Gothenburg 30 May 2022

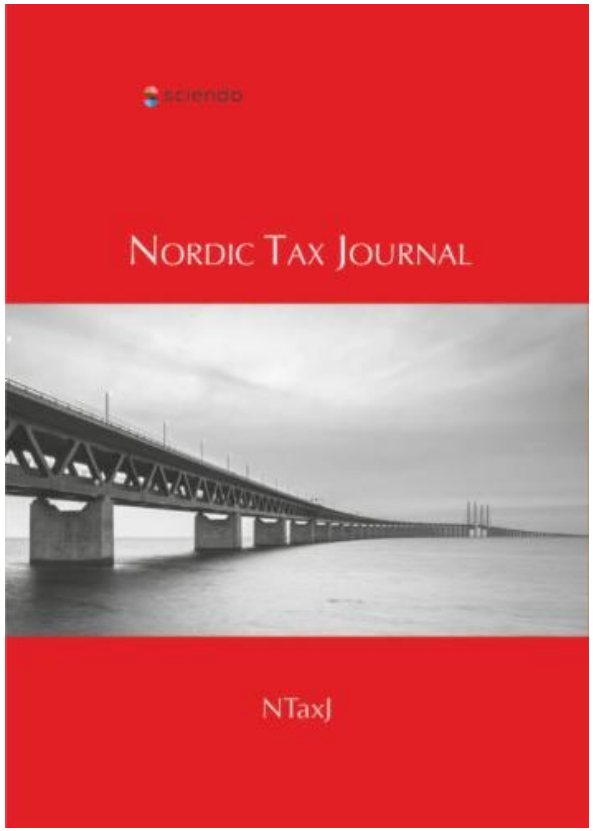
Legal Pragmatism

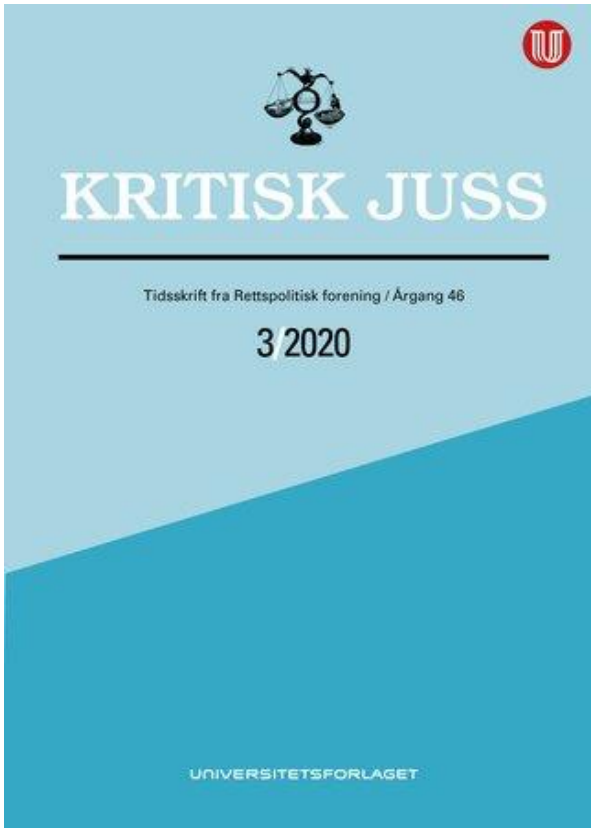
– A Useful and Adequate Explanatory Model for Danish Adjudication on Tax Avoidance?

University of Gothenburg
The Tax Law Academy Seminar Series

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Background





- P.K. Schmidt, *Legal Pragmatism – A Useful and Adequate Explanatory Model for Danish Adjudication on Tax Avoidance?*, Nordic Tax Journal, 2021, issue 1, pp. 29-44.
- P.K. Schmidt, *Retspragmatisme og skatteundgåelse*, Kritisk Juss, 2020, vol. 46, nr. 3, pp. 208-221.

