweckes ausgelegt werden*".

> "*The legislator's clear intention was directed at the taxation of the income […].*"[109]

Sometimes the court found, on a teleological interpretation of the respective provision, that the wording of a law is decisive.[110] Additionally, the Reich Fiscal Court also tried to carefully distinguish teleological interpretation from, e.g. historical means of interpretation:

> "*In case of a doubtful wording, the interpretation of a legal provision also has to consider its historical development.*"[111]

Sometimes, the Reich Fiscal Court claimed to even go "*beyond the clear wording*" of a statute just to find in a next step that the "*purpose*" of the law "*requires an interpretation divergent from the clear wording*".[112] The court also explicitly stated that legislative gaps are to be closed via the mechanism of analogy,[113] even to the detriment of the taxpayer.[114]

However, the latter mentioned cases must be distinguished from cases where the Reich Fiscal Court went beyond the boundaries of interpretation. Sometimes, the court even admitted that it went into the sphere of the legislator. In a case decided

109 RFH 4. 11. 1921, I A 89/21, RFHE 7, 159: "*Die klare Absicht des Gesetzgebers war also auf die steuerliche Erfassung auch der Bezüge […] gerichtet […]*".

110 RFH 5. 6. 1925, I B 20/25, RFHE 17, 142: "*Ist der Wortlaut des Gesetzes eindeutig und steht fest, daß der Gesetzgeber den nach diesem Wortlaut normierten Rechtszustand tatsächlich vorschreiben wollte, darf der dem Gesetz unterworfene Richter die Rechtsnorm nicht in einem Sinne anwenden, der mit ihrem Wortlaut nicht vereinbar ist, und an die Stelle der Regel, welche der Gesetzgeber, wenn auch vielleicht aus mangelhafter Erkenntnis der Verhältnisse, aufgestellt hat, eine andere Regel, und zwar diejenige setzen, welche der Richter als Norm aufgestellt hätte, wenn er zum Gesetzgeber berufen gewesen wäre*".

111 RFH 28. 6. 1933, IV A 203/32, RFHE 33, 343: "*Bei zweifelhaftem Wortlaut ist für die Auslegung einer Gesetzesvorschrift auch auf deren Entstehungsgeschichte Rücksicht zu nehmen*".

112 RFH 24. 2. 1925, I A 96/24, RFHE 16, 64: "*Gleichwohl würde der Senat keine Bedenken tragen, auch gegenüber dem klaren Wortlaut dem Zwecke und der wirtschaftlichen Bedeutung des Gesetzes Geltung zu verschaffen, wenn diese erkennbar eine vom an sich klaren Wortlaut abweichende Auslegung verlangen*".

113 RFH 7. 1. 1921, I D 3/20, RFHE 4, 243: "*Hier liegt eine Lücke des Gesetzes vor, die nicht im Wege einer Auslegung des gesetzten Rechtes, sondern im Wege freier Fortbildung des Rechtes durch die Rechtsprechung auszufüllen sein wird*".

114 RFH 23. 6. 1921, I D 1/21, RFHE 6, 292: "*Wenn nun auch die Rechtsprechung bei Anwendung der Steuergesetze nicht nur auf Auslegung des gesetzten Rechtes beschränkt, sondern auch dazu berufen ist, vorhandene Lücken des Gesetzes im Wege freier Fortbildung des gesetzten Rechtes auszufüllen, so findet diese Aufgabe doch ihre Begrenzung darin, daß es sich eben um Ausfüllung von Lücken des Gesetzes handeln muß. Soweit in Frage steht, ob ein bestimmter Tatbestand eine Steuerpflicht auslösen soll, kann die Ausfüllung einer Lücke des Gesetzes nur dann in Frage kommen, wenn der Gesetzgeber die Steuerpflicht für den Tatbestand selbst angeordnet, aber diesen sie bedingenden Tatbestand nicht völlig genau umschrieben hat. Nicht dagegen darf der Richter einen anderen Tatbestand, der nach seiner Ansicht möglicherweise den Gesetzgeber hätte veranlassen können, die gleiche Steuer auch auf diesen Fall zu erstrecken, der Steuerpflicht unterwerfen. Das würde auf eine materielle Abänderung des geltenden Rechts, nicht mehr auf bloße Ergänzung durch Ausfüllung einer Lücke hinauskommen, und solche Gesetzesänderung ist jedenfalls bezüglich der grundlegenden Frage, auf welche Tatbestände die Steuerpflicht erstreckt werden soll, dem Gesetzgeber allein vorzubehalten*".

