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Tax cancellation

A comparative analysis

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Table of contents

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dr Piotr Buława

Introduction

An initial reason for undertaking research on tax cancellation (British English: extra-statutory concession, Polish: *umorzenie zobowiązania podatkowego*, German: *Steuererlass*, Czech: *prominutí daně*) was the entry into force of the Restructuring Law Act[1] in Poland on 1 January 2016. The Act created new possibilities to cancel tax liabilities within the framework of insolvency arrangement. However, the Act did not take into account the characteristics of tax liabilities.[2] Such legal circumstances in Poland led to the undertaking of research in order to present a comprehensive analysis of the institution of tax cancellation. The need for this research was particularly evident in the case of tax cancellation under insolvency law, which is not part of tax law even in the *sensu largo* sense.

The issue of tax cancellation does not only concern the Polish legal system but also other legal systems, so the research presented here is of a comparative nature. Although the reasons for undertaking the research was related to the above-mentioned specific problem of the Polish law, the book attempts to present the institution of tax cancellation in a broader context, without favouring *a priori* any of the legal systems under consideration. Thus, the research goes beyond the specific problems of the Polish law, and it is therefore justified to present the results of these studies in a book in English. In order to carry out a comparative analysis of the institution of tax cancellation considering its historical development, the author chose legal systems of the following four countries: Poland, Germany, the Czech Republic, and England. When selecting legal systems for the comparative analysis, the author considered the need for diversity. It was necessary to choose legal systems of countries that differ significantly from each other within the scope of the institution being compared.[3] On the other hand,

[1] Prawo restrukturyzacyjne [Restructuring Law Act] of 15 May 2015, consolidated text in the Journal of Laws of 2019, item 243.

[2] Piotr Buława, 'Restrukturyzacja zobowiązań podatkowych w świetle nowego Prawa restrukturyzacyjnego – zmiany systemowe' [Restructuring of tax liabilities in light of the new Restructuring Law Act—systemic changes], *Monitor Prawniczy* 9 (2016), supp 20–24.

[3] Jaakko Husa, *A New Introduction to Comparative Law* (Oxford: Hart Publishing 2015), 124.

the author kept in mind the practical comparability of institutions existing in different countries. The comparative approach may have some limitations caused by the fact that it is not possible to entirely cross cultural borders.[4] Due to the above limitations, the analysis covers legal systems of selected European countries and not countries from other cultures.

When making the selection of legal systems to be compared, it was essential to choose countries representing two primary legal cultures of the world.[5] The analysis covers Germany as regards the continental (Romano-Germanic) legal system and England as regards the common law. The author extended the comparison to the legal system of the Czech Republic, which, like the German and Polish legal systems, belongs to the continental legal culture but is also the 'successor' to the socialist legal culture that played the role of a separate legal culture in the 20th century.[6]

The primary objectives of the book are to assess the institution of tax cancellation in the analysed legal systems and compare the conditions of its application. The broad scope of the objectives comes from a postulate by Rodolfo Sacco, who claims that the primary aim of comparative law as a science is to acquire knowledge about legal systems. The results of this research may be applied in practice, but not necessarily so.[7] The Cultural Manifesto of Comparative Law adopted by Italian comparatists in Trento in 1987, commonly known as 'Thesis of Trento' (Italian: *Tesi di Trento*), confirms Sacco's postulate.[8] The proposed expansion of knowledge should not be understood in comparative law as a presentation of regulations of different legal systems, i.e. as a study at the first (essential) stage of comparative law research according to the scale of the depth of the study adopted by Husa.[9] Comparative law research at the fourth and fifth stages, as specified by Husa, aims to explain with the help of auxiliary sciences the reasons

[4] Ibid., 23.

[5] In addition to the Romano-Germanic, common law, and socialist legal culture, René David enumerates the following legal cultures: Islamic, Hindu, Jewish law, and the laws of the Far East, Africa and Madagascar. René David, in Camille Jauffret-Spinosi, René David, Marie Goré, *Les grands systèmes de droit contemporains* (Paris: Dalloz 2016), 16.

[6] Husa, *A New Introduction to Comparative Law*, 216, 219.

[7] Rodolfo Sacco, Piercarlo Rossi, *Einführung in die Rechtsvergleichung* (Baden-Baden: Nomos 2017), 13.

[8] 'Le Tesi di Trento', Law Faculty, University of Trento, http://www.jus.unitn.it/faculty/guida/tesi.html, accessed 23 February 2020.

[9] Husa identifies five stages of comparative law research: 1) presentation of provisions of other legal systems usually in connection with drafting of legislation, 2) comparison within a specific scale or common comparative framework, usually in order to solve a particular problem or fill in gaps in law, 3) systematic presentation of similarities and differences regarding a particular institution, 4) analysis of similarities and differences regarding a particular institution with the help of, e.g. sociology of law, legal history, legal anthropology etc., and 5) problematisation, including development of the theory and methodology of comparative law. Husa, *A New Introduction to Comparative Law*, 141–142.

for the existence of similarities and differences regarding the same institution in the compared legal systems and, consequently, to generate research questions through problematisation. The author also sets himself such goals in the book.

The book is thematically divided into two parts. The first part of the monograph consists of Chapters I-IV and elaborates on common issues for all forms of tax cancellation, while in the second part, i.e. in Chapters V-VIII, it analyses particular forms of tax cancellation: administrative tax cancellation, debt relief, and insolvency arrangement. Chapter I presents necessary comparative assumptions concerning the definition of tax cancellation and other relevant notions, which are unrelated to a particular legal system, and presents comparative methods applied in this book. The next chapter shows sources of law in the compared countries, with particular emphasis on the institutions of prerogative and pardon. Chapter III discusses the institutions of privilege and dispensation in the canon law of the Catholic Church. These institutions are the reference point of the comparative analysis. The last chapter of the first part (Chapter VI) analyses the evolution of the institutions of discretion and free discretion in the compared countries. The second part of the book begins with Chapter V, which analyses administrative tax cancellation. It is evaluated with particular emphasis on the issues of the legal basis, premises for a cancellation, and judicial review. The issue of tax cancellation granted by the minister of finance is excluded from Chapter V and discussed separately in Chapter VI. Then, Chapters VII and VIII discuss possible forms of tax cancellation within the framework of insolvency law. Chapter VII presents the institution of insolvency arrangement with a particular focus on the role of the tax authority in the proceedings. Finally, Chapter VIII analyses the possibility of tax cancellation within the framework of the institution of debt relief, including the purpose of this institution from the tax law perspective. Due to the multidimensionality of the analysis, the author formulates the following research theses, which play a pivotal role in the conducted analysis and provide a point of reference for the conclusions formulated at the end of the book:

1. Tax cancellation may be made on the basis of a prerogative or statute;
2. Tax cancellation is related to a legal norm or factual circumstances of the creation or collection of a tax liability;
3. Tax cancellation may be a privilege or dispensation;
4. For decades, the courts have been deciding on tax cancellation in place of tax authority.

The analysis presented in this book is based on the law as of 1 March 2020.

Chapter I

Comparative assumptions

1. Operative rule

In his comparative analysis, the author paid special attention to the fact that 'tax cancellation' may not mean the same in different legal systems. Thus, in the present book, 'tax cancellation' is understood as an operative rule, and not as a specific institution in a particular legal system. The operative rule is one of the essential tools of comparative law. This rule describes a given phenomenon when countries have developed different legal mechanisms for dealing with the same specific tax problem,[1] as in the case of tax cancellation. Hence, tax cancellation is understood not only as the expiry of tax liabilities but also as permanent refraining (forbearance) from enforcing tax liabilities in the course of tax collection.

Since tax cancellation is defined in the book as an operative rule, the term 'cancellation' for the purposes of this monograph cannot be equated with the Polish term *umorzenie* within the meaning of Article 59 § 1 point 8 of the Polish Tax Ordinance Act,[2] which refers only to the expiry of tax arrears as a result of their cancellation. Such understanding of the institution of tax cancellation would be too narrow and would make it impossible to carry out a comparative analysis of this institution in its full diversity present in the compared legal systems. Therefore, the subject of the analysis is not only tax arrears but also undue tax liabilities. In addition, the analysis is not limited to the question of expiry of tax liabilities, i.e. termination of legal relationship obliging the taxpayer to pay tax liabilities,[3] but also covers permanent refraining from collecting tax liabilities.

[1] Carlo Garbarino, 'An Evolutionary Approach to Comparative Taxation: Methods and Agenda for Research', *The American Journal of Comparative Law*, 57(2009), 688.

[2] Ordynacja podatkowa [Tax Ordinance Act] of 29 August 1997, consolidated text in the Journal of Laws of 2019, item 900.

[3] Henryk Dzwonkowski, Małgorzata Kurzac, in Henryk Dzwonkowski, ed., *Ordynacja podatkowa. Komentarz* [Tax Ordinance Act: Commentary], (Warsaw: C.H. Beck 2016), 429.

Consequently, in order to ensure clarity of the book, the analysis is limited to tax liabilities that are revenues of central budgets (the state budgets). Tax liabilities are a revenue source not only for central budgets but also for budgets of territorial units other than countries. An examination of tax revenues of such other entities would greatly expand the subject of the research, especially in the case of the United Kingdom (England) and Germany due to their federal nature. Therefore, the study also leaves out tax liabilities that are a source of revenue for local government units in Poland and the Czech Republic.

The analysis undertaken in this book is not confined to the traditional meaning of the institution of tax cancellation, i.e. the institution of tax law, but also scrutinises it in the light of insolvency law regulations. The direct reason for such an extension of the scope of research was the amendment of Article 342 of the Insolvency Law Act[4] as of 1 January 2016 and the entry into force of the Restructuring Law Act in Poland on 1 April 2016, which radically changed the law concerning entities in insolvency.[5] As a result of the amendment of Article 342 of the Insolvency Law Act, the Polish tax authority, like the tax authorities in the other discussed legal systems, no longer enjoys preferential right to satisfy its tax liabilities over private law liabilities in liquidation proceedings. The loss of the privilege has increased the probability of entering into an insolvency arrangement involving tax liabilities. In addition, there has been a constant development of the so-called consumer insolvency, which includes tax liabilities. Therefore, an analysis of the issues related to tax cancellation should also include insolvency law regulations, as they can be used to annul a tax. German legal doctrine also indicates that tax cancellation must be analysed from the viewpoint of not only tax law but also insolvency law.[6] Some German scholars even believe that if the tax authority has refused to cancel tax liabilities, the taxpayer should attempt to cancel them with the help of the insolvency law.[7]

2. Comparative law methodology

Comparative research was based primarily on the following methods: critical analysis of Polish, German, Czech, and English legal provisions; legal literature and case-law concerning the institution of tax cancellation; and legal provisions

[4] Prawo upadłościowe [Insolvency Law Act] of 28 February 2003, consolidated text in the Journal of Laws of 2019, item 498.

[5] Aleksandra Machowska, ed., *Prawo restrukturyzacyjne i upadłościowe. Zagadnienia praktyczne* [Restructuring and Insolvency Law: Practical Issues], (Warsaw: Wolters Kluwer 2016), 23.

[6] Carl Gerber, *Stundung und Erlass von Steuern* [Deferment and Cancellation of Taxes], (Stuttgart: Richard Boorberg Verlag 2006), 59.

[7] Rüdiger Wienberg, Kai Dellit, in Reinhard Bork, Gerrit Hölzle, *Handbuch Insolvenzrecht* [Handbook of Insolvency Law], (Cologne: RWS Verlag 2014), 869.

and literature of the canon law of the Catholic Church regarding the institutions of privilege and dispensation. The undertaken comparative analysis used the following:

- functional comparison (common core approach);
- tax formats.

Given the differences in legal doctrine with respect to the above-mentioned research methods, the author carried out the analysis in compliance with the guidelines for these methods by Carlo Garbarino.[8]

The functional comparison method assumes that different legal institutions and practices in the compared legal systems may have a similar problem-solving function. On the other hand, similar institutions, even with identical names, may play different functions. Therefore, the purpose of the functional comparison is to find functional equivalents.[9] The adopted method based on the confrontation of the results of national reports allows to carry out an analysis of common problems and avoid an analysis of linguistic aspects of the compared institutions by referring to the operative rule. This reference is particularly important when major obstacles to the application of the common core approach are taken into consideration, such as rapid legislative changes, complexity of a particular tax system, and diversity of national tax concepts.

By using the functional comparison method for the research, it is possible to show similarities and differences between institutions of tax cancellation in the compared legal systems. However, it is not the objective of the book to indicate a common (unifying) model for the systems in question, which has been presented many times in legal literature as the underlying goal of this method.[10] Instead, the primary objective of the monograph is to present the similarities and differences between the institutions being compared. Then, it aims to assess such similarities and differences[11] and identify reasons for their existence.

The functional comparison method is complemented by the tax format comparison method. The theory of tax formats focuses on law as a social activity. A particular format of tax law is the outcome of the activity of some groups or communities institutionally involved in its creation. Examples of tax formats are statutes, administrative guidelines, case-law (judicial decisions) and opinion of scholars (legal literature),[12] and prerogatives.

The analysis is carried out at the micro-level, i.e. at the level of individual legal institutions. By contrast, comparison at the macro-level takes place between

[8] Garbarino, *An Evolutionary Approach to Comparative Taxation*, 687–705.

[9] Husa, *Introduction to Comparative Law*, 119.

[10] Mathias Reimann, Reinhard Zimmermann, *The Oxford Handbook of Comparative Law*, (Oxford: Oxford University Press 2008), 380–381.

[11] Sacco, Rossi, *Einführung in die Rechtsvergleichung*, 20.

[12] Garbarino, *An Evolutionary Approach to Comparative Taxation*, 689–691.

legal systems or their fundamental aspects.[13] The macro-comparison *per se* is not a subject of this monograph. The analysis at the micro-level considers the legal nature of the institution of tax cancellation and the need to focus on specific solutions for that institution within the framework of tax and insolvency law. Hence, references to entire legal systems or their fundamental aspects are limited to an absolute minimum. This minimum comprises a presentation of the sources of law and institution of taxing discretion in the compared systems. In terms of the sources of law, there are significant differences between the legal systems in question. It is highly relevant for explanation of tax formats, including the institution of prerogative. Taxing discretion plays a vital role in determining a position of the tax authority in tax cancellation proceedings. In addition, an analysis of tax cancellation as part of insolvency arrangement or debt relief requires presenting these proceedings in each of the countries.

3. Uniform terminology

Since the book is comparative and quasi-multidisciplinary in nature (it covers tax and insolvency law), it has been necessary to adopt a uniform terminology. First of all, the taxpayer is called 'the taxpayer' in the text of the whole book, even though it would be advisable to use the term 'bankrupt' or 'debtor' within the scope of the chapters dedicated to insolvency law. Moreover, all tax authorities are called 'tax authority' regardless of their internal structure and customary nomenclature adopted in given countries. Similarly, ministers exercising competences in the field of taxation are called 'ministers of finance,' even though such ministers sometimes carry completely different titles, such as the Chancellor of the Exchequer in England (the United Kingdom).

Adoption of proper uniform terminology for all insolvency proceedings is an important issue. In Poland, insolvency law is currently regulated by two separate acts, i.e. the Insolvency Law Act and the Restructuring Law Act. Nonetheless, it does not change the fact that they functionally constitute one field of law, i.e. insolvency law.[14] Within Polish insolvency law, there are convergent or similar notions, such as insolvency proceedings (Polish: *postępowanie upadłościowe*), insolvency proceedings involving liquidation (Polish: *postępowanie upadłościowe obejmujące likwidację*), liquidation proceedings (Polish: *postępowanie likwidacyjne*), liquidation proceedings (Polish: *postępowanie konkursowe*), debt relief proceedings (Polish: *postępowanie oddłużeniowe*), sanative proceedings (Polish: *postępowanie sanacyjne*), composition proceedings (Polish: *postępowanie*

[13] Husa, *Introduction to Comparative Law*, 101.

[14] Aleksander Jerzy Witosz, in Anna Hrycaj, Andrzej Jakubecki, Antoni Witosz, eds., *Prawo restrukturyzacyjne i upadłościowe. System Prawa Handlowego. Tom 6* [Restructuring and Insolvency Law: Commercial Law System, Vol. 6], (Warsaw: C.H. Beck 2016), 620.

układowe), and restructuring proceedings (Polish: *postępowanie restrukturyzacyjne*).

Thus, the author adopted a uniform terminology in this field based on Czech terminology. In this legal system, there are liquidation proceedings (Czech: *konkurs*), debt relief proceedings (Czech: *oddlužení*), and restructuring proceedings (Czech: *reorganizace*). This terminology was taken from the Czech Insolvency Law Act[15] because it is the most transparent and systematic terminology among the legal systems being compared. The lawmakers in other countries do not make such a clear distinction between these institutions. Unlike the Czech legislators, they often merge them into single proceedings or subdivide them into separate proceedings. The Czech legislature has separated exactly these three proceedings in the Insolvency Law Act.

In keeping with the division adopted by the Czech lawmakers, liquidation proceedings are understood in this book as insolvency proceedings that lead to the liquidation of the taxpayer's assets so that the creditors' claims are equally satisfied. Claims not satisfied under these proceedings shall not expire. In addition, debt relief proceedings refer to insolvency proceedings, whose main objective is to cancel all taxpayer's liabilities without their full satisfaction. Finally, restructuring proceedings are insolvency proceedings under which the taxpayer and their creditors conclude an insolvency arrangement concerning the settlement of the taxpayer's liabilities through, among others, their cancellation.

The Polish terms *upadłość* and *postępowanie upadłościowe* are translated as 'insolvency' and 'insolvency proceedings.' The translations of these terms as 'bankruptcy' and 'bankruptcy proceedings' appear usually only in historical contexts and are not used in this book. On the other hand, the terms 'bankruptcy' and 'bankruptcy proceedings' are used here in sections devoted to the English law system.

In order to maintain clarity in the terminology, all legal documents enacted by the legislature, e.g. by the Parliament, are called 'statutes,' unless there is no reference to a specific document. In Poland, Germany, and the Czech Republic, the concept of a statute (Polish: *ustawa*, German: *Gesetz*, Czech: *zákon*) is commonly used, but there are also other terms in practical use, such as an act or law. In the theory of law, there is a distinction between statute in the formal and material senses.[16] In the case of English law, it is common to use the terms Act of Parliament or primary legislation. However, from the point of view of this monograph it is irrelevant whether an act contains abstract-general norms; instead, what matters is whether it was enacted by the legislature. Therefore, given

[15] Zákon o úpadku a způsobech jeho řešení (insolvenční zákon) [Act on insolvency and the means of its resolution (Insolvency Law)] of 30 March 2006, Collection of Laws no. 182/2006.

[16] A statute in the material sense is any general-abstract legal act and a statute in the formal sense is any legal act issued in the form of a legal act (German: Gesetzform) by parliament regardless of its content.

the English terminology, the book uses the term 'statute.' The term can be applied to all countries under analysis. In addition, 'parliament' should be understood as a body of legislation provided for by the legal system of a given country, and not as an institution called 'parliament' (UK: *Parliament*, Czech: *Parlament*). In Poland and Germany, the term 'parliament' is not formally used to designate legislative bodies; instead, Poland uses the terms *Sejm* and *Senat,* while Germany uses *Bundestag* and *Bundesrat*.

One more issue needs to be clarified. Whenever a reference is made to the legal system in force in England, the terms 'England' or 'English law' are used instead of 'the United Kingdom' or 'British law.' The reason behind the above terminology decision is the existence of different legal systems on the territory of one country, the United Kingdom. There are currently three jurisdictions in the UK: English law in England and Wales,[17] Scottish law in Scotland, and Northern Irish law in Northern Ireland.[18] The differences between the legal systems are particularly significant in the area of private law. There is also a separate regulation in the field of insolvency law.[19] Conversely, there is one common legal system in the UK as far as constitutional and tax law is concerned. The reasons for this division are historical. Pursuant to the Acts of Union 1707 establishing a personal union between the Kingdoms of England and Scotland, it was guaranteed that Scottish law would remain independent of the English law except for trade and taxation. Similar provisions contained in the Act of Union 1801 established a real union between the United Kingdom of Great Britain and the Kingdom of Ireland.[20] Hence, England has British tax law and English insolvency law.

Given the above differences, a uniform terminology is adopted in this respect, i.e. the terms 'England' and 'English law' are used in the monograph to indicate the legal system in force in England, also within the scope of legal regulations in force in the entire United Kingdom. The introduced terminology is dictated by the scope of the book, which covers the issues associated with tax cancellation in England and not in the UK as a whole. Moreover, an analysis of the relations between the UK and England is not the subject of this monograph. If all of the above terms were used simultaneously, such an analysis would be indispensable. In addition, using only the terms 'Great Britain' and 'British law' would suggest that the subject of the book is also Scottish and Northern Irish law.

[17] Separate Welsh law has been developed since 1 January 2007 under the Government of Wales Act 2006.

[18] Alisdair Gillespie, Siobhan Weare, *The English Legal System*, (Oxford: Oxford University Press 2015), 22.

[19] In England it applies to the Insolvency Act 1986, and in Scotland it applies to the Bankruptcy (Scotland) Act 2016.

[20] Gillespie, Weare, *The English Legal System*, 3–4.

Chapter II

Sources of law and prerogative

When determining the legal basis for the institution of tax cancellation, it is fundamental to explain the nature of this institution. From the perspective of Polish law, particularly in light of Article 87 point 1 of the Constitution of the Republic of Poland,[1] it seems obvious that the answer to that question is a parliamentary statute. Nonetheless, the following analysis of sources of law indicates that, in contrast to Article 87 above, there are no corresponding articles in the compared legal systems. The absence of such provisions makes it likely that tax liabilities will be cancelled on a legal basis other than a statute, e.g. based on a prerogative. Hence, it is justified to provide an overview of the sources of law in the compared countries, as well as the institution of prerogative, which is not well-known in Poland, Germany, or the Czech Republic.

1. Right to impose tax liabilities

Before analysing the sources of law and the institution of prerogative, it seems justified to consider the legal basis for the imposing of tax liabilities. Unlike the legal basis for tax cancellation, the legal basis for imposing tax obligations is currently only a parliamentary statute. There is a relationship between tax cancellation and imposition of tax liabilities. This relationship is not only logical (the imposition of tax liabilities is a prerequisite for their cancellation) but also historical. The relationship is particularly noticeable when we analyse the evolution of the right to impose tax liabilities.

Tax liabilities are a compulsory transfer of taxpayer's assets to a ruler (currently a state). The conditions of this transfer are unilaterally determined by the ruler or more broadly by state institutions. In the event of non-compliance

[1] Konstytucja Rzeczpospolitej Polskiej [Constitution of the Republic of Poland] of 2 April 1997, Journal of Law 1997, No. 78, item 483, hereinafter referred to as 'Polish Constitution.'

with these obligations, their collection may be enforced.[2] Hence, tax liabilities have always been an important element of the relations between the authorities (a monarch) and society. At the same time, the development of a modern state is inseparably linked to the development of taxation.[3] The importance of taxation for these relations is emphasised by the fact that the imposition of tax liabilities has been a recurrent cause of disputes, including armed conflicts.[4]

It should be emphasised that the above-mentioned concept of 'tax liabilities' is confirmed by current legal regulations. According to Article 6 of the Polish Tax Ordinance Act, 'tax shall be a public, gratuitous, compulsory and non-refundable pecuniary performance in favour of the State Treasury … resulting from statutory tax law.'[5] Pursuant to § 3 point 1 of the Fiscal Code of Germany[6] 'taxes shall mean payments of money, other than payments made in consideration of the performance of a particular activity, which are collected by a public body for the purpose of raising revenue and imposed by the body on all persons to whom the characteristics on which the law bases liability for payment apply; the raising of revenue may be a secondary objective.'[7] Czech and English statutory law does not contain a substantive definition of tax liabilities. However, tax liabilities are defined similarly in the legal literature in these countries.[8]

Taxation became a particularly important issue in Europe in the early modern period, i.e. in the 16th–19th centuries. The reason for this was the growing state fiscalism. The end of the Middle Ages was associated with a change in the structure of the army. Armed forces increasingly relied on regular army, which replaced knighthood. However, maintaining a regular army was incomparably more expensive than maintaining a knight-based army. Such an army could not support itself from the ruler's property, as had been the case during feudalism,

[2] Włodzimierz Nykiel, 'Pojęcie i konstrukcja podatku' [Concept and structure of tax] in Leonard Etel, ed., *System Prawa Finansowego. Tom III. Prawo daninowe* [System of Financial Law. Volume III. Revenue Law], (Warsaw: Wolters Kluwer 2010), 28.

[3] Peter Badura, *Staatsrecht: Systematische Erläuterung des Grundgesetzes für die Bundesrepublik Deutschland* [State Law: Systematic Explanation of the Basic Law of the Federal Republic of Germany], (Munich: C.H. Beck 2015), 625.

[4] Andy Lymer, Lynne Oats, *Taxation: Policy and Practice*, (Birmingham: Fiscal Publication 2017), 3.

[5] 'The Tax Ordinance Act', *Supertrans2014*, https://supertrans2014.files.wordpress.com/2014/06/the-tax-ordinance-act.pdf, accessed 20 March 2020.

[6] Abgabenordnung [Fiscal Code] of 16 March 1976, consolidated text in Federal Law Gazette 2002, part I, p. 3866.

[7] 'The Fiscal Code of Germany' *Federal Ministry of Justice and Consumer Protection and the Federal Office of Justice*, https://www.gesetze-im-internet.de/englisch_ao/englisch_ao.pdf, accessed 20 March 2020.

[8] Lymer, Oats, *Taxation*, 3; Geoffrey Morse, David Williams, Sandra Eden, Davies: Principles of Tax Law, (London: Thomson Reuters 2016), 18; Lenka Hrstková-Dubšeková, Meritum: Daňový řád [Essence: Code of Tax Procedure], (Prague: Wolters Kluwer 2015), 7.

when most of the state's expenses had been financed from the monarch's property, the so-called royal domain.[9]

In earlier periods, i.e. in ancient times and the Middle Ages, there were undoubtedly some services with characteristics of tax liabilities, although, as in the case of tithe, they often did not take the form of monetary services. Thus, taxation was not intensive and was a one-off exercise in many cases. Moreover, tax liabilities were usually imposed on 'foreigners,' i.e. conquered peoples or disadvantaged social groups.[10] For example, during the reign of Julius Caesar, tax liabilities could not be imposed on Roman citizens.[11] In the Middle Ages, many social groups obtained privileges that exempted them from certain tax burdens.[12]

In the early modern period, the rapid growth of fiscalism in European countries was accompanied by the development of a new form of government—absolute monarchy. The theoretical foundations of absolutism were created by Jean Bodin, who claimed that the king stood above the law and had power limited only by divine law.[13] In practice, the essence of the new political system was to concentrate authority in one centre of power within a centralised state. The monarch became the sole creator of law. This concentration of power resulted in, among others, limitation of state privileges (e.g. Joseph's reforms in the Habsburg monarchy in the 18th century),[14] which affected the possibility of imposing tax liabilities on the majority of the population. Imposition and cancellation of tax liabilities became a sovereign right of a monarch.

Due to political changes and an increase in financial needs of the state, many social groups opposed the monarch's right to impose tax liabilities. Resistance to the growing fiscalism and absolutism of the monarchy was particularly strong in England, i.e. in the most developed country of that time in Western civilisation.[15] The resistance resulted in civil wars lasting many years, including the reign of Oliver Cromwell as Lord Protector. In the end, this led to the Glorious Revolution and adoption of the Bill of Rights in 1688. According to Article 4 of the Bill, levying (imposing) tax liabilities without grant of Parliament is

[9] Cezary Kosikowski, Jacek Matuszewski, 'Geneza i ewolucja oraz funkcje podatków' [Origin, evolution and functions of taxes], in Etel, *System*, 41.

[10] Ibid., 44.

[11] Lymer, Oats, *Taxation*, 4.

[12] Juliusz Bardach, Bogusław Leśnodorski, Michał Pietrzak, *Historia ustroju i prawa polskiego* [History of Polish Political System and Law], (Warsaw: Wydawnictwo Prawnicze LexisNexis 2001), 91, 101.

[13] Zbigniew Wójcik, *Historia Powszechna XVI–XVII wieku* [World History of 16th–17th centuries], (Warsaw: Wydawnictwo Naukowe PWN 1999), 305.

[14] Karel Malý et al., *Dějiny českého a československého práva do 1945* [History of Czech and Czechoslovak Law till 1945], (Prague: Leges 2010), 183.

[15] Wójcik, *Historia Powszechna*, 23.

illegal. As a result of the adoption of the Bill of Rights 1688, England was transformed into a constitutional monarchy.[16] The Bill of Rights 1688 is still in force today.

Due to the development of the 'Nobles Democracy,' absolutist monarchy characteristic of most European countries of that period was not fully established in Poland.[17] Already in a privilege issued in Buda in 1355, the Polish king Louis I of the Hungary promised not to collect extraordinary taxes beyond the customary amount. Then, in a privilege issued in Košice in 1374, the same king pledged not to impose tax liabilities on the nobility without the consent of the entire nobility class.[18] In 1507, control over all military expenses, which constituted the majority of the state's expenses, was ceded to the Sejm (the Polish Parliament).[19] Unfortunately, as the result of the Partition in 1772–1795, the Polish State became incorporated into the legal systems of the absolute monarchies of Prussia, Austria and Russia.

The other two countries included in the comparative analysis, i.e. Germany and the Czech Republic, are successors of the absolutist monarchies of Prussia and Austria. From 1620 to 1918, the Lands of the Bohemian Crown were under the rule of the Habsburgs, and they constituted an essential part of the Habsburg monarchy.[20] In the case of Czech law, there is a strong connection with the legal legacy of the absolutist monarchy. As Karel Malý points out, the absolutist reforms of the 18th century were the foundation of the modern state and the entire legal order of the Czech Republic (the Czechoslovak Republic) was based on these reforms until the beginning of the period of real socialism, i.e. the years 1948–1950.[21]

Until the second half of the 19th century, the Austrian and Prussian monarchies were absolutist monarchies, in which power was concentrated in the hands of the monarch. Moreover, after the outbreak of the French Revolution in 1789, absolutist monarchy evolved into a police state.[22] The right to impose tax liabilities only by statute, i.e. with the consent of Parliament, was guaranteed in the Prussian monarchy only in Article 99 of the 'octroyed' Constitution of Prussia of 5th December 1848.[23] The publication of the Constitution was the re-

[16] Reiner Sahm, *Zum Teufel mit der Steuer! 5000 Jahre Steuern – langer Leidensweg der Menschheit* [To Hell with Tax! 5000 Years of Taxes–the Long Path of Humankind Suffering], (Berlin: Springer 2018), 165.

[17] Bardach, et al., *Historia prawa*, 177.

[18] Ibid., 91.

[19] Ibid., 233, 237.

[20] Malý, *Dějiny práva*, 148–149.

[21] Ibid., 175.

[22] Ibid., 178.

[23] 'Verfassungsurkunde für den preußischen Staat' *dokumentArchiv.de*, http://www.documentarchiv.de/nzjh/verfpr1848.html, accessed 24 February 2020.

sult of the revolutions of 1848 (Spring of Nations).[24] In the case of the Austrian monarchy, parliamentary control over the state budget was guaranteed for the first time by the October Diploma of 1860. The right to impose tax liabilities was granted to Parliament under the December Constitution of 1867. In this case, the concessions of the ruling monarchy were the result of the defeat in the Second Italian War of Independence and, consequently, the loss of Lombardy and Venezia.[25]

At present, in all the countries covered by the analysis, only parliaments have the right to impose tax liabilities on the taxpayer. The legal basis for the exclusive right of parliaments is expressed in the following provisions:

1. Article 217 of the Polish Constitution;
2. Article 2 point 2 of the Basic Law for the Federal Republic of Germany;[26]
3. Article 2 point 4 of the Constitution of the Czech Republic;[27]
4. Article 4 of the Bill of Rights 1688.

Considering the above facts, the author agrees with Piotr Badura that the right to impose tax liabilities is an element of financial sovereignty of a state and is of crucial importance for constitutional order because a modern state is a 'tax state.'[28]

2. Prerogative

The current legal regulations in the compared countries allow imposing tax liabilities only by the parliaments; however, they do not settle the issues of tax cancellation. From the *a maiore ad minus* argument it must be concluded that parliaments are entitled to cancel tax liabilities because they can impose them. Nonetheless, this argument does not exclude the right of other entities to cancel these liabilities.

The comparative analysis carried out in this book shows that parliaments do not, in fact, have the exclusive right to cancel tax liabilities. In other words, the cancellation of specific tax liabilities does not have to result directly and unconditionally from a statute. This lack of exclusive right corresponds to the following position of the author that this right has not undergone historical evolution similar to the right to impose tax liabilities and this right is still vested in monarchs or nowadays in governments and their subordinate tax authorities.

[24] Badura, *Staatsrecht*, 35.

[25] Malý, *Dějiny práva*, 215–217, 239.

[26] Grundgesetz für die Bundesrepublik Deutschland [Basic Law of the Federal Republic of Germany] of 24 May 1949, Federal Law Gazette 1949. part I, p. 1, hereinafter referred to as Basic Law.

[27] Ústava České republiki [Constitution of the Czech Republic] of 16 December 1992, Collection of Laws no. 1/1993, hereinafter referred to as 'Czech Constitution.'

[28] Badura, *Staatsrecht*, 625, 875.

In such a case, tax cancellation does not require a legal basis in the form of a statute, or the legal basis is formal, i.e. the tax authorities are vested with full discretion regarding tax cancellation under a statute. The legal basis for tax cancellation in such a case may result from a prerogative of the entity exercising cancellation.

In the past, the royal prerogatives were understood in England as all rights belonging to the monarch and directly related to the exercise of its role. The exercise of prerogative powers did not require formal participation of other state institutions such as parliament or government.[29] According to the opinion of William Blackstone expressed in the 18th century, 'by the word prerogative we usually understand that special pre-eminence, which the king hath, over and above all other persons, and out the ordinary course of the common law, in right of his regal dignity. … Prerogatives are either direct or incidental.'[30] Therefore, they were not of general and abstract nature, as statutes are today, but were applied to individual cases. On the other hand, in 19th century Albert Venn Dicey pointed out that 'the prerogative appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.'[31] Nowadays, prerogative power is very often abrogated by the enactment of a statute, and administrative (governmental) powers are almost entirely based on statutes rather than on the Crown's authority.[32] Given the above definition of a prerogative by Dicey, it may be understood as any competence of the administration (government) that has no direct or indirect legal basis in a statute. Hence, it is justified to assume that administrative powers in England are dichotomously divided into (i) powers based on parliamentary statutes and (ii) powers based on prerogatives.

At present, prerogatives as constitutional conventions belong to Crown, but they are exercised by the government or ministries. As Ludwig Bar states, the prime minister has mostly taken over the exercise of prerogatives from the Crown.[33] On the other hand, prerogatives are no longer as important as in the past because they have been replaced by Acts of Parliament, which are statutes as to their nature. Currently in England, almost all internal affairs are regulated

[29] Gerhard Albert Ritter, *Parlament und Demokratie in Großbritannien* [Parliament and Democracy in Great Britain], (Göttingen: Vandenhoeck & Ruprecht 1971), 25.

[30] William Blackstone, *Commentaries on the Laws of England*, (Oxford: Clarendon Press 1765), 238.

[31] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, (London: Macmillan 1915, reprint Indianapolis: Liberty Classics 1982), 282.

[32] Eric Barendt, 'Fundamental Principles', in David Feldman, Peter Birks, eds., *English Public Law*, (Oxford: Oxford University Press 2004), 13–14.

[33] Ludwik Bar, *Sądowa kontrola administracji w Anglii* [Judicial Review of Administration in England], (Warsaw: Państwowe Wydawnictwo Naukowe 1962), 16.

directly or indirectly by Acts of Parliament. Nonetheless, prerogatives remain a notable feature of the UK constitutional order.[34] As the analysis of English law in later chapters of the book shows, tax cancellation may be one such remaining prerogative.

In German law, a prerogative (*Vorrecht*) is understood as a privilege of the monarch, which is exercised independently of any statutes. In the case of a constitutional monarchy, prerogatives must be exercised in accordance with the constitution.[35] Pursuant to Article 109 of the Weimar Constitution of 1919,[36] all legal privileges, including prerogatives, were abolished. The Basic Law in Article 60 point 2 entitles the president to grant pardon (*Gnadenrecht*), which is literally described as a prerogative. However, it only applies to the pardon for persons convicted of a criminal offence.[37]

In Polish legal literature, the president's right to issue official acts without the countersignature of the prime minister is called the president's prerogative (*prerogatywa prezydenta*). The legal basis for exercise of the president's prerogative powers is Article 144 point 3 of the Polish Constitution. Moreover, in exercising their prerogatives, the president is bound by the principles and values expressed in the Constitution; therefore, the president's prerogatives may not be exercised entirely arbitrarily.[38] In the Czech Republic, just as in Poland, prerogatives are understood as the president's right to issue official acts without countersignature.[39] Prerogatives are listed in § 62 of the Czech Constitution. In both countries, the president's prerogatives do not apply to tax cancellation.