Agenda

- Background
- Interpretation of tax legislation in Denmark
- Tax avoidance – two ”schools”
- What is legal pragmatism?
- Is the Supreme Court’s case law on tax avoidance an expression of legal pragmatism?
- Asessments, discussion and questions



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Jacob Graff's Investigations

CBS COPENHAGEN BUSINESS SCHOOL
HANDELSHØJSKOLEN

Four hypotheses (2003)

1) As a consequence of the principle of legatity a clear statutory basis is required for taxation.

2) GRL § 43 enhances the requirement for a clear statutory basis.

3) Nuances can be found in the requirement for a clear statutory basis.

4) The enhanced requirement entails that taxation should be clearly set out in legislation.

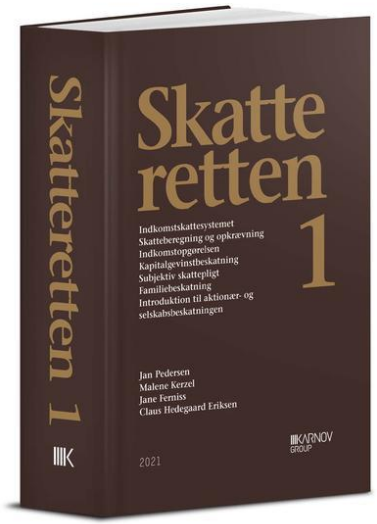


Interpretation of tax legislation

What do the textbooks say?

- The interpretation of tax legislation is not different from interpretation within other legal areas.
  - Jane Bolander et al., *Lærebog om indkomstskat*, DJØF Forlag 2021, p 129.
  - Jan Pedersen et al., Skatteretten 1, Karnov Group 2021, p. 127
  - H. Dam et al., Grundlæggende skatteret, Karnov Group 2021, p. 43







- However: Mass administration and polycentric legal sources.
  - A. Michelsen, SR-skat, 1996, p. 183 et seq.

Two points of view

”…the Danish Supreme Court’s exceptional ability to strike a balance between legal formalism and necessary realism has been very fruitful.”

T. Nielsen, *Indkomstbeskatning I*, Juristforbundets Forlag 1965, p. 35.*



”…Danish law’s common tendency to decide single cases by piling-up the concrete facts of the case, is certainly not less prominent within the area of tax law.”

M. Glistrup, *Skatteret*, Gads Forlag 1957, p. 31.*

* My own translation

Avoidance

The Doctrine of Reality vs. Ordinary interpretation

- Jan Pedersen's doctrine of reality (court developed GAAR):
  - Fictitious or artificial transactions may be set aside for tax purposes if the private law basis of an arrangement has been manipulated to such an extent that the underlying substance of the transaction significantly deviates from the outer legal shell.
  - Concerns the assessment of the facts of the case.

- Criticism (fx Thøger Nielsen, Aage Michelsen og Søren Friis Hansen)
  - Assessment of facts and interpretation cannot be carried out independently.
  - The inclination to place emphasis on the substance of an arrangement simply follows ordinary principles for interpretation (where attempt of avoidance may be included as one factor in the assessment).
  - The Doctrine of Reality hard to reconcile with GRL § 43.

- Now LL § 3 also applies – contains a statutory GAAR based on ATAD and the OECD PPT. Primarily applies to corporations.

Legal Pragmatism

- Is legal pragmatism a better explanatory model?

- One legal theory among many.
  - In modern times most prominent in a U.S. context.
  - Also deep roots in the Nordic legal tradition (A.S. Ørsted)

- Characteristics:
  - Openness towards looking at the law's functions and consequences.
  - Middle position between formalism (deducing solutions from general principles) and idealism (openness towards flexibility and the significance of values)
  - Aknowledges legal reasoning even if build on premises that cannot be observed explicitly in the law.
  - Disposition to ground judgements in facts and consequences rather than conceptualisms and generalities.