in 1929, the judges found it "*unfortunate*" that they had to "*take over the competencies of the legislator*" in "*cases of emergency*" and that they had to go "*beyond the clear wording of a provision*" where "*the sense of justice mandatorily required a different solution.*"[115] It was no rarity that judges based their decisions on grounds of their own sense of justice.[116] Cases like these reveal that the jurisprudence sometimes overstepped the mark.[117] *Hensel* pointed out that the courts were frequently trying to compensate the legislator's defective work by applying a "*corrective*" interpretation. In doing so, they were rather following a public sense of justice or equity than accepting the badly drafted laws and hoping that the legislator would fix the problems.[118]

Also subject to criticism was the so called "*typecasting approach*" ("*typisierende Betrachtungsweise*").[119] Under this approach, the Reich Fiscal Court did not have to take into account the specific facts of a case but could simply impose taxes on a fictitious fact pattern that would "*typically*" have happened.[120] Those lines of cases were therefore largely based on what judges found to be a reasonable, typical course of action.[121] The Reich Fiscal Court also found that there was no such principle as "*in dubio contra fiscum*" and held that the empire's budgetary plight and the financial needs are legitimate aspects that must be taken into account by the court in the interpretation of a fiscal emergency ordinance.[122]

115 RFH 17. 10. 1929, I A a 35/29, RFHE 26, 55: "*Der Reichsfinanzhof verkennt nicht die Notwendigkeit, auch gegenüber dem klaren Wortlaut einer einzelnen Gesetzesstelle eine Auslegung zu wählen, die dem Grundgedanken des ganzen Gesetzes Rechnung trägt und eine vernünftige Entscheidung ermöglicht. Unter weiteren Gesichtspunkten bleibt es aber immer mißlich, wenn die Rechtsprechung die Befugnisse der Gesetzgebung gegen den Gesetzgeber übernimmt. Jedenfalls sollten solche Fälle nur Notfälle bleiben. Um den Gesetzeswortlaut beiseite zu schieben, darf es nicht schon genügen, daß seit Erlaß des Gesetzes ein Problem tiefer erfaßt ist und man nun eine bessere Lösung weiß; es muss vielmehr das Rechtsempfinden zwingend die andere Lösung erfordern*".

116 RFH 4. 6. 1930, VI A 852/28, RFHE 27, 67: "*Es wäre nach der Auffassung des Senats verkehrt und würde der Bedeutung der höchstgerichtlichen Rechtsprechung für eine vernünftige Weiterentwicklung des Rechts nicht entsprechen, wenn man einen für richtig erkannten leitenden Grundsatz allein deshalb aufgeben würde, weil man sonst in einem untergeordneten Punkte zu einem Gegensatz mit dem klaren Wortlaut des Gesetzes käme. Man wird vielmehr in einem solchen Falle zu versuchen haben, der Gesetzesvorschrift, die einer Durchführung des für richtig erkannten Grundsatzes im Wege steht, eine gegebenenfalls auch dem Wortlaut entgegenstehende Auslegung zu geben, die eine Anpassung und Eingliederung der Einzelbestimmung in den Rahmen des Gesetzes zuläßt*".

117 *Hensel* in *Krüger* 243; *Lion*, Vierteljahresschrift für Steuer- und Finanzrecht 1927, 184; *Lion*, StuW 1931, 615; *Gassner*, Interpretation 20; *Walz*, Steuergerechtigkeit 223; *Crezelius*, Steuerrechtliche Rechtsanwendung 232 et seq; *Tipke*, Steuerrechtsordnung I 205.

118 *Hensel* in *Krüger* 244.

119 *Lion*, StuW 1931, 630; *Gassner*, Interpretation 70; *Crezelius*, Steuerrechtliche Rechtsanwendung 217.

120 *Lion*, StuW 1931, 629 et seq.

121 *Lion*, StuW 1931, 629; *Gassner*, Interpretation 61 et seq; *Crezelius*, Steuerrechtliche Rechtsanwendung 209 et seq; *Nevermann*, Justiz und Steuerumgehung 236. For an example, see RFH 7. 5. 1930, VI A 67/30, RFHE 27, 22.

122 RFH 25. 3. 1931, VI A 627/31, RFHE 28, 197.