Given the above understanding of prerogative powers in the compared legal systems, the term 'prerogative' is understood here as the right of the executive authority (e.g. monarch, government, governmental administration) that does not result directly or indirectly from a statute but solely from the function exercised in the state by these bodies. Such a definition is based on English law because prerogative is a binding and well-known legal institution in England. It is worth noting that monarchs themselves repeatedly exercised the right to impose tax liabilities as one of its prerogatives in the era of absolutism.

[34] Barendt, Fundamental Principles, 13–14.

[35] Carl Creifelds, Klaus Weber, eds., *Rechtswörterbuch* [Legal Dictionary], (Munich: C.H. Beck 2007), 899.

[36] Verfassung des Deutsches Reichs [Constitution of the German Reich] of 11 August 1919, Reich Law Gazette, p. 1383.

[37] Badura, *Staatsrecht*, 625.

[38] Bogusław Banaszak, Konstytucja Rzeczpospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. Commentary], (Warsaw: C.H. Beck 2012), 777.

[39] Veronika Žlebková, *Význam kontrasignace na výkon právomocí prezydenta republiky* [Significance of Countersignature for Exercising Powers of President of Republic], Master's thesis, Palacký University, Olomouc 2011, https://theses.cz/id/i31m16/?isshlret=ŽLEBKOVÁ%3B;zpet=%2Fvyhledavani%2F%3Fsearch%3DŽlebková%26start%3D2, accessed 24 February 2020, 23.

The current understanding of the institution of prerogative in German, Polish, and Czech law has only a historical connection with the institution of prerogative that is well-known in English law, but in all the cases it derives from the monarch's authority. The president's prerogatives are directly based on the provisions of the constitutions of these countries, i.e. they cannot be considered as prerogatives within the meaning of contemporary English law. The lack of such a legal basis for prerogatives, as well as for other constitutional conventions, is a characteristic feature of this institution in English law. In the case of German law, the institution of prerogative may also be associated with the law of mercy. However, as pointed out later in the book, this institution is currently only present in criminal law in Germany.

3. Sources of law

The institution of prerogative within the meaning of English law is a source of law independent of statutes. Thus, an analysis of tax cancellation from the perspective of prerogative requires a prior analysis of sources of law in the compared countries. This analysis is necessary to verify formal applicability of prerogative as well as to identify the differences between the legal system of England and other legal systems being compared.

3.1. Poland

Pursuant to Article 87 of the Polish Constitution, only legal acts listed in this provision are sources of law in Poland, i.e. the Constitution, statute (*ustawa*), international agreement ratified by the parliament, and ordinance (*rozporządzenie*). Therefore, this provision introduces a closed catalogue of sources of law, which are all of statutory nature. The law may be enacted only in the forms provided for in the Constitution and only by entities to which the Constitution expressly grants such a competence.[40] The catalogue also contains an internal hierarchy. The Constitution occupies the superior position, followed by ratified international agreements, statutes, and ordinances, which have the lowest position in this hierarchy.

A statute has a unique role in the system of sources of law. In practice, every legal norm in force in Poland should be 'genetically' based on a statute, which is

[40] Lech Garlicki, in Roman Hauser, Zygmunt Niewiadomski, Andrzej Wróbel, *Konstytucyjne podstawy funkcjonowania prawa administracyjnego. System Prawa Administracyjnego. Tom 2* [System of Administrative Law, Volume 2: Constitutional Basis of the Functioning of Administrative Law], (Warsaw: C.H. Beck 2012), 58.

called the doctrine of supremacy of statute law.[41] Thus, for example, ordinances as secondary legislation can be issued only in the basis of a specific authorisation contained in a statute. Conversely, it is permissible and feasible for public administration authorities to issue internal legal acts. However, these acts may be addressed only to entities subordinate to the issuing authority and cannot serve as a legal basis for the rights and obligations of an entity that is not a public administration authority, e.g. the taxpayer.[42]

3.2. Germany

The Basic Law does not list sources of law in force in Germany, even though the Basic Law is undoubtedly the primary source of law. Legal literature indicates the following statutory sources of law: statute (*Gesetz*), ordinance (*Verordnung*), and bylaw (*Satzung*). In addition, there are two extra-statutory sources of law: customary law (*Gewohnheitsrecht*) and general legal principles (*Allgemeine Rechtsgrundsätze*).[43]

Within the scope of sources of law, statute takes precedence. This is not explicitly stated in the Basic Law. However, in accordance with the case-law of the Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*), the primacy of statute is a prerequisite for the fulfilment of the State's duty to act in accordance with the law.[44] In the original sense, the primacy of statute ensures that a public administrative authority may interfere in the fundamental rights of citizens, in particular their freedom and property, only on the basis of a statute. Nowadays, the BVerfG expounds on this primacy considering the theory of relevance (*Wesentlichkeitstheorie*). According to this theory, a statute does not need to indicate all elements of a legal norm that interferes with fundamental rights, but only the essential elements.[45]

Since Germany is a federal state, a statute may be passed by the federal legislative body—*Bundestag* or one of regional legislative bodies—*Landtag*. The scope

[41] Marcin Wiącek, in Marian Safian, Leszek Bosek, Konstytucja RP. Tom II. Komentarz do art. 87–243 [Polish Constitution, Volume 2: Commentary to Articles 87–243], (Warsaw: C.H. Beck 2016), 74.

[42] Ibid., 66.

[43] Helmut Linhart, *Einführung in das Recht. Lehrbuch der Bayerischen Verwaltungsschule. Neue Reihe. Band 1* [Textbook of the Bavaria Administrative School, New Series, Volume 1: Introduction into the Law], (Munich: Bayerische Verwaltungsschule 2013), 75.

[44] Michael Sachs, in Paul Stelkens, Heinz Joachim Bonk, Michael Sachs, *Verwaltungsverfahrensgesetz. Kommentar* [Administrative Procedure Act: Commentary], (Munich: C.H. Beck 2014), 1627.

[45] Hans Hofmann, in Bruno Schmidt-Bleibtreu, Franz Klein, Hans Hofmann, Hans-Günter Henneke, eds., GG -Kommentar zum Grundgesetz [Commentary to the Basic Law], (Cologne: Carl Heymanns Verlag 2018), 942–943.

of the legislative power of both bodies is indicated in the Basic Law. Under Article 80 of the Basic Law, the federal government, federal ministers, and land governments may be empowered by a statute to issue an ordinance. The statute must specify the purpose and scope of the future ordinance. It is worth noting that an ordinance issued by the federal authorities takes precedence over a local provincial statute enacted by regional legislative bodies.[46] Bylaws, in contrast, are acts of law issued by public administrative authorities, which are binding only within these authorities[47] and are an element of local government law.[48] Thus, they are not a source of rights and obligations of entities that are beyond the control of a particular public administrative authority. Hence, they are not a source of law in the strict sense.

When presenting sources of law in Germany, we cannot ignore customary law, which is understood as a long-standing, well-established practice recognised by the society as law. Customary law has been almost completely transformed into statutory law or has been repealed by statutory law over the centuries. However, customary law remains in force to a certain extent.[49] Nonetheless, it should be stressed that pursuant to Article 2 point 2 of the Basic Law, any interference into individual freedom of person or the right to life and physical integrity requires a legal basis in parliamentary statute; therefore, customary law may not, *a contrario,* violate this freedom or right.

The fundamental principles of law in Germany should be perceived as unwritten principles arising from the essence and nature of law on which all fair legal systems are based. These principles do not have to be derived from the Basic Law but from specific areas of law, such as civil law.[50] According to Article 25 of the Basic Law, the fundamental principles of public international law are also part of the German legal system.

There are also acts widely used in the field of tax administration, such as internal administrative guidelines (*Verwaltungsvorschrift*) or letters of the Federal Ministry of Finance (*BMF-Schreiben*), but they are not formally sources of law. These letters are addressed to regional tax authorities and concern federal taxes.[51] General and abstract acts predominate among the acts in question. Even letters from the Ministry that refer to specific examples are rather general. The guidelines do not constitute a source of law and are not binding on the courts. In practice, the guidelines are binding in the case of the need for ensuring equal

[46] Rüdiger Sannwald, in Schmidt-Bleibtreu, et al., *GG Kommentar zum Grundgesetz*, 2135.

[47] Linhart, *Einführung in das Recht*, 80.

[48] Sannwald, in Schmidt-Bleibtreu, et al., *GG Kommentar zum Grundgesetz*, 2134.

[49] Linhart, *Einführung in das Recht*, 82.

[50] Ibid., 84.

[51] Dieter Birk, Marc Desens, Henning Tappe, *Steuerrecht* [Tax Law], (Heidelberg: C.F. Müller 2016), 19–20.

treatment of taxpayers as well as in the case of discretion exercised by the tax authority.[52]

3.3. Czech Republic

Unlike the Polish Constitution, the Czech Constitution does not contain a catalogue of sources of law. In accordance with the Czech legal literature, only the following statutory acts are sources of law in the Czech Republic: (i) constitutional statute (*ústavní zákon*), (ii) statute (*zákon*), and (iii) secondary legislation, i.e. ordinance of the Government of the Czech Republic (*nářízení*) and ordinance of minister (*vyhláška*).[53] Statutes are considered constitutional if they have been adopted under the procedure applicable to the amendment of the Constitution. The following constitutional statutes are currently in force: (i) the Constitution, (ii) the Charter of Fundamental Rights and Freedoms (*Listina základních práv a svobod*),[54] and (iii) the Constitutional Act on the Security of the Czech Republic (*Ústavní zákon o bezpečnosti České republiky*).[55] Pursuant to Article 2 point 4 of the Czech Constitution, obligations or restrictions may be imposed on citizens only by a statute.

Statutes are supplemented by ordinances of the Government of the Czech Republic and ordinances of ministers. Under Article 78 of the Constitution, government ordinances are issued by the Government on the basis of the Constitution. Additional authorisation in a specific statute is not required. On the other hand, ministerial ordinances are issued by an individual minister on the basis of the authorisation contained in a specific statute. Moreover, according to Article 10 of the Constitution, international agreements ratified by the Parliament are a source of law that takes precedence over statutes.

Regarding the application of tax law, it is worth noting the internal administrative guidelines (*pokyny*) issued by the General Financial Administration (*Generální finanční ředitelství*). The guidelines may not formally be a source of rights and obligations of an entity outside the tax authority (e.g. the taxpayer), and the tax authority may disregard them in justified cases. As the Supreme Administrative Court of the Czech Republic (*Nejvyšší správní soud*, *NSS*) indicated in its

[52] Hofmann, in Schmidt-Bleibtreu, et al., *GG Kommentar zum Grundgesetz*, 956.

[53] Jan Dvořák, Jiří Švestka, Michaela Zuklínová, eds., *Občanské právo hmotné* [Substantive Civil Law], (Prague: Wolters Kluwer ČR 2016), 112.

[54] Usnesení předsednictva České národní rady o vyhlášení Listiny základních práv a svobod jako součásti ústavního pořádku České republiky [Resolution of the Presidium of the Czech National Council on the declaration of the Chapter of Basic Rights and Freedoms as part of constitutional order of the Czech Republic] of 16 December 1992, Collection of Laws no. 2/1993.

[55] Ústavní zákon o bezpečnosti České republiky [Constitutional Act on security of the Czech Republic] of 22 April 1998, Collection of Laws no. 110/1998.

judgment of 25 October 2006,[56] there may be situations where following internal administrative guidelines by the tax authority will lead to the imposition of tax liabilities on the taxpayer contrary to the provisions of a statute. In such cases, the guidelines shall not be applied.

3.4. England

The legal system of England differs significantly from the legal systems discussed earlier. These differences are fundamental and multidimensional. First of all, it must be pointed out that the legal system of England (United Kingdom) is not based on one or more statutory legal acts that jointly form the constitutional order. British legal literature indicates that England (United Kingdom) does not have a written constitution.[57] As St John-Stevas states, 'we have no constitution in this country: we have only procedure—hence its importance.'[58]

The unwritten British constitution consits of rules and practices shaping the political order and regulating the exercise of the public authority and relationships between citizens and the state. Some of the rules are contained in many statutory acts of law adopted over the centuries. For example, the following acts are acknowledged as part of the unwritten British constitution: Magna Charta 1215, Bill of Rights 1688, Parliament Act 1911, and European Communities Act 1972. In practice, it can be a collection of more than 300 statutory acts, although even a complete list of these acts would never fully reflect the unwritten British constitution.[59]

The unwritten British constitution is also determined by constitutional conventions, which even prevail over the above-mentioned statutory legal acts. Conventions are not law in the strict sense and cannot be regarded as legal acts. As David Charles Miller Yardley indicates, 'conventions, in the sense of important rules of practice, … are not laws, … but they are regarded as being of so fundamental nature that it would be unthinkable that anyone should transgress them. … constitutional conventions form the very basis or essence of the British unwritten constitution.'[60] There are the following main constitutional conventions: parliamentary sovereignty, the rule of law, separation of powers, Crown prerogatives, and collective responsibility of government ministers. From the point of view of the continental legal system, they can be compared to unwritten prin-

[56] Rozsudek [Judgment] of the NSS of 25 October 2006, case no. 8 Afs 3/2005-59.

[57] Colin Turpin, *British Government and the Constitution. Text, Cases and Materials*, (London: Butterworths Lexis Nexis 2002), 3.

[58] Hansard, HC vol 991, cols 721, (30 October 1980).

[59] Turpin, *British Government*, 3–5.

[60] David Charles Miller Yardley, *Introduction to British Constitution Law*, (London: Butterworths 1990), 6.

ciples of constitutional law. Additional sources of the unwritten British constitution include case-law, customs, and even books of authority.

Since the United Kingdom does not have a written constitution, a formal hierarchy of sources of law has not developed. Such a situation is in significant contrast to the previously analysed legal systems. Only parliamentary statutes take precedence over all other legal acts.[61]

Legal acts enacted on the basis of statutes play a vital role in the functioning of public administrative authorities, including the tax authority. These acts are collectively referred to as 'statutory instruments' or 'secondary legislation.' As indicated in section 1(1) of the Statutory Instruments Act 1946, if the Parliament after 1 January 1948 confers power to make, confirm, or approve orders, rules, regulations, or other subordinate legislation on his Majesty in Council or any Minister of the Crown, any document by which that power is exercised shall be known as a statutory instrument. An enabling act may not directly express how delegated power shall be exercised, but it shall be used in any case for the purpose for which the enabling act conferred it.[62] Pursuant to section 2(1) of this Act, any statutory instrument shall immediately be sent to and printed by the King's printer of Acts of Parliament.

In practice, public administration, including tax administration, is repeatedly carried out without any legal basis in statute or other statutory legal act; instead, it is based on discretionary power. Such an exercise of discretionary power results in administrative practices that are often referred to as 'administrative quasi-legislation' or 'tertiary rules' and are not legal acts.[63]

Moreover, governments often implement extra-statutory administrative rules in order to avoid recourse to formal legislative procedures. It is pointed out that extra-statutory administrative rules are, in fact, more effective and subject to only limited parliamentary scrutiny. In addition, they are not even always published.[64]

The last important source of law in England is case-law. It is a distinctive feature of the British legal system compared to other legal systems, although statutory legal acts take precedence over case-law. There are still areas of public law that remain regulated mainly by case-law, e.g. substantive content of the doctrine of *ultra vires*. Unless or until case-law is repealed or amended by statutory legal acts, it remains in full force.[65]

[61] Evelyn Ellis, 'Sources of Law and the Hierarchy of Norms', in Feldman, Birks, *English Public Law*, 44–45.

[62] Turpin, *British Government*, 411.

[63] Ibid., 426.

[64] Ibid., 430–431.

[65] Ellis, in Feldman, Birks, *English Public Law*, 68–69.

4. Formal and actual prerogative

The above-mentioned sources of law in Poland, Germany, and the Czech Republic explicitly exclude the possibility of formal existence of a prerogative as a source of law in these jurisdictions. By contrast, sources of law in England (United Kingdom) are formed differently, as there is no written constitution and the structure of sources of law is not formalised. Such a situation enables the existence of formal prerogative in this legal system.

The lack of formal prerogative in the compared countries with the exception of England does not determine the need to analyse these legal systems from the point of view of prerogative. Considering the dichotomous division of competences of public administration authorities due to legal basis (statute or prerogative) as defined by A.V. Dicey,[66] the analysis of legal systems from the point of view of prerogative should come down to verification of the legal basis for tax cancellation. The obligation to exercise power based on a statute by the authority is understood differently in the compared legal systems. It cannot be ruled out that the institution of prerogative actually applies to the legal systems of Poland, Germany, or the Czech Republic as substantive prerogative. Such a prerogative takes place if, according to a statute, the tax authority is vested with full discretion concerning the cancellation of tax liabilities. Hence, the verification of the legal basis will focus only on the absence of a substantive legal basis in the statute granting the right to tax cancellation.

5. Pardon

When analysing the legal systems in terms of the institution of prerogative, as well as the monarch's right to cancel tax liabilities, it is also advisable to discuss the right of pardon (Polish: *prawo łaski*, German: *Gnadenrecht*, Czech: *milost*), which has been recognised as a prerogative of the monarch. The issue of pardon has repeatedly appeared in justifications of the need for tax cancellation in the compared countries.

In the past, the monarch cancelled tax liabilities of the taxpayers by referring to the right of pardon. During the transition from absolute monarchy to constitutional monarchy, parliaments objected to the exercise of the right of pardon to cancel tax liabilities. An excellent example of parliament's objection to exercising the right of pardon to cancel tax liabilities is the so-called Lucius case (*Fall von Lucius*), in which a significant part of the German legal doctrine indicates that the right of pardon may apply to criminal penalties but not to tax liabilities.[67]

[66] Dicey, *Law of the Constitution*, 282–283.

[67] In 1890, it was revealed that the former Prussian Minister of Finance Freiherr Lucius von Ballhausen had received an individual, extra-statutory tax cancellation from the King of Prussia.

At present, the right of pardon in the UK, known as the royal prerogative of mercy, concerns only convicted persons and their criminal cases.[68] In Polish law, the right of pardon is directly indicated in Articles 139 and 144 point 3(18) of the Polish Constitution. Marek Safian points out that the term 'pardon' (*łaska*) in Polish legal language can be understood broadly as dispensation from the need to comply with the law or can be interpreted narrowly as the right to absolve a person of guilt for a crime as if the committed crime never occurred, or commute criminal sentences imposed by courts. In practice, it is assumed that the right of pardon should be understood narrowly in Poland.[69]

In Germany and the Czech Republic, the right of pardon is also associated with criminal issues only. The right of pardon, regulated by Article 60 point 2 of the Basic Law, and exercised by the President, is limited only to the power to pardon offenders.[70] Pursuant to § 62 letter g of the Czech Constitution, the President of the Republic may grant pardons or commute sentences imposed by courts and order expunging of a criminal record. Moreover, it is stressed in the legal literature that such a prerogative in the Czech Republic may be vested only in the President.[71]

Reinhard Mussgnung adopts a definite attitude on the right of pardon. In his opinion, the right of pardon is historically one of the last prerogatives of an absolutist monarch, and the exercise of this prerogative remains exclusively in his jurisdiction. This right was characteristic of constitutional monarchies that arose from absolutist monarchies. Subsequently, the right was taken over by entities acting as heads of state in republics, e.g. presidents. Based on the right of pardon, it is possible to suspend in individual cases the effect of criminal law, criminal proceedings or other quasi-criminal provisions, e.g. disciplinary provisions. The right of pardon should not apply to other areas of law, such as tax law, unlike in the time of the absolute monarchy.[72] The comparative analysis of the provisions of the Basic Law confirms the position of Mußgnug.

This issue was the subject of a parliamentary debate. During the debate, the then current Minister of Finance declared that this practice had previously involved many ministers of finance, with the tax cancellation being based on the royal prerogative, and more precisely on the right of pardon. Many members of the Prussian Parliament criticised this practice, but in the end the minister managed to defend it before the Parliament. Reinhard Mußgnug, *Der Dispens von gesetzlichen Vorschriften* [Dispensation from the Provisions of Statute], (Heidelberg: Carl Winter Universitätsverlag 1964), 49–50.

[68] Andrew Le Sueur, 'The Nature, Powers and Accountability of Central Government', in Feldman, Birks, *English Public Law*, 224.

[69] Krzysztof Kozłowski, in Safian, Bosek, *Konstytucja RP*, 680.

[70] Badura, *Staatsrecht*, 625.

[71] František Weyer, *Československé právo ustavní* [Czechoslovak Constitutional Law], (Prague: Melantrich 1937), 52.

[72] Mußgnug, *Dispens*, 105–106.

Chapter III

Privilege and dispensation

Besides the issue of the legal basis, in order to understand the institution of tax cancellation it is crucial to determine its purpose. In this book, the scope of the institution of tax cancellation is based on the operative rule, i.e. the subject of the research is, from a formal point of view, various legal regulations of selected legal systems having similar effects as regards the expiry of the tax liability or permanent refraining from enforcing the tax liability in the course of tax collection. Thus, the purpose of tax cancellation corresponds directly to the subject matter of this book. Also, it allows for a more comprehensive analysis of the institution of tax cancellation, as shown in the following chapters.

1. Purpose of cancellation

Tax cancellation should be justified not only in specific cases but generally as a legal institution. The comparative analysis carried out in the following chapters indicates that tax cancellation may have different purposes, from removing unforeseen, atypical effects of tax statutes to achieving social and economic goals. The diversity of these goals makes it difficult to classify them or even provide their systematic description. These difficulties are compounded by the fact that the object of the analysis is tax cancellation in both tax and insolvency law under four different legal systems. Therefore, it justifies the adoption of an external classification criterion or several criteria that are to some extent neutral, making it possible to analyse the purpose of tax cancellation. These criteria should be formulated in such a way so as to allow the existing forms of tax cancellation to be systematised (classified) according to their purpose.

The classification criteria corresponding to the above requirements can be established by analysing the differences between the institutions of the 1983 Code of Canon Law (1983 CIC)[1] that allow not to apply provisions of statutory law in

[1] 'Code of Canon Law', vatican.va, http://www.vatican.va/archive/cod-iuris-canonici/eng/documents/cic_lib1-cann35-93_en.html#CHAPTER_IV., accessed 25 February 2020.

specific cases. These institutions are privilege (Cann. 76–84) and dispensation (Cann. 85–93).[2] The analysis of these institutions provided herein shows that the above-mentioned classification criteria are as follows: (i) issuing body, (ii) purpose, understood in a narrow sense, (iii) duration of an institution, and (iv) systemic constraints on using an institution. As a result of the application of these classification criteria, a specific form of tax cancellation may be classified as either dispensation or privilege.

It is the institutions formed under canon law that allow setting the criteria for the classification of tax cancellations. Such a role is supported by the neutral character of these institutions with respect to the legal systems under consideration. The institutions are subject to canon law, not the one of the compared legal systems. On the other hand, these institutions are not entirely unfamiliar to the compared legal systems as they originate from Roman law and all these legal systems, including English law, have been influenced by Roman law.[3]

The institution of privilege is of particular importance for this analysis. At this point, it should be emphasised that the legal system of the Catholic Church has not been subjected to the process of taking over by the parliament of the right of the monarch to impose taxes. There is no parliament elected by members of the Catholic Church, and the Pope imposes all taxes. To this day, the Vatican City State remains a quasi-absolute monarchy.[4] Moreover, the Pope has had the right to impose and collect taxes only in Vatican City since the liquidation of the State of the Church in 1870,[5] which explains the institution of privilege. However, the comparative analysis shows that the institution of privilege is not alien to modern legal systems.

2. Privilege

Pursuant to Can. 76 § 1 of the 1983 CIC, privilege (Latin: *privilegium*, Polish: *przywilej*, German: *Privileg*, Czech: *privilegium*) 'is a favour given through a particular act to the benefit of certain physical or judicial persons; it can be granted by the legislator as well as by an executive authority to whom the legislator has granted this power.' According to canon law lawyers the word 'privilege' comes from the expressions *lex private*, which means private law.[6] In the period of Clas-

[2] Jiří Rajmund Tretera, Záboj Horák, *Církevní právo* [Church law], (Prague: Leges 2016), 74.

[3] Husa, *Introduction to Comparative Law*. 166, 184.

[4] According to Can. 331 of the 1983 CIC 'the Bishop of the Church of Rome … by virtue of his office … has supreme, full, immediate and universal ordinary power in the Church, and he can always freely exercise this power.'

[5] The Italian army seized Rome on 20 September 1870, Pierre Pierrard, Historia Kościoła Katolickiego [History of the Catholic Church], (Warsaw: Instytut Wydawniczy Pax 1984), 297.

[6] Tretera, Horák, *Církevní právo*, 75.

sical Roman law, privilege, by way of exception, was passed by the legislative assembly as law aimed not towards the general public but towards individuals.[7]

Privilege is to be a source of favourable legal situation for the addressee of the privilege,[8] so privilege by definition cannot be universal. Particularly crucial for the identification of a privilege is the presumption in Can. 78 § 1 of the 1983 CIC, according to which a privilege is perpetual. Pursuant to Can. 83 § 1 of the 1983 CIC, 'a privilege ceases on the expiry of the time or the completion of the number of cases for which it was granted.'

In Polish legal literature, the institution of privilege is associated with the prior period. As indicated in the PWN Encyclopaedia, a privilege was an act of the monarch in the feudal period that granted certain individuals or social classes particular rights or exempted them from general applicable law. A common privilege during the Middle Ages were town privileges, e.g. exemption of new settlers from taxes for a certain period in order to speed up the growth of settlements.[9] Privilege is understood differently in countries with common law tradition, where it is not treated only as part of history. Indeed, privilege is defined as 'a particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens … held by a person or class, against or beyond the course of the law.'[10] Such a definition is consistent with the concept of privilege in canon law. Moreover, it confirms that the institution of privilege does not need to refer only to legal institutions from the past (feudalism or privileges of the nobility and clergy).

Jiří Rajmund Tretera and Záboj Horák point out that the institution of privilege in Western culture is repeatedly associated only with privileges granted to certain social groups in the pre-parliamentary period, e.g. the nobility or clergy. Therefore, this institution is still perceived negatively. Nonetheless, such an assessment should be considered unjustified because the authors evaluate this institution positively.[11]

Currently, in countries whose legal systems are compared, the term (the institution of) 'privilege' is not commonly used by the legislature, case-law, or legal literature. This should be seen as an advantage of this institution because it makes it more neutral in relation to the compared legal system. Also, the fact that the term 'privilege' in not used in the countries concerned does not mean that this institution cannot be used in their legal systems. An example of such

[7] Janusz Sondel, *Słownik łacińsko-polski dla prawników i historyków* [Polish-Latin Dictionary for Lawyers and Historians], (Cracow: UNIVERSITAS 2001), 787.

[8] Jorge Miras, in: Piotr Majer, ed., *Kodeks prawa kanoniczego. Komentarz* [Code of Canon Law: Commentary], (Cracow: Wolters Kluwer 2011), 118.

[9] Jan Wojnowski, ed., *Wielka encyklopedia powszechna PWN. Tom 22* [Great Universal Encyclopaedia PWN], (Warsaw: Wydawnictwo Naukowe PWN 2004), 487.

[10] Henry Campbell Black, *Black's Law Dictionary*, (St. Paul: West Publishing 1983), 625.

[11] Tretera, Horák, *Církevní právo*, 75.

a use is the Polish Special Economic Zones Act,[12] which, from a formal point of view, is a typical location privilege (town privilege). Consequently, this institution can be used for classification of tax cancellations, which is the subject of Chapters V–VIII.

3. Dispensation

According to Can. 85 of the 1983 CIC, a dispensation (Latin: *dispensatio*, Polish: *dyspensa*, Germany: *Dispens*, Czech: *dispense*), is 'the relaxation of merely ecclesiastical law in a particular case, can be granted by those who have executive power within the limits of their competence, as well as by those who have the power to dispense explicitly or implicitly either by the law itself or by legitimate delegation.' The mere granting of a dispensation does not change the law but modifies the legal situation of the addressee of this dispensation, i.e. the addressee is not obliged to comply with certain effects of statutory law provisions and does not simultaneously violate the law.[13] However, as indicated by Can. 86 of the 1983 CIC, the subject of the dispensation cannot be the very essence of a given provision of law. At present, dispensation in canon law may be related to the current or future state of affairs. Initially, dispensation was treated in canon law only as a way to legalise the states of affairs that were inconsistent with the then-applicable law.[14] Later on, in the Code of Canon Law of 1917, a dispensation was regarded as a statutory act rather than administrative act. It was a result of derogation from provisions of statutory law in an individual case.[15]

Dispensation may only be granted if there are just and reasonable causes for doing so. This premise serves to protect against arbitrariness and full discretion as well as ensures that all applications of dispensation create just legal conditions.[16] On the other hand, dispensation may be granted repeatedly if it is deemed useful for the spiritual welfare of the faithful. As underlined in ecclesiastical legal literature, dispensation reflects the fundamental maxim that law is made for man, not man for the law.[17]

Pursuant to Can. 87 § 1 of 1983 CIC, the Holy See and the diocesan bishop have the unrestricted right to grant dispensation except that the diocesan bishop

[12] Ustawa o specjalnych strefach ekonomicznych [Special Economic Zones Act] of 20 October 1994, consolidated text in the Journal of Laws 2019, item 2020.

[13] Miras, in Majer, *Kodeks prawa kanoniczego*, 121.

[14] Piotr Sadowski, 'Rzymskie źródła kanonicznego pojęcia dyspensy' [Roman origin of the canonical concept of dispensation], *Opolskie Studia Administracyjno-Prawne* [Opole Administrative and Legal Studies] 4/10 (2012), 81.

[15] Tretera, Horák, *Církevní právo*, 77.

[16] Miras, in Majer, *Kodeks prawa kanoniczego*, 124.

[17] Sadowski, 'Pojęcie dyspensy', 79.

has no right to dispense from procedural and penal laws. Priests and deacons, according to Can. 89 of the 1983 CIC, cannot grant a dispensation unless such power is expressly granted them. The distinction regarding the right to grant dispensation between the Holy See and diocesan bishops on the one hand, and priests and deacons on the other hand, corresponds to the division of power between the minister of finance and tax authorities concerning tax cancellation.

In the Code of Canon Law of 1917, diocesan bishops could only grant a dispensation within the scope of the concession granted to them, i.e. within the scope indicated by the Holy See. The Code of Canon Law of 1983 replaced the concession system with a reservation system, i.e. a diocesan bishop has the right to apply dispensation in full except for areas reserved for the Holy See.[18] Therefore, a certain analogy can be found in the discussed legal systems when it comes to the scope of the right of the minister of finance and the tax authority to cancel tax liabilities.

Dispensation as an institution of canon law is rooted in Roman law[19] and thus could be applied in public law. Roman law has repeatedly stated that the legislature should focus on regulations for the general public, and not on exceptions.[20] Point 1.3.6. of the Digest of Justinian states that 'as Theophrastus says, a thing that happens once or twice is passed over by the lawgivers.'[21]

Already in the early 1960s, Germany legal literature described a tendency in legal science to analyse the right of an administrative authority to unilaterally derogate from the application of statutory law provisions separately for a particular field of law or even for particular provisions of statutory law. So far, however, the possibility of including these rights within one legal institution has been neglected. Reinhard Mußgnug claims that such an institution is dispensation,[22] understood as an act of power (*Hoheitsakt*) excluding in specific cases the application of provisions of statutory law that should apply to it.[23] Dispensation understood in this way always applies to individual cases. Hence, the institution of dispensation does not include the right to issue a generally applicable legal act, e.g. an act under which any entity meeting the conditions indicated in the act may take advantage of an exemption.[24]

In secular law, such as German law, dispensation is an act of power that, in a specific case, excludes the application of a legal norm that should apply. Such an exemption is not outside the law. The legal basis for this exemption is con-

[18] Tretera, Horák, *Církevní právo*, 77.

[19] Sadowski, 'Pojęcie dyspensy', 92.

[20] Ibid., 82.

[21] Alan Watson, *The Digest of Justinian. English-Language Translation, Vol. 1*, (Philadelphia: University of Pennsylvania Press 1998), 12.

[22] Mußgnug, *Dispens*, 33–34.

[23] Ibid., 59.

[24] Ibid., 128.

tained in the legal system itself. As Bo Cook Seo observes, the legislature often ensures that a legal act provides for specific atypical cases where the application of provisions of such an act would be contrary to the objectives for which it was adopted. The legislature is aware that it is impossible to predict and codify all atypical cases. Therefore, it empowers the public administration authority to derogate from provisions of the applicable statutory law in atypical situations, as is the case, for instance, with § 163 and § 227 of the German Fiscal Code regulating tax cancellation.[25]

The problem of atypicality is closely related to the nature of administrative law, including tax law and the institution of dispensation. Unlike civil or criminal law, which is enforced in court, administrative law is casuistic and based on certain patterns. This situation is due to, firstly, the very nature of the administration itself, which, through its organs, has to resolve far more cases that the courts, and, secondly, the fact that not all administrative staff has legal education. As a result, administrative law regulations repeatedly leave out atypical situations. Conversely, they relatively often allow for dispensation.[26]

Some references to the concept of dispensation can be found in Polish administrative law literature. In the opinion of Dariusz Kijowski, dispensation should be understood as a departure from behaviour that is ordered or prohibited by the law, i.e. breaking a given legal norm to protect an individual or collective interest that deserves higher protection than the interest for which the broken legal norm was enacted.[27]

Karol Kiczka, in turn, points out that in scientific discourse dispensation is thought to be applicable to acts of exceptional nature that allow departing from the general order or prohibition. A dispensation is based on an assumption opposite to a simple administrative act, which is based on generally applied legal norms. The conducted administrative proceedings concerning dispensation must demonstrate that a departure from generally applicable legal norms is justified in the specific case and that such a departure will not negatively affect important public interest.[28]

Since, as indicated above, the institution of dispensation may be assumed to be a derogation from generally applicable legal norms, it should also be remembered that the use of dispensation is usually based on discretion, which is re-

[25] Bo Cook Seo, *Der Billigkeitserlass im System des Steuerrechts* [Equity Tax Cancellation in Tax Law System], (Hamburg: Verlag Dr. Kovač 2009), 14.

[26] Mußgnug, *Dispens*, 110.

[27] Dariusz Kijowski, in Roman Hauser, Zygmunt Niewiadomski, Andrzej Wróbel, eds., *Prawo administracyjne materialne. System Prawa Administracyjnego. Tom 7* [System of Administrative Law, Volume 7: Substantive Administrative Law], (Warsaw: C.H. Beck 2017), 416.

[28] Karol Kiczka in Roman Hauser, Zygmunt Niewiadomski, Andrzej Wróbel, eds., *Publiczne prawo gospodarcze. System Prawa Administracyjnego. Tom 8B* [Public Commercial Law. System of Administrative Law. Volume 8B], (Warsaw: C.H. Beck 2013), 482–484.

peatedly supplemented by additional premises for applying dispensation. While analysing the discretionary nature of dispensation (*Dispensationsermessen*), Mußgnug stresses that discretionary nature is an integral part of the institution of dispensation.[29] The premises referred to above are as follows: (i) equity (*Billigkeit*) in the case of German law, (ii) an important interest of the taxpayer (*ważny interes podatnika*) or the public interest (*interes społeczny*) in the case of Polish law, and (iii) just and reasonable cause in the case of canon law. There is no doubt that the premises for using dispensation are intended to limit the possible use of this institution by an administrative authority.[30]

4. Classification criteria

The institutions of privilege and dispensation have distinctive features that can be catalogued. The following table contains four features to distinguish between privilege and dispensation. These features can be used to separate different forms of tax cancellation and classify them as privilege or dispensation. However, it should be kept in mind that such a classification does not eliminate the risk that a particular type of tax cancellation may have features of both institutions and that these features may have different intensities. In a specific case, it may prevent unambiguous classification.

Table 1. Distinguishing features of privilege and dispensation

No.	Feature	Privilege	Dispensation
1	Issuing body	The legislature and the executive	The executive
2	Purpose in the narrow sense	Providing a legal benefit or advantage to the addressee against or beyond the course of the law	Ensuring equity and reasonableness in the individual case of law application
3	Duration of the institution	Permanent nature	Individual case
4	Systemic limitation of the institution	Lack of such limitations	Connection with administrative discretion

5. Legal norms and factual circumstances

Tax cancellation may also be classified as related to a legal norm imposing taxes or factual circumstances of the case. It should be stressed, however, that this re-

[29] Mußgnug, *Dispens*, 123.
[30] Cook Seo, *Billigkeitserlass*, 15.

lationship occurs with the legal norm (factual circumstances of the case) governing the creation and collection of tax liabilities and not with the legal norm (factual circumstances of the case) governing the cancellation of tax liabilities. The comparative analysis in Chapters V–VIII will confirm the existence and importance of this relationship.