Legal Pragmatism and Danish Adjudication

- ”Danish courts are and should be characterized by a pragmatic approach, real considerations and common sense. Good legal argumentation, which respects the law and include real considerations, leads to better decisions.”
  - Børge Dahl, *Juridisk argumentation og retsanvendelse*, i *Liber Amicorum Peter Møgelvang-Hansen* (Børge Dahl. et al. red.), Ex Tuto 2016.*

- ”…there has been formulated a legal theory, which to a very large extent corresponds to the form of adjudication that we see in Denmark. It is called legal pragmatism…”*
  - Jonas Christoffersen, *Pragmatisme i spændingsfeltet mellem ret og retfærdighed*, Ugeskrift for retsvæsen, p. 349 et seq. (2019B).

- The style of the Danish courts have been described as:
  - Down to earth, realistic and practical.

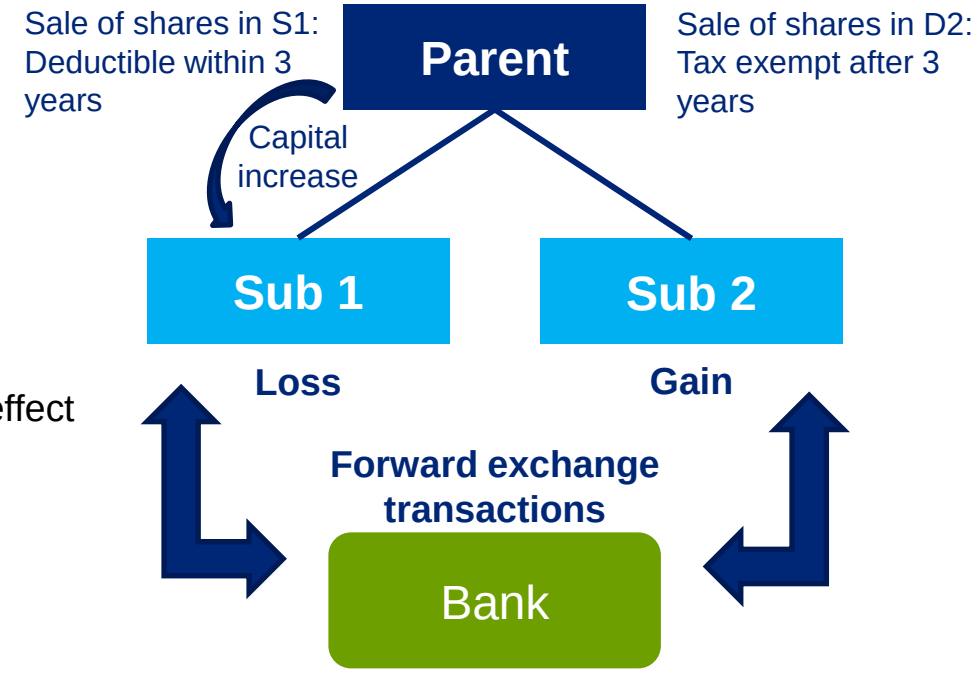
* My own translation

Case law on tax avoidance

”Recent” judgements from the Supreme Court

SKM2014.422.HR (Topdanmark A/S)

- Tax authorities: No deductible loss
- LSR and ØLR: Losses deductible
- HR: No deductible losses
  - No notable economic risk
  - No commercial grounds
  - Creating tax benefits was sole purpose and effect
  - The losses were not ”real” but constructed
- An expression of pragmatic adjudication?



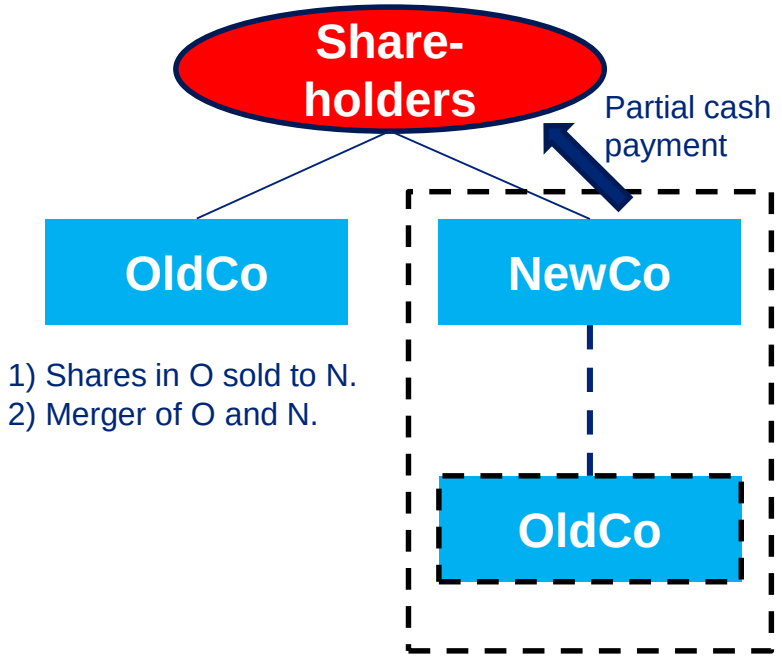
NB. See also U.2018.2166

Case law on tax avoidance

”Recent” judgements from the Supreme Court

SKM2016.16.HR / U.2015.2277 (TAKS)

- Faroe Court and ØLR: Decision in favor of taxpayer.
- HR: Decision in favour of tax authorities.
- The aim was to find a way to take out capital without surrendering any property rights to the shares.
- No commercial reasons.
- After an overall assessment:
  - The payment should be considered a taxable dividend,
  - and not a tax exempt gain on shares.
- An expression of pragmatic adjudication?



NB. See also SKM2019.458.HR

Case law on tax avoidance

”Recent” judgements from the Supreme Court

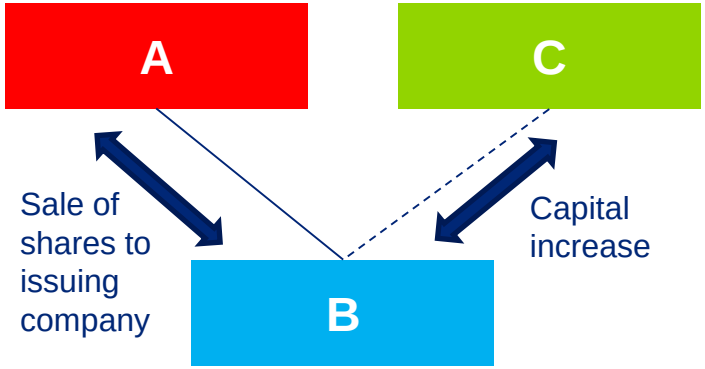
SKM2006.749 (Finwill)

- A’s direct sale to C of shares in B → Taxable (3 year rule).
- A instead sold the shares in B to the issuing company itself → Tax exempt dividends.
- B’s repurchase financed by simultaneous capital increase with funds injected by C.

- The tax authorities set aside the transactions → Seen as one transaction = sale of shares directly from A to B.

- HR: Judgement in favor of taxpayer.
  - Perhaps of significance that Danish law – in contrast to Faroese law – contained anti-avoidance rules and that the legislator was aware of the fact that certain tax planning/avoidance opportunities existed (i.e. not the same need to protect the Danish system)

- An expression of pragmatic adjudication?



Case law on tax avoidance

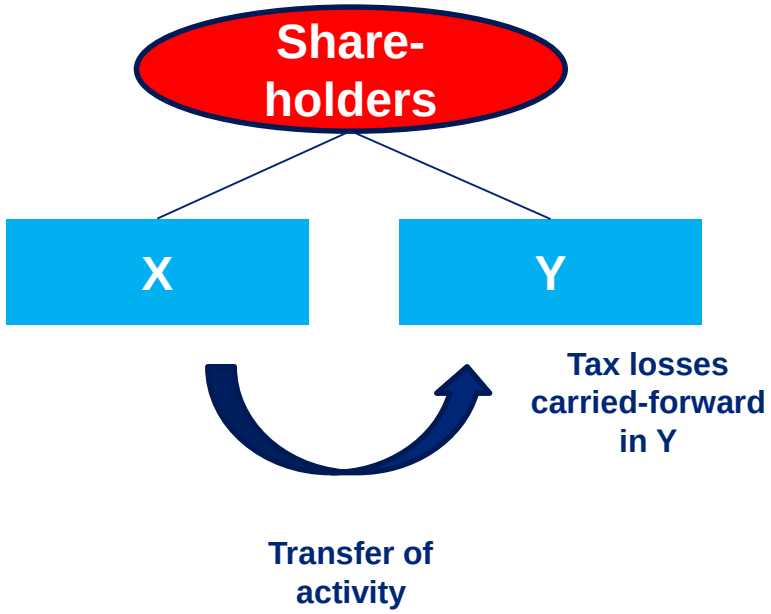
”Recent” judgements from the Supreme Court