The adopted classification is the result of a multi-stage process of applying the law. This process looks as follows: (i) establishing factual circumstances of the case, (ii) establishing the applicable legal norm in the case, (iii) applying (subsuming) the legal norm to the factual circumstances, and (iv) determining the legal consequences of this application.[31] In order to determine the legal consequences, a public administration authority must, by way of the application, connect the established factual circumstances with the chosen legal norm.[32] At the time of the application, the legal norm and factual circumstances constitute two opposing but complementary elements of the application of the law. The correct application takes place when true and relevant factual circumstances are matched to the correct legal norm.[33]

Due to discrepancies in the understanding of the legal norm, this concept needs to be considered below.[34] In the present study, it is assumed, following Maciej Zieliński, that a legal norm is a norm of conduct that has been established (recognised) by a competent public authority.[35] Thus, a legal norm is not understood as a specific editorial unit of a legal text, e.g. statutory law. Legal norms may be spread over a wide range of legal provisions and, conversely, a single legal provision (possibly together with other relevant legal provisions) may be a source of different legal norms.[36] As a result, tax cancellation is more often a consequence of the interplay between different legal provisions forming legal norms than a specific legal provision.

Each norm should specify the addressee of the norm (who), circumstances determining the application of the norm (when), and model of compulsory conduct (what).[37] The content of the legal norm is derived from sources of law (e.g.

[31] Tomasz Przesławski, *Wybrane zagadnienia prawoznawstwa. Szkice z propedeutyki prawa* [Selected Problems of Jurisprudence. Sketches from the Propaedeutic of Law], (Warsaw: C.H. Beck 2018), 88.

[32] Ibid., 112.

[33] Ibid., 112.

[34] As Józef Nowacki and Zygmunt Tobor indicated, there can be currently distinguished five different concepts of the legal norm in Polish legal literature. Józef Nowacki, Zygmunt Tobor, *Wstęp do prawoznawstwa* (Introduction to Jurisprudence], (Warsaw: Wolters Kluver 2016), 77.

[35] Maciej Zieliński, *Wykładnia prawa. Zasady – reguły – wskazówki* [Interpretation of Law: Principles, Rules and Guidelines], (Warsaw: Wolters Kluwer 2017), 18.

[36] Zygmunt Ziembiński, 'Przepis prawny a norma prawna' [Legal provision and legal norm], *Ruch Prawniczy i Ekonomiczny* [Legal and Economic Movement] 1/22 (1960), 105.

[37] Tatiana Chauvin, Tomasz Stawecki, Piotr Winczorek, *Wstęp do prawoznawstwa* [Introduction to Jurisprudence], (Warsaw: C.H. Beck 2017), 90–91.

statutory law, case-law) through their interpretation.[38] This may result in the establishing (recognition) of a legal norm, the content of which requires tax cancellation. An example of tax cancellation due to a legal norm is an irremediable contradiction between legal provisions forming a legal norm.

As regards the concept of factual circumstances, it is understood as any facts to which the applicable law ascribes specific legal effects.[39] However, unlike circumstances that are part of the legal norm, these circumstances are not abstract but factual (which does not exclude the existence of certain presumptions in this regard).[40] The examples of specific factual circumstances resulting in tax cancellation include a poor financial situation of the taxpayer, poor health, or natural disaster. It should be underlined that factual circumstances of both formation and collection of tax liabilities may be relevant for tax cancellation.

[38] Przesławski, *Wybrane zagadnienia prawoznawstwa*, 93.

[39] Ibid., 89.

[40] Eugeniusz Smoktunowicz, Cezary Kosikowski, *Wielka encyklopedia prawa* [Great Encyclopaedia of Law], (Białystok–Warsaw: Wydawnictwo Prawo i Praktyka Gospodarcza 2000), 961.

Chapter IV

Discretion

In addition to the legal basis and the purpose of tax cancellation considered in Chapters II and III, it is also desirable to investigate which entity decides on tax cancellation. As pointed out at the beginning of this book, the entity cancelling tax liabilities does not always have to be a tax authority. In the case of an insolvency arrangement or debt relief, the court cancels tax liabilities, which is directly prescribed in statutory law and is analysed in Chapters VII and VIII. However, the role of the court in cancelling tax liabilities is not limited to an insolvency arrangement or debt relief. Also, compared with legal systems, tax cancellation under tax law increasingly depends on the courts rather than the tax authorities. Such a situation results from the replacement of the institution of full discretion (Polish: *swobodne uznanie*, German: *freie Ermessen*) by the institution of discretion (Polish: *uznanie administracyjne*, German: *Ermessen*) and evolution of the concept of discretion itself.

Discretion as an institution closely related to administrative actions has been developed over centuries. With the end of the absolute monarchy, the actions of the tax authorities related to tax cancellation became subject to judicial review, which in many cases made it impossible to freely cancel tax liabilities. It is worth noting that while attempting to define tax cancellation for this book, the analysis should not be limited to the letter of the law but should also consider the results of actions of the tax authorities, courts, and creditors.

It must be pointed out that in the compared legal systems the tax authority cancelling tax liabilities generally uses two related but separate institutions: discretion and full discretion. According to Jan Zimmermann, these institutions have different nature and should not be equated with each other. Discretion occurs when, after a legal norm has been applied (subsumed) to factual circumstances, the tax authority has the power to choose one of the available legal consequences of the issuing act as part of the application. Full discretion should be understood as the right of the tax authority to act without the need to refer to any legal basis as this action belongs to an area not regulated by the law. Further-

more, such an action may not be reviewed for its legality, i.e. conformity with the law.[1]

The distinction between discretion and full discretion is essential for the analysis of tax cancellation as a prerogative of the tax authority. The origin of full discretion is linked to the attempt of the monarch (executive) to preserve their broad powers when the legislature (parliament) started to supervise the executive's actions.[2] Putting the executive under the supervision of the legislature also concerned tax law, which resulted in the possibility to impose taxes only with the consent of the parliament. Full discretion can therefore be functionally linked to the institution of prerogative, which was formed at the same time and concerned the monarch's rights stemming from the fact of being the monarch rather than from a statute. A prerogative is, in fact, the legal basis for the exercise of full discretion. As Marian Zimmermann points out, the abolition of full discretion was met with resistance from the administrative authority fighting to preserve traditional prerogatives.[3]

Unlike full discretion, discretion is based on parliamentary statutes. According to Zimmermann, the development of parliamentarism and the establishment of modern administration have led to a situation where there is no extra-statutory zone with the exception of English law, and the public administration is, by definition, entirely subject to the law, including judicial review. Discretion leaves no room for the tax authority to act on the basis of a prerogative. Thus, a comparative analysis of full discretion and discretion enables to indirectly identify the legal basis of tax cancellation: a prerogative of the tax authority or parliamentary statute.

Of particular importance for this comparative analysis is the relationship between discretion and general clauses (undefined terms). It should be pointed out that legal provisions allowing for tax cancellation usually contain general clauses as grounds for tax cancellation. The issue of general clauses had already been considered in the legal literature of the Austrian Empire since the founding of

[1] Jan Zimmermann, Prawo administracyjne [Administrative Law], (Cracow: Zakamycze 2005), 364–365; Małgorzata Jaśkowska, in Roman Hauser, Zygmunt Niewiadomski, Andrzej Wróbel, *Instytucje prawa administracyjnego. System Prawa Administracyjnego. Tom 1* [System of Administrative Law, Volume 1: Institutions of Administrative Law], (Warsaw: C.H. Beck 2010), 229; Klaus-Dieter Drüen, in Klaus Tipke, Heinrich Wilhelm Kruse, eds., *Abgabenordnung. Finanzgerichtsordnung* [Fiscal Code: Code of Procedure for Fiscal Courts], (Cologne: Otto Schmidt 2014), § 5, p. 4; Sonia Skulová, *Správní uvážení: Základní charakteristika a souvislosti pojmu* [Administrative discretion: basic characteristics and context of the term], (Brno: Masarykova univerzita 2004), 28–29; differently Wojciech Jakimowicz, *Przewodnik po prawie administracyjnym* [Guide to Administrative Law], (Warsaw: Wolters Kluwer 2016), 618.

[2] Marian Zimmermann, in Maurycy Jaroszyński, Marian Zimmermann, Wacław Brzeziński, *Prawo administracyjne* [Administrative Law], (Warsaw: Państwowe Wydawnictwo Naukowe 1956), 353.

[3] Ibid., 355.

the Supreme Administrative Court (*Verwaltungsgerichtshof*) in Vienna in 1876. The legal views formed during the Austrian Empire were later adopted in Polish, German, and Czech legal systems, particularly in the legal literature.

According to the concept of Edmund Bernatzik (later also the concept of Walter Jelinek), general clauses that remain ambiguous despite the application of all interpretative canons are subject to discretion and, consequently, their application by the authority is excluded from judicial review.[4] On the other hand, according to the opposite view of Friedrich Tezner, general clauses are excluded from discretion, and their application by the administrative authority is subject to judicial review. Tezner even describes the combination of discretion and general clauses as the last tower of absolutism in a state under the rule of law (*Rechtsstaat*).[5] Therefore, when analysing discretion, it should be indicated who has the last word on the application of tax cancellation, i.e. which entity is competent to make the final determination (*Letztentscheidung*).[6] Bearing in mind the importance of discretion for the actions of the tax authorities on tax cancellation, this institution will be examined in this chapter.

1. Uznanie administracyjne

1.1. General remarks

During the Second Republic of Poland, the Austrian concepts of discretion, including that of Bernatzik and Tezner, were taken over by the Polish law. The Decree of the President of the Republic of Poland on the Supreme Administrative Tribunal of 27 October 1932[7] was a faithful copy of the Austrian Supreme Administrative Court Act of 22 October 1875.[8,9] Pursuant to Article 6 section 2 of the Decree mentioned above, which is a copy of § 3 letter c of the Austrian Act

[4] Andrzej Dziadzio, 'Kontrola „Swobodnego uznania" przez austriacki Trybunał Administracyjny 1876–1918. Doktryna i Orzecznictwo' [Review of 'Free discretion' by the Austrian Administrative Tribunal 1876–1918. Doctrine and Case-Law], in Piotr Fiedorczyk, Andrzej Nowakowski, eds., *Miscellanea Historico-Iuridica Bialostocensia*, (Białystok: Wydział Prawa Uniwersytetu w Białymstoku 1995), 133.

[5] Jaśkowska, Hauser et al., *Instytucje prawa administracyjnego*, 231–232.

[6] Hartmut Mauer, *Allgemeines Verwaltungsrecht* [General Administrative Law], (Munich: C.H. Beck 2011), 143.

[7] Rozporządzenie Prezydenta Rzeczpospolitej o Najwyższym Trybunale Administracyjnym [Decree of the President of the Republic of Poland on the Supreme Administrative Tribunal] of 27 October 1932, Journal of Law 1932, No. 94, item 806.

[8] Gesetz betreffend die Errichtung eines Verwaltungsgerichtshofes [Act on the Establishment of the Supreme Administrative Court] of 22 October 1875, Reich Law Gazette 1876, no. 36.

[9] Dziadzio, 'Kontrola Swobodnego uznania', 123.

of 1875, the Tribunal may not review acts issued by the administrative authority using discretion if it was exercised within the limits specified in a statute. This adoption of Austrian law hypothetically allowed to introduce in the Second Republic an extensive judicial review of the exercise by the administrative authority of discretion based on the Austrian Empire model.[10] After 1945, i.e. in the period of socialism in Poland, discretion was understood as full discretion and was subject to criticism as an institution contrary to the fundamental principles of the political system and, above all, to the rule of socialist law.[11] As a result of this view, the existence of discretion in socialist law was denied in the legal literature. After 1956, there was a revival in the use of discretion, which had to be clearly defined in a statute and did not concern the interpretation of ambiguous legal provisions.[12]

Currently, Polish law rejects the concept of full discretion and accepts the institution of discretion,[13] even though it is indicated that recognition is a product of legal literature and has no legal basis.[14] The prevailing view in the Polish legal literature is that discretion can be used in the last stage of application of the law, i.e. it concerns the choice of legal consequences, while the interpretation of undefined terms (e.g. general clauses) is not subject to discretion.[15] As indicated by the Voivodship Administrative Court (*Wojewódzki Sąd Administracyjny*, *WSA*) in Cracow in its judgment of 3 June 2011, for a century, since the time of Tezner's concept, it has been generally accepted in the literature of administrative law that the interpretation of vague terms should be distinguished from using the institution of discretion. The interpretation of the vague terms is subject to strict judicial review.[16] The court also usually adopts a narrow understanding of discretion, i.e. solely as the right to choose one of several possible resolutions in the case. According to the judgment of the Supreme Administrative Court (*Naczelny Sąd Administracyjny*, *NSA*) of 16 January 2013,[17] the exercise of discretion occurs when applying the law in a specific case. It consists of determining the legal consequences of the established factual circumstances by the authority applying the law.[18] Recent court judgments also show a tendency to further narrow the understanding of the institution of discretion. As indicated by the NSA in its

[10] Zimmermann, *Prawo administracyjne*, 366.

[11] Jaroszyński, et al., Prawo administracyjne, 356.

[12] Jaśkowska, in Hauser et al., *Instytucje prawa administracyjnego*, 241.

[13] Zimmermann, *Prawo administracyjne*, 367.

[14] Jakimowicz, *Przewodnik po prawie administracyjnym*, 618.

[15] Jaśkowska, in Hauser et al., *Instytucje prawa administracyjnego*, 242.

[16] Judgment (*wyrok*) of the WSA in Cracow of 3 June 2011, no. II SA/Kr 50/10, Legalis no. 423135.

[17] Judgment (*wyrok*) of the NSA of 16 January 2013 r., no. II OSK 1703/11, Legalis no. 759544.

[18] A similar position was expressed in the judgment (*wyrok*) of the WSA in Szczecin of 17 August 2016., no. SA/Sz 405/16, Legalis no. 1547871.

judgment of 5 September 2018,[19] the limits of discretion are also exceeded when the authority chooses one of the alternative options but this grossly violates the principle of justice, or it is unreasonable.[20]

Without going into a detailed analysis of the substance and scope of discretion, because they go beyond the subject of the book, it should be emphasised that according to the accepted case-law, the interpretation of undefined terms (general clauses) does not fall within the scope of discretion.[21] In particular, the NSA in its judgment of 25 February 1997[22] states that the appearance of undefined terms in a statutory law does not imply the right to free interpretation of the law. However, it is an obligation to carry out a precise interpretation using all interpretative canons. The interpretation of undefined terms is part of statutory interpretation. It is hence subject to extensive judicial review. A different approach is taken where discretion means the right to choose one of several possible resolutions in the case under consideration. In that situation, judicial review is limited. In most court judgments, it is assumed that the court is permitted to examine the legality (*legalność*) of acts issued upon the authority's discretion and not their equity (*słuszność*).[23] However, the criterion of legality is understood very broadly. The court is obliged to verify whether all legal provisions applicable in the case have been correctly applied. In addition, the court checks if the authority has complied with selection guidelines arising from statutory law and constitutional principles.[24]

The above view based on administrative law is directly applicable to tax law. According to the prevailing view in the tax law literature, although judicial review of acts issued upon the authority's discretion should be conducted to a limited extent, the review cannot be dispensed with, and it should be based on the criterion of legality.[25] The NSA confirmed this position in its judgment of 7 February 2001[26] concerning tax cancellation under Article 67 of the Tax Ordinance

[19] Judgment (*wyrok*) of the NSA of 5 September 2018, no. II FSK 3325/15, Legalis no. 1824476.

[20] A similar position was expressed in the judgment (*wyrok*) of the NSA of 5 April 2018, no. II FSK 805/16, Legalis no. 1789915; judgment (*wyrok*) of the WSA in Gliwice of 27 April 2018, no. I SA/Gl 1322/17, Legalis no. 1766947; and judgment (*wyrok*) of the WSA in Warsaw of 11 May 2017, no. III SA/Wa 278/16, Legalis no. 1631011.

[21] Jaśkowska, in Hauser et al., *Instytucje prawa administracyjnego*, 286; judgment (*wyrok*) of the NSA of 11 July 2018, no. II FSK 1917/16, Legalis no. 1828099; judgment (*wyrok*) of the NSA of 2 September 2016, no. I OSK 2352/15, Legalis no. 1512286; judgment (*wyrok*) of the WSA in Poznań of 25 January 2018, no. I SA/Po 963/17, Legalis no. 1721403; and judgment (*wyrok*) of the WSA in Warsaw of 25 October 2017, no. VIII SA/Wa 544/17, Legalis no. 1691382.

[22] Judgment (*wyrok*) of the NSA in Lublin of 25 February 1997, no. II SA/Lu 582, Legalis no. 40725.

[23] Judgment (*wyrok*) of the NSA of 18 April 2007, no. II FSK 1708/06, Legalis no. 129070.

[24] Jaśkowska, in Hauser et al., *Instytucje prawa administracyjnego*, 288–289.

[25] Jakimowicz, *Przewodnik po prawie administracyjnym*, 621.

[26] Judgment (*wyrok*) of the NSA of 7 February 2001, no. I SA/Gd 1507/00, Legalis no. 140602.

Act (now Article 67a section 1 of the Tax Ordinance Act). According to the justification of this judgment, judicial review of acts issued at the authority's discretion is limited to verification of their legality. Consequently, it is limited to an evaluation whether the following have been met:

1. the tax authority has properly collected pieces of evidence within the tax procedure;
2. the conclusions pointed out in the justification of a refusal to cancel tax are justified by the pieces of evidence collected during the procedure;
3. the assessment of evidence has been conducted in accordance with the due process of law;
4. conclusions arising from this assessment are logical and correct.

However, the review does not check the purposefulness (*celowość*) of an act. As Jakimowicz emphasises, judicial review cannot be unlimited because the court is not a third instance in an administrative (tax) procedure.[27]

Case-law includes judgments that break with the above judicial approach. An example of this is the NSA judgment of 9 March 2006,[28] in which the court held that by issuing a discretionary act, the authority is bound not only by the strict letter of the legal provision but also by the objective set by that provision and ethical norms. Furthermore, in the judgment of 2 March 2016,[29] the NSA expressed that the tax authority does not have complete freedom in making decisions. Cases where the tax authority exercises its competences voluntarily, in a completely unreasonable manner, or contrary to fundamental constitutional principles are not beyond judicial review. Such cases occur where a decision based on Article 67a of the Tax Ordinance Act is issued as follows: (i) in gross violation of the principle of fairness, (ii) on the basis of manifestly irrelevant or unreasonable criteria, or (iii) on the basis of false premises.

To summarise this part of the discussion, one must agree with the position of Jaśkowska, who claims that in reality the scope of judicial review of acts issued upon the authority's discretion is unclear. Generally, the courts limit themselves to reviewing discretionary acts by checking if the authority has issued an act in compliance with rules of procedure, including whether all pieces of evidence have been collected and taken into consideration. Some courts examine whether the authority has gone beyond its power in issuing a discretionary act. However, there are judgments in which the courts verified acts issued upon the authority's discretion in terms of fairness or purposefulness,[30] which is particularly evident in recent cases.

[27] Jakimowicz, *Przewodnik po prawie administracyjnym*, 425.

[28] Judgment (*wyrok*) of the NSA of 9 March 2006, no. I OSK 1267/05, Legalis no. 275616.

[29] Judgment (*wyrok*) of the NSA of 2 March 2016, no. II FSK 2474/15, Legalis no. 1469920.

[30] Jaśkowska, in Hauser et al., *Instytucje prawa administracyjnego*, 290.

1.2. The role of discretion in tax matters

The institution of discretion has a direct impact on the scope of tax cancellation. The fulfilment of the conditions of an important interest of the taxpayer or public interest, which are analysed in Chapter V, does not necessarily result in cancellation of tax liabilities. Pursuant to Article 67a section 1 of the Tax Ordinance Act, which is the legal basis for administrative cancellation, the tax authority 'may' cancel tax liabilities. This wording indicates that the tax authority has not only the right to cancel tax liabilities but also the freedom to exercise this right.[31] As indicated in the literature on tax or administrative law, the discretion granted to the tax authority should be understood narrowly as the right to choose from among potential courses of actions in the cases that are permitted by the provision of law granting this right and are consistent with the purpose of this provision.[32] Therefore, from the taxpayer's point of view, there is no right to claim tax cancellation even if such a tax cancellation would be justified by an important interest of the taxpayer or public interest.

The legal literature and case-law continuously discusses whether in specific cases the tax authority may be obliged under its discretion to take a favourable decision on tax cancellation. According to the view whereby the tax authority is not bound by specific guidelines when exercising its discretion, tax cancellation is perceived as an act of grace.[33] This view was confirmed by the WSA in Warsaw in its judgment of 23 October 2006.[34] The court states that even if the conditions for tax cancellation are fulfilled in the case in question, the tax authority may or may not grant the taxpayer relief through tax cancellation. In the opposite view, tax cancellation is not an act of grace. Within the tax procedure, the taxpayer exercises his or her rights to pursue cancellation of their tax liabilities, while the tax authority exercises its procedural duty.[35] Such a view not only reinforces the position of the taxpayer but also increases the scope of judicial review over the tax authority's actions.

The right to act under own discretion has no effect on the tax authority's obligation to conduct the tax procedure in compliance with all requirements pro-

[31] Adam Bartosiewicz, Ryszard Kubacki, 'Ulgi płatnicze w świetle wartości konstytucyjnych. Glosa do wyroku NSA z 16.1.2007 r., I FSK 477/06' [Payment reliefs in the light of constitutional values: Glossary to the NSA judgment of 16.1.2017, I FSK 477/06], *Monitor Podatkowy,* 12 (2007), 46.

[32] Bogusław Dauter, in Stefan Babiarz, Bogusław Dauter, Bogusław Gruszczyński, Roman Hauser, Andrzej Kabat, eds., *Ordynacja podatkowa. Komentarz* [Tax Ordinance Act: Commentary], (Warsaw: Wolter Kluwer 2015), 430.

[33] Judgment (*wyrok*) of the NSA in Warsaw of 2 March 1994, no. III SA 1001/93, Legalis no. 41954.

[34] Judgment (*wyrok*) of the WSA in Warsaw of 23 October 2006, no. III SA/Wa 2007/06, Legalis no. 84309.

[35] Judgment (*wyrok*) of the NSA in Łodź of 12 October 1999, no. I SA/Łd 1160/97, Lex no. 40975.

vided for in the Tax Ordinance Act. Compliance with this obligation is subject to judicial review. In particular, the tax authority should collect pieces of evidence in the case and clarify all facts after comprehensive and careful consideration of all evidence in the case.[36] These actions should be reflected in the justification of the decision on tax cancellation. It must be stressed that the institution of discretion does not affect the obligation under Article 210 section 4 of the Tax Ordinance Act to draw up a correct and convincing statement of reasons for the issued decision.[37] Furthermore, it is stressed in the legal literature that the tax authority, when exercising its discretion, should also take into account fundamental constitutional principles and general principles of tax procedure, especially the principle of legitimate expectation (*zasada zaufania do organów podatkowych*).[38]

As regards the tax authority's obligation to consider constitutional principles when exercising its discretion, the judgment of the WSA in Cracow of 26 September 2014[39] deserves special attention. In this judgment, the court indicated that the tax authority must be guided by the fiscal interest of the State when exercising its discretionary right to cancel tax liabilities. According to the court, tax cancellation under Article 67a section 1 of the Tax Ordinance Act does not in itself constitute a privilege for the taxpayer. Moreover, tax cancellation is a form of assistance provided by the State to the taxpayer in order to avoid adverse effects of using generally applicable law (in that case, the effects of tax collection), both socially and individually, on the taxpayer and his or her relatives and dependants. Therefore, the purpose is to ensure that the State does not suffer higher losses as a result of pursuing to collect tax liabilities compared to cancelling tax liabilities.

2. Ermessen

2.1. General remarks

During the German Reich and the Weimar Republic, the Austrian model of discretion, which was initially dominated by the Bertnazik's theory and then by the Tezner's theory, was taken over by the German legal literature. However, unlike in Austria (in the Austrian Empire, then in the Republic of Austria), German courts did not have significant power of judicial review over acts issued at the discretion of the authority. The court was entitled to carry out such a review only

[36] Dzwonkowski, Kurzac, in Dzwonkowski, *Ordynacja Podatkowa*, 467.

[37] Jacek Brolik, in Rafał Dowgier, ed., Ordynacja podatkowa. Dowody w postępowaniu podatkowym, [Tax Ordinance Act: Evidence in tax procedure], (Białystok: Temida 2 2013), 184–185.

[38] Dauter, in Babiarz et al., *Ordynacja podatkowa*, 430.

[39] Judgment (wyrok) of the WSA in Cracow of 26 September 2014, no. I SA/Kr 842/14, Lex no. 1512473.

if it was permitted under a specific legal provision. Therefore, in the opinion of Brigitta Varadinek, the institution of discretion in Germany was predominantly of full discretion nature until 1945.[40]

At present, in the legal literature, discretion (*Ermessen*) is understood as the right of the tax authority to determine the content of an administrative act at the last stage of its issuing, i.e. to determine legal effects of the act (*Rechtsfolgeseite*).[41] The application of full discretion (*Freie Ermessen*) is not permitted. Within the exercise discretion, the administrative authority may decide whether to issue an administrative act at all (*Entschließungsermessen*) and what content the decision will have (*Auswahlermessen*).[42]

It remains a matter of dispute in the administrative law literature whether the administrative authority, when exercising its discretionary powers, is bound by a specific purpose, e.g. an objective set by the legal provision granting discretionary powers.[43] Hartmut Maurer expresses the view that the administrative authority is bound not only by the object of the legal provision granting discretionary powers but also by fundamental rights arising from the Basic Law and general principles of administrative law.[44]

The discretion is subject to extensive judicial review. This control focuses on determining whether the authority has exceeded the limits of the granted discretion (*Ermessenüberschreitung*) and whether there has been an abuse of the discretion (*Ermessensfehlgebrauch*).[45] The limits of discretion are exceeded when the administrative authority chooses a resolution in the case which is not provided for by the legal provision granting the discretion. An abuse of discretion occurs when, in making an administrative act, the authority disregards the objective of the legal provision granting the discretion. The review may be extended to include failure to exercise discretion by the administrative authority (*Ermessenunterschreitung*), i.e. failure to act by a public authority.[46]

Many authors in the German legal literature are of the opinion that apart from the discretion as described above, discretionary interpretation of undefined terms (*Beurteilungsspielraum*) is allowed at the stage of establishing factual circumstances of the case (*Tatbestandseite*).[47] According to Maurer, the exclusion

[40] Brigitta Varadinek, 'Ermessen und gerichtliche Nachprüfbarkeit im französischen und deutschen Verwaltungsrecht und im Recht der Europäischen Gemeinschaft' [Discretion and Justice Verifiability in French and German Administrative Law and Law of the European Community], PhD Thesis, Free University of Berlin, Berlin 1993, 96–98.

[41] Mauer, *Allgemeines Verwaltungsrecht*, 143.

[42] Ibid., 148.

[43] Varadinek, 'Ermessen und gerichtliche Nachprüfbarkeit', 103.

[44] Mauer, *Allgemeines Verwaltungsrecht*, 150.

[45] Eva-Maria Gersch, in Franz Klein, ed., *Abgabeordnung – einschließlich Steuerstrafrecht* [Fiscal Code, including Tax Penal Law], (Munich: C.H. Beck 2016), 43.

[46] Jaśkowska, in Hauser, et al., Instytucje prawa administracyjnego, 278.

[47] Mauer, *Allgemeines Verwaltungsrecht*, 154.

of discretionary interpretation of undefined terms may be appropriate from the view of the Basic Law, but it is too strict an approach.[48] The courts have been expressing a different view since the judgment of the BVerfG in the Kalkar case.[49] As stated in the judgment, the parliament is not entitled to grant public administration authorities the right to refrain from applying interpretative canons, e.g. to undefined terms. Thus, in the past, the court performed a limited review of the application of undefined terms in administrative acts. Nowadays, however, the interpretation of such terms is subject to full judicial review.[50] In recent case-law, the BVerfG has allowed the public authority to use discretionary powers in interpreting undefined terms but only for complex and multidimensional terms whose understanding is particularly dynamic.[51]

The German legal literature distinguishes between two forms of exercising discretion: individual exercise of discretion (*individuelle Ermessenausübung*) and general exercise of discretion (*generelle Ermessenausübung*). The individual exercise takes place when the public authority exercises its discretion without any guidance from a higher authority. Such an exercise serves to ensure justice in an individual case (*Einzelfallgerechtigkeit*) and results from considering the factual circumstances of the case. The general exercise is based on internal administrative guidelines (*Verwaltungsrichtlinien*). Therefore, if there are guidelines relevant to the case, the public authority is obliged to exercise discretion following these guidelines. That exercise serves to ensure equal treatment of all addressees of administrative acts. The above division is important for better understanding of the concept of administrative tax cancellation, which is analysed in Chapter V. It is also worth noting that administrative tax cancellation in German law aims at eliminating injustice (inequity) in a specific case. Maurer points out that the individual exercise is applied in atypical cases and the general exercise is applied in typical cases.[52]

2.2. Discretion in tax law cases

The institution of discretion for the purposes of tax procedure is regulated in § 5 of the Fiscal Code.[53] Pursuant to this provision, if tax authority is entitled to

[48] Ibid., 156.

[49] Decision (*Beschluss*) of the BVerfG of 8 August 1978, no. 2 BvL 8/77, Official Collection of Decisions no. 49, pp. 89–147.

[50] Mauer, *Allgemeines Verwaltungsrecht*, 157.

[51] Decision (*Beschluss*) of the BVerfG of 17 April 1991, no. 1 BvR 419/81 and 1 BvR 213/83, Official Collection of Decisions no. 84, pp. 34–58.

[52] Mauer, *Allgemeines Verwaltungsrecht*, 146–147.

[53] Thilo Cöster, in Ulrich Koenig, ed., *Abgabeordnung §§ 1 bis 368. Kommentar* [Fiscal Code §§ 1 to 368. Commentary], (Munich: C.H. Beck 2014), 1140.

act at its discretion, it is obliged to exercise discretion pursuant to the purpose of the discretion conferred on it and within the limits set by the legal provision granting this discretion. Thus, the tax authority cannot limit itself to read legal provisions granting the discretion but is required to consider the purpose of the entire written and unwritten legal system, including international treaties, constitutional law, and human rights.

The administrative act on tax cancellation pursuant to § 163 or § 227 of the Fiscal Code is based on discretion, i.e. the tax authority has the right and obligation to exercise the granted discretion when issuing an act pursuant to the above paragraphs.[54] As emphasised in the legal literature, § 163 and § 227 of the Fiscal Code, which provide for administrative tax cancellation, are of the so-called 'double discretion' (*Koppelungsvorschrift*) nature. This means that they consist of both an undefined term of inequity (*unbillig*) and the right of the tax authority to exercise discretion, i.e. the authority 'may' cancel tax liabilities. The legal literature also expresses the view that the application of the double discretion is questionable regarding its constitutional conformity. However, due to the nature of tax cancellation, it is deemed to comply with the Basic Law. Moreover, the constitution conformity is supported by the fact that tax cancellation does not impose any obligations on the taxpayer.[55]

The discretion exercised in connection with cancellation of tax liabilities under § 163 and § 223 of the Fiscal Code should, in any case, comply with the following: previous administrative practice (provided it is a lawful practice), the principles of equality and proportionality, taxpayer's legitimate expectation, good faith (*Treu und Glauben*), and social state.[56] The Joint Senate of the Federal Supreme Courts of Justice (*Gemeinsamer Senat der obersten Gerichtshöfe des Bundes*) acknowledges that the tax cancellation act is a discretionary act. Nonetheless, the content and limits of the applied discretion are determined by the concept of inequity (*Unbilligkeit*).[57] The legal doctrine emphasises that the taxpayer theoretically has no rights to pursue cancellation of their liabilities due to inequity, but there is a growing tendency in case-law to broaden the review of cases concerning tax cancellation. It is sometimes argued that if, in a particular case, inequity of taxation is confirmed, there is no place for discretion. Tax cancellation due to inequity should not, therefore, be regarded as an act of grace but as a means of legal protection in situations that have not been considered by the legislature when enacting statutory law.[58]

[54] Gersch, in Klein, *Abgabeordnung*, 37.

[55] Koenig, in Koenig, *Abgabeordnung*, 71.

[56] Ibid., 73–75.

[57] Entscheidung vom Gemeinsamen Senat der obersten Gerichthöfe [Decision of Joint Senate of all Supreme Federal Courts] of 19 October 1971, no. Gms-OGB 3/70, Federal Tax Gazette 1972, part II, p. 603.

[58] Reinhart Rüsken, in Klein, *Abgabeordnung*, 986.

The limits of discretion are also exceeded when a discretionary act runs contrary to, for instance, the general purpose of tax cancellation or the principle of proportionality, and when a discretionary runs contrary to the current lawful administrative practice.[59] The scope of the tax cancellation due to inequity is also a subject of internal administrative guidelines (*Verwaltungsanweisungen*). In Germany, as in Poland, the guidelines are not a source of law, but they are binding on the administrative authority to the extent that they are in line with the relevant parliamentary statute. Therefore, the taxpayer is entitled to claim their application unless they are inconsistent with the statute.[60] The courts are indirectly bound by the guidelines and administrative practice,[61] i.e. by the established practice of most agencies of the German tax authority in dealing with most tax cases. In any case, the legal basis for tax cancellation is always a parliamentary statute. Therefore, in this case, the legal basis for tax cancellation is § 163 of the Fiscal Code and not an internal administrative guideline.[62]

The use of discretion in an individual case does not release the tax authority from the obligation to provide a justification for refusing to cancel the tax. The authority must indicate in its justification why the conditions for tax cancellation due to inequity have not been met in this particular case and should prove that the tax assessment notice is lawful. Furthermore, the authority needs to refer in the justification to internal administrative guidelines, if applicable.[63]

The discretion exercised by the tax authority is not limitless, since it is to some extent subject to judicial review. If the tax authority refuses to cancel tax liabilities due to inequity, i.e. under § 163 or § 223 of the Fiscal Code, the taxpayer is entitled to file a claim with the financial court (*Finanzgericht*) pursuant to § 40 of the Code of Procedure for Fiscal Courts.[64] This right significantly increases the role of the courts in possible tax cancellation. However, according to § 5 of the Fiscal Code and § 102 of the Code of Procedure for Fiscal Courts, the court resolves such disputes only within the limits of an infringement of discretion.[65] As pointed out in the legal literature, the discretion of tax authorities should not be replaced by the discretion of the courts.[66] Therefore, court

[59] Gersch, in Klein, *Abgabeordnung*, 40.

[60] Rüsken, in Klein, *Abgabeordnung*, 986–987.

[61] Judgment (*Urteil*) of the BFH of 14 March 2007, no. XI R 59/04, Collection of the BFH Decisions, no. 10/2007, p. 1838.

[62] Guido Bodden, 'Steuergerechtigkeit im Billigkeitsverfahren nach § 163' [Tax Justice in Tax Cancellation Procedure under § 163], *Deutsches Steuerrecht* 30 (2016), 1719.

[63] Ibid., 1722.

[64] Finanzgerichtsordnung [Code of Procedure for Fiscal Courts] of 6 October 1965, Federal Law Gazette 1965, part. I, No. 14, pp. 442–462.

[65] Entscheidung vom Gemeinsamen Senat der obersten Gerichthöfe [Decision of Joint Senate of all Supreme Federal Courts] of 19 October 1971, no. Gms-OGB 3/70, Federal Tax Gazette 1972, part II, p. 603.

[66] Koenig, in Koenig, *Abgabeordnung*, 76–77.

resolutions in such cases are limited to upholding or overturning actions of the tax authority.[67]

An additional restriction on the use of tax cancellation by the tax authority are the rights of other taxpayers. The Fiscal Code also allows to protect third parties against the tax cancellation. A third party may file a claim with the court to oblige the tax authority to treat the taxpayers equally (*Verpflichtungsklage*).[68]

3. Správní uvážení

3.1. General remarks

The Czech legal literature indicates that the transition from full discretion to discretion (*správní uvážení*) was associated with the transition from an absolute monarchy to a modern constitutional state. The departure from full discretion was a lengthy process that began in 1848,[69] so already in the time of the Austrian Empire. Previously, it was assumed that if the law did not regulate a particular issue, it was entirely at the discretion of the administrative authority, which often verged on arbitrariness (*libovůle*).[70]

Following the breakup of the Austrian Empire, the legal regulation on administrative courts, including judicial review of discretion, was taken over by the First Czechoslovak Republic on the basis of Article 2 of the Act on the Supreme Administrative Court and the Resolution of Competence Dispute of 2 November 1918.[71] As indicated in the Czechoslovak legal literature (1918–1938), the courts were able to review the exercise of discretion only as regards the exceeding of discretion by the tax authority.[72] The above view from the period of the First Czechoslovak Republic was confirmed in § 245 section 2 of the Czechoslovak

[67] Decision (*Urteil*) of the BFH of 20 September 2012, no. IV R 29/10, *Deutsches Steuerrecht* 49 (2012), 2489.

[68] Gersch, in Klein, *Abgabeordnung*, 1007.

[69] Adam Gregor, 'Správní uvážení' [Administrative discretion], Bachelor thesis, Charles University, Prague 2016, https://dspace.cuni.cz/handle/20.500.11956/76732, accessed 26 February 2020, 18–19.

[70] Adolf Merkl, *Obecné právo správní. Díl první* [General Administrative Law. First Part], (Praha-Brno: Orbis 1931), 151.

[71] Zákon o nejvyšším správním soudě a o řešení kompetenčních konfliktu [Act on the Supreme Administrative Court and Resolution of Competence Dispute] of 2 November 1918, Collection of Laws no. 3/1918.

[72] Jiří Hoetzel, *Československé správní právo. část všeobecná* [Czechoslovak Administrative Law. General Part], (Prague: Melantrich 1937), 347, 432.

Code of Civil Procedure of 1963.[73] Pursuant to this section, judicial review of a decision issued in the exercise of discretion was limited solely to verification whether the administrative authority had exceeded the limits of discretion and guidelines imposed by a parliamentary statute.

In 2003, however, the scope of judicial review of decisions based on discretion was extended. Pursuant to § 78 section 1 of the Code of Administrative Court Procedure,[74] the court is entitled to quash a decision of the administrative authority if the authority exceeds the limits of discretion vested in it or abuses (*zneužil*) it. Soňa Skulová considers this amendment revolutionary.[75] As a result of this amendment, the NSS in its order of 20 July 2006[76] specifies the principles to be followed by the administrative authority when applying discretion. In the court's view, every discretion has its limitations, resulting first and foremost from the constitutional principles of the prohibition of arbitrariness (*libovůle*), equality, proportionality, prohibition of discrimination, and obligation to respect human dignity. Compliance with these principles is a subject to judicial review.

On the other hand, as indicated by Vladimir Mikule, the tax authorities are entitled and obliged, particularly when granting rights or imposing obligations, to act at their discretion when deciding if a parliamentary statute gives them such a right. Furthermore, discretion in this situation means the freedom to choose among potential courses of action in a particular case (bearing in mind the purpose of this parliamentary statute). Such a decision is not excluded from judicial review. Nonetheless, the court does not review whether among many possible courses of actions the chosen one is the most advisable, but only whether the authority has exceeded the limits of discretion laid down in the statute.[77]

The opinion of Mikule is supported by the case-law. The NSS composed of the enlarged Senate in its decision of 22 April 2014[78] expressed that discretion takes place whenever the administrative authority is given the power to deal with a case freely within the specified scope. The legislature leaves it up to the authority to choose one of the possible actions at its discretion after considering all the circumstances of the case.

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[73] Občanský soudní řád [Code of Civil Procedure] of 4 December 1963, Collection of Laws no. 99/1963.

[74] Soudní řád správní [Code of Administrative Court Procedure] of 21 March 2002, Collection of Laws no. 150/2002.

[75] Skulová, *Správní uvážení*, 201, 208.

[76] Decision (*Usnesení*) of the NSS of 20 July 2006, no. 6 A 25/2002-59, Collection of the NSS Decisions no. 950/2006.

[77] Vladimir Mikule, in Dušan Hendrych, *Správní právo. Obecní část* [Administrative Law: General Part], (Prague: C.H. Beck 2012), 535.

[78] Decisions of enlarged Senate (*Usnesení rozšířeného senátu*) of the NSS of 22 April 2014, no. 8 As 37/2011–154, Collection of the NSS Decisions no. 3073/2014.

3.2. Discretion under Czech tax law

According to § 262 of the Tax Procedure Code, the Administrative Procedure Code[79] does not apply to tax administration. This exclusion also applies to the general principles of administrative law expressed in §§ 2–8 of the Administrative Procedure Code, since the general principles of tax law are separately regulated in §§ 5–9 of the Tax Procedure Code.[80] In the light of the above exclusion, it is doubtful whether the institution of discretion as understood in administrative law is directly applicable in tax law, as regards tax cancellation. Unfortunately, the Czech tax law literature lacks a more extensive analysis of the institution of discretion. It is only mentioned, among others, that all actions of the tax authority should be reasonable, understandable, and foreseeable, and any public authority may be exercised only to the extent and in the form prescribed by statutes.[81] However, this is not the same as an application of discretion within the meaning of administrative law.

Conversely, an analysis of other Czech legal regulations justifies the conclusion that no findings confirm the notion that discretion or general clauses should be treated any differently under tax law than under general administrative law. Such differences are also not indicated in commentaries to the Tax Procedure Code. It is worth noting that the expression 'the tax authority may' (*správce daně může*) is used in the Tax Procedure Code more than 100 times. Cancellation of tax liabilities under § 260 of the Tax Procedure Code and cancellation of default interest under § 259b of this Code also depends on the tax authority, as these paragraphs use the expression 'may cancel.' This frequency indicates that the institution of discretion must be known to Czech tax law. The lack of direct regulation of discretion in Czech tax law and a reference to administrative law may be explained in accordance with the view of Skulová, namely that the development of the institution of discretion has not been systematic and there is no general concept of this institution in Czech law.[82] Therefore, it must be concluded that the institution of discretion, as defined in administrative law, also applies to tax law.

In the literature on the subject, Pavel Mates points out that an example of the broadest discretion in Czech law is § 260 of the Tax Procedure Code, which entitles the minister of finance to cancel tax liabilities even though that paragraph does not specify the conditions for such cancellation. In the opinion of Mates,

[79] Správní řád [Administrative Procedure Code] of 24 June 2004, Collection of Laws no. 500/2004.

[80] Josef Baxa, in Josef Baxa et al., *Daňový řád: Komentář. I díl* [Tax Procedure Code: Commentary. I Part], (Prague: Wolters Kluwer 2011), 1513–1514.

[81] Zdeněk Burda, 'Prominutí příslušenství daně v judikatuře správních soudů' [Cancellation of accessory tax liabilities in the case-law of administrative courts], *Daně a právo v praxi*, 10 (2015), 52.

[82] Skulová, *Správní uvážení*, 100.

such broadly understood discretion may be compared to the right of pardon exercised by the Czech President.[83]

When analysing the institution of discretion in Czech law, it is necessary to stress that internal administrative guidelines issued by the General Directorate of Finance (*Generální finanční ředitelství*) play an important role in the exercise of discretion in tax matters. In practice, the tax authorities did not refer directly to the guidelines in previous years for fear of being accused of invoking extra-statutory acts. Therefore, the authority cited the content of the guidelines but did not explicitly refer to them. On the other hand, the authority refused to accept the taxpayer's request for tax cancellation, which complied with the guidelines regarding the non-binding nature of these guidelines.

Increasingly, the tax authorities tend to refer to internal administrative guidelines, but most often to demonstrate the non-discriminatory nature of their actions. The guidelines contain many detailed provisions that ensure a uniform approach to taxpayers. Such an approach limits the authority's discretion[84] and may consequently be considered as constraining discretion. On the other hand, this approach limits an actual judicial review of tax cancellation acts.

4. Discretion

When considering discretion under English law, it should be first emphasised that administrative law in force in England differs significantly from administrative law in force in the other legal systems under discussion. As early as the turn of the 20th century, it was emphasised that administrative law had been borrowed from the Continent and was incompatible with the spirit and tradition of common law.[85] Therefore, the institution of discretion in England is characterised by significant differences from the previously analysed institutions of discretion, which are all derived from the theory of Austrian administrative law.

The English legal literature does not pay much attention to the issue of discretion, although it generally accepts that there are no significant constraints on exercising discretionary powers by the administrative authority.[86] The tax authority, like other administrative agencies, has the right to apply discretion in a broad sense. However, under traditional English administrative law, the administrative authorities exercising their powers are not entitled to transfer them to another entity, but in pursuit of government policy they have at their disposal full discretion. The tax authorities may even adopt their own guidelines for the exercise of

[83] Pavel Mates, Správní uvážení [Administrative discretion], (Pilsen: Aleš Čeněk 2013), 89.

[84] Burda, 'Prominutí příslušenství daně', 51–52.

[85] Bar, *Sądowa kontrola administracji*, 70.

[86] Jaśkowska, in Hauser et al., *Instytucje prawa administracyjnego*, 231–232.

discretion. The guidelines on exercising discretion may be formulated by other entities, e.g. by the Parliamentary Ombudsman.[87] Unfortunately, they have not yet published any guidelines on the subject of extra-statutory concessions, under which the English tax authorities cancel tax liabilities without an explicit legal basis. The issue of non-publication regarding extra-statutory concessions will be analysed in Chapter V.

On the other hand, decisions on tax cancellation may be the subject of court proceedings under a separate court procedure designed for all matters of public law, i.e. the procedure of judicial review.[88] Its purpose is to control any actions of public administration authorities concerning the exercise of executive power. Over the centuries, such control has been gradually taken over by the courts from the parliament. As Michael Fordham indicates, 'judicial review is a central control mechanism of administrative law (public law), by which the judiciary take the historic constitutional responsibility of protecting against abuses of power by public authorities.'[89]

In the past, the parliament itself controlled the actions of the executive. This review was primarily political in nature—if a decision of the administrative authority was politically incorrect, it could result in the resignation of a minister.[90] Nowadays, control is usually exercised by the courts, which increasingly refer to the orthodox common law grounds, but also to the European Convention on Human Rights (ECHR).[91] Although control over the actions of the tax authorities is a significant part of judicial review, the constitutional implications of this control have so far remained unexamined.[92]

The basis for the exercise of judicial review over the tax authorities' actions can be found in the theory of parliamentary sovereignty and the ultra vires doctrine resulting from this theory. According to the theory of parliamentary sovereignty, 'the courts have a constitutional mandate to only impose the will of an elected parliament.'[93] Thus, the courts should focus on verifying whether the tax authority is acting within the powers conferred on it by the parliament, i.e. not acting ultra vires. Any actions outside these powers are void.[94] From this point of view, extra-statutory concessions may be theoretically considered void since there is no legal basis for their issue.[95]

[87] Turpin, *British Government*, 85.

[88] Mark Elliott, Jason N.E. Varuhas, *Administrative Law. Text and Materials*, (Oxford: Oxford University Press 2017), 467.

[89] Michael Fordham, *Judicial Review Handbook*, (Oxford: Hard Publishing 2008), 34.

[90] Bar, *Sądowa kontrola administracji*, 107.

[91] Elliott, Varuhas, *Administrative Law*, 472–473.

[92] Sandra Eden, 'Judicial Control of Tax Negotiation', *eJournal of Tax Research*, 1 (2005), 6.

[93] Ibid., 7.

[94] Ibid., 9.

[95] Ibid., 10.

Judicial review based solely on the theory of parliamentary sovereignty and the doctrine of ultra vires has met with increasing criticism in the English case-law and legal literature. This criticism is particularly evident in the application of the ECHR and EU law by the courts.[96] Therefore, in practice, an alternative approach to judicial review is based on the fairness and other common law principles.[97] Such an approach is called the common law theory of judicial review. It is assumed that the courts should not be guided solely by the hypothetical intent of the parliament; instead judicial review must also be based on common law principles shaped by tort or contract law. This approach is intended to help ensure good government.[98]

Within the common law approach, the courts also take actions to review the actions of public administrative authorities regarding the principle of legitimate expectation. The institution of legitimate expectation in public law is formulated similar to the institution of breach of contract in private law.[99] The reference to the principle of legitimate expectation, and not to the doctrine of ultra vires, seems particularly crucial in the case of extra-statutory concessions. As is clear from the very name of the institution, the concessions have no legal basis in any parliamentary statute, which is why they should always be considered ultra vires. Then, if something is ultra vires, it cannot create legitimate expectations. However, according to J. Freedman and J. Vella, 'this appears manifestly unfair.'[100]

A different position is represented by Sandra Eden, who points out that there are currently two competing views concerning the scope of judicial review over actions of public authorities. The first (majoritarianism) is based on the doctrines of parliamentary sovereignty and ultra vires, while the second (communitarianism) on the principles of justice and fairness. Furthermore, she indicates that this division is not clear-cut, although the majoritarianism view is more supported among the courts.[101] At this point, however, it is worth noting that the implementation of judicial review based on common law principles is a slow process and may never even be completed. As Colin Turpin indicates, 'the courts disclaim any power to interfere with the merits of decisions reached by the executive as a matter of policy.'[102] This position also applies to tax cancellation. The courts have repeatedly stated that by issuing an extra-statutory concession, the tax authorities take care of and manage tax matters. In this respect, the courts

[96] Ibid., 7.

[97] Ibid., 7.

[98] Elliott, Varuhas, *Administrative Law*, 15–16.

[99] Eden, 'Judicial Control', 14.

[100] Judith Freedman, John Vella, 'HMRC's Management of the U.K. Tax System: The Boundaries of Legitimate Discretion', in Chris Evans, Judith, Freedman, Richard Krever, eds., *The Delicate Balance: Tax, Discretion and the Rule of Law*, (Amsterdam: IBDF 2011), 111.

[101] Eden, 'Judicial Control', 22.

[102] Turpin, *British Government*, 52.

give priority to the autonomy of public authorities over the principles of fairness, equality, and control of power.[103]

The existence of a limitation of judicial review over concessions has been confirmed by the rules on the procedure. A taxpayer cannot claim the benefits of a concession before the court because he or she does not have the capacity (*locus standi*) to bring an action before court to challenge the concession granted to another taxpayer.[104] The main problem in this respect is the obligation of the taxpayer to demonstrate a sufficient interest in challenging the concession, which is usually not recognised by the courts. Conversely, in some specific cases, the courts allowed a third party to initiate a judicial review. An example of such a case is the judgment of the Court of Appeal in the case of R (National Federation of Self-Employed and Small Businesses Ltd) vs Inland Revenue.[105] The court in the above case allowed an association of small entrepreneurs representing, in fact, competitors of the taxpayer who had obtained the concession, to file a claim to commence the judicial review. In most cases, however, the courts do not allow other taxpayers to initiate a judicial review, even if these taxpayers are competitors of the addressee of the concession.[106]

Based on the considerations presented above, it must be assumed that compared with other legal systems under the analysis, the scope of discretion vested in the English tax authorities is broad and is subject to relatively marginal judicial review. At the same time, the traditional approach to discretion as well as judicial review based solely on the doctrine of ultra vires are coming under increasing pressure.[107] The courts are moving away from the 'no-fettering rule' towards the 'law of policy,'[108] which means that the tax authority will be increasingly bound by the policy when exercising discretion. However, no such developments have been noticed with respect to tax cancellation. Finally, the question remains what impact Brexit and, consequently, the UK's withdrawal from the EU will have on the trends considered in this section.

5. Summary

Historically, the first limitation of tax cancellation granted by the tax authority was the introduction of constraints on full discretion that was related to the transformation of an absolute monarchy into a constitutional monarchy. In the

[103] Eden, 'Judicial Control', 23.

[104] David W. Williams, 'Extra statutory concessions', *British Tax Review* (1979), 143.

[105] R. v. Inland Revenue Commissioners, ex p. National Federation of Self-Employed and Small Businesses Ltd [1981] 2 WLR 722.

[106] Eden, 'Judicial Control', 20.

[107] Elliott, Varuhas, *Administrative Law*, 160.

[108] Ibid., 186.

case of Poland, Germany, and the Czech Republic, the definition and scope of discretion are very similar, each being a result of embracing the Austrian model by these legal systems. Evidence confirming the continuation of this model in Poland can be found in the reasoning of the judgment of the WSA in Cracow of 3 June 2011,[109] in which the court explicitly referred to the 100-year-old doctrine of Tezner on discretion. Accordingly, in all these countries, discretion is subject to judicial review in keeping with this doctrine, although the intensity of this review varies considerably in practice.

In the compared legal systems, there have been noticeable amendments in statutory law as well as the evolution of interpretation and application of that statutory law in order to broaden judicial review of administrative acts issued upon the authority's discretion. At present, the review is no longer limited to the issue of undefined terms (general clauses) or verification that the administrative (tax) authority has not exceeded the limits of discretion, but increasingly covers the content of acts issued upon the authority's discretion. The content of discretionary acts is scrutinised in terms of purposefulness and compliance with the principles of constitutional and tax law. The evolution of the approach to the institution of discretion is particularly evident in English law, where judicial review is no longer limited to the doctrine of ultra vires but is increasingly based on common law principles. As a result of such changes, the role of the tax authorities in tax cancellation is decreasing. It is worth recalling that one of the most important postulates regarding the abolition of absolute monarchy was to make actions of the monarchy's authority subject to judicial review.[110] Therefore, in the case of Poland, Germany, and the Czech Republic, the current state of the law can be considered as the final stage of dismantling the remains of a state based on the doctrine of absolutism.

[109] Judgment (*wyrok*) of the WSA in Cracow of 3 June 2011, no. II SA/Kr 50/10, Legalis no. 423135.

[110] Walter Berka, Verfassungsrecht. *Grundzüge des österreichischen Verfassungsrechts für das juristische Studium* [Constitutional Law. Basis of Austria Constitutional Law for Legal Study], (Vienna: Verlag Österreich 2016), 298.

Chapter V

Administrative cancellation

Since the tax authority collects tax liabilities, it is legitimate to analyse the institution of tax cancellation exercised by the tax authority. The form of tax cancellation analysed in this chapter is called 'administrative cancellation' because the tax authority is part of the public administration.

As indicated in Chapter II, from the constitutional law perspective, the tax authorities in all countries compared in this book are not entitled to impose tax liabilities—only the respective parliaments have the right to do so, as is clear from the constitutions of these countries (in the case of England, from the Bill of Rights 1688). Nonetheless, it does not mean that tax liabilities may only be cancelled based on a statute. Tax cancellation can be made on the basis of a prerogative without the participation of the parliament. Moreover, establishing a formal legal basis for tax cancellation does not determine the existence and content of substantive statutory provisions specifying the conditions for taking decisions on tax cancellation.

Practice shows that some tax cancellations do not always have technical justification such as imperfections in legislative technique, so they are not always of a dispensation nature. When cancelling a tax, the tax authority often invokes political and teleological reasons. This results in tax cancellation being understood as a privilege.

1. Umorzenie

The institution of tax cancellation was introduced to the Polish legal system by the Tax Ordinance Act of 1934.[1] Pursuant to Article 130 § 1 of the Act, the Minister of Finance was entitled to cancel, in whole or in part, tax liability in economically justified cases or in cases deserving special consideration. Moreover,

[1] Ordynacja podatkowa [Tax Ordinance Act] of 15 March 1934, Journal of Laws of 1934, No. 39, item 346.

according to Article 130 § 2 of the Act, the Minister of Finance was entitled to cancel part of tax liability for taxpayers of a specific territory in the event of a natural disaster. The Minister of Finance was also allowed under Article 130 § 4 of the Act to transfer the right to cancel tax liabilities to his subordinate tax authorities. The institution of tax cancellation remained in force in the period of the socialist state. Tax cancellation was possible under Article 34 of the Decree of 26 October 1950[2] on Tax Obligations and then under Article 8 of the Tax Obligations Act of 19 December 1980.[3]

1.1. Scope of tax cancellation

Currently, tax cancellation is allowed under the provisions of the Tax Ordinance Act of 1997. Pursuant to Article 67a § 1 point 3 of the Tax Ordinance Act, at the request of the taxpayer, in cases justified by an important interest of the taxpayer or the public interest, the tax authority may cancel tax arrears in whole or in part. The subject of cancellation may be tax arrears, default interest, or deferment fee (*opłata prolongacyjna*). Tax cancellation with other forms of tax relief, i.e. with the institutions of tax determent and spread of tax payment are regulated jointly in Chapter 7a of the Tax Ordinance Act. However, they are not the subject of this analysis because they do not comply with the operative rule adopted at the beginning of the book. Deferment of tax payment or spread of tax payment does not result in the expiry of tax liabilities or permanent refraining from enforcing tax liabilities in the course of tax collection.

In the event of cancellation of tax liabilities (principal amount), default interest is also automatically cancelled, although a separate cancellation of default interest is also possible.[4] The subject of cancellation are not all liabilities arising from a given tax but only a specific amount of money. Thus, if a tax liability is assessed at a higher amount after cancellation of the tax liability, the surplus will not be subject to prior tax cancellation.[5] Tax cancellation may cover not only the taxpayer's tax liabilities but also, in accordance with Article 67c § 2 of the Tax Ordinance Act, it may apply to tax liabilities payable by the heirs of the taxpayer, the tax remitter, or third parties.

Any taxpayer may apply for tax cancellation regardless of his or her legal status or type of conducted business activity. However, in the case of entities

[2] Dekret o zobowiązaniach podatkowych [Decree on Tax Obligations] of 26 October 1950, Journal of Laws 1950, No. 49, item 452.

[3] Ustawa o zobowiązaniach podatkowych [Tax Obligations Act] of 19 December 1980, Journal of Laws 1980, No. 27, item 111.

[4] Leonard Etel, *Ordynacja podatkowa. Komentarz* [Tax Ordinance Act: Commentary], (Warsaw: Wolters Kluwer 2017), 563.

[5] Dzwonkowski, Kurzac, in Dzwonkowski, *Ordynacja Podatkowa*, 464.

conducting business activity pursuant to Article 67b § 1 of the Tax Ordinance Act, there is only a limited possibility to cancel tax liabilities. First of all, tax cancellation is allowed if it does not constitute public aid or the granted public aid is *de minimis* aid. In such a case, tax cancellation that constitutes public aid is permitted, but only for the purposes enumerated in Article 67b § 1 point 3 of the Tax Ordinance Act.

According to Leonard Etel, the provision of Article 67b of the Tax Ordinance Act results from national and European legislation on state aid.[6] The same position is also held by Bogusław Dauter.[7] Therefore, it should be assumed that Article 67b of the Tax Ordinance Act does not regulate tax cancellation itself, but instead regulates state aid regarding tax cancellation. Hence, there are no grounds here for further analysis of Article 67b of the Tax Ordinance Act.

Tax cancellation is only possible if a tax liability is not disputed. The institution of tax cancellation cannot be applied in order to adjust tax assessment.[8] A decision on tax cancellation does not change the legal relationships constituting the tax liability. The above decision has a significant legal effect, but only in terms of collection of the tax liability itself. Consequently, this decision leads to the reversal of the tax liability regarding its payment; however, a subsequent change of tax assessment concerning the already cancelled tax liability is not precluded.[9]

1.2. Tax liabilities and tax arrears

A characteristic feature of tax cancellation under Article 67a § 1 point 3 of the Tax Ordinance Act is the possibility to cancel only tax arrears, i.e. tax liabilities that have already been due and payable. Undoubtedly, only due and payable tax liabilities can be tax arrears.[10] As a result, it is pointed out that the tax authority and the taxpayer have to postpone their tax cancellation actions until the tax liability becomes tax arrears despite all other conditions for tax cancellation being met. This additional condition may delay the issuance of any decision cancelling or refusing to cancel tax and it introduces some uncertainty for the taxpayer in the period before the tax liability becomes due and payable. It is worth noting here that until 2001 the tax authority was entitled to waive collection (*zaniechanie poboru*) of all tax liabilities in individual cases, i.e. it was possible to cancel tax liabilities that were not yet due and payable. The revocation of this institution has been criticised in the legal literature.[11]

[6] Etel, *Ordynacja podatkowa*, 567.
[7] Dauter, in Babiarz, *Ordynacja podatkowa*, 510.
[8] Ibid., 426.
[9] Dzwonkowski, Kurzac, in Dzwonkowski, *Ordynacja Podatkowa*, 464, 466.
[10] Etel, *Ordynacja podatkowa*, 564.
[11] Ibid., 358.

Cancellation of the already paid tax liabilities is also ruled out because, according to Article 59 § 1 point 1 of the Tax Ordinance Act, tax liabilities expire with their payment. The courts exclude the possibility of applying for tax cancellation with simultaneous voluntary payment of tax liabilities out of an abundance of caution. In the opinion of the courts, in such a case, tax cancellation proceedings are pointless and should be discontinued.[12] This issue is relevant to tax practice, since submitting an application for tax cancellation does not suspend enforcement of due and payable tax liabilities.

Limitation of the possibility of cancellation to tax arrears has a systemic dimension that should be assessed less critically. As a result of the limitation, the tax cancellation in question is a one-off cancellation and should not be treated as a tax privilege which is a permanent, recurring benefit, as indicated in Chapter III. The effect of tax privilege would be achieved under Article 67a § 1 point 3 of the Tax Ordinance Act only if the tax authority issued periodic decisions on tax cancellation.

In Article 234 § 2 point 3 of a draft of the new Tax Ordinance Act,[13] it is proposed to rule out the limitation of tax cancellation to tax arrears. It entails the risk of creating an institution of a tax privilege nature. However, it should be stressed that the entry into force of the new Tax Ordinance Act with the proposed amendment has not been decided. In the explanatory statement to the new Tax Ordinance Act, the above-mentioned practical problems related to the inability to cancel tax liabilities before they become due and payable was pointed out as the reason for ruling out the limitation.[14] At this point, it is worth noting that in the past canon law also limited dispensation to current situations only, as indicated in Chapter III, and dispensation could not concern future situations. Nonetheless, now the CIC allows applying dispensation to future situations similarly as the draft of the new Tax Ordinance Act does.

There are currently two exceptions to the above limitation that only tax arrears may be cancelled by the tax authority. One exception is the institution of waiver of tax collection based on Article 22 of the Tax Ordinance Act. The exception literally concerns 'waiver of tax collection,' not 'tax cancellation,' but this institution fully corresponds with the operative rule adopted in the book. A more detailed analysis of this institution is provided in Chapter VI.

Another exception to the limitation is the farm tax, which is not a source of revenue for the State but for municipalities. Pursuant to Article 13c point 1 of the Farm Tax Act,[15] upon application of the taxpayer, the tax authority (namely,

[12] Judgement (*wyrok*) of the NSA of 4 May 2005, no. I FSK 1999/04, Lex no. 177353.

[13] Rządowy projekt ustawy – Ordynacja podatkowa [Government Bill–Tax Ordinance Act] of 4 June 2019, Sejm paper no. 3517.

[14] Uzasadnienie projektu ustawy – Ordynacja podatkowa [Explanatory statement to the Government Bill–Tax Ordinance Act] of 4 June 2019, Sejm paper no. 3517, 13–14.

[15] Ustawa o podatku rolnym [Farm Tax Act] of 15 November 1984, consolidated text in Journal of Laws 2019, item 1256.

commune head, mayor, or president of a city) may waive assessment or collection of the farm tax liability in whole or in part depending on the size of losses caused by a natural disaster on the farm. A condition for the waiver of assessment or collection of tax liabilities is the declaration of the state of emergency in the area covering the taxpayer's farm.[16] The exceptional and temporary nature of that condition leads to the conclusion that tax cancellation under Article 13c point 1 of the Farm Tax Act cannot be understood as tax privilege but as a dispensation. However, it is worth noting that the farm tax is not a source of significant revenues.

1.3. Public interest and important interest of the taxpayer

The conditions of an important interest of the taxpayer and the public interest are critical to deciding by the tax authority on granting or refusing a tax cancellation based on Article 67a of the Tax Ordinance Act. More specifically, the fulfilment of at least one of the above conditions is a prerequisite for granting cancellation. The legal literature indicates that these conditions are very broad general clauses, requiring references not only to legal terms but also to general philosophical terms.[17] Moreover, the assessment by the tax authority of whether the conditions are met is based on some aspects of fairness (*na elementach natury słusznościowej*).[18]

It is difficult to define the concept of 'an important interest of the taxpayer' and 'the public interest' because these terms are repeatedly redefined on a case-by-case basis by the courts in their judgments. According to Henryk Dzwonkowski, the judicial approach is inconsistent in this respect. In addition, it can be observed that some courts attempt to avoid resolving cases concerning tax cancellation.[19]

Marek Zdebel points out that the use of unspecified conditions for tax cancellation is necessary because it is impossible to clearly and exhaustively specify all situations justifying the application of tax cancellation.[20] At the same time,

[16] Leonard Etel, Podatek rolny. Podatek leśny. Komentarz [Farm Tax, Forest Tax: Commentary], (Warsaw: Wolters Kluwer 2012), 212.

[17] Dzwonkowski, Kurzac, in Dzwonkowski, *Ordynacja podatkowa*, 461–462.

[18] Marek Zdebel, 'Warunki stosowania w Polsce umorzeń płatności należności budżetowych' [Conditions for the application of cancellation of budgetary revenues in Poland], in Ireneusz Mirek, Tomasz Nowak, eds., *Prawo finansowe po transformacji ustrojowej: międzynarodowe i europejskie prawo podatkowe: Zjazd Katedr Prawa Finansowego i Podatkowego: Łódź 5–6 czerwca 2012 r.* [Financial Law after Political Transformation: International and European Tax Law: Convention of Departments of Financial and Tax Law: Łódź 5–6 June 2012], (Łódź: Wydawnictwo Uniwersytetu Łódzkiego 2013), 494–495 and publications cited therein.

[19] Dzwonkowski, Kurzac, in Dzwonkowski, *Ordynacja podatkowa*, 462.

[20] Zdebel, 'Warunki stosowania w Polsce umorzeń płatności', 497.

it is reasonable to search for other terms that would allow a more transparent decision on tax cancellation. Zdebel also states that, unfortunately, the present case-law concerning the terms of an important interest of the taxpayer and the public interest allows to conclude that it is futile to attribute one general descriptive meaning to these terms, since they must be constantly redefined.[21] Therefore, based on Article 67a § 1 point 3 of the Tax Ordinance Act, it is hard to unequivocally classify tax cancellation as privilege or dispensation.

When trying to determine the content of the terms of an important interest of the taxpayer and the public interest, it should be made clear that objective reasons are decisive, and not subjective perceptions of the taxpayer or the tax authority.[22] It should also be noted that the tax authority rarely agrees with the taxpayer's interpretation of these terms and the taxpayer's applications for tax cancellation are usually rejected by the tax authority.[23]

The courts have reached some conclusions concerning the understanding of the public interest clause, which refer to the provisions of Articles 22 and 67a of the Tax Ordinance Act. According to some authors, the public interest can be identified with general social fiscal interest (*ogólnospołeczny interes fiskalny*), which consists of the fiscal interest of the State and the prohibition on creating unnecessary expenses for the State budget, such as unemployment or social welfare benefits.[24] As the NSA points out in its judgment of 30 May 2001, the public interest requires not only assurance of maximum income for the State budget but also limitation of its potential expenses, e.g. unemployment benefits or social welfare assistance.[25]

Other authors indicate that the public interest should not be identified solely with the protection of State's revenues, i.e. only with fiscal interest.[26] In particular, the interpretation of that clause should take into account the need to protect particular values. However, there is no catalogue of such values. Moreover, the courts indicate only a sample catalogue of these values. In the reasoning of the NSA judgment of 12 February 2003, the court states that an order to take into consideration the public interest referred to in Article 67a § 1 of the Tax Ordinance Act should mean a directive to respect values common for the whole society, such as justice, security, protection of citizen's legitimate expectations, efficient operation of public administration, and right to correct its erroneous decisions.[27] The values mentioned in the judgment seem, however, to be merely

[21] Ibid., 496.

[22] Dauter, in Babiarz, *Ordynacja podatkowa*, 434.

[23] Monika Münnich, *Nieostre zwroty ocenne w polskim prawie podatkowym* [Undefined Descriptive Terms in Polish Tax Law], (Lublin: Wydawnictwo KUL 2017), 189.

[24] Ibid., 193–194.

[25] Judgment (*wyrok*) of the NSA of 30 May 2001, no. III SA 830/00, Lex no. 54007.

[26] Bartosiewicz, Kubacki, 'Usługi płatnicze', 46.

[27] Judgment (*wyrok*) of the NSA of 12 February 2003 r., no. III SA 1838/01, Legalis no. 57165.

a representative and non-binding list of values chosen to justify a particular decision. Moreover, Monika Münnich rightly notes that the public interest is a vague term that is increasingly being interpreted in a much broader context than the axiological perspective as far as tax law is concerned.[28]

From an alternative point of view in the legal literature in this regard, the list of values related to the public interest should be narrowed down to the values expressed in the Polish Constitution. Supporters of this attitude emphasise that any attempt to implement constitutional values is in the public interest.[29] This approach deserves particular attention because it indicates that the first source of tax cancellation are provisions of the Constitution.

The courts also understand the public interest as a 'safety valve' of tax law, which is supposed to eliminate unacceptable results of applying tax law. As the WSA in Białystok states in the judgment of 6 July 2005, the concept of the public interest also applies to cases in which there is a need to rectify the errors of the legislator. The errors must result in tax arrears that cannot be paid.[30] Such reasoning brings the administrative cancellation in Poland closer to the institution of dispensation.

The opinions presented above on the understanding of the concept of the public interest do not dispel doubts concerning its application. The NSA in the judgment of 7 May 2018[31] expresses an opinion that determination of the existence of the public interest in a given case requires balancing the fiscal interest of the State against the need to apply tax cancellation. Therefore, the tax authority should determine in each particular case which of the above is more favourable from the public interest point of view. An economic calculation may favour the public interest. Moreover, the tax authority should consider the principles that are common to the whole society, such as justice, ethics, and legitimate expectations of the taxpayer. Unfortunately, in the above-mentioned judgment and its reasoning, the court also refers to more vague clauses, such as ethics, in order to clarify the meaning of the public interest.

The public interest clause may also be subjected to a legal analysis from the historical point of view. As Marian Zimmermann points out, in the period of the Second Polish Republic (1918-1939), administrative courts refused to review administrative decisions if they were based on provisions invoking the public interest.[32] The clause had a broad scope and allowed the tax authority to cancel tax liabilities in a relatively arbitrary manner. Therefore, it may be no coincidence that the public interest clause has been redefined.

[28] Münnich, *Nieostre zwroty ocenne*, 193.

[29] Bartosiewicz, Kubacki, 'Usługi płatnicze', 49.

[30] Judgment (*wyrok*) of WSA in Białystok of 6 July 2005 r., no. I SA/Bk 134/05, Lex no. 187915.

[31] Judgment (wyrok) of the NSA of 7 May 2018, no. II FSK 2845/17, Legalis no. 1776976.

[32] Zimmermann, in Jaroszyński, et al., *Prawo administracyjne*, 355.

As in the case of the public interest clause, the clause of an important interest of the taxpayer has been repeatedly redefined to reflect particular factual circumstances. This redefining reflects the diversity of factual circumstances and the plurality of taxpayers' interests, which are difficult to cover by a single definition.[33] However, in addition to some example cases, it is possible to identify some trends in the case-law concerning the meaning of an important interest of the taxpayer, although it needs to be stressed that these trends are not stable and do not represent a common judicial approach. For instance, the application of stricter criteria for business-related tax liabilities is apparent. In the opinion of the courts, business activity involves economic risk. Therefore, there is no important interest of the taxpayer to cancel tax liabilities when the taxpayer's financial problems result from an erroneous business decision taken by the taxpayer, such as taking a loan without having the credit capacity to repay it[34] or concluding a contract with a dishonest business partner.[35]

Consequently, the case-law most often indicates that decisions to cancel tax liabilities are taken due to an important interest of the taxpayer if the life situation of the taxpayer justifies the cancellation. The taxpayer must not be at fault for this life situation. Moreover, the life situation must threaten their existence or that of their family. It may also lead to their use of social assistance. The NSA points out that it is advisable to place a particular emphasis on analysing taxpayer's family situation. Such an analysis should not be limited to extraordinary situations but should also take into consideration everyday life situation of the taxpayer since the taxpayer's interest in tax cancellation should not be restricted to extraordinary events.[36] On the other hand, it is stressed in the case-law that a mere failure of the taxpayer in private life cannot be considered as an important interest of the taxpayer.[37]

The second most common category of events justifying the existence of an important taxpayer's interest are broadly understood natural disasters or extraordinary random cases.[38] Tax liabilities may be cancelled, e.g. in the event of fire or illness.[39] However, it is worth noting that this category does not include cases related to the taxpayer's health problems if expenses incurred for rehabilitation purposes (including medicines) of the taxpayer are deductible from the

[33] Bartosiewicz, Kubacki, 'Usługi płatnicze', 48.

[34] Judgment (*wyrok*) of the NSA in Szczecin of 8 November 1995, no. SA/Sz 1044/95, Legalis no. 39757.

[35] Judgment (*wyrok*) of the NSA in Warsaw of 1 October 1999, no. III SA 7493/98, Legalis no. 52369.

[36] Judgment (*wyrok*) of the NSA of 10 March 2009, no. I FSK 31/08, Lex no. 537191.