SKM2010.26.HR / U.2010.252 (Feri-Lux)

- The tax authorities: Y was not the rightful recipient of the income generated by the activity.

- HR: The tax authorities have not documented that Y was not the rightful recipient of the income:
  - The relocation of the activity was motivated by commercial as well as tax-optimizing reasons.
  - LL § 15 specifically regulated utilization of losses.
  - The fact that the relocation was also made for tax optimization purposes does not entail that the transaction should be set aside for tax purposes.

- An expression of pragmatic adjudication?



My view

- The adjudication of the Danish Supreme Court can to a wide extent be considered as pragmatic.

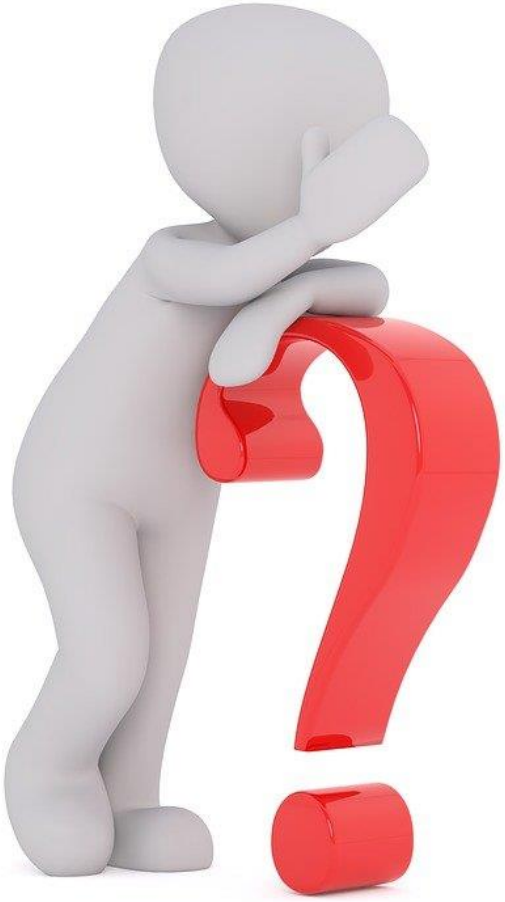
- The interpretation of tax legislation is not different from interpretation within other legal areas. A realistic interpretation method is applied.

- Recent case law illustrates that the Supreme Court – in tax avoidance cases – tries to strike a sensible balance between legal formalism, necessary realism, fairness, and the need to protect the tax system → I.e. a pragmatic approach.

- In my view legal pragmatism appears to be a useful and adequate explanatory model for Danish adjudication on tax avoidance.

- These particular features may be overlooked if the Court's approach to tax avoidance is trivialized as instances of ordinairy interpretation or oppositely placed on a pedestal and conceived as a consequent application of a court-developed GAAR.

Discussion and questions



Epilogue

Former Supreme Court Judge Jon Stokholm in Festskrift til Palle Bo Madsen, Jurist- og Økonomforbundets Forlag, 2021, p. 63-72.

- ”… a discussion about the emperor’s beard.”
- Not a legal doctrine or a court-developed GAAR.
- A commonly known tool to determine the relevant facts on which the Court will base its legal subsumption.
- Not a condition that avoidance is present.
- Fundamentally, an expression of a tool for the assessment of evidence.