[37] Dzwonkowski, Kurzac, in Dzwonkowski, *Ordynacja podatkowa*, 462.

[38] Zdebel, 'Warunki stosowania umorzeń płatności', 496.

[39] Judgment (*wyrok*) of the NSA in Poznań of 17 March 1994, no. SA/Po 3597/93, nr Lex 26142.

taxpayer's income.[40] These two categories of events justifying tax cancellation are related to the factual circumstances at the time of tax collection.

When considering the content of the clause of an important interest of the taxpayer, attention should be drawn to other general clauses. In particular, the principles of justice and ability-to-pay should be considered. In its judgment of 17 March 2004, the WSA in Wroclaw indicates that the ability-to-pay principle may lead the tax authority to cancel tax liabilities. The court states in its reasoning that the ability to pay a tax liability by a taxpayer should be taken into account when considering possible tax cancellation. According to the court, the tax authority should remember that if the payment of the tax liability interferes with the taxpayer's ability to pay, this will be a prerequisite for considering tax cancellation.[41]

In the case-law, the principle of fiscal justice is associated with the ability to pay. For example, in the judgment of 7 March 2014,[42] the WSA in Warsaw indicates that the issue of tax cancellation cannot be considered only from the perspective of the principle of the universality of taxation (*zasada powszechności opodatkowania*), as the tax authority did in this case. It is also necessary to refer to the principle of fiscal justice. Moreover, it is essential to keep in mind the taxpayer's ability to pay, which is determined by pragmatic aspects, including their economic, financial and social situation.

The courts postulate that tax cancellation should be effective, i.e. it should contribute to the improvement of the taxpayer's economic situation and strengthen their tax (financial) health. Such an opinion is expressed, for instance, by the NSA in its judgment of 13 July 1995,[43] which is based on the Taxes and Charges Management Act previously in force; however, it is still valid as confirmed in the legal literature.[44] In the judgment in question, the court refused to cancel tax liabilities since the taxpayer was at the final stage of the liquidation proceedings and the tax cancellation would not have had a positive impact on their financial health. Hence, it may be assumed by analogy that tax cancellation should not take place in the event of the taxpayer's insolvency.

A negative condition for tax cancellation is the taxpayer's non-compliance with the law. According to the NSA, there is no legal interest in cancelling the tax if the

[40] Judgment (*wyrok*) of the WSA in Olsztyn of 16 July 2008, no. I SA/Ol 157/08, Legalis no. 128594. In addition, the NSA states that cancer could not independently constitute a legal basis for tax cancellation. Judgment (*wyrok*) of the NSA of 22 March 2012, no. I FSK 1842/10, Lex no. 1145429.

[41] Judgment (*wyrok*) of the WSA in Wroclaw of 17 March 2004, no. I SA/Wr 4003/01, Legalis no. 170058.

[42] Judgment (*wyrok*) of the WSA in Warsaw of 7 March 2014, no. III SA/Wa 1626/13, Legalis no. 1064277.

[43] Judgment (*wyrok*) of the NSA in Łódź of 13 July 1995, no. SA/Łd 2191/94, Lex no. 26868.

[44] Dzwonkowski, Kurzac, in Dzwonkowski, *Ordynacja podatkowa*, 464.

taxpayer had enough money to pay tax liabilities but knowingly did not pay them on time. Otherwise, the taxpayer would be rewarded for unlawful behaviour.[45]

A noteworthy view on the interpretation of an important interest of the taxpayer and the public interest is expressed by Münnich, who acknowledges that the content of the term 'interest' plays a key role in this interpretation. In Münnich's opinion, such interest should be understood as an objective need to achieve a certain benefit in the form of a goal (or a state of facts) that embodies a particular value generally accepted by the given society. These clauses express two equivalent objective values, i.e. individual and public interest, which complement each other and fulfil the meta-clause contained in the Polish Constitution, i.e. the principle of the common good.[46] Pursuant to Article 1 of the Constitution, 'the Republic of Poland shall be the common good of all its citizens.'

The above-mentioned examples of judgments in cases concerning the interpretation of the requirements for tax cancellation allow to identify certain tendencies in the case-law. However, we must refer to the opinion of Zdebel that an important interest of the taxpayer and the public interest do not have one general descriptive meaning and require constant redefinition. Furthermore, it should be stressed that these clauses are repeatedly interpreted by referring to other general clauses or principles of law, including constitutional principles. The constant redefinition of the clauses and the lack of clear judicial approaches to these clauses prove the existence of a quasi-prerogative of the tax authority and the courts in this area. It also confirms the previously quoted opinion of M. Zimmermann that the clause of the public interest has a wide scope and allows the tax authority to cancel tax liabilities in a relatively free manner.

On the other hand, while interpreting the terms of an important interest of the taxpayer and the public interest, administrative courts refer directly to the legal principles incorporated into the Polish legal system, e.g. constitutional principles or the principles of justice and ability-to-pay. Therefore, Article 67a § 1 point 3 of the Tax Ordinance Act does not have to be understood only as a quasi-prerogative of the tax authorities and courts. It can also be perceived as a formal legal basis for tax cancellation when, notwithstanding Article 67a § 1 point 3 of the Tax Ordinance Act, it is justified by legal principles already contained in the Polish legal system, including the Constitution.

The provision of Article 67a § 1 point 3 of the Tax Ordinance Act is akin to the institution of dispensation. This conclusion is based on an assessment of the reasons, forms, and ways of limiting the possibility of applying tax cancellation. The above-mentioned case-law also supports this conclusion. Moreover, the NSA in its judgment of 21 September 2018[47] emphasises that the clause of an im-

[45] Judgment (*wyrok*) of the NSA of 30 October 2009, no. II FSK 805/08, Lex no. 570342.

[46] Münnich, *Nieostre zwroty ocenne*, 188.

[47] Judgment (*wyrok*) of the NSA of 21 September 2018, no. I GSK 1783/18, Legalis no. 1824465.

portant interest of the taxpayer should be associated with extraordinary, exceptional, unforeseen circumstances that make it impossible to pay off tax arrears. However, despite this conclusion, we should also agree with M. Zimmermann's opinion that the clauses of an important interest of the taxpayer and the public interest can be understood much more broadly and can also be based on further considerations, including those of a political or teleological nature.

As indicated in the previous chapter, the application of dispensation is linked to the application of general clauses. In the cases mentioned above, there are clauses of an important interest of the taxpayer and the public interest. This position does not interfere with the need for the constant redefinition of these clauses taking into consideration factual circumstances of the particular case. Dispensation applies, in principle, to atypical situations, so it is impossible to specify in advance the conditions for its application.

Considering the above, it is reasonable to take the view that tax cancellation is not a tax advantage.[48] The legal doctrine states that tax cancellation is a unique institution, since taxes must, in principle, be paid. Everyone must bear the burden of public services. According to Dauter, the application of tax cancellation is an act of refraining from enforcing the principle of equal taxation (*zasada równości opodatkowania*).[49] Nonetheless, it is hard to agree with this opinion as regards tax cancellations classified as dispensations.

The analysis carried out justifies the conclusion that tax cancellation under Article 67a § 1 point 3 of the Tax Ordinance Act may be related to either a legal norm or factual circumstances. The case-law under examination indicates that this provision is generally applicable to cancellations that are justified by the occurrence of certain facts at the time of collection of tax liabilities.

2. Steuererlass

Tax cancellation was already available in Germany under the Reich Fiscal Code of 1919,[50] which was the predecessor of the Fiscal Code of Germany of 1977 currently in force. Pursuant to § 108 point 1 of the Reich Fiscal Code, the minister of finance was entitled to cancel in whole or in part a tax liability in specific cases, e.g. a natural disaster, if the circumstances of the case showed that collection of the tax liability would have been unjust. Pursuant to the same provision, the minister of finance could transfer the right to tax cancellation to lower-level tax authorities.

[48] Dzwonkowski, Kurzac, in Dzwonkowski, *Ordynacja podatkowa*, 463.

[49] Dauter, in Babiarz, *Ordynacja podatkowa*, 426.

[50] Reichsabgabenordnung [Reich Fiscal Code] of 13 December 1919, German Reich Law Gazette 1919, part I, No. 242, 2018.

2.1. Scope of cancellation

At present, the tax authority is entitled to cancel tax liabilities through an administrative act (*Verwaltungsakt*) pursuant to §§ 163 and 227 of the Fiscal Code. Tax cancellation may concern either tax liabilities or possible default interest and it may apply to either percentage or nominal value.[51] Moreover, tax cancellation may be granted routinely or at the taxpayer's request, even though the taxpayer's consent for cancellation is not required.[52] The result of tax cancellation is the expiry of the tax liability, which, unlike the debt forgiveness agreement under § 397 of the BGB,[53] is a unilateral public law disposal of tax liability by the tax authority.

Tax cancellation is possible at the stage of tax liabilities assessment (*Festsetzung der Steuer*) under § 163 of the Fiscal Code and at the stage of its collection (*Erhebung*) under § 227 of the Fiscal Code. In practice, it means that the taxpayer may apply for tax cancellation during both assessment and collection proceedings, and the refusal to cancel tax liabilities at the assessment stage does not affect the possibility of tax cancellation at the collection stage, with one exception. The refusal at the assessment stage precludes cancellation at the collection stage unless it is based on other reasons than the previous refusal.[54] Thus, the legal literature indicates that § 227 of the Fiscal Code is applied more extensively and effectively.[55]

Pursuant to § 163 of the Fiscal Code, an administrative decision on tax cancellation is issued in parallel with a tax assessment notice establishing tax liabilities. The subject matter of the assessment is to determine tax liabilities of the taxpayer, and the subject matter of the tax cancellation procedure under § 163 of the Fiscal Code is partial or total cancellation of these tax liabilities. The possibility of tax cancellation does not formally affect the assessment. It is worth noting that the decision on tax cancellation is an independent administrative act and is not part of the tax assessment notice.[56]

The proceedings for assessing tax liabilities may be conducted in parallel with the proceedings for tax cancellation, even though both administrative acts ending the proceedings often constitute a single administrative act.[57] It is important to stress that, unlike the tax assessment notice, the Fiscal Code does not provide any legal form for tax cancellation. A decision on tax cancellation may even be

[51] Bodden, 'Steuergerechtigkeit', 1716.

[52] Gerber, *Stundung und Erlass*, 51.

[53] Bürgerliches Gesetzbuch [Civil Code] of 18 August 1896, consolidated text in Federal Law Gazette 2003, part I, 738.

[54] Rüsken, in Klein, *Abgabeordnung*, 1421.

[55] Cöster, in Koenig, *Abgabeordnung*, 1138.

[56] Rüsken, in Klein, *Abgabeordnung*, 1005.

[57] Ibid., 981.

of an implied nature.[58] However, it is commonly accepted that the tax authority issues a written decision in the event of refusal to cancel tax liabilities.[59]

There is no formal obstacle for the taxpayer to simultaneously initiate administrative appeal proceedings against the tax assessment notice indicating its illegality and against the refusal to cancel tax liabilities despite the illegality of tax liabilities.[60] Tax cancellation proceedings under § 227 of the Fiscal Code apply at the stage of tax collection (payment). If the tax liability has already been paid, tax cancellation under § 227 of the Fiscal Code will be granted by way of a tax refund or set off against other due taxpayer's liabilities. In extraordinary cases, it is admissible to cancel the already paid taxes for which the statute of limitations has passed. On the other hand, it is not allowed to cancel future tax liabilities on the basis of § 227 of the Fiscal Code as this legal provision concerns cancellation at the stage of tax collection.[61] This makes it difficult to grant the taxpayer a permanent cancellation. Thus, it brings this provision closer to the institution of dispensation.

Tax cancellation procedure does not have a suspensive effect on possible enforcement, even though it is conducted together with tax collection.[62] In addition, the application of other institutions of the Fiscal Code, such as deferment under § 222 of the Fiscal Code or temporary stay or limitation of enforcement under § 258 of the Fiscal Code, excludes the possibility of tax cancellation under § 227 of the Fiscal Code.[63] Unlike tax cancellation under § 163 of the Fiscal Code, tax cancellation under § 227 of the Fiscal Code does not have a direct effect on the tax assessment and does not modify such an assessment.[64]

It is worth noting at this point that the locally competent tax authority cancels tax liabilities, but tax cancellation usually requires the consent of higher-level tax authorities. The locally competent tax authorities may independently cancel tax liabilities up to EUR 20,000. Cancellation of tax liabilities between EUR 20,000 and EUR 100,000 requires the approval of a higher tax authority (*Oberfinanzdirektor*, in Bavaria *Landesamt für Steuer*). Finally, a cancellation of tax liabilities over EUR 100,000 requires the approval of the highest state tax authority (*Landesfinanzbehörde*).[65]

Since state tax authorities also collect federal taxes, in many cases it is necessary to obtain approval for tax cancellation from the federal tax authority. According to the letter from the Federal Ministry of Finance of 28 July 2003, any

[58] Ibid., 1004.

[59] Rainer Fritsch, in Koenig, *Abgabeordnung*, 1642.

[60] Bodden, 'Steuergerechtigkeit', 1717.

[61] Fritsch, in Koenig, *Abgabeordnung*, 1643.

[62] Ibid., 1641.

[63] Rüsken, in Klein, *Abgabeordnung*, 1418.

[64] Ibid., 1417.

[65] Schreibe vom 2. Januar 2004. Gleich lautende Erlasse der obersten Finanzbehörden der Länder [Letter of 2 January 2004: Equal Tax Cancellations of the Highest Financial Authorities of the States], Federal Tax Gazette 2004. part I, 29–30.

tax cancellation under § 227 of the Fiscal Code must be authorised by the Ministry. Depending on the type of tax liability, tax cancellation pursuant to § 163 of the Fiscal Code may require the approval of the Ministry. Generally, an approval is required if tax cancellation exceeds EUR 200,000 or EUR 400,000.[66]

2.2. Principle of equity

In proceedings conducted pursuant to §§ 163 and 227 of the Fiscal Code, a condition for tax cancellation is the principle of equity (*Billigkeit*). There is a common agreement in the German legal literature that, when cancelling a tax liability at the stage of its assessment, the tax authority should, above all, analyse the equity of the tax liability in the objective sense (*sachliche Billigkeit*). On the other hand, when cancelling a tax liability at the stage of its collection, the tax authority should primarily consider the equity of the tax liability in a subjective sense (*persönliche Billigkeit*), i.e. take into account the taxpayer's life situation.[67] Thus, there are two particular types of tax cancellation: (i) cancellation in connection with the legal norm imposing a tax liability for reasons of equity in the objective sense, and (ii) cancellation in connection with the factual circumstances of creation or collection of tax liabilities for reasons of equity in a subjective sense. Tax cancellation is also possible, among others, in connection with the factual circumstances of tax collection for reasons of equity in the objective sense, but this is relatively rare.

Unlike in Poland, tax cancellation under the German Fiscal Code is not conditional on the public interest or an important interest of the taxpayer. The German legal doctrine associates the public interest with the protection of fiscal interests of the State, although the tax authority usually does not refer to this issue refusing to cancel tax liabilities. The issue of taxpayer's interest is combined with the personal and economic situation of the taxpayer.[68] Moreover, the German legal doctrine also considers the possibility of tax cancellation within the scope of tax law as a 'safety valve' to guarantee compliance of tax law with fundamental rights (*Grundrechte*).[69]

[66] Schreibe vom Bundesministerium der Finanzen vom 28. Juli 2003 über Mitwirkung des Bundesministeriums der Finanzen bei Billigkeitsmaßnahmen bei der Festsetzung oder Erhebung von Steuern, die von den Landesfinanzbehörden im Auftrag des Bundes verwalten werden Nr. IV D – S 2 0457 – 17/03 [Letter from the Federal Ministry of Finance of 28 July 2003 on the involvement of the Federal Ministry of Finance in cancellation measures with respect to the assessment or collection of taxes administrated by the state finance authorities on behalf of the Federation, No. IV D – S 2 0457 – 17/03], Federal Tax Gazette 2001, part I, 401.

[67] Rüsken, in Klein, *Abgabeordnung*, 981.

[68] Gerber, *Stundung und Erlass*, 56–57.

[69] Christina Becker, *Der Steuererlaß nach § 227 Abgabenordnung* [Tax Cancellation under § 227 of the Fiscal Code], (Bern: Peter Lang 2003), 95.

2.3. The principle of equity in the objective sense

The reason for using tax cancellation on account of equity in the objective sense in German law is the abstract, general nature of statute as a legal act. The legal literature even indicates that any tax law provision of an abstract, general nature must lead to inevitable tax inequity. When adopting tax law in the form of a parliamentary statute, the parliament is forced to overlook the diversity of social relations through a generalised approach. However, such an approach may lead to a situation where the imposition or collection of tax liabilities in atypical cases could be unequitable (in the objective sense) only because of the content of a legal provision. German law generally considers this situation to be constitutional.

In specific cases, it is permitted to adjust tax liabilities with the help of tax cancellation.[70] While referring to this permission, Rainer Fritsch indicates that equity is justice in a particular case. Parliamentary statutes are by necessity of a general, abstract nature. Their application leads to equitable results in typical cases. Tax equity as a result of the rule of law is legally and factually impossible without adjustment under § 227 or, alternatively, under § 163, of the Fiscal Code.[71] The principle of justice in an individual case (*Einzelfallgerechtigkeit*) should be recognised on a par with the principle of statutory justice (*Gesetzgerechtigkeit*).[72] This formulation of the meaning of tax cancellation is consistent with the institution of dispensation. It is worth recalling that already in Roman law the institution of dispensation did not apply to cases provided for in the statutory law, but only to atypical cases.[73]

German courts, on the other hand, argue that the principle of separation of powers expressed in the Basic Law must be taken into account when the principle of equity is applied. Consequently, the principle of equity cannot apply to typical situations provided for in statutory law. The principle of equity cannot, therefore, serve to modify the general legal order determining tax liabilities, even if that order is unconstitutional.[74] This also applies to atypical cases which the lawmakers anticipated when adopting a statute.[75] In the past, the minister of finance invoked before administrative courts documents produced during the legislative process in order to demonstrate that the parliament had anticipated

[70] Judgment (*Urteil*) of the BFH of 23 November 1994, no. X R 124/92, Federal Tax Gazette 1995, part II, 82.

[71] Rainer Fritsch, in Koenig, *Abgabeordnung*, 1627.

[72] Cöster, in Koenig, *Abgabeordnung*, 1138.

[73] Sadowski, *Pojęcie dyspensy*, 82.

[74] Judgment (*Urteil*) of the BFH of 26 October 1994, no. X R 104//92, Federal Tax Gazette 1995, part II, 297.

[75] Fritsch, in Koenig, *Abgabenordnung*, 1630.

specific atypical situations referred to by the taxpayer in the tax cancellation request.[76]

The inequity of tax liabilities in the objective sense occurs when imposing the tax liability in the particular case is inequitable despite the fact that the determination of tax liabilities is consistent with grammatical, systematic, and teleological interpretation of law.[77] As the Federal Fiscal Court (*Bundesfinanzhof, BFH*) points out, if the taxpayer believes that legal norms related to their tax case conform with the Basic Law in a typical tax situation envisaged by the parliament but considers the tax liability in their particular, atypical case to be inequitable, the taxpayer may seek tax cancellation. The taxpayer may do so without first challenging the assessment notice on the equitable basis.[78] For this reason, the principle of equity cannot be applied in the event of typical or recurring tax situations.

At present, the German legal doctrine is critical of tax cancellation for reasons of equity, primarily due to the scale of using this institution and attempts to avoid the need for a broader interpretation of statutes.[79] Thus, if statutory provisions raise constitutional doubts, it is postulated to verify the correctness of the interpretation of the statutory provisions taking into consideration the case-law, or to initiate a constitutional review procedure, e.g. under Article 100 of the Basic Law, but not to apply tax cancellation under § 163 of the Fiscal Code. An exception to the above conduct should be made when statutory provisions comply with the Basic Law, but become unconstitutional in the event of unusual application.[80] This conduct correlates with the view that the principle of equity should not be used to achieve economic, social, or other purposes.[81] Also, the tax authority must be guided by the hypothetical will of the parliament deciding whether to cancel a tax liability. This assumption means that the tax authority should settle the atypical case by considering how the legislature would settle the case if it had to consider the atypical case at the law-making stage.[82]

Tax cancellation based on the principle of equity should not be used to correct an incorrect assessment notice after the expiry of the time limit for filing remedies such as an administrative appeal. On the other hand, as indicated above, tax

[76] Judgment (*Urteil*) of the BFH of 20 September 2012, no. IV R 29/10, *Deutsches Steuerrecht* 49 (2012), 2489.

[77] Judgment (*Urteil*) of the BFH of 15 February 1973, no. V R 152/69, Federal Tax Gazette 1973, part II, 466–467. and Judgment (*Urteil*) of the BFH of 21 January 1992, no. VIII R 51/88, Federal Tax Gazette 1993, part II, 4.

[78] Judgment (*Urteil*) of the BFH of 20 September 2012, no. IV R 29/10, *Deutsches Steuerrecht* 49/2012, 2488.

[79] Bodden, 'Steuergerechtigkeit', 1714.

[80] Rüsken, in Klein *Abgabeordnung*, 988.

[81] Ibid., 987–988.

[82] Judgment (*Urteil*) of the BFH of 20 September 2012, no. IV R 29/10, Deutsches Steuerrecht 49 (2012), 2489.

cancellation is not limited in time, and in some cases tax liabilities may be cancelled even after the expiry of the limitation period.[83] As in the case of final assessment notices, tax cancellation for reasons of equity cannot be justified by the excessive length of a particular tax proceeding or by the fact that the tax liability is assessed after a longer period of time since the tax liability arose.[84] In practice, the BFH allows tax cancellation in the exceptional cases of apparent and unambiguous irregularities in the administrative decision. Furthermore, remedial measures against this administrative decision must be impossible or pointless.[85] On the other hand, the application of tax cancellation for reasons of equity is excluded in the event of the taxpayer's failure to comply with procedural deadlines, e.g. to appeal against an assessment notice.[86] There are also no grounds for using tax cancellation to avoid a breach of EU law. As indicated in the legal literature, there is no legal basis in the EU legal order that would require the application of tax cancellation for reasons of equity to remove discrepancies between an assessment notice and EU law.[87] However, according to the case-law, a tax liability can be cancelled on account of an issue of an incorrect tax assessment notice if there is a fundamental breach of the principle of good faith (*Treu und Glauben*).[88] The possibility of applying tax cancellation in the above-mentioned exceptional cases makes this institution similar to the institution of dispensation.

Even though the case-law on tax cancellation for reasons of equity is extensive, it is difficult to indicate a common judicial approach in this respect.[89] In the event of possible application of the principle of equity, the tax authority must take into account not only principles of law and constitutional values but also factual circumstances in a particular case.[90] However, the taxpayer is not entitled to invoke the principle of equity in order to take advantage of, e.g. tax-loss carryforward or transfer of a tax loss from one source of income to another unless it is allowed under tax law.[91]

Judgments on tax cancellation that refer to constitutional values form the last group of tax cancellations under discussion. When dividing this group, it should be borne in mind that the application of tax statutes remains linked to the principle of equity. Therefore, constitutional conformity of tax statutes can

[83] Bodden, Steuergerechtigkeit', 1718.

[84] Rüsken, in Klein, *Abgabeordnung*, 992.

[85] Ibid., 990–991.

[86] Judgment (*Urteil*) of the BFH of 26 May 1994, no. IV R 51/93, Federal Tax Gazette 1994, part II, 834.

[87] Rüsken, in Klein, *Abgabeordnung*, 991.

[88] Judgment (*Urteil*) of the BFH of 20 September 2012, no. IV R 29/10, *Deutsches Steuerrecht* 49 (2012), 2490.

[89] Rüsken, in Klein, *Abgabeordnung*, 1003.

[90] Judgment (*Urteil*) of the BFH of 26 October 1994, no. X R 104//92, Federal Tax Gazette 1995, part II, 298.

[91] Rüsken, in Klein, *Abgabeordnung*, 1001–1002.

be ensured in a specific case or set of specific cases through the application of tax cancellation for reasons of equity.

Constitutional values should be understood as the principles expressed in the Basic Law, in particular: (i) the principle of equality of taxation, (ii) the ability-to-pay principle, (iii) the prohibition of over-taxation, and (iv) the protection of marriage and family.[92] There are, however, no legal grounds to grant tax cancellation to the taxpayer who objects to purchasing weapons for the army since the taxpayer has no right to refuse to pay tax liabilities by invoking the conscience clause.[93]

In the view of the outcome of the above analysis and the lack of the common judicial approach, it seems justified to agree with the opinion of Ulrich Koenig that German law allows tax cancellation for reasons of equity under conditions that can be divided into the following three groups: (i) violation of the purpose of a statute, (ii) violation of general legal principles, and (iii) violation of constitutional values.[94] Bearing in mind the above-mentioned general clauses and the fact that exercise of tax cancellation focuses on atypical or exceptional cases, it can be concluded that the institution of tax cancellation for reasons of equity in the objective sense may be classified as a dispensation.

The tax cancellation in question relates to the legal norm imposing tax liabilities. The reason for using this tax cancellation is not related to the factual circumstances of the cases. However, the consequences of the legal norm itself, i.e. the specific tax liability arising from this legal norm are contrary to the purpose of the parliamentary statute, general legal principles, or constitutional values.

Similarly to Poland, in Germany a general clause is a condition for the tax cancellation in question. However, there is no uniform case-law on defining this clause. Consequently, the existence of a quasi-prerogative of the tax authority and courts concerning tax cancellation is, to some extent, legitimate. On the other hand, the courts in their reasoning indicate that whatever tax cancellation decision is taken, a reference must be made to the provisions of parliamentary statutes, general legal principles, or constitutional values. Therefore, provisions of parliamentary statutes themselves and general legal principles, which are both sources of universally applicable law in Germany, should be regarded as grounds for tax cancellation. Hence, there is no quasi-prerogative in the case of tax cancellation for reasons of equity in the objective sense.

[92] Fritsch, in Koenig, *Abgabeordnung*, 1636.

[93] Judgment (*Urteil*) of the BFH of 6 December 1991, no. III R 81/89, Federal Tax Gazette 1992, part II, 303.

[94] Fritsch, in Koenig, *Abgabeordnung*, 1632.

2.4. The principle of equity in a subjective sense

The taxpayer's financial situation justifies tax cancellation for reasons of equity in a subjective sense. It is said in the legal literature that it is wrong to require the taxpayer to pay tax liabilities if he/she is unable to pay them without jeopardising his/her ability to cover subsistence costs or in an extreme case where his/her existence is at risk.[95] Tax cancellation for reasons of equity in a subjective sense must always meet two cumulative conditions, i.e. the need for cancellation (*Erlassbedürftigkeit*) and the dignity of cancellation (*Erlasswürdigkeit*).

The rationale for the need for cancellation consists of two elements. The taxpayer must not only be in a financial situation threatening their very existence, i.e. without current assets, but they must also be in a bad financial situation, i.e. without fixed assets. In many cases, the taxpayer is in a difficult financial situation but has fixed assets, e.g. real property, which excludes the possibility of applying for tax cancellation. In addition, there must be a connection between possible tax cancellation and elimination of a threat to the taxpayer's existence. It is worth noting at this point that the purpose of tax cancellation is to protect minimum living conditions. This protection is assumed to apply only to natural persons. Nonetheless, as indicated in the legal literature, it cannot be ruled out that a legal person may benefit from a tax cancellation if the existence of specific natural persons depends on this legal person.[96]

Tax cancellation for reasons of equity in a subjective sense may take place only if the collection of tax liabilities leads, or threatens to lead, to economic or personal 'liquidation' of the taxpayer.[97] In the case of a natural person, a financial situation endangering their existence occurs when the taxpayer does not have the means to support themselves and their family in terms of food, clothing, housing, medical care, necessary household equipment, and expenses related to obtaining the income.[98] The mere occurrence of a natural disaster does not determine the need to cancel tax liabilities, even though its occurrence should be taken into account when analysing the life situation of the taxpayers.[99] Further, the death of the taxpayer cannot independently constitute a basis for the cancellation of tax liabilities of their heirs.[100] It should be stressed that the subsequent improvement of the taxpayer's financial situation must not result in revoking of the already granted tax cancellation.[101]

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[95] Fritsch, in Koenig, *Abgabenordnung*, 1637.

[96] Rüsken, in Klein, *Abgabenordnung*, 1421.

[97] Judgment (*Urteil*) of the BFH of 6 September 2005, no. X B 22/05, BeckRS no. (2005) 25008811.

[98] Fritsch, in Koenig, *Abgabenordnung*, 1637.

[99] Ibid., 1639.

[100] Rüsken, in Klein, *Abgabenordnung*, 1422.

[101] Fritsch, in Koenig, *Abgabenordnung*, 1643.

The situation in which tax cancellation may be granted due to a threat to the existence of a legal person is a contentious issue in the legal literature. According to one view, tax cancellation cannot occur in the event of temporary payment problems.[102] The opposite view is that tax cancellation may be applied precisely in cases of temporary problems or may be addressed to the taxpayers who are not over-indebted. This opinion is supported by the limits of discretion that should not be exercised by the tax authority to rescue unprofitable entities.[103] While analysing the fulfilment of conditions for tax cancellation, it is undoubtedly necessary to consider the assets (balance sheet) of a legal person. In the case of a company, the assets of the parent company and its affiliates should also be taken into consideration.[104]

There is no need for tax cancellation in a situation where the taxpayer has assets at their disposal, e.g. where the taxpayer is in financial difficulties but has assets whose monetisation or encumbrance would change their situation. This concerns especially the elderly. Indeed, monetarisation or encumbrance of the taxpayer's assets should not lead to the loss of their essential assets,[105] which can be understood as the assets listed in § 90 of Book XII of the Social Code (*Sozialgesetzbuch*),[106] such as own flat, work tools, and objects satisfying scientific or cultural needs, as long as they are not luxurious. The obligation to monetise assets should not force the taxpayer, e.g. a pensioner, to a single payment of the entire life insurance. Tax cancellation is always beneficial to a particular taxpayer, but the society is burdened with its effects (costs). Therefore, the taxpayer should also consider taking other measures to pay tax liabilities, such as taking a loan or, in the case of an entrepreneur, monetising their private assets not used in business activity. In the case of married couples, the spouse's assets should also be considered.[107]

The existence of a cause-and-effect relationship between a possible tax cancellation and a change in the taxpayer's financial situation is of key importance to the application of tax cancellation under § 227 of the Fiscal Code. Tax cancellation is justified only if the tax burden is the cause of a taxpayer's financial problems. By contrast, there is no reason to cancel tax liabilities if the cancellation does not change the taxpayer's fiscal situation. In other words, if the taxpayer is over-indebted or has lost tax liquidity, there are no grounds to cancel such tax liability regardless of whether the taxpayer is charged with a specified

[102] Ibid., 1638.

[103] Rüsken, in Klein, *Abgabenordnung*, 1421.

[104] Fritsch, in Koenig, *Abgabenordnung*, 1637.

[105] Ibid., 1638–1639.

[106] Sozialgesetzbuch (SGB) Zwölftes Buch (XII) – Sozialhilfe [Social Code (SGB) Twelfth Book (XII) – Social Welfare] of 27 December 2003, Federal Law Gazette 2003, part I, No. 67, 3022–3071.

[107] Rüsken, in Klein, *Abgabenordnung*, 1422.

tax liability.[108] Moreover, tax cancellation should serve the taxpayer, not a third party, i.e. another creditor of the taxpayer.[109] If debts to other entities are several times higher that tax liabilities not paid by the taxpayer, it is assumed that tax cancellation is unacceptable.[110] On the other hand, tax cancellation is justified if the taxpayer regains financial capacity necessary to stop receiving social assistance as a result of the cancellation, e.g. by starting to work as a taxi driver.[111] The above-mentioned limitations on granting tax cancellation prevent the tax authority from frequently using of this institution. Such a limitation is materially relevant to the classification of tax cancellation as a privilege or dispensation.

As previously indicated, the fulfilment of the 'need for cancellation' condition is not sufficient to cancel tax liabilities under § 227 of the Fiscal Code. It is also necessary to fulfil the 'dignity of cancellation' condition. This condition should be understood in such a way that tax cancellation does not infringe on the public interest and the loss of 'ability-to-pay' by the taxpayer is not the result of their behaviour.[112] There is a lack of public interest in the case of tax cancellation where the burden of the tax liability falls on a third party (e.g. in the form of value-added tax) if the final consumer of goods or services has already paid the taxpayer the amount of money corresponding to the tax liability.[113] In practice, the issue of misbehaviour is more relevant to the 'dignity of cancellation' condition, which should be individualised for each taxpayer. When analysing the taxpayer's misbehaviour, the tax authority should bear in mind the age of the taxpayer, their illness, the dependence of third parties, fortuitous events, and their level of intelligence.[114]

Tax evaders are not allowed, in principle, to benefit from tax cancellation, even though committing a tax crime does not exclude a priori the possibility of tax cancellation.[115] Alcoholics, who are treated as sick people under German law, are eligible for tax cancellation. However, the 'dignity of cancellation' condition will not be met by a person who has not submitted tax returns except for one-off cases as well as disabled or elderly people. The condition of 'dignity of cancellation' also applies to entities conducting business activity. An entrepreneur who knowingly or with gross negligence has led their enterprise to financial difficulties should not benefit from tax cancellation. It is, however, assumed that taking

[108] Ibid., 988–989.

[109] Decision (Beschluss) of the BFH of 18 July 2002, no. V B 52/02, BeckRS no. (2002) 25000976.

[110] Carsten Farr, *Vollstreckungsschutz, Stundung und Erlass – sowie weitere Wege zur Wahrung steuerliche Rechte* [Protection against Enforcement, Deferral, Cancellation – and Other Ways of Protection of Tax Rights], (Berlin: Erich Schmidt Verlag 2014), 107.

[111] Judgment (*Urteil*) of the BFH of 27 September 2001, no. X R 134/98, Federal Tax Gazette 2002, part. II, 176.

[112] Fritsch, in Koenig, *Abgabenordnung*, 1639.

[113] Ibid., 1640.

[114] Farr, *Vollstreckungsschutz, Stundung und Erlass*, 109.

[115] Rüsken, in Klein, *Abgabenordnung*, 1423–1424.

a loan that is too high or making risky investments does not exclude the possibility of applying for tax cancellation.[116] The condition of dignity may be omitted in extreme situations, for instance, when tax collection results by itself in 'extermination' of the taxpayer (*existenzvernichtend sein*). In such a situation, the public interest supports tax cancellation.[117]

Based on the above analysis, it can be concluded that the general clause on the principle of equity in a subjective sense has fixed and predictable content. Therefore, it is necessary to rule out the existence of a prerogative as regards the tax cancellation in question. Moreover, tax cancellation for reasons of equity is based on a statute, and an administrative decision on tax cancellation is subject to interpretation by the tax authority and courts.

Tax cancellation for reasons of equity in a subjective sense should be classified as tax cancellation related to the factual circumstances of tax collection or, alternatively, to the factual circumstances of creation of tax liability. In this respect, it is similar to the Polish provision under Article 67a of the Tax Ordinance Act.

To sum up, tax cancellation as defined in the Fiscal Code by the German legislature should be considered as corresponding to the institution of dispensation. This view is not affected by the fact that the institution of tax cancellation is regulated in two separate provisions of the Fiscal Code. Under both provisions, tax liabilities may be cancelled for the same reasons, i.e. for reasons of equity in the objective and subjective sense. Similarly to the institution of dispensation, the tax cancellation in question is limited by the general clause on the principle of equity.

The relationship between the institution of tax cancellation and the institution of dispensation is particularly evident in the case of tax cancellation for reasons of equity in the objective sense. The purpose of this cancellation is to eliminate inequity in atypical cases that were not provided for in a parliamentary statute. In addition, since Roman law assumes that statutory law should regulate typical cases without exceptions, and the German legal literature indicates that the legislator, forced to ignore the diversity of social relations in statutory law, typifies them, we can thus notice a convergence of Roman and German legal regulations as regards typical and atypical cases.

3. Prominutí daně

In the Czech Republic, tax cancellation under provisions of tax law has changed significantly over the years due to legislative amendments. With the entry into

[116] Fritsch, in Koenig, *Abgabenordnung*, 1640.

[117] Rüsken, in Klein, *Abgabenordnung*, 1424.

force of the Tax Procedure Code on 1 January 2011,[118] the possibility to cancel tax liabilities under provisions of tax law was significantly limited. Pursuant to § 259 point 1 of the original version of the Tax Procedure Code, after 1 January 2011, tax cancellation was possible only if other particular statute so provided. However, no tax statute provided for this possibility. According to the explanatory statement to the bill of the Tax Procedure Code, the purpose of such a restriction concerning tax cancellation was to reduce the risk of corruption, remove inequalities and lack of transparency, reduce the workload of administrative bodies in connection with conducting tax cancellation proceedings, motivate the taxpayers to properly and timely pay their tax liabilities, and eliminate possible collisions with provisions of state aid law.[119]

The scope of tax cancellation was extended through an amendment to the Tax Procedure Code, which entered into force on 1 January 2015.[120] Since this amendment, it has been allowed to cancel default interests, but not tax liabilities themselves.[121] Therefore, within the scope of Czech tax law, the analysis will focus on the issue of cancellation of default interest related to tax liabilities.

3.1. Scope of cancellation

Currently, tax cancellation is regulated by §§ 259, 259b, and 259c of the Tax Procedure Code, and these provisions apply only to cancellation based on separate regulations and cancellation of default interest (*úroky z prodlení daně*). However, it should be stressed at this point once again that at present such separate provisions do not allow to cancel tax liabilities. Therefore, the analysis in this respect is theoretical, although it cannot be ruled out that some separate provisions will

[118] Daňový řád [Tax Procedure Code] of 22 July 2009, Collection of Laws no 280/2009.

[119] Důvodová zpráva (k návrhu zákona č. 267/2014) [Explanatory statement (to the bill no. 267/2014)], Chamber of Deputies paper no. 252/0 (2014), https://www.psp.cz/sqw/text/tiskt.sqw?o=7&ct=252&ct1=0, accessed 28 February 2020, pkt. 11.28.1.

[120] Zákon, kterým se mění zákon č. 586/1992 Sb., o daních z příjmů, ve znění pozdějších přepisů, a další související zákony [Act on the amendment of the Income Tax Act no. 586/1992 Coll. as amended and further related acts] of 23. October 2014, Collection of Laws no. 267/2014.

[121] The following legislative proposals have been notified in connection with legislative work on the reintroduction of tax cancellation. The amount of CZK 300,000 (approx. EUR 12,000) was proposed as the limit for tax cancellation. Consideration was also given to the introduction of an obligation to make any tax cancellation public. The following three cancellation principles were pointed out: reduction of corruption risk, transparency, and predictability. These proposals were not accepted because in the end the possibility to cancel tax liabilities was not reintroduced. Důvodová zpráva (k návrhu zákona č. 267/2014) [Explanatory statement (to the bill no. 267/2014)], Chamber of Deputies paper no. 252/0 (2014), https://www.psp.cz/sqw/text/tiskt.sqw?o=7&ct=252&ct1=0, accessed 28 February 2020, points 11.28.2–11.28.3.

be adopted in the future. Hence, this subchapter refers to hypothetical cancellation of tax liabilities.

The Tax Procedure Code in § 259 sets out basic rules for tax cancellation that apply to both types of cancellation (separate provisions and default interest). Pursuant to point 2 of that section, tax liabilities and incidental liabilities, including default interest, may be cancelled only between the date of creation of tax liabilities and the date of expiry of the limitation period. Hypothetical tax cancellation after the expiry of the limitation period is permitted only if a tax liability has been paid earlier. The legal literature indicates that tax cancellation should, in principle, take place in the course of ongoing tax proceedings, but it cannot be ruled out that tax cancellation would occur even before the tax proceedings are initiated.[122] Such cancellation is permissible because an assessment of tax liabilities is not a prerequisite for cancellation of tax liabilities.[123]

It should be pointed out that in the Czech Republic tax liabilities are assessed through a payment assessment (*platební výměr*) after conducting a fact-finding process (*nalézací řízení*) even if the amount of tax liabilities is determined on the basis of a tax return submitted by the taxpayer as part of self-assessment.[124] In practice, if the content of the payment assessment is consistent with the submitted tax return, the assessment is not delivered to the taxpayer and is retained on the taxpayer's file.

The Tax Procedure Code in § 259 point 3 specifies the permissible frequency of applying for possible tax cancellation. An application may be submitted no more than once every 60 days, and it must be based on other grounds than the previous application to avoid rejection. In the event of a refusal to cancel a tax liability, the taxpayer, pursuant to point 4 of the said section, is not entitled to appeal, but the refusal decision must state the reasons thereof.[125] Legal remedies (*oprávní prostředky*) against a favourable decision on tax cancellation are also not available to third parties.[126] However, the lack of available legal remedies should be understood as the lack of such remedies under the tax procedure. Currently, the taxpayer is entitled to file a court action (*žaloba*) over the refusal to cancel the tax liability. In the previous period, the NSS and the Constitutional Court had denied the taxpayer the right to challenge an unfavourable decision on tax cancellation, but in 2006 the case-law of the courts concerning the cancellation of default interests changed in favour of the

[122] Alena Schillerová, in Baxa, et al., *Daňový řád*, 1496.

[123] Lenka Matyášová, Marie Emilie Grossová, *Daňový řád s komentářem a judikaturou* [Tax Procedure Code with Commentary and Case-Law], (Prague, Nakladatelství Leges 2015), 987.

[124] Hrstková-Dubšeková, *Meritum Daňový řád*, 100.

[125] Schillerová, in Baxa, et al., *Daňový řád*, 1498.

[126] Judgment (*rozsudek*) of the NSS of 9 October 2009, no. 5 Afs 44/2009-64, Collection of the NSS Case-law no. 2249/2011.

taxpayer.[127] By contrast, hypothetical tax cancellation is still defined in the legal literature as a special measure of supreme authority (*speciální vrchnostenský prostředek*) to which no legal remedy is related.[128]

As there are currently no separate provisions allowing cancellation of tax liabilities, the institution of administrative cancellation in the Czech Republic cannot be classified as a privilege or dispensation. Nonetheless, it is worth noting that the limitation of the frequency of applying for tax cancellation, which is provided for in the Tax Procedure Code, is a feature of dispensation. However, the limitation actually means that an application can be submitted no more than once every 60 days, so the limitation is purely procedural and does not affect the ability to permanently use the institution of tax cancellation. Similarly, it is impossible to determine whether the tax cancellation is linked to a legal norm or factual circumstances and whether the legal basis for such cancellation is unrestricted and, consequently, a quasi-prerogative. Finally, we may conclude that cancellation of tax liabilities (principal amount) is not currently available for the taxpayer.

3.2. Default interest cancellation

As already indicated, since the amendment of the Tax Procedure Code entered into force on 1 January 2015, it has been permitted to cancel default interest. However, this possibility applies only to default interest arising after 1 January 2015.[129] Default interest arises by virtue of law, and the tax authority may not modify its amount.[130] The legal basis for cancellation of default interest is § 259b of the Tax Procedure Code, although cancellation is only permitted after the conditions specified in §§ 259b and 259c of the Tax Procedure Code are jointly fulfilled.

The possibility of cancelling default interest should not be confused with the cancellation of tax liabilities. However, given the comparative nature of this analysis, in the case of the Czech Republic it is reasonable to examine the regulation on default interest cancellation as some limited form of tax cancellation. Otherwise, this institution would have to be omitted, which would negatively impact the comprehensiveness of the comparative analysis undertaken in this book. Moreover, the regulation governing the cancellation of default interest in the Czech Republic is highly original compared to the regulations in the other

[127] Judgment (*rozsudek*) of the NSS of 24 May 2006, no. 1 Afs 85/2005-45, Collection of the NSS Case-law no. 1692/2006.

[128] Ondřej Lichnovský, Roman Ondrýsek, *Daňový řád. Komentář* [Tax Procedure Code: Commentary], (Prague: C.H. Beck 2016), 887.

[129] Matyášová, Grossová, *Daňový řád*, 996.

[130] Ibid., 994.

analysed countries, which also confirms the need for an analysis regarding default interest cancellation.

Before analysing the conditions for the cancellation in question, it should be noted that an application for cancellation of default interest, pursuant to annexe 1 point c to the Administrative Fees Act,[131] is subject to a fee of CZK 1,000 if the cancellation concerns an amount higher than CZK 3,000. The fee is charged on each type of default interest separately, e.g. separately from default interest related to income tax and default interest related to value-added tax. Further, the fee is charged separately for each taxpayer even if the taxpayers submit a joint application for the cancellation, e.g. in the case of cooperating spouses.

According to § 259b point 1 of the Tax Procedure Code, the formal conditions for default interest cancellation are payment of the tax liability and submission of an application for cancellation of default interest related to the overdue but already paid tax liability. Subsequently, pursuant to § 259c point 2 of the Tax Procedure Code, both the taxpayer applying for cancellation and all members of the taxpayer's executive body must be recognised as persons who have not seriously breached their tax obligations within the last three years. The Code does not specify how to understand a serious breach of tax obligations, but it is described in detail in the Internal Administrative Guideline no. GFŘ-D-21.[132]

Internal administrative guidelines, the so-called *pokyny* 'D,' have been issued by the General Financial Administration (*Generální finanční ředitelství*) since 2011 and are supplementary to statutes.[133] The 'D' guidelines are internal instructions binding the tax authority in those areas that are not explicitly regulated by statutes and other legal acts, or not regulated at all. For the taxpayers, they are for informative purpose only, i.e. they cannot formally be a source of the taxpayer's rights and obligations. These guidelines have been issued to harmonise the practice of the tax authorities after the introduction of new substantive or procedural statutory tax law. There is a particular need for issuing such guidelines in cases of divergent interpretations of the same provisions of law by different tax authorities or in case of frequently recurring discrepancies in the content of decisions issued by the tax authorities.[134]

According to the Guideline no. GFŘ-D-21, a serious breach of tax obligations within the meaning of § 259c point 2 of the Code occurs in the following cases:

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[131] Zákon o správních poplatcích [Administrative Fees Act] of 26 November 2004, Collection of Laws no. 634/2004.

[132] Pokyn GFŘ-D-21 k promíjení příslušenství daně [Guidelines GFŘ-D-21 on cancelling accessory tax liabilities] of 16 February 2015, no. 4260/15/7100–40123, https://www.financnisprava.cz/assets/cs/prilohy/d-zakony/Pokyn_GFR_D-21.pdf, accessed 28 February 2020.

[133] Marie Karfíkova, in Milan Bakeš et al., *Finanční právo* [Financial Law], (Prague: C.H. Beck 2012), 23–25.

[134] Jana Nedvědická, 'Správní uvážení v daňovém řízení', *Daně a právo v praxi*, 4 (2008), 35.

1. The taxpayer/member of the taxpayer's executive body is an unreliable taxpayer within the meaning of § 106a of the Goods and Services Tax Act;[135]
2. The taxpayer/member of the taxpayer's executive body has been convicted at least once for committing offences listed in § 53 point 2 a-c of the Tax Procedure Code;
3. The taxpayer/member of the taxpayer's executive body conducts or participates in an activity in connection with which there is a risk of non-payment of tax liabilities and, as a result, the tax authority has initiated proceedings to secure claims;
4. The taxpayer/member of the taxpayer's executive body has violated their statutory obligations, as a result of which tax liabilities in the amount of at least CZK 50,000 (approx. EUR 2,000) has had to be assessed by carrying out additional activities or estimation, or by concluding an agreement;
5. The taxpayer/member of the taxpayer's executive body has seriously hindered or prevented carrying out activities of the tax authority by repeatedly failing to submit tax returns, as a result of which the tax authority has called on the taxpayer to submit those returns. The repeated failure to submit tax returns should be understood as at least two non-submissions within 12 consecutive months;
6. The taxpayer/member of the taxpayer's executive body has violated provisions of the Accounting Act[136] and has been fined as a result;
7. The taxpayer/member of the taxpayer's executive body has been fined at least CZK 250,000 (approx. EUR 10,000) in connection with an offence related to tax or accounting issues;
8. The taxpayer/member of the taxpayer's executive body has failed to keep records, in particular an account book, despite the obligation to keep them resulting from a statute or having been imposed by the tax authority;
9. The taxpayer/member of the taxpayer's executive body has otherwise significantly threatened or violated the proper performance of tax obligations.

Since the above list of acts and omissions concerns all activities and omissions of the taxpayer/member of the taxpayer's executive body, including those not related to the subject of tax cancellation, it may be assumed that the Guideline introduces collective responsibility.[137] On the other hand, as regards violation of tax or accounting regulations, extraordinary circumstances should also be considered, such as natural disasters, ill health, or other personal reasons, which significantly individualises the above violations.

The Guideline is based on the legal presumption that if a legal person has 'committed' one of the acts listed above, this act has been committed by all mem-

[135] Zákon daní z přidané hodnoty [Goods and Services Tax Act] of 1 April 2004, Collection of Laws no. 235/2004.

[136] Zákon o účetnictví [Accounting Act] of 12 December 1991, Collection of Laws no. 563/1991.

[137] Matyášová, Grossová, *Daňový řád*, 999.

bers of its executive body. The members had to perform this function during the period of committing the act. For that reason, a verification for cancellation purposes cannot be limited to natural persons but must include all legal persons in which these natural persons have held executive positions for the last three years. As a side note, it is worth mentioning that in the Czech Republic a member of an executive body may also be another legal person.[138] This presumption may lead to the examination of an endless chain of legal persons in order to demonstrate the absence of a serious breach of tax obligations.

Fulfilment of the formal conditions specified in §§ 259b point 1 and 259c point 2 of the Tax Procedure Code determines neither whether a favourable decision on cancellation will be taken nor the amount of possible cancellation. When deciding on cancellation, the tax authority should take into account the following three criteria: the circumstances justifying the reason for cancellation (§ 259 point 2), the economic and social conditions of the taxpayer in which the collection of tax liabilities would be too 'severe' (§ 259b point 3), and the frequency of breaches of tax obligations by the taxpayer (§ 259c point 1). These criteria are listed in order of their importance. Cancellation may cover up to 100% of default interest. As indicated by the NSS in its judgment of 5 December 2008,[139] the tax authority should reduce the financial burden on the taxpayer by cancelling default interest when the objective social and economic situation of the taxpayer so requires.

The legal literature indicates that justified (*ospravedlnitelné*) reasons (circumstances) for default in paying tax liabilities are of a general clause nature.[140] However, the following analysis of the content of this clause does not confirm this opinion. An interpretation of this clause is provided once again in the Guideline no. GFŘ-D-21. The interpretation does not take the form of a descriptive definition or general guidance but of a table with examples of justified reasons for default and the respective percentages of possible cancellation.

Table 2. Justified reasons for default

No.	Justified reason for default	Amount of cancellation (%)
1	The taxpayer has made the payment of the tax liability under an incorrect title (*variabilní symbol*) or to an incorrect bank account. It does not apply to unclear payments.	100
2	The taxpayer could not fulfil their tax obligations due to ill health (permanent or temporary), which the taxpayer can prove.	100

[138] Dvořák, et al., O*bčanské právo hmotné*, 281.

[139] Judgment (*Rozsudek*) of the NSS of 5 December 2008, no. 2 Afs 99/2008–52.

[140] Lichnovský, Ondrýsek, *Daňový řád*, 890.

cont. tab. 2

3	The default concerns tax advances, but the tax liability itself has not arisen or has arisen in a lower amount than the paid advances.	70
4	The taxpayer has obtained permission to pay in instalments the tax liability related to the default interest in question.	20
5	The taxpayer was affected individually or collectively by a natural disaster within the calendar year in which the tax liability was to be paid. A natural disaster is considered to be one of the following: (i) unforeseeable fire, (ii) explosion, (iii) lightning strike, (iv) gale of over 75 km/h, (v) flood, (vi) flash flood, (vii) hailstorm, (viii) slope failure, (ix) landslide or rockslide, if not caused by industrial or construction activities, (x) damage caused by avalanches or earthquakes with a magnitude of at least 4 on the Richter scale.	100
6	The default interest has arisen in connection with a tax surcharge on transfer of real property ownership or on real property acquisition, and the taxpayer has paid on time the tax liability determined on the basis of previous real property valuations by a certified property valuer. However, the tax authority assesses the tax liability in a different amount due to defects in the valuer's valuation.	90
7	The default interest has arisen in connection with submission of an adjusted tax return (*dodatečné daňové tvrzení*) by the taxpayer without a request from the tax authority.	20
8	The default in payment of the tax liability related to default interest has not exceeded 15 calendar days.	30
9	The default interest related to the tax liability which is paid in instalments has arisen in connection with devolution of this tax liability from the bequeather to an heir; the default applies for the period from the date of the bequeather's death to the date on which the decision on inheritance becomes final.	100

This Guideline also indicates that the justification for the default has to be revised individually for each tax liability. It is worth noting that the tax authority under point III.3.A. of the Guideline in question is to examine whether the non-payment of the tax liability was justified on the maturity date of the tax liability and not on the date of possible cancellation. The above list gives examples where cancellation may be related to factual circumstances on the maturity date of the tax liability and not at the time of collection of the tax liability.

As a second criterion for determining the amount of cancelled default interest, the tax authority must consider the economic and social situation of the taxpayer for whom the collection of the tax liability would be too 'severe.' The tax authority is obligated to take this situation into account even if the criterion of a justified reason for default provides for the cancellation of 100% of default interest. Conversely, the economic and social situation does not need to be rou-

tinely verified by the tax authority. Such a situation is to be analysed only at the taxpayer's request.[141] However, unlike the criterion of a justified reason for default, the economic and social situation is considered as at the date of issuing a decision on cancellation. This criterion is clearly and formally defined in the Guideline. The basis for determining the economic and social situation of the taxpayer is their income within the meaning of the Income Tax Act.[142] The taxpayer's income for the previous calendar year is divided by twelve times the minimum wage. Then, the taxpayer has the right to cancellation of a percentage of default interest in accordance with the following table:

Table 3. Economic and social situation of a natural person

No.	The amount of natural person's income	Amount of cancellation (%)
1	up to 12 times the minimum wage	50
2	between 12 and 24 times the minimum wage	40
3	between 24 and 48 times the minimum wage	30
4	over 48 times the minimum wage	20

Furthermore, when determining the economic and social situation of the taxpayer, the tax authority should consider whether the taxpayer had the right to spread the payment of the already paid tax liabilities into instalments. If the taxpayer met this condition, possible cancellation should be increased by 50%. This reduction does not apply to the period of payment of tax liability in instalments. Pursuant to § 157 point 1 of the Tax Procedure Code, default interest is not paid for the period of payment of tax liabilities in instalments.

The frequency of breaches of tax obligations by the taxpayer is the third and last criterion for cancelling default interest. As with the criterion of a justified reason for default, the Guideline includes a compilation of particular situations and the percentages by which default interest should be reduced in the event of cancellation.

Once the legal status of the taxpayer is examined, and all the three criteria are considered, the percentages are added together. As an example of the calculation, the Guideline describes the case of a taxpayer who has not paid their tax liability on time due to hospitalisation. The taxpayer has earned 48 times the minimum wage in the last calendar year and has been fined four times in the last three years for not submitting tax returns on time. Since the default has been justified, the taxpayer is entitled to cancellation in the amount of 100%. Addi-

[141] Matyášová, Grossová, *Daňový řád*, 996.

[142] Zákon České národní rady o daních z příjmů [Act of the Czech National Council on Income Tax] of 20 November 1992, Collection of Laws no. 586/1992.

tionally, he is entitled to cancellation in the amount of 30% due to his social and economic situation. Unfortunately, the cancellation has to be reduced by 50% as a result of late submissions of the tax returns. As a result, the taxpayer is 'entitled' to cancellation of 80% of default interest.

Table 4. Breach of tax obligations by the taxpayer

No.	Type of breach of tax obligations	Amount of cancellation (%)
1	As at the date of issuing a decision on default interest cancellation, the tax authority's records indicate that the taxpayer is in arrears with another tax liability.	–50
2	In the last three years, the taxpayer's tax liabilities have been assessed at least twice through additional means of inquiry (*pomůcky*) within the meaning of § 98 of the Tax Procedure Code without the participation of the taxpayer, regardless of the amount of these tax liabilities.	–50
3	In the last three years, disciplinary sanctions under § 247 of the Tax Procedure Code have been imposed on the taxpayer at least twice.	–50
4	In the last three years, the taxpayer has been validly punished at least twice for failure to fulfil non-monetary obligations under § 247a of the Tax Procedure Code.	–50
5	In the last three years, the taxpayer has been validly penalised at least twice for late submission of their tax return pursuant to § 250 of the Tax Procedure Code.	–50

As previously indicated, the Guideline no. GFŘ-D-21 is unambiguous. This makes it possible to decide on cancellation of default interest, but only in typical situations. Therefore, as the NSS indicates in its judgment of 7 September 2012,[143] the tax authority, in justifying its decision to refuse cancellation, should not limit itself by referring only to the Guideline, but should refer directly to the Tax Procedure Code, which takes precedence over internal administrative guidelines.

According to the Guideline no. GFŘ-D-21, decisions on default interest cancellation must be taken in accordance with point 3.3 letter f of the Internal Anti-Corruption Programme of the Financial Administration of the Czech Republic of 29 April 2014.[144] Pursuant to this programme, decisions on cancellation should be made by a committee of at least three members. The committee is also obliged to draw up minutes of the meeting concerning a specific cancellation.

[143] Judgment (*rozsudek*) of the NSS of 7 September 2012, no. 2 Afs 55/2012-24, Collection of the NSS Case-law no. 3251/2012.

[144] Interní protikorupční program Finanční správy České republiky [Internal Anti-Corruption Programme of the Financial Administration of the Czech Republic] of 29 April 2014, no. 19086/14//7000-01200, https://www.financnisprava.cz/assets/cs/prilohy/fs-financni-sprava-cr/IPP_FS_CR_UZ_D5.pdf, accessed 28 February 2020.

As pointed out in the legal doctrine, cancellation of default interest should not infringe the principle of legitimate expectation. Cancellation should be treated as an exception to this principle. Moreover, cancellation may not serve to blur the differences between the taxpayers who pay tax liabilities correctly and on time and other taxpayers. Hence, according to Lenka Matyášová and Marie Emilie Grossová, it is not permitted to create an impression on the part of the taxpayer that default interest will be cancelled.[145]

The discussion carried out so far in this chapter leads to the conclusion that the model of administrative cancellation adopted in Czech law is of a different nature compared to the other analysed legal systems, since Czech law does not provide for any possibility of cancelling tax liabilities (principal amount of tax liabilities) by a unilateral act of the tax authority. Such a possibility has been limited only to default interest, which, because of the Guideline no. GFŘ-D-21, is on the one hand transparent, but on the other hand very schematic and repeatedly not applicable in an atypical situation. The Guideline is presented narrowly, because a characteristic feature of this Guideline is its high level of detail.

The general clause on the justified reasons (circumstances), which is used in the Tax Procedure Code lacks substance. Therefore, the analysed institution does not correspond to the structure of the institution of dispensation. This is mainly due to the inability to cancel a tax liability and the lack of a real general clause that would determine the scope of the cancellation in a flexible way. On the other hand, the limited availability of cancellation precludes classification of this institution as a privilege.

Given the current regulations, it is justified to claim that the institution of tax cancellation is treated as a pardon/privilege in the Czech Republic, so the legislator has decided to limit its application. It is also characteristic of Czech regulation that the possibility of cancellation is associated with the occurrence of the maturity date of tax liabilities and their collection. Cancellation related to a legal norm imposing a tax liability, i.e. related to the application of a statute, plays a marginal role. The marginal role of this type of cancellation can be explained by the proposal that only the parliament should have the right to cancel tax liabilities in such a case, for instance, through amendments to tax statutes. The position of Václav Boněk confirms the above opinion.[146]

3.3. Dispute over tax cancellation

In the Czech legal literature, there is a dispute over the scope of possible tax cancellation. Jaroslav Kratochvíl explicitly calls for restoration of the possibility

[145] Matyášová, Grossová, *Daňový řád*, 995.

[146] Václav Boněk, 'Ještě jednou k prominutí daně a jejího příslušenství' [Once more on cancellation of taxes and their accessories], *Daňový expert*, 5 (2008), 18.

of individual tax cancellation. He indicates that the possibility to cancel only default interest is insufficient to respond effectively to injustice and disproportionate severity (*tvrdost*) of taxation in specific cases. Since the legislature cannot foresee all cases, the possibility of cancelling the tax would facilitate the work of the tax authorities and increase the taxpayer's confidence in the tax system. On the other hand, the above-mentioned author stresses that restoration of the institution of tax cancellation is not only a matter of legislative technique but also of political will.[147] The presented view may also be understood as an expression of the need to introduce the institution of tax cancellation into Czech law, albeit in the form of dispensation.

In 2008, i.e. before the entry into force of the current Tax Procedure Code, Boněk was critical about the possibility of tax cancellation. In his opinion, problems related to legal ambiguity should be removed by amendments to statutory law or by the case-law, and through the institution of tax cancellation. He also emphasises that tax cancellation in specific cases significantly increases expenditure on the administration of the tax authority and causes corruption. In the case of applying the institution of tax cancellation, he proposes to use measurable criteria such as minimum subsistence level or state of insolvency. Boněk also claims that most of the legal systems do not know the institution of tax cancellation, which is a questionable view given the considerations in this book.[148]

According to Boněk, two issues deserve special attention. Firstly, there are problems with the risk of corruption and a lack of transparency in the practice of assessment and collection of tax liabilities, a view that we must, unfortunately, agree with. Secondly, it is proposed to introduce an identical standard of detail to the content of parliamentary statutes imposing and cancelling tax liabilities. Boněk suggests that if there is a need to cancel a tax liability, it should be cancelled only through amendments to tax statutes passed by the parliament. In other words, the parliament should be given the exclusive right to cancel tax liabilities. As demonstrated in Chapter II, this view is already of a historical nature and stems from the proposal to give the parliament the exclusive right to impose tax liabilities. This proposal, however, has already been implemented in Czech law and there is no justification for extending the proposal to cancellation of tax liabilities.

[147] Jaroslav Kratochvíl, 'Je potřebný a možný návrat individuálního prominutí do daňového řadu' [It is required and possible to return to tax cancellation in the Tax Procedure Code], *Daně a právo v praxi*, 4 (2014), 23.

[148] Boněk, 'Promitnutí daně a jejího příslušenství', 18.

4. Extra-statutory concessions

English statutes, i.e. Acts of Parliament, do not regulate the institution of tax cancellation. In reality, the English tax authorities have relatively broad power to mitigate the harshness of tax liabilities imposed on the taxpayers. The first documented case of such a mitigation took place in 1793.[149] As these mitigations do not have a specific legal basis, they are collectively referred to as 'extra-statutory concessions,'[150] which for the purposes of this book will also be called tax cancellation. Currently, the concessions are issued by the tax authority of the UK government, i.e. Her Majesty's Revenue and Customs, who have duties of care and management of the taxes.[151] In addition, the concessions must be formally approved by the minister of finance, i.e. the Chancellor of the Exchequer.[152]

4.1. Legal basis

Hypothetically, such concessions in England are based on Article 1 point 1 of the Tax Management Act 1970. According to this Article, 'income tax, corporation tax and capital gains tax shall be under the care and management' of the tax authority, which automatically entitles the tax authority to cancel tax liabilities.[153] Article 5 and 9 of the Commissioners for Revenue and Customs Act 2005 may also be considered as a legal basis for tax cancellation, even with a slightly broader scope. This Act regulates the exercising of the function of the Commissioners, who are employees of the tax authority. Pursuant to Article 5 of this Act, the Commissioners are responsible for collecting and managing revenue, which also includes tax liabilities. Then, according to Article 9 of the Act, the Commissioners 'may do anything which they think necessary or expedient in connection with the exercise of their functions,' which means that they also have the right to cancel tax liabilities.

In fact, from a formal point of view, given the considerations made in the previous chapters, it should be assumed that these concessions have no legal basis. This assumption is suggested, e.g. by their name and the fact that they are the result of the tax authority's practice.[154] In 1947, Stafford Cripps denied the

[149] Stephen Daly, 'The life and times of ESCs: defence?', in Peter Harris, Dominic de Cogan, *Studies in the History of Tax Law. Vol. 8*, (Oxford: Hart Publishing 2017), 169.

[150] Lymer, Oats, *Taxation*, 20.

[151] David Tallon, Ian Young, Paul Elliott, Dinesh Dave, *Inland Revenue Practices and Concessions. Volume 1*, (Harlow: Longman 1985), 6b.

[152] Ibid., 14.

[153] *Halsbury's Laws of England. Capital Gains Tax*, (London: Lexis Nexis UK 2011), Vol. 6, 1046.

[154] Jonathan Law, *Oxford Dictionary of Accounting*, (Oxford, Oxford: Oxford University Press 2016), 188.

existence of a legal basis for these concessions. According to him, they had been issued 'without any particular legal authority under any Act of Parliament but by the Inland Revenue under my authority.'[155] This position is confirmed by Judith Freedman, who believes that 'it continues to be assumed that a valid concession may go beyond the law in some circumstances.'[156]

4.2. Reasons for granting concessions

Article 160 point 2 of the Finance Act 2008 is of crucial importance for determining the substance of an extra-statutory concession, since this article defines such concessions. A concession is to be understood in accordance with a statement of the tax authorities 'that they will treat persons as if they were entitled to … a reduction in a liability to a tax or duty … to which they are not, or may not be, entitled in accordance with the law.' Moreover, pursuant to point 3 of the above Article, the statement of the authorities is to be understood broadly and should include, for instance, a statement of practice, an interpretation, a decision, or a press release, even if such statement is not described as an extra-statutory concession.

The concessions are of general application, but they are caused by specific circumstances of a particular case. Most of the concessions address one of the following problems:

- minor anomalies under statutory law;
- transitory anomalies under statutory law;
- case of hardship at the margins of statutory law where the application of statutory remedies would be difficult or disproportionate to the importance of the case.[157]

The legal literature points out that the tax authority conventionally indicates the above reasons for cancellation, although this is not a complete list. Tax cancellation may take place in order to resolve practical problems related to the functioning of the tax system. Concessions can also be used to avoid potential abuse of law through strict application of the law by the tax authority. In practice, the tax authority does not distinguish between concessions granted as individual concessions and as class concessions, even though the former are sometimes even called remissions or waivers. Similarly, the tax authority does not distinguish between published and unpublished class concession. It is worth noting that since 1944 the tax authority has been publishing lists of tax cancellations that are now available on the Internet. The first publication of these

[155] Hansard, HC Deb vol. 466, col 2267 (6 July 1949).

[156] J. Freedman, J. Vella, HMRC's Management op. cit., 111.

[157] Daly, 'The life and times of ESCs', 176–178.

lists coincided with the establishment by Parliament of the Select Committee on Statutory Instruments.[158] The lists of published cancellations resemble in their form statutory law,[159] and are updated twice a year.[160] It should be stressed that these lists do not contain all tax concessions. There are situations where the tax authority publishes a proposal to revoke concessions that have never been published before.[161]

4.3. Types of concession

Currently, there are two lists of extra-statutory concessions in force: one applies to income taxes and is called 'extra-statutory concessions,' while the other applies to tax on goods and services and is called 'VAT Notice 48.' Both lists are available in the latest versions on the tax authority's website.[162] The former list of concessions is divided into 11 parts, marked with successive letters of the alphabet:

A. concessions applicable to individuals (income tax and interest on tax);
B. concessions applicable to individuals and companies (income tax and corporation tax);
C. concessions applicable to companies etc. (corporation tax and income tax);
D. concessions relating to capital gains (individuals and companies);
E. concessions relating to estate duty;
F. concessions relating to inheritance tax (also applicable where tax charged is capital transfer tax);
G. concessions relating to stamp duties;
H. concessions relating to development land tax (individuals and companies);
I. concessions relating to petroleum revenue tax;
J. concessions relating to capital transfer tax only.[163]

Chronologically, the first list of concessions was published in 1944 and contained 65 items. Until this list was published, many authors had questioned the existence of the institution of tax cancellation as a systemic phenomenon. As David Williams points out 'prior to 1944, the existence of extra-statutory concessions resembled in some ways the life of the plesiosaurs that are supposed to inhabit Loch Ness. Everyone believed they existed, but no one could actually catch one.'[164] The list in question indicates that the concessions described therein are of

[158] Bar, *Sądowa kontrola administracji*, 82.
[159] John Tiley, Glen Loutzenhiser, *Revenue Law*, (Oxford: Hart Publishing 2012), 49.
[160] Tallon, et al. *Inland Revenue*, 6b.
[161] Daly, 'The life and times of ESCs', 190–191.
[162] Morse, et al., *Davies: Principles of Tax Law*, 48.
[163] Tallon, et al., *Inland Revenue*, 1001.
[164] Williams, 'Extra Statutory Concessions', 137.

general application and the individual concessions not included in the list may be used in exceptional circumstances.[165] In 1984, the extra-statutory concessions list already contained 170 concessions and the VAT-48 list included 39 concessions.[166] The list of concessions of 6 April 2018[167] contained 312 items and the VAT-48 list of 12 September 2017[168] included 37 items.

It is neither appropriate nor possible to present all tax cancellations herein. However, it is advisable to analyse some of the cancellations to illustrate their diversity and the effect of their application. A good example is ESC F8 concession called 'Accumulation and Maintenance Settlements,' which is already obsolete. Under English law, accumulation and maintenance (A&M) trust allows transferring property, e.g. from grandparents to grandchildren on favourable terms regarding inheritance tax. However, a trust may be qualified as an A&M trust only if one or more of its beneficiaries become entitled either to interest on a possession or to a share of the capital of the trust at an age not exceeding 25 years.[169] Therefore, it is common to specify the age of the beneficiary directly in the trust document, but in some anomaly cases there is no such record in the trust document, or an even higher age of the beneficiary is stipulated. According to this concession, the tax authority does not have to verify the content of the trust document. It can rely on the fact that the beneficiary effectively becomes entitled to the interest or share before or at the age of 25.[170] This concession is, therefore, an example of tax cancellation related to the norms of procedural law. Another example is ESC B56 concession, which concerns the outbreak of foot-and-mouth disease in sheep in 2001.[171]

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[165] *A List of Extra-Statutory Wartime Concessions Given in the Administration of Inland Revenue Duties*, (London: His Majesty's Stationery Office 1944), 2.

[166] Tallon, et al., *Inland Revenue*, 6b.

[167] 'Extra-Statutory Concessions', *GOV.UK*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/733377/Extra_Statutory_Concessions.pdf, accessed 28 February 2020.

[168] 'VAT Notice 48: Extra Statutory Concessions', *GOV.UK*, https://www.gov.uk/government/publications/vat-notice-48-extra-statutory-concessions/vat-notice-48-extra-statutory-concessions, accessed 28 February 2020.

[169] 'Tolley®Exam Training' *Reed Elsevier UK 2015*, http://www.tolleytaxtutor.co.uk/taxtutor/files/subscriber/personal-tax/uk-trusts-and-estates/lectures/1d10.pdf, accessed 28 February 2020, 99.

[170] Daly, 'The life and times of ESCs', 176.

[171] The English income tax introduces a presumption known as the herd basis rule, according to which newly bought sheep slaughtered before entering the flock are treated as trading stock, which makes them a source of income. Unfortunately, during the foot-and-mouth disease (FMD) outbreak in 2001, the main reason for slaughtering sheep not entered into a flock was FMD disease, which is why in reality no income was generated on the part of farmers. This concession enabled farmers to treat such animals as if they had entered the herd before slaughter. Consequently, such slaughter did not result in new income on the part of farmers. *Inland Revenue, Tax Bulletin*, issue 55 (2001), 890–891.

As previously indicated, many concessions are not included in the above lists. They are often of an individual nature, as in the case of the concession granted to the University of Greenwich. The University rented accommodation to students during the academic year. If accommodation is provided to students, the rental is a zero-rate service as far as VAT is concerned. The university has obtained a concession that allows it to rent student accommodations to non-students during the summer months as zero-rate service.[172]

It is worth noting the concession marked as ESC A19, which entitles the tax authority to cancel income tax arrears or capital gains tax arrears if the arrears have resulted from the tax authority's failure to make proper and timely use of the information supplied, e.g. by the taxpayer or their employer.

When analysing individual concessions, it is also worth noting that, according to the legal literature, using some specific concessions poses a risk of favouritism, acting ultra vires, or failure to publish concessions.[173] In practice, the problems of non-publication of concessions are particularly evident. Practitioners admit that the tax authorities repeatedly offer them class concessions that have not been published.[174] A well-known example of favouritism towards a particular social group is awarding barrister pupils the right to be tax-free during the first six months of pupillage.[175] It should be stressed, however, that the legal professions are beneficiaries of many concessions.[176] Hence, it is reasonable to assume that the described examples of tax cancellation are of a privileged nature. This is due to political and teleological reasons, although specific concessions may be of a dispensation nature.

The practice of not publishing class concessions may be well illustrated by the events that took place in Parliament in 1984–1985. During a debate in Parliament, the ministry of finance indicated that in 1984 there were only three class concessions in use that were not published. As a result of strong pressure exerted by Parliament, the Government agreed to set up a committee to verify the issue of unpublished concessions in use. The report of May 1985 showed that there were 27 unpublished class concessions.[177]

4.4. Extra-statutory agreements

The tax authorities often conclude extra-statutory tax agreements with the taxpayers. Like concessions, tax agreements also have no specific legal basis. The

[172] Daly, 'The life and times of ESCs', 177–178.

[173] Ibid., 187.

[174] Ibid., 190.

[175] Richard Vallat, et al., *Taxation and Retirement Benefits Guidance*, (London: The General Council of the Bar of England and Wales 2016), 18.

[176] Tallon, et al., *Inland Revenue*, 2601.

[177] Ibid., 6a.

exception is the settlement of an appeal to the General or Special Commissioners. Pursuant to Article 54 of the Tax Management Act 1970, the inspector or another proper officer of the Crown and the taxpayer may come to an agreement if the taxpayer has given notice of appeal and the appeal has not yet been determined by the Commissioner (the appeal authority).

The possibility of concluding a tax agreement was formally accepted for the first time in 1982 in the case of R (National Federation of Self-Employed and Small Businesses Ltd) v Inland Revenue Commissioners.[178] In this case, the House of Lords allowed for the possibility of concluding an agreement, i.e. a special arrangement between the tax authority, the employers, and the trade unions. According to this arrangement, 'the men were to give their true names for the future and pay their future taxes: but they were given an amnesty for much of past. They were to be let off most of the past tax of which they had defrauded the Revenue.'

As with the concessions, the publicity of these agreements is limited. While publishing the list of the tax agreements, the tax authority informs that they can be read in the Inland Revenue Library in Somerset House (currently Bush House). Their content is not available in any other form.[179] Such agreements are usually disclosed in connection with their judicial reviews.

An example of a tax agreement that plays an essential part in determining the applicability of this institution is the agreement concluded with the three Al Fayed brothers. This agreement is subject to review by the Court of Session in Scotland.[180] Two of the brothers are neither tax resident nor domiciled in the United Kingdom, but they are involved in some business activities in the UK, e.g. in the Harrods Group. Only Mohammed Al Fayed is tax resident and domiciled in the UK. However, all three brothers carry out international activities. They have domestic and foreign income that is subject to income and capital gain taxes. Due to the nature of the income and international position of the Al Fayed brothers, they can relatively easily avoid taxation of this income in the UK. Therefore, the tax authority concluded a tax agreement with them dated 22 and 28 April 1997, according to which the Al Fayed brothers would individually pay a specified lump sum of money on account of income tax and capital gains tax in the UK in the period 1997–2003 and the tax authority would accept it. However, the tax authority later took an action not to be bound by the agreement, citing lack of competence to conclude such an agreement. The tax authority claims that the agreement is by its nature ultra vires since concluding a forward tax agreement, i.e. an agreement regarding future tax liabilities is not a proper way to exercise duties of care and management by the tax authority. Al Fayed brothers

[178] R. v. Inland Revenue Commissioners, ex p. National Federation of Self-Employed and Small Businesses Ltd., [1981] 2 WLR 722.

[179] Tallon, et al. *Inland Revenue*, 2401.

[180] Al Fayed v Advocate General for Scotland (representing the IRC), [2004] ScotCS 278.

argue that they have legitimate expectations based on this agreement. Moreover, the agreement is not so unfair as to amount to an abuse of power. The court holds that the tax authorities have the right to conclude agreements relating to the transactions and circumstances of the case but occurring in the past. The conclusion of such agreements is part of the duties of care and management. Agreements on future events should be treated differently. The court argues that in such a case the tax authority does not really know how much it cancels. In addition, the circumstances and law itself may change in the future, which precludes the legitimacy of granting tax cancellation and, consequently, concluding an agreement.

On the other hand, the court does not exclude a priori any possibility of concluding a forward tax agreement, even though such an agreement should take into account future changes in the circumstances and law and should allow the tax authority to carry out a genuine and realistic tax assessment in the future. The agreement in question does not meet these conditions. It provides the Al Fayed brothers with the right to pay a fixed lump sum of tax in the following years, which is ultra vires, and the doctrine of legitimate expectation does not apply. As the court stated, a taxpayer cannot have legitimate expectation that they will be entitled to an ultra vires relaxation of a statutory requirement. To sum up, the court sets a limit on a possible privilege related to tax cancellation, indicating where a tax agreement is allowed. In addition, the possibility of concluding an agreement between the tax authority and the taxpayer on future transactions and circumstances without the restriction indicated above would create the possibility of granting the taxpayer a permanent tax privilege.

4.5. Legal nature of concessions

Extra-statutory concessions are described in the legal literature as a curiosity, since 'they are not law, but in practice they prevail over the law.'[181] They may be challenged only through judicial review. Furthermore, concessions were criticised by the Tax Law Simplification Committee.

A radical opinion in this regard was expressed by David Williams: 'Most of the extra-statutory concessions are illegal. That they exist at all in either overt or covert form is a matter of concern. That they not only exist, but grow regularly, in open contradiction to the rule of law, cannot but reflect on the quality of the executive that creates them and the polity that tolerates them.'[182]

In the case-law that has developed over the decades, there are examples of judicial reasoning that either affirm the institution of concession (tax cancella-

[181] Morse, et al., *Davies: Principles of Tax Law*, 48.

[182] Williams, 'Extra Statutory Concessions', 144.

tion) or criticise this institution.[183] An example of a strongly critical view of tax cancellation is the judgment of Adrian John Wilkinson v The Commissioners of Inland Revenue, in which judge Alan Moses points out that 'taxation by the executive, and not by the elected, has led to war.'[184] This point of view demonstrates that for part of English legal doctrine, the issue of tax cancellation (extra-statutory concessions) is of similar political and social importance to the imposition of taxes. As indicated in Chapter II, the imposition of taxes without Parliament's approval has been a source of many conflicts, including wars. An opposite opinion is presented by Kenneth Diplock, who repeatedly indicates that one of the reasons for issuing concessions is simply their practicality. In his opinion, when granting concessions, the tax authority comes properly within the ambit of its duty of care and management of taxes.[185] Furthermore, it is pointed out that Parliament does not have time to deal with all concessions, and the issue of particular concessions may be inappropriate for the legislative processes due to their triviality, temporariness, or complexity.[186] The legal literature even claims that 'the unseemly haste, inexpert debate and lack of proper examination which accompanies the annual Finance Bill makes it inevitable that the Act will be coupled with explanatory literature and followed up by concessions.'[187]

The position of Alexander Johnston, former head of the tax authority, can be considered as moderate. In his view, concessions are a positive phenomenon, but they should only help in tax administration and should not allow the tax authority to change the law. Johnston's opinion may be understood as a proposal to use concessions only as a dispensation. A similar position is expressed by Stephen Daly, who indicates that concessions are an important element of the tax system. However, according to him, the problem is not concessions themselves but ensuring that they are used for their proper purpose.[188] It is worth noting that concessions violate the strict letter of the law, but they are always in favour of the taxpayer.[189]

Considering the position taken by Diplock, we should agree with the opinion that Parliament pays little attention to the institution of extra-statutory concessions. The current system of parliamentary oversight was established as early as 1897 in connection with the granting of the first reported extra-statutory concession on the assets remaining after the death of the Russian Emperor Alexander III.[190] As agreed, the tax authorities have been required to inform annually

[183] Ibid., 141.
[184] Adrian John Wilkinson v The Commissioners of Inland Revenue [2002] EWHC 182.
[185] Daly, 'The life and times of ESCs', 181–182.
[186] Ibid., 185.
[187] Tallon, et al., *Inland Revenue*, 9.
[188] Daly, 'The life and times of ESCs', 193–194.
[189] Tallon, et al., *Inland Revenue*, 11.
[190] Ibid., 11.

the Comptroller & Auditor General of all concessions exceeding GBP 50 stating the reasons for tax cancellation. In turn, the General, using their discretion, has been reporting to the Committee of Public Accounts any case where it has been reasonable that particular concessions should be brought to the Committee's attention. The Committee may initiate a legislative process to put the concession on a statutory footing. Unfortunately, practice has shown that these bodies have focused their work only on the possibility of putting concessions on a statutory footing and not on the question whether the tax authority exceeded its discretionary power in issuing the concessions.[191]

The administrative cancellation in English law takes the form of a prerogative that is currently exercised by the tax authority subordinate to the UK government. It is important to note that the very name of the tax authority—Her Majesty's Revenue and Customs—indicates that the tax authority is now symbolically subordinate to the Crown. The view that administrative cancellation in England is of a prerogative nature is supported by the lack of a clear legal basis in parliamentary statutes, even of a carte blanche type, for the tax authority to cancel tax liabilities. In fact, the cited legal literature explicitly points out that there is no such basis.

On the other hand, dispensation as a model of administrative cancellation in England must be rejected. The tax authority refers to general clauses (e.g. minor or transitory anomalies or cases of hardship at the margins), which it follows when cancelling tax liabilities. Nonetheless, in the legal literature, it is indicated that tax liabilities are also cancelled in other cases where there is no link to such clauses. Cancellation in many cases is just necessary for practical collection and management of taxes.[192] Therefore, it must be concluded that these clauses lack substance, and the purpose of administrative cancellation in England is primarily to implement government policies rather than the clauses mentioned earlier.

In conclusion, since England is the only country in question to have maintained a state of continuity since the Middle Ages, gradual changes can be observed in the meaning of tax cancellation in English law. With the adoption of the Bill of Rights 1688, the possibility to impose tax liabilities without Parliament's consent was excluded. The year 1944 saw the publication of the first list of concessions that had not officially existed before. In the 1980s, Parliament dealt with the issue of publication of all class concessions by the Government. The Court of Session of Scotland in the case of Al Fayed has significantly limited the possibility to cancel future tax liabilities through a tax agreement. At the same time, the institution of concession in its current form is criticised in the legal literature.

[191] Daly, 'The life and times of ESCs' 192–193.

[192] Ibid., 175.

The example of English law confirms that it is now possible to cancel tax liabilities without a legal basis in a parliamentary statute, i.e. based on a prerogative. The institution of extra-statutory concession shows that tax cancellation does not have to be limited by a general clause but can be exercised by the tax authority for political or teleological reasons. Therefore, it should be assumed that tax cancellation exercised by the tax authority in England is generally of a privilege nature.

Under English law, it is not feasible to classify as concessions cancellation in connection with a legal norm or cancellation in connection with factual circumstances due to the very diverse nature of these cancellations. It is worth noting that tax cancellation may also be related to a procedural legal norm that has not been observed in the other legal systems under discussion. The analysis of English law also points to the problem of lack of transparency in granting tax cancellation, which has been indicated earlier in the discussion of the Czech law system.

5. Acceptilation

English law allows, under further conditions, for cancellation of tax liabilities through concluding an agreement between the tax authority and the taxpayer. In the legal systems of other countries under consideration, i.e. Poland, Germany, and the Czech Republic, there are no such regulations within tax law. On the other hand, in these countries it is hypothetically possible to cancel tax liabilities with the help of a debt forgiveness agreement, although it should be stressed that it is a contract law institution, not a tax law institution. Therefore, it is not an institution explicitly dedicated to tax liabilities. This institution is regulated by Article 508 of the Polish Civil Code (*zwolnienie z długu*), § 397 of the German BGB (*Erlassvertrag*), and §§ 1995-1997 of the Czech OZ (*prominutí dluhu*). In English law, a debt forgiveness agreement is not treated as an independent legal institution, but only as a gift.[193]

The origin of the debt forgiveness agreement is the Roman law institution of *acceptilatio*. The subject of *acceptilatio* was the expiry of a legal obligation without the creditor achieving the expected satisfaction. *Acceptilatio* was concluded through a ceremonial reciprocal exchange of the debtor's question and the creditor's answer.[194] *Acceptilatio* could only apply to oral contracts. Furthermore, *ac-*

[193] Wojciech Dajczak, Tomasz Giaro, Franciszek Longchamps de Berier, *Prawo rzymskie. U podstaw prawa prywatnego* [Roman Law: At the Roots of Private Law], (Warsaw: Wydawnictwo Naukowe PWN 2016), 464.

[194] Małgorzata Pyziak-Szafnicka, in Adam Olejniczak, ed., *System Prawa Prywatnego. Tom 6. Prawo zobowiązań – część ogólna* [System of Private Law, Volume 6: Law of Obligations–General Part], (Warsaw: C.H. Beck 2014), 1605.

ceptilatio, in its original form, was of a receipt nature. In this case, the creditor confirmed receiving performance of an obligation despite its actual failure. It was not until the Roman Empire that the institution of *acceptilatio* began to function as a contract with the direct aim to terminating obligations (liabilities as regards pecuniary obligations).[195]

A similar result in Roman law was also achieved through the conclusion of an agreement to the contrary (*contrarius consensus*), which resembles the modern institution of termination of contract by mutual agreement.[196] The legal literature indicates that there may have existed other institutions similar to *acceptilatio*, but there are no reliable legal sources about them.[197]

Currently, in the analysed legal systems, the institution of debt forgiveness is also of a contractual nature, so it requires a mutual declaration of will of both parties. It is not possible to unilaterally forgive debt in Poland, Germany,[198] and the Czech Republic.[199] The main effect of debt forgiveness is the expiry of the obligation, even though, pursuant to § 397 (2) of the BGB, negative acknowledgement of debt (*negatives Schuldanerkenntnis*) is also available. The purpose of such debt forgiveness is not expiry of debt but recognition that there is no obligation.[200]

The institution of debt forgiveness agreement could theoretically be used for tax cancellation. However, the tax laws of the above countries do not provide for this possibility. In the case of German law, the legal literature clearly states that tax cancellation taking the form of an agreement (a contract) between the tax authority and the taxpayer is not permitted, but this issue is not expressly regulated by law. It is pointed out that such an agreement would require a legal basis in a statute, which is currently lacking. If the tax authority concluded such an agreement, it would be considered as void.[201]

Tax cancellation in the form of a debt forgiveness agreement should also be considered unacceptable under Polish and Czech law. Pursuant to Article 7 of the Polish Constitution in conjunction with Article 120 of the Polish Tax Ordinance Act, the tax authority acts only on the basis of statutory law, and currently

[195] Paul Jörs, Wolfgang Kunkel, *Römisches Recht* [Roman Law], (Heidelberg: Springer 1949), 197.

[196] Dajczak, et al., *Prawo rzymskie*, 464.

[197] Jörs, Kunkel, *Römisches Recht*, 197.

[198] Przemysław Drapała, 'Zwolnienie z długu' [Debt Forgiveness], *Przegląd Sądowy*, 7/8 (2002), 114.

[199] Tomáš Kindl, in Jíři Švestka, Jan Dvořák, Josef Fiala, et al., eds., Občanský zákoník: Komentář. Svazek V [Civil Code: Commentary, Volume V], (Prague: Wolters Kluwer 2014), commentary to § 1997, point 1.

[200] Pyziak-Szafnicka, in Olejniczak, et al., *System Prawa Prywatnego. Prawo zobowiązań – część ogólna*, 1615.

[201] Gerber, *Stundung und Erlass*, 57.

there is no provision in statutory law authorising the tax authority to conclude a debt forgiveness agreement. Similarly, § 5 (1) of the Czech Tax Procedure Code obliges the tax authority to act solely on the basis of law, and there is no legal provision allowing the tax authority to enter into such an agreement. Moreover, the Czech Tax Procedure Code does not provide for the possibility of tax cancellation at all, except for default interest.

6. Summary

6.1. General comments

The compared legal systems of Poland, Germany, the Czech Republic, and England differ significantly from each other regarding the scope of possible tax cancellation in the form of administrative cancellation and conditions for such an action, as shown in the table below.

Table 5. Scope and conditions for tax cancellation under public law

No.	Country	Scope of cancellation	Conditions for cancellation
1	Poland	due tax liabilities	In the public interest, understood as: – fiscal interest of the State – protection of values, including constitutional values Due to an important interest of the taxpayer, understood as: – bad life situation of the taxpayer through no fault of their own – natural disasters or extraordinary random cases – the principle of justice – the ability-to-pay principle
2	Germany	tax liabilities	For reasons of equity in the objective sense, i.e. if the result of tax assessment in a particular case is atypical and results in a violation of: – the purpose of a parliamentary statute – general legal principles – constitutional values For reasons of equity in a subjective sense, i.e. if, at the stage of tax collection, the following conditions are jointly fulfilled: – the need for cancellation – the dignity of cancellation

cont. tab. 5

3	the Czech Republic	default interest	The following conditions are jointly met: 1. tax liability is already paid 2. there are no serious breaches of tax obligations within the last three years 3. a good 'point score' for: – justified reason for default – economic and social situation of the taxpayer – frequency of breaches of tax obligations by the taxpayer
4	England	tax liabilities	Officially determined by the tax authorities: – minor anomalies under statutory law – transitory anomalies under statutory law – cases of hardship at the margins of statutory law where the application of statutory remedies would be difficult or disproportionate to the importance of the case An analysis of the issued concessions shows that there are no restrictions regarding the possible reasons for tax cancellation.

First of all, it is worth referring to the two extreme models of administrative cancellation, i.e. the English and the Czech models. In England, tax cancellation may be granted by the tax authority relatively freely. The reason for that freedom can be tracked back to the rapid transition from absolute monarchy to constitutional monarchy in the 17th century. This quick change prevented the formation of a model absolute monarchy in England and, consequently, there was no need to dismantle it, including the royal prerogatives typical of an absolute monarchy. The importance of the institution of prerogative for tax cancellation is reinforced by the fact that judicial review of tax cancellation decisions is significantly limited compared to other legal systems, in which the tax authority is bound by discretion, as indicated in Chapter IV.

The scope of tax cancellation in England indicates that extra-statutory concessions may be of a privilege or dispensation nature; however, they are mostly of a privilege nature, and there is no clear difference in this respect. Likewise, tax cancellation in England may be connected with a legal norm or factual circumstances of creation or collection of tax liabilities. Cancellation may also take place in connection with a procedural legal norm, which is not the case in the other compared legal systems. Therefore, it should be assumed that among all the legal systems compared, administrative cancellation is most commonly used in England.

The opposite of the English model is the Czech model, in which tax cancellation granted by the tax authority is currently not permitted. Only default interest can be cancelled. The Czech legal literature points out that this situation is the result of an attempt to reduce corruption and increase transparency of the tax

authority's activities.[202] The reason for this may be an attempt to harmonise the requirements for parliamentary approval for imposition and cancellation of tax liabilities. As the scope of the comparative analysis undertaken in this book does not include constitutional law issues, it is impossible to decide here whether the situation in the Czech Republic results from constitutional requirements, legal doctrine, or historical experience. Nonetheless, it is worth noting that both the Czech Republic and Germany are 'heirs' of absolute monarchies. In Germany, as the comparative analysis above has shown, administrative tax cancellation is of a dispensation nature, i.e. it is available but to a limited extent.

The provisions of Czech law entitle the tax authority to cancel default interest. These regulations are characterised by far-reaching details, which makes it challenging to apply them in atypical cases. On the other hand, the possibility to take advantage of tax cancellation is significantly limited by numerous exclusions where tax cancellation cannot take place. Hence, it is hard to unambiguously classify these regulations as dispensation or privilege.

The performed examination of the Internal Administrative Guideline no. GFŘ-D-21 has revealed that tax cancellation may occur only in connection with factual circumstances. This Guideline is an example of an attempt to regulate cancellation at the same level of detail as is the case of provisions imposing tax liabilities in law statutes. However, the guidelines are not statutes. On the other hand, these guidelines significantly limit the tax authority's discretion in cancelling default interest and introduce precise conditions for cancellation and the amount of cancellation.

In the context of the compared legal systems, Polish regulations of the institution of administrative cancellation are of a moderate nature. On the one hand, pursuant to Article 67 § 1 point 3 of the Polish Tax Ordinance Act, it is theoretically permitted to cancel tax liabilities on the basis of two general clauses: the public interest and an important interest of the taxpayer, which allow for broad application of this institution. On the other hand, administrative practice on this issue, which has been judicially reviewed, does not confirm broad application of the institution. Hence, it leads to the classification of this institution as quasi-dispensation. This position is confirmed by Münnich's opinion that the tax authority very rarely cancels tax liabilities.[203] It is worth discussing the impact of the experience of the First Polish Republic as a country without absolute monarchy on the formation of such a model of administrative cancellation.

Pursuant to Article 67a of the Tax Ordinance Act, tax cancellation is in practice most often connected with factual circumstances of creation or collection of

[202] Důvodová zpráva (k návrhu zákona č. 267/2014) [Explanatory statement (to the bill no. 267/2014)], Chamber of Deputies paper no. 252/0 (2014), https://www.psp.cz/sqw/text/tiskt.sqw?o=7&ct=252&ct1=0, accessed 28 February 2020, points 11.28.2–11.28.3, and Boněk, 'Promitnutí daně a jejího příslušenství', 18.

[203] Münnich, *Nieostre zwroty ocenne*, 189.

tax liabilities. Nonetheless, it cannot be ruled out that tax cancellation may be connected with the legal norm imposing tax liabilities.

Administrative cancellation in Germany is based on §§ 163 and 227 of the Fiscal Code and is similar to the model of dispensation. It refers to the general clause, i.e. the principle of equity and its purpose is to ensure justice in specific, atypical cases as opposed to statutory justice, which is of a general nature. The above purpose of cancellation is entirely consistent with the regulations of canon law. Taking into consideration the institution of dispensation, it is also of particular importance that the German law separates cancellation for reasons of equity in the objective and subjective sense. This separation confirms that cancellation may be connected with a legal norm (simple inequality of statutory law) in a specific, atypical case or it may be connected with atypical factual circumstances related to the taxpayer. The carried out analysis of the legal literature and the case-law indicates that administrative cancellation in Germany applies in exceptional cases, which concern in particular tax cancellation for reasons of equity in a subjective sense. In such a situation, tax cancellation is only possible if the following conditions are jointly fulfilled: (i) the need for cancellation and (ii) the dignity of cancellation, which underlines the nature of this institution as a dispensation.

6.2. Quasi-prerogative

The existence of a legal basis for administrative cancellation (or lack of it) needs to be discussed separately. As indicated earlier, the regulation of Article 67a of the Polish Tax Ordinance Act is based on the condition of the public interest and an important interest of the taxpayer. The public interest is a general clause with a wide scope and allows the tax authority to cancel tax liabilities in a relatively arbitrary manner. Consequently, it is reasonable to assume that the legal basis for tax cancellation is a quasi-prerogative since the legal basis contained in Article 67a of the Polish Tax Ordinance Act is of a carte blanche nature. A separate issue is that in practice the tax authority uses this institution with caution. On the other hand, while interpreting this clause, the courts refer, among other things, to constitutional principles, which indicates that provisions of the Polish Constitution may ultimately also be the legal basis for tax cancellation.

German law shows that the problem of a quasi-prerogative may be solved by referring to statutory law interpreting general clauses. In reading §§ 163 and 227 of the German Fiscal Code, German courts refer to the purpose of legal provisions imposing a tax liability, to general legal principles, or to constitutional principles. Such references are possible because tax cancellation under the above sections is of a dispensation nature.

As indicated in Chapter III, dispensation in a specific case excludes the application of a legal norm that should apply. Such exclusion is not illegal. The legal basis for this exemption derives from the legal system itself and its most obvious source may be the constitution. Therefore, in the case of Poland, it may be worth introducing a direct reference to provisions of the Polish Constitution in Article 67a of the Tax Ordinance Act while obviously preserving these provisions in the said article as a dispensation.

Chapter VI

Administrative tax cancellation granted by the minister of finance

The issue of tax cancellation granted by the minister of finance is excluded from Chapter IV for reasons of clarity of the analysis. Moreover, the need for a separate analysis of this type of cancellation is supported by the position of the minister of finance in public administration. The Polish and Czech legal systems provide for cancellation of tax liabilities by the minister of finance.

1. Cancellation by the MF under Polish law

Pursuant to Article 22 § 1 point 1 of the Tax Ordinance Act, the minister of finance may, by way of an ordinance (a form of secondary legislation), waive the collection of tax liabilities (*zaniechać poboru podatku*) in whole or in part in cases justified by an important interest of the taxpayer or public interest. Given the operative rule adopted in the Introduction, such a regulation is a form of tax cancellation. A cancellation based on an ordinance must specify the type of tax being cancelled, the period the cancellation applies to, and the group of addressees of the cancellation. Therefore, an administrative cancellation based on a regulation is not addressed to a particular addressee,[1] although the ordinances cited in footnotes 2 and 3 do not confirm this. The content of these ordinances indicates that the cancellations they envisage are generally linked to the legal norm regarding the creation of tax liabilities.

Similarly to the tax cancellation under Article 67a of the Tax Ordinance Act, the minister of finance may waive the collection of tax liabilities only if it is justified by an important interest of the taxpayer or public interest. These provisions have the same meaning as given in Article 67a of the Tax Ordinance Act.

[1] Henryk Dzwonkowski, Jagoda Kondratowska, in Dzwonkowski, *Ordynacja podatkowa*, 273.

The minister of finance regularly issues ordinances on tax cancellation. He issued six such ordinances in 2018[2] and another six in 2019.[3] These ordinanc-

[2] Rozporządzenie Ministra Finansów w sprawie zaniechania poboru podatku dochodowego od osób fizycznych od niektórych przychodów (dochodów) otrzymanych na łagodzenie zagrożenia bezpieczeństwa publicznego, w tym zagrożenia pożarowego, w zdewastowanych lasach niestanowiących własności Skarbu Państwa [Ordinance of the Minister of Finance on waiving the collection of personal income tax on certain revenues (income) received to mitigate public security threats, including fire hazard in devastated forests not owned by the State Treasury] of 8 February 2018, Journal of Laws 2018, item 363; Rozporządzenie Ministra Finansów w sprawie zaniechania poboru wpłat z zysku od niektórych zysków z tytułu dotacji celowych [Ordinance of the Minister of Finance on waiving the collection of profit payments for certain profits arising from targeted subsidies] of 25 June 2018, Journal of Laws 2018, item 1248; Rozporządzenie Ministra Finansów w sprawie zaniechania poboru podatku od czynności cywilnoprawnych od umowy sprzedaży lub zamiany waluty wirtualnej [Ordinance of the Minister of Finance on waiving the collection of tax on civil law transactions imposed on a contract of sale or exchange of virtual currency] of 11 July 2018, Journal of Laws 2018, item 1346; Rozporządzenie Ministra Finansów w sprawie zaniechania poboru podatku dochodowego od niektórych dochodów uzyskanych w następstwie wykonywania umów offsetowych [Ordinance of the Minister of Finance on waiving the collection of income tax on certain income from the performance of offset agreements] of 12 September 2018, Journal of Laws 2018, item 1778; Rozporządzenie Ministra Finansów w sprawie zaniechania poboru podatku dochodowego od osób fizycznych od nagród otrzymanych przez żołnierzy Powstania Warszawskiego [Ordinance of the Minister of Finance on waiving the collection of personal income tax on awards received by soldiers of the Warsaw Uprising] of 12 September 2018, Journal of Laws 2018, item 1781; and Rozporządzenie Ministra Finansów w sprawie zaniechania poboru podatku dochodowego od osób fizycznych od dochodów (przychodów) z tytułu stypendiów otrzymywanych w ramach programu „Erasmus+" [Ordinance of the Minister of Finance on waiving the collection of personal income tax on income (revenues) from scholarships received under the 'the Erasmus+' programme] of 15 October 2018, Journal of Laws 2018, item 2114.

[3] Rozporządzenie Ministra Finansów w sprawie zaniechania poboru podatku dochodowego od niektórych dochodów uzyskanych w następstwie wykonywania umów offsetowych [Ordinance of the Minister of Finance on waiving the collection of income tax on certain income from the performance of offset agreements] of 7 January 2019, Journal of Laws 2019, item 41; Rozporządzenie Ministra Finansów w sprawie zaniechania poboru podatku dochodowego od osób fizycznych od dochodów (przychodów) z tytułu nagród za przyczynienie się do szybkiej likwidacji chorób zakaźnych zwierząt [Ordinance of the Minister of Finance on waiving the collection of personal income tax on income (revenues) from awards for contributing to the rapid eradication of infectious animal diseases] of 29 April 2019, Journal of Laws 2019, item 815; Rozporządzenie Ministra Finansów, Inwestycji i Rozwoju w sprawie zaniechania poboru podatku dochodowego od osób fizycznych od dochodów (przychodów) z tytułu niektórych stypendiów i innych środków finansowych przyznanych przez Narodowe Centrum Nauki [Ordinance of the Minister of Finance, Investment and Development on waiving the collection of personal income tax on income (revenues) from certain scholarships and other financial resources granted by the National Science Centre] of 14 October 2019, Journal of Laws 2019, item 1982; Rozporządzenie Ministra Finansów, Inwestycji i Rozwoju w sprawie zaniechania poboru podatku dochodowego od osób fizycznych od nagród otrzymanych przez Powstańców Warszawskich [Ordinance of the Minister of Finance, Investment and Development on waiving the collection of personal income tax on awards received by soldiers of the Warsaw Uprising] of 18 October 2019, Journal of Laws 2019, item 2092; Rozporządzenie Ministra Finansów w sprawie zaniechania poboru podatku dochodowego od osób fizycznych od

es concern, among others, awards received by soldiers of the Warsaw Uprising, benefits received as a part of promotion of employment, or acquisitions of fixed assets and services within the framework of the offset agreements.

Tax cancellation under an ordinance of the minister of finance should only apply to tax liabilities that are not yet due. In other words, it does not apply to tax arrears,[4] but this view is disputed in the legal literature. Dzwonkowski claims that waiving of tax collection may occur at any time and is not limited to undue tax liabilities.[5] According to Etel, the possibility of applying tax cancellation under Article 22 of the Tax Ordinance Act to future tax liabilities determines the nature of this institution.[6] This allows the minister of finance to establish permanent tax cancellation, which the minister does in practice, e.g. in the Ordinance of 14 October 2019 on waiving the collection of personal income tax (…) granted by the National Science Centre.[7] In this ordinance, the entire period from 1 January 2019 to 31 December 2020 is subject to cancellation. As Münnich points out, the minister of finance is increasingly granting income tax preferences when it comes to income earned incidentally by narrow groups of taxpayers.[8] A characteristic feature of this privilege is the fact that it is granted for a longer period of time and not in an individual case.

It needs to be pointed out here that in the original version of the Tax Ordinance Act, pursuant to Article 22 § 2, the tax authority was also entitled to waive, in whole or in part, the assessment of tax liabilities or their collection. This provision also applied to future tax liabilities so that tax cancellation could be permanent. However, based on this provision, the NSA in its judgment of 17

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niektórych dochodów (przychodów) otrzymanych na podstawie przepisów o promocji zatrudnienia i instytucji rynku pracy [Ordinance of the Minister of Finance on waiving the collection of personal income tax on certain income (revenues) received under the provisions on promotion of employment and labour market institutions] of 23 December 2019, Journal of Laws 2019, item 2522; and Rozporządzenie Ministra Finansów w sprawie zaniechania poboru podatku dochodowego od niektórych dochodów spółek kapitałowych powstałych przekształcenia samodzielnych publicznych zakładów opieki zdrowotnej [Ordinance of the Minister of Finance on waiving the collection of income tax on certain corporate income resulting from the transformation of independent public health care centres] of 23 December 2019, Journal of Laws 2020, item 12.

[4] Etel, *Ordynacja podatkowa*, 359 and Bogusław Gruszczyński, in Babiarz, ed., *Ordynacja podatkowa*, 244.

[5] Dzwonkowski, Kondratowska, in Dzwonkowski, ed., *Ordynacja podatkowa*, 273.

[6] Etel, *Ordynacja podatkowa*, 359.

[7] Rozporządzenie Ministra Finansów, Inwestycji i Rozwoju z dnia 14 października 2019 r. w sprawie zaniechania poboru podatku dochodowego od osób fizycznych od dochodów (przychodów) z tytułu niektórych stypendiów i innych środków finansowych przyznanych przez Narodowe Centrum Nauki [Ordinance of the Minister of Finance, Investment and Development of 14 October 2019 on waiving the collection of personal income tax on income (revenues) from certain scholarships and other financial resources granted by the National Science Centre], Journal of Laws 2019, No. 1982.

[8] Münnich, *Nieostre zwroty ocenne*, 195.

May 2000[9] firmly stressed that cancellation of tax liabilities under Article 22 of the Tax Ordinance Act was of an extraordinary nature and could not be a permanent element of the application of tax law to a particular taxpayer. Thus, the court expressed its disapproval of the permanent tax cancellation. Article 22 § 2 of the Tax Ordinance Act was repealed as of 1 January 2001.[10]

Administration cancellation granted by the minister of finance under Article 22 § 2 point 1 of the Tax Ordinance Act is not formally an administrative act (decision). However, according to Article 87 § 1 of the Polish Constitution, it is a universally binding source of law. Therefore, it is hard to accept the view that the tax cancellation granted by the minister of finance in the ordinance is based on the discretion considered in Chapter IV since this discretion applies to administrative acts and not to sources of law. The ordinance is also not subject to judicial review, as is the case with decisions on tax cancellation under Article 67a of the Tax Ordinance Act.

2. Cancellation by the MF under Czech law

At present, the only form of the administrative cancellation based on the Tax Procedure Code and not just cancellation of default interest is a decision of the minister of finance on group tax cancellation (*hromadné prominutí*) under § 260 of the Code. Pursuant to point 2 of this section, group cancellation of tax liabilities has consequences for all taxpayers affected by the reason for cancellation. In the legal literature, it is stressed that such a decision is an administrative decision and not another administrative act, even though the addressee of the decision is not individually identified.[11] Moreover, this construction of the decision is aimed at limiting possible abuses of this institution by the minister of finance and ensuring that it is used in a non-discriminatory way.

The obligation to apply the group decision to all taxpayers meeting the conditions for tax cancellation does not, in practice, preclude a far-reaching indi-

[9] Judgment (*wyrok*) of the NSA in Warsaw of 17 May 2000, no. III SA 869/99, Lex no. 43043.

[10] Ustawa o zmianie ustawy o postępowaniu egzekucyjnym w administracji, ustawy o podatkach i opłatach lokalnych, ustawy o dopłatach do oprocentowania niektórych kredytów bankowych, ustawy - Prawo o publicznym obrocie papierami wartościowymi, ustawy - Ordynacja podatkowa, ustawy o finansach publicznych, ustawy o podatku dochodowym od osób prawnych oraz ustawy o komercjalizacji i prywatyzacji przedsiębiorstw państwowych - w związku z dostosowaniem do prawa Unii Europejskiej [Act amending the Act on Administrative Enforcement Proceedings, the Act on Local Taxes and Charges, the Act on Subsidised Interest on Certain Bank Loans, the Law on Public Trading in Securities, the Tax Ordinance Act, the Act on Public Finances, the Corporate Income Tax Act, and the Act on Commercialisation and Privatisation of State Enterprises, in connection with the harmonisation of Polish law with the European Union legislation] of 8 December 2000, Journal of Laws 2000, No. 122, section 1315.

[11] Lichnovský, Ondrýsek, *Daňový řád*, 892.

vidualisation of the addressee of the decision in its content. Decisions of the minister of finance are published in the official journal of the ministry (*Finanční zpravodaj*). In the explanatory memorandum to the bill of the Tax Procedure Code,[12] it is stated that the obligation to publish the decision is intended not only to inform other potential addressees of the fact of tax cancellation but also to limit the possibility of abuse of this institution.

The minister of finance is entitled to issue a general decision only in the case of inequalities resulting from the application of tax law or in the case of extraordinary events, in particular natural disasters such as floods. In the explanatory memorandum to the bill of the Tax Procedure Code, it is also pointed out that inequalities in the application of tax law may arise if legal provisions are contradictory and the application of one provision unintentionally leads to violation of another. Furthermore, it is indicated in this explanatory memorandum that the contradiction between provisions is repeatedly caused by the very nature of tax law, since tax law is adopted primally under political pressure.[13] This view is reflected in the case-law, for instance in the judgment of 17 January 2017.[14] The NSS argues therein that the purpose of tax cancellation under § 260 of the Code of Tax Procedure is not to rectify unlawful tax decisions but to respond flexibly to a contradiction between statutes (or their legal provisions) so that the taxpayer is not burdened with a disproportionate tax liability or duty. This reasoning suggests that the group decision is to be of dispensation nature, as it should apply to atypical situations not foreseen by the legislature, such as contrary legal provisions.

The issuing of a general decision on the tax cancellation is under the discretion of the ministry of finance. However, according to the judgment of the NSS of 27 August 2015,[15] if a decision has already been issued and the taxpayer meets all the conditions set out in the decision, they are entitled to seek tax cancellation by filing a claim with the court.

In the period from 2011 to 2019, i.e. when the current regulation was already in force, the ministry of finance issued the following ten general decisions on tax cancellation:

1. Decision of 22 March 2011, no. 904/32 038/2011 on the cancellation of default interest for late payment of the fee under Act no. 334/1992 on the Farmland Protection Fund if the interest does not exceed CZK 200 per the calendar year;

[12] Důvodová zpráva (k návrhu zákona č. 280/2009) [Explanatory memorandum (to the bill no. 280/2009)], Chamber of Deputies paper 685/0 (2008), https://www.psp.cz/sqw/text/tiskt.sqw?o=5&ct=685&ct1=0, accessed 1 March 2020.

[13] cf. Matyášová, Grossová, *Daňový řád*, 996.

[14] Judgment (*rozhodnutí*) of the NSS of 17 January 2017, no. 5 Afs 99/2016-28, unreported.

[15] Judgment (*rozhodnutí*) of the NSS of 27 August 2015, no. 1 Afs 171/2015-41, Collection of case-law of the NSS no. 3345/2016.

2. Decision of 2 February 2012, no. MF-21 680/2012/26 on the cancellation of part of the administrative fee for the application for a permit to operate a lottery or similar games. The cancellation amounted to CZK 4,500 or CZK 2,500, respectively, and was related to the protracted process of implementing EU Directive 98/34/EC into Czech law;
3. Decision of 14 November 2012, no. MF-99332/2012/26-262 on the cancellation of part of the administrative fee for the application for a permit to operate a lottery or similar games; The cancellation amounted to CZK 4,500 or CZK 2,500, respectively, and was related to the protracted process of implementing EU Directive 98/34/EC into Czech law;
4. Decision from 2012 (no specific date of issue), no. MF-18 701/2012/904 on the cancellation of default interest for late payment of tax liabilities in the years 2011–2012 if the delay does not exceed 15 days;

Decision from 2012 (no specific date of issue), no. MF-93346/2012/904 on the cancellation of income tax in the amount of excise duty on alcohol beverages withdrawn from the market in connection with the 'methanol scandal';

5. Decision from 2013 (no specific date of issue), no. MF-118798/2012/904 on the cancellation of default interest for late payment of tax liabilities in the years 2013–2014 if the delay does not exceed 15 days;
6. Decision from 2013 (no specific date of issue), no. MF-116635/2012/904-39 on the cancellation of default interest for late payment of income tax due to the late payment of investment bonuses by the Czech Republic;
7. Decision of 19 April 2013 (no number) on the cancellation of property tax on the real property located at no. 39 in Frenštát pod Radhoštěm in connection with a gas explosion;
8. Decision of 11 June 2013, no. MF-65 647/2013/39 on the cancellation of income tax for flood victims. A state of emergency in connection with the flood was declared by a decision of the Government of the Czech Republic.[16] Based on this decision, income tax in the amount of damage caused by the flood was cancelled;
9. Decision of 22 November 2013 (no number) on the cancellation of part of the administrative fee for the application for a permit to operate a lottery or similar games. The cancellation amounted to CZK 4,500 or CZK 2,500, respectively, and was related to the protracted process of implementing EU Directive 98/34/EC into Czech law.[17]

[16] Rozhodnutí Vlády České republiky ze dne 2. června 2013 o vyhlášení nouzového stavu pro kraje postižené povodněmi [Decision of the Government of the Czech Republic declaring a state of emergency in regions affected by floods] of 2 June 2013, Collection of Laws no. 140/2013.

[17] 'Finanční zpravodaj' [Financial Bulletin], *Ministerstvo financí České republiky* [Ministry of Finance of the Czech Republic], https://www.mfcr.cz/cs/legislativa/financni-zpravodaj, accessed 1 March 2020.

Since 2013, the minister of finance has not issued any general decision on tax cancellation. There are some decisions, but they concern the cancellation of penalties, which are not a subject of this analysis. Moreover, the decisions listed above indicate cautious approach of the minister of finance to tax cancellation with some exceptions regarding non-implementation of an EU directive or effects of natural disasters.

Tax cancellations based on a decision of the ministry of finance are of various nature. The decision of 19 April 2013 on the cancellation of property tax on the real property located at no. 39 in Frenštát pod Radhoštěm in connection with a gas explosion is indeed of dispensation nature and is related to the factual circumstances of tax collection. The decision on the cancellation of default interest for late payment of tax liabilities in the years 2013–2014 if the delay does not exceed 15 days is a privilege for the taxpayers who do not regulate their tax liabilities on time, and such cancellation is related to the legal norm imposing an obligation to pay default interest in the case of late payment. Hence, it is not possible to clearly determine the legal nature of this type of tax cancellation.

3. Cancellation by the MF under German and English law

The Fiscal Code of 1977, currently in force, does not provide for cancellation of tax liabilities by the minister of finance, although in some cases the consent of the minister is required for the tax authority to grant tax cancellation, as indicated in Chapter V. The possibility of tax cancellation by the minister of finance, however, was allowed under § 108 para. 2 of the Reich Fiscal Code of 1919. Pursuant to this paragraph, the minister of finance could make a general tax cancellation (*allgemeine Befreiung*), which was subject to approval by the parliament (*Reichsrat*).

Under the system of extra-statutory concessions discussed in Chapter V, English law does not provide for a separate right to cancel tax liabilities by the minister of finance. However, it should be emphasised that the very name 'concession' indicates that the tax authority cancels tax liabilities on the basis of a prerogative of the government or the minister of finance.

As in canon law, concessions in English law should be understood as the power of a lower authority to exercise a right (in this case, the right to cancel tax liabilities) independently to the extent specified by a higher authority. It follows that the English tax authorities exercise part of the powers of the ministry of finance, who may also exercise these powers to full extent, i.e. to the extent delegated to the tax authorities and to the remaining extent. The opposite of the above is the institution of reservation, i.e. a situation where a subordinate authority may exercise a right to the full extent except in areas explicitly exclud-

ed.[18] Similar systems of concessions, under which the ministers of finance could delegate their powers to cancel tax liabilities to subordinate tax authorities, were provided for in the German Reich Fiscal Code of 1919 and the Polish Tax Ordinance Act of 1934.

Given the limited transparency of the tax cancellation process in England, as analysed in Chapter V, it is hardly possible (or impossible) to determine whether currently in England the minister of finance exercises their prerogatives and cancels tax liabilities independently of the tax authorities.

4. Summary

The power of the minister of finance to cancel tax liabilities by issuing an ordinance is based on Article 22 of the Tax Ordinance Act. Nonetheless, unlike the tax authorities, the minister of finance is not bound by the institution of discretion when exercising tax cancellation. Moreover, ordinances of the minister of finance are not subject to judicial review, unlike decisions of the tax authorities. The position of the minister of finance in this case is hence similar to the position of the minister of finance in England, who is entitled to grant concessions in this respect.

Tax cancellation by the minister of finance is based on general clauses, which, as already indicated in Chapter V, have a wide scope and allow cancelling tax liabilities in a relatively free manner. This position applies particularly to the 'public interest' clause. Thus, it must be assumed that cancellation under Article 22 of the Tax Ordinance Act is of quasi-prerogative nature and, as in the case of Article 67a of the Tax Ordinance Act, a direct reference to the provisions of the Polish Constitution should be considered *de lege ferenda*, as mentioned in Chapter V.

An analysis of the content of ordinances issued by the minister of finance between 2018 and 2019 indicates that these cancellations are usually privileges in nature and are related to the legal norm regarding the creation of tax liabilities. The classification of this institution as a privilege is also supported by the subject of these cancellations, e.g. receipt of awards by soldiers of the Warsaw Uprising.[19] Moreover, such cancellations are often permanent. On the other hand, the fact that the Germany minister of finance is not currently entitled to cancel tax li-

[18] Tretera, Horák, *Církevní právo*, 77.

[19] Rozporządzenie Ministra Finansów, Inwestycji i Rozwoju w sprawie zaniechania poboru podatku dochodowego od osób fizycznych od nagród otrzymanych przez Powstańców Warszawskich [Ordinance of the Minister of Finance, Investment and Development on waiving the collection of personal income tax on awards received by soldiers of the Warsaw Uprising] of 18 October 2019, Journal of Laws 2019, item 2092.

abilities and the fact that the Czech minister of finance has not used this institution for several years confirm the distinctive character of the Polish regulations in this area.

The failure to issue general decisions on tax cancellation by the Czech minister of finance pursuant to § 260 of the Code of Tax Procedure confirms the scepticism of decision-makers in the Czech Republic regarding tax cancellation. It is worth noting that the cancellations granted by the Czech minister of finance in the past concerned relatively small amounts or specific natural disasters, which underlines marginal importance of this institution for the Czech legal system. Interpretation of § 260 of the Code of Tax Procedure confirms that this institution is of dispensation nature. This opinion is supported by the fact that cancellation under § 260 of the Code of Tax Procedure may be granted only in the event of inequalities arising from the application of tax law or in the event of a natural disaster. Both conditions are atypical in nature. On the other hand, an analysis of the content of the decisions issued in the past under § 260 of the Code of Tax Procedure shows that it is difficult to clearly classify this institution as a privilege or dispensation. Specific decisions of the Minister of Finance are related to the legal norm or the factual circumstances of the creation or collection of tax liabilities.

Finally, the German and English legal systems have been excluded from this summary since the possibility to cancel tax liabilities by the ministers of finance in these countries is not available or has not been proved. The performed analysis has not provided a reasonable explanation of why this institution is not currently available in German legal system.

Chapter VII

Insolvency arrangement

As indicated in the Introduction, currently tax liabilities may be cancelled not only in the form of administrative cancellation but also on the basis of provisions of insolvency law, which concern all the taxpayer's liabilities, including tax liabilities. An institution of insolvency law that may lead to tax cancellation is insolvency arrangement. As a result of obtaining adequate creditor support and judicial approval for the arrangement, tax liabilities can be cancelled even against the will of the tax authority.

While considering the institution of insolvency arrangement from the point of view of the subject matter of the book, all the research theses put forward in the Introduction remain valid. Therefore, the analysis is not limited to this institution but also focuses on the crucial issues of the legal basis and purpose of the tax authority's participation in insolvency arrangement proceedings.

Unlike the analysis undertaken in Chapters V and VI, this chapter places more emphasis on procedural aspects of tax cancellation. Furthermore, the term 'arrangement proceedings' is used alongside the term 'insolvency arrangement,' since there is a close link between substantive and procedural law regarding the adoption of insolvency arrangement. The legal literature points out to the complex substantive and procedural nature of insolvency law.[1] Hence, unlike in administrative cancellation, it is not possible to discuss insolvency arrangement without procedural regulations. The relationship between these two types of regulations is confirmed by the structure of the regulation on insolvency arrangement procedure. In all discussed legal systems, substantive and procedural regulations are contained in the same structural divisions (sections, articles, chapters) within statutes governing insolvency arrangement.

The institution of insolvency arrangement is an institution of insolvency law known to the legal systems covered by this analysis since the first half of the 20th century. In the past, however, tax liabilities were not subject to cancellation un-

[1] Aleksander Jerzy Witosz, in Hrycaj, Jakubecki, Witosz, *Prawo restrukturyzacyjne i upadłościowe. System*, 623.

der insolvency arrangement proceedings as they enjoyed priority of satisfaction before private law liabilities within this procedure. The following table shows that the priority of satisfaction in all compared legal systems has only been abolished in the last several years or decades. Nonetheless, despite the abolition of this privilege, some liabilities have retained their privileged position. This fact is also reflected in the table below:

Table 6. Abolition of the privilege of satisfaction

No.	Country	Date of the abolition of the privilege	Liabilities that have retained their privileged position
1	Poland	1 January 2016	– remuneration of employees arising before the declaration of insolvency – farmers' liabilities for products delivered from their farms – maintenance obligations and disability or death pension obligations – liabilities of the Social Insurance Institution for three years before the declaration of insolvency
2	Germany	1 January 1999	none
3	Czech Republic	1 January 2007	– remuneration of employees – compensation for damage to health – liabilities of the Labour Office of the Czech Republic in respect of salaries paid out by the taxpayer – liabilities concerning additional social securities – maintenance obligations
4	England	15 September 2003	– contributions to occupational pension schemes – remuneration of employees – levies on coal and steel production

Given the purpose of the analysis, it is essential to answer two questions: firstly, whether the support of the tax authority for an insolvency arrangement and, consequently, for tax cancellation, is of a prerogative nature, and secondly, whether tax cancellation based on an insolvency arrangement is a privilege or dispensation within the meaning of Chapter III. The answer to the first question may seem unnecessary as it follows from the essence of the arrangement that it must be supported by a certain majority of creditors and approved by the court. However, the tax authority attends the creditors' meeting and may vote in favour of or against the arrangement. Thus, the tax authority indirectly decides whether to adopt or reject the arrangement. In the case of a significant share of tax liabilities in the total sum of liabilities participating in insolvency arrangement proceedings, the position of the tax authority determines the results of the proceedings, including the possible cancellation of tax liabilities. As is clear from the analysis presented later in this chapter, the decision of the tax authority to support or to

refuse to support an insolvency arrangement has no direct or explicit basis in the statutes. Also, the tax authority often has no guidelines on how to vote on an insolvency arrangement. At the same time, arrangement procedure as court procedure may lead to an increased role of the courts in tax cancellation at the expense of the tax authority.

1. Restrukturyzacja

Insolvency arrangement procedure in Poland is a classic institution of insolvency law aimed at avoiding liquidation of taxpayer's assets or insolvency itself while partially satisfying the creditors.[2] However, as a result of the entry into force of the Restructuring Law Act on 1 January 2016, arrangement procedure formally became quasi-independent of insolvency law and is regulated in a separate statute, the Restructuring Law. Thus, arrangement proceedings are now called 'restructuring' (*restrukturyzacja*) or 'restructuring proceedings' (*postępowanie restrukturyzacyjne*) in Poland.

With the entry into force of the Restructuring Law, provisions on arrangement procedure (Art. 267–305) and recovery procedure (Art. 492–521) were deleted from the Insolvency Law, and these issues were regulated in the Restructuring Law, although a few provisions on arrangement procedure remained in the Insolvency Law. These provisions concern arrangement in liquidation procedure (Art. 266a–266f) and arrangement in consumer insolvency (Art. 491^{22}–491^{23}). However, according to Art. 266f and 421^{23} of the Insolvency Law, the provisions of the Restructuring Law apply to these provisions.

1.1. Course of proceedings

Currently, insolvency arrangement is available to all entrepreneurs as well as partners in partnerships and companies not conducting business activity if they are insolvent or threatened with insolvency. Article 2 of the Restructuring Law provides for four types of restructuring proceedings: (i) arrangement approval proceedings (*postępowanie o zatwierdzenie układu*), (ii) accelerated arrangement proceedings (*przyśpieszone postępowanie układowe*), (iii) arrangement proceedings (*postępowanie układowe*), and (iv) sanative proceedings (*postępowanie sanacyjne*). A detailed discussion of these procedures is beyond the scope and needs of this book. For all four types of proceedings, the legislator establishes a common procedure (Art. 1–209 of the Restructuring Law), which, depending on the

[2] Robert Lewandowski, Przemysław Wołowski, *Prawo upadłościowe i naprawcze* [The Bankruptcy and Reorganisation Law], (Warsaw: C.H. Beck 2015), 167.

particular proceedings, is supplemented with specific provisions (Art. 210–337 of the Restructuring Law).

All four arrangement proceedings contain three fixed elements:

1. drawing up of the insolvency table;
2. the creditors' meeting at which an insolvency arrangement proposal is put to the vote;
3. approval of the arrangement by the court if the creditors' meeting has adopted the arrangement.[3]

Pursuant to Art. 7 para. 1 of the Restructuring Law, arrangement proceedings are initiated only at the request of the taxpayer, except for sanative proceedings. Therefore, the creditors, including the tax authority, cannot initiate such proceedings. Together with the application for initiation of restructuring proceedings, the taxpayer must submit arrangement proposals (with the exception of sanative proceedings).

Arrangement proceedings cover personal debts of the taxpayer arising before opening the proceedings and interest arising after opening the proceedings. According to Art. 115 paras. 1 and 2 of the Restructuring Law, arrangement proposals may be submitted by the taxpayer as well as by the creditors' council, court supervisor, administrator, or creditors holding jointly more than 30% of the total amount of liabilities. The tax authority may submit arrangement proposals on terms applicable to other creditors. The proposals may include, among others, a reduction (cancellation) of liability based on the structure of a debt forgiveness contract (Art. 508 of k.c.), which, together with the institution of acceptilation, is analysed in Chapter V.[4]

Pursuant to Art. 162 para. 1 of the Restructuring Law, the conditions for restructuring should be, in principle, the same for all creditors, but the creditors may be divided into groups if the arrangement proposals provide for such division. It is also allowed to give preferential treatment to the creditors who will provide the taxpayer with new financing necessary to implement the arrangement.

Except for the arrangement approval proceedings, a necessary part of any arrangement proceedings is to convene the creditors' meeting to vote on the proposals. Pursuant to Art. 119 para. 1 of the Restructuring Law, the arrangement is adopted when a majority of voting creditors representing at least two-thirds of the total amount of liabilities vote for it. The quorum required to vote on the arrangement is 20% of all creditors. If the voting takes place in groups, the arrangement must be adopted in all groups with the statutory majority noted above. In the case of an objection by a certain creditor group to the proposals, pursuant to

[3] Patryk Filipiak, Anna Hrycaj, *Prawo restrukturyzacyjne. Komentarz* [Restructuring Law: Commentary], (Warsaw: Wolters Kluwer 2017), 35.

[4] Machowska, *Prawo restrukturyzacyjne i upadłościowe*, 315.

Art. 119 para. 3 of the Restructuring Law, the objection may be overcome if the creditors holding two-thirds of the total amount of liabilities vote in favour of the arrangement, and the creditors from the disagreeing group are satisfied in the arrangement in a manner no less favourable than in liquidation proceedings. The objections of individual creditor groups cannot be replaced by a court decision, as is the case in the other compared legal systems. This fact affects the actual role of the tax authority in cancelling tax liabilities under an insolvency arrangement. According to Art. 164 para. 1 of the Restructuring Law, the adopted arrangement requires court approval. The court may refuse to approve the arrangement if it contravenes the law, or if it is evident that the arrangement will not be performed. It is presumed to be obvious that the arrangement will not be implemented if the taxpayer fails to fulfil the obligations (liabilities) arising after the opening of arrangement proceedings. The legislator does not specify the type of violation, but it is assumed in the legal literature that even a minor infringement of the law should result in a refusal to approve the arrangement.[5] Moreover, under Art. 165 para. 1 of the Restructuring Law, the court may refuse to approve the arrangement if its terms are grossly detrimental to the creditors who voted against it and raised objections. Since Art. 165 para. 1 of the Restructuring Law refers to creditors and not one creditor, it is suggested in the legal literature that the court is not entitled to refuse approval of the arrangement if its terms are grossly detrimental to only one creditor.[6] This position is crucial because usually only one tax authority is the creditor with respect to tax liabilities in arrangement proceedings.

Until the court approves the arrangement, it has no legal effect. Aggrieved creditors, including the tax authority, may raise objections against the arrangement within one week of the creditors' meeting. The court approves the arrangement at the hearing in the form of an order. In the operative part of the order, the court includes the terms of the arrangement.

The arrangement is binding on all creditors covered by it, even if their liabilities are not included in the insolvency table. This rule does not apply to creditors whose liabilities were intentionally not reported by the taxpayer for entry in the insolvency table. The arrangement does not affect the rights of creditors against guarantors or co-debtors of the taxpayer. The guarantors and co-debtors have no right to recourse against the taxpayer.[7] With the entry into force of the arrangement, all previous enforcement proceedings and proceedings to secure claims conducted against the taxpayer in connection with the liabilities covered by the arrangement, including proceedings conducted by the tax authority, are discontinued.

[5] Ibid., 336.

[6] Rafał Adamus, *Prawo restrukturyzacyjne. Komentarz* [Restructuring Law: Commentary], (Warsaw: C.H. Beck 2015), 336.

[7] Stanisław Gurgul, *Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz* [Insolvency Law, Restructuring Law: Commentary], (Warsaw: C.H. Beck 2017), 1136.

Arrangement proceedings end with the approval of the arrangement, therefore its implementation is not formally part of the proceedings. It is worth noting that the court discontinues arrangement proceedings if the taxpayer loses the ability to meet their current liabilities for a period of 30 days and has no real chance to restore this ability. In the case of annulment of the arrangement, the situation reverts to the pre-arrangement state. This reversal must take into account any payments already made during the implementation of the arrangement.

After the terms of the insolvency arrangement have been fulfilled, pursuant to Art. 172 para. 1 of the Restructuring Law, the court issues a decision on the fulfilment of the above terms. The decision is issued at the request of the taxpayer or court supervisor. This decision may then be challenged through appellate proceedings. Fulfilment of the arrangement does not have to be voluntary. It may also be fulfilled by enforcing liabilities from the taxpayer. As soon as the decision becomes final, outstanding liabilities covered by the arrangement are cancelled.

1.2. Conditions for cancellation

The Restructuring Law does not provide for negative conditions for cancellation that are related to the taxpayer's behaviour.[8] However, according to Art. 8 of the Restructuring Law, arrangement proceedings can only be initiated if it they are not intended to harm the creditors. This provision may raise doubts as to its interpretation since arrangement inherently leads to partial cancellation of liabilities. Thus, from a financial point of view, it is not beneficial to creditors, including the State Treasury.[9]

The prohibition of harming creditors is a general clause similar to an important interest of the taxpayer and the public interest in the Tax Ordinance Act. An essential guideline for the understanding of this clause is expressed in the explanatory statement to the bill of Restructuring Law, which lists three cases of harm to the creditors.[10] Pursuant to this statement, the opening of arrangement proceedings may harm creditors if the factual circumstances show that by approving and implementing the arrangement, the creditors would be satisfied to a lesser extent or significantly later compared to declaration of insolvency and liquidation of the taxpayer's assets. The creditors would also be harmed if the way in which the taxpayer's enterprise is managed and the taxpayer negotiates

[8] Rządowy projekt ustawy – Prawo restrukturyzacyjne [Government Bill–Restructuring Law] of 9 October 2014, Sejm paper no. 2824, 19.

[9] Adamus, *Prawo restrukturyzacyjne*, 49.

[10] Rządowy projekt ustawy – Prawo restrukturyzacyjne [Government Bill–Restructuring Law] of 9 October 2014, Sejm paper no. 2824, 9.

with their creditors indicates that the sole purpose of initiating the proceedings is to prevent the creditors from pursuing effective enforcement against the taxpayer's assets. The taxpayer may attempt to initiate arrangement proceedings in order to suspend ongoing enforcement proceedings and gain the time necessary to dispose of the assets.[11] The third case occurs when the creditors actually associated with the taxpayer and towards whom the taxpayer undertakes fictitious obligations attempt to vote through the arrangement proposal.[12]

An interpretation of the clause that prohibits harming creditors should take into account the nature of these proceedings since the position of the creditors in arrangement proceedings is of key importance. Thus, if the vast majority of creditors support an application to initiate arrangement proceedings, the court should open such proceedings even if, in its view, the proceedings seek to harm the creditors.[13] The question remains how to understand the expression 'the vast majority of creditors' and how to resolve the creditors' conflicting interests when opening the restructuring proceedings. The issue of defining the interest of the tax authority in arrangement proceedings is discussed later in this chapter.

The relativity of the prohibition of harming creditors is emphasised by Rafał Adamus, who points out that creditors are always harmed when the opening of arrangement proceedings is less favourable to creditors than their absence.[14] The principle of prohibition of harming creditors expressed in the Restructuring Law is subjective and does not affect the possibility of tax cancellation. If the creditors express their willingness to enter into the arrangement, the court must open the proceedings even if the creditors, including the tax authority, may be objectively harmed.

1.3. Position of the tax authority

Tax liabilities are not 'anonymous.' They belong to the State Treasury represented by the tax authority. Therefore, the Treasury may also have a subjective interest in arrangement proceedings. Unfortunately, the Restructuring Law, as well as other statutes, does not regulate this issue. In particular, there is no legal regulation specifying when the tax authority should support arrangement proposals. Hence, the participation of the tax authority in arrangement proceedings, in-

[11] The existence of such a threat is confirmed by the experience of the 1990s, when debtors used arrangement proceedings to liquidate their assets and thus avoided fulfilling the arrangement. Adamus, *Prawo restrukturyzacyjne*, 48.

[12] Rządowy projekt ustawy – Prawo restrukturyzacyjne [Government Bill–Restructuring Law] of 9 October 2014, Sejm paper no. 2824, 9.

[13] Piotr Zimmerman, *Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz* [Insolvency Law, Restructuring Law: Commentary], (Warsaw: C.H. Beck 2016), 1051.

[14] Adamus, *Prawo restrukturyzacyjne*, 49.

cluding possible support for arrangement proposals, may be conditioned by the various objectives it pursues. This issue is discussed later in this analysis.

The regulation of the proceedings for the adoption of insolvency arrangement does not contain a separate provision concerning the participation of the tax authority in these proceedings. In practice, there are no provisions in tax law, including the Tax Ordinance Act, that would authorise the tax authority to participate in arrangement proceedings. Hence, the right of the tax authority to participate in such proceedings, including the right to support arrangement proposals cancelling tax liabilities, should be considered as a prerogative.

The administrative law literature indicates that there are separate requirements regarding the need to precisely define the legal basis for nonregulatory administration acts even if these acts have an external effect on the administration. The legal basis for these acts does not have to be clearly defined in a statute.[15] Such a legal basis for the participation of the tax authority in arrangement proceedings may be provided by Art. 2 para. 1 points 1, 5, and 6 of the National Revenue Administration Act.[16] Under this provisions, the tasks of the National Revenue Administration (*Krajowa Administracja Skarbowa*) include: (i) tax collection, (ii) provision of service and support for the taxpayer in the proper performance of their tax obligations, and (iii) enforcement of tax liabilities. This legal basis is too general to allow the tax authority to vote for the insolvency arrangement cancelling tax liabilities. It is worth noting that this provision is equivalent to Article 1 point 1 of the Tax Management Act 1970, according to which 'income tax, corporation tax and capital gains tax shall be under the care and management' of the tax authorities, which automatically entitles them to cancel tax liabilities.[17] As indicated in Chapter V, it has been repeatedly emphasised in the English legal literature that tax cancellation is a prerogative of the tax authorities (Government) despite the existence of the above legal basis.

The interest of the State Treasury in arrangement proceedings within the scope of tax liabilities may be hypothetically represented by the General Counsel of the Republic of Poland (*Prokuratoria Generalna Rzeczypospolitej Polskiej*), which, following Art. 4 para. 1 points 2 and 3 of the General Counsel of the Republic of Poland Act,[18] represents the State Treasury and government authorities before a common court (*sąd powszechny*). Arrangement proceedings are conducted before a common court. In practice, the tax authority participates and votes at the creditors' meeting, deriving its right to do so from the mere fact that

[15] Jaśkowska, in Hauser et al., *Instytucje prawa administracyjnego*, 223.

[16] Ustawa o Krajowej Administracji Skarbowej [National Revenue Administration Act] of 16 November 2016, consolidated text in Journal of Laws 2020, item 505.

[17] *Halsbury's Laws of England, Vol. 6: Capital Gains Taxation* (London: Lexis Nexis UK 2011), 1046.

[18] Ustawa o Prokuratorii Generalnej Rzeczypospolitej Polskiej [General Counsel of the Republic of Poland Act] of 15 December 2016, consolidated text in Journal of Laws 2019, item 1265.

it is an administrative authority dealing with tax issues. Such a situation supports the existence of a prerogative in this respect.

Assuming hypothetically that Art. 2 para. 1 points 1, 5, and 6 of the National Revenue Administration Act constitute a legal basis for the tax authority to participate in restructuring proceedings, it does not preclude, in this respect, the existence of a quasi-prerogative, i.e. a situation where the legal basis for such participation is of a carte blanche nature. The above provisions do not set out the guidelines that the tax authority should follow when participating in arrangement proceedings. In particular, they do not establish when the tax authority can or should support the arrangement proposals. As further analysis shows, the tax authority may actually be guided by significantly different objectives.

First of all, the adoption of an insolvency arrangement may ensure higher and faster satisfaction (collection) of tax liabilities than enforcement proceedings. However, reducing the interest of the State Treasury in its participation in the proceedings to increased and accelerated tax collection means focusing only on the fiscal aspect of this institution. Being guided exclusively by fiscal interest may be simple and convenient for the tax authority. It is also, to some extent, consistent with the interpretation of the public interest, which is a condition for the cancellation of tax liabilities under Art. 67a of the Tax Ordinance Act. The explanatory statement to the bill of the Restructuring Law points out, however, that the intention of the legislator was not to directly increase revenues of the State Treasury but to introduce an effective instrument that would enable restructuring of the taxpayer's enterprise and prevent its liquidation.[19] Later in the explanatory statement, the government, which authored the bill, clearly emphasises the non-fiscal objectives of tax cancellation. In the opinion of the government, in the medium and long-term, the decrease in direct revenues of the State Treasury from the tax liabilities being subject of insolvency arrangement will be more than compensated by increased revenues from tax liabilities paid by the taxpayer and their contractors. It will also bring overall economic benefits resulting from more efficient insolvency proceedings. Arrangement proceedings are expected to lead to the preservation of jobs in the taxpayer's enterprise and the enterprises of the taxpayer's contractors. Consequently, it should lead to a reduction of expenditure from the State Treasury, e.g. on unemployment benefits or social assistance.[20] Nonetheless, it is worth stressing that, in accordance with the principle of budgetary universality expressed in Art. 42 paras. 1 and 2 of the Public Finance Act,[21] expenditure from the budget is executed separately from a specific source of income. Therefore, it is difficult to estimate savings on so-

[19] Rządowy projekt ustawy – Prawo restrukturyzacyjne [Government Bill—Restructuring law] of 9 October 2014, Sejm paper no. 2824, 8.

[20] Ibid., 87.

[21] Ustawa o finansach publicznych [Public Finance Act] of 27 August 2009, consolidated text in Journal of Laws 2019, item 869.

cial policy resulting from adoption of a particular insolvency arrangement. In addition, the benefits of increased revenues or reduced expenditure of the State Treasury apply not only to a particular taxpayer but also to all their contractors, or even the economy as a whole.

The situation in which the tax authority is guided solely by the fiscal interest in arrangement proceedings also seems to be contrary to the principle of the social market economy expressed in Art. 22 of the Polish Constitution. From the viewpoint of this principle, the participation of the tax authority in arrangement proceedings cannot be limited to the financial consequences of cancelling the revenue of the State Treasury. The tax authority should consider whether the cancellation of tax liabilities by adopting an insolvency arrangement has more positive than negative effects not only on the State budget but also on the society.[22] The literature on commercial and constitutional law tends to suggest that the State should not only have regulatory, coordinating, and stabilising functions but should also be allowed, by way of exception and on the basis of a statute, to engage in economic activities in order to protect overriding public interests.[23]

The objectives of the Restructuring Law presented above are, thus, primarily economic and social and not strictly fiscal. They should be assessed positively due to the need to ensure economic competitiveness. On the other hand, they should not be considered as legal grounds for tax cancellation but rather as incentives for possible support of the arrangement proposals. These objectives are more goals than legal obligations and are of a general nature. Moreover, considering a broad understanding of these purposes, the tax authority would be in almost all cases entitled to vote in favour of the arrangement cancelling tax liabilities. In most cases, the tax authority is able to demonstrate that medium- and long-term costs, including indirect costs of liquidation of the taxpayer's enterprise (e.g. loss of the State Treasury's revenues from taxes paid by taxpayer's co-operators and an increase in social assistance for former employees of the taxpayer) caused by failure to adopt the insolvency arrangement, will be higher than the amount of tax liabilities cancelled under the arrangement.

The objectives in question also appear to be at least partly contrary to tax law. According to the legal doctrine, tax regulations have several objectives. Their main objective is the fiscal purpose. In addition, the levied taxes can serve an economic and social purpose. However, these objectives should be ancillary achievements, even 'by-products.'[24] Tax cancellation may lead to an increase in budget revenues in the medium or long-term, but it always leads to their

[22] Bartosz Jankowski, *Pomoc publiczna w prawie Unii Europejskiej – implikacje dla Polski* [Public Aid in European Union Law–Implications for Poland], (Warsaw: Urząd Komitetu Integracji Europejskiej 2001), 15.

[23] Ibid., 8.

[24] Ryszard Mastalski, in Etel (ed), *System*, 345–346.

decrease in the financial year when the cancellation occurs. Active pursuit of economic and social objectives is also contrary to the principle of tax neutrality. This principle in the field of income tax should be seen mostly as a goal or proposal, supported especially by liberal economists.[25] However, in the case of value-added tax, this is a fundamental principle expressed, among others, in the fifth recital of the preamble to the EU Directive 2006/112 on the common system of VAT.[26]

As already noted above, the participation of the tax authority in economic and social objectives by taking part in arrangement proceedings confirms the existence of a quasi-prerogative. It should be pointed out here that, in accordance with the constitutional principle of supremacy of statute, the essential part of the tax specification must remain under parliamentary control and only the parliament has the right to shape them.[27] Hence, it should be the parliament that decides in the form of a statute on economic or social objectives pursued by the tax. The acceptance that the tax authority shapes these objectives should be treated as a violation of the principle of supremacy of statute.

Article 67a of the Tax Ordinance Act also does not provide justification for the tax authority to pursue non-fiscal purposes in arrangement proceedings. There are many similarities between the reference to the need to consider economic and social purposes in arrangement proceedings and the reference to an important interest of the taxpayer or the public interest in administrative cancellation. However, arrangement procedure is separate from tax procedure. As indicated in the judgment of the WSA in Gliwice of 27 January 2010,[28] collection of tax liabilities from the taxpayer in insolvency is governed primarily by regulations contained in the Insolvency Law and the Restructuring Law.

Considering the above, when voting on the insolvency arrangement or submitting own arrangement proposals, the tax authority should be guided primarily by the fiscal interest of the State Treasury. The tax authority has no legal basis to pursue other objectives in arrangement proceedings. In particular, it has no legal grounds to replace the parliament in creating non-fiscal tax objectives. The time perspective (short-, medium-, or long-term) in which the fiscal interest of the State Treasury is to be pursued remains open. This perspective can be linked to the period in which the arrangement is to be implemented. Moreover, the classification of the arrangement based on the institutions of privilege and dispensation facilitates a *de lege ferenda* analysis to indicate the objectives that the tax authority may or should pursue by participating in arrangement proceedings.

[25] Ibid., 347.

[26] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, Official Journal of the European Union L 347 of 11.12.2006, 1–118.

[27] Judgment (*wyrok*) of the TK of 6 March 2002, no. P 7/00, Legalis no. 53821.

[28] Judgment (*wyrok*) of the WSA in Gliwice of 27 January 2010, no. I SA/Gl 706/09, Lex no. 599971.

The adoption of an insolvency arrangement requires a two-thirds majority of the creditors divided into groups, which makes the institution of insolvency arrangement relatively neutral in terms of privilege and dispensation. It is worth noting that the court cannot replace with its decision an objection of the creditors in a specific group over the arrangement proposals. This fact limits the possibility of adopting an arrangement and the role of the court in these proceedings. Conversely, it strengthens the position of the creditors, including the tax authority. The role of the tax authority in arrangement proceedings remains an open question. The answer to the question as to which objectives should be pursued by the tax authority in arrangement proceedings determines the existence of a privilege (economic and social objectives) or a quasi-dispensation (fiscal interest of the State Treasury) in this respect. Unfortunately, under current legal regulation, it is not possible to answer such a question with certainty.

2. Insolvenzplan

Insolvency arrangement (*Insolvenzplan*), under the name of 'compulsory settlement' (*Zwangsvergleich*), was already regulated in §§ 160–187 of the German Bankruptcy Law of 1877[29] (*Konkursordnung*) as an institution of insolvency law. It was followed by the Insolvency Law of 1977, subsequently replaced by the Insolvency Law of 5 October 1994[30] (*Insolvenzordnung, InsO*), which entered into force on 1 January 1999.

The InsO was a significant reform of insolvency law; in particular, it eliminated the privilege of satisfaction of tax liabilities over private law liabilities. Currently, all liabilities, including tax liabilities, form one category of insolvency claims, except for lower-ranking claims enumerated in § 39 of the InsO.[31] The previous Bankruptcy Law listed in § 61 six categories of insolvency claims. While tax liabilities formed the second category, most private law liabilities were only in the sixth category.

The InsO provides for two separate arrangement procedures. The first procedure applies to entrepreneurs and is regulated in §§ 217–269 of the InsO. The second procedure concerns consumer insolvency proceedings, which include mandatory consensual proceedings, and is regulated in §§ 304–311 of the InsO.

[29] Konkursordnung [Bankruptcy Act] of 10 February 1877, German Reich Law Gazette 1877, No. 10, 351–389.

[30] Insolvenzordnung [Insolvency Law Act] of 5 October 1994, Federal Law Gazette 1994, part I, No. 70, 2866–2910.

[31] Ulrich Ehricke, in: Hans-Peter Kirchhof, Horst Eidenmüller, Rolf Stüner (eds.), *Münchener Kommentar zur Insolvenzordnung* [Munich Commentary on the Insolvency Law Act], (Munich: C.H. Beck 2013), 1104.

2.1. Arrangement for entrepreneurs

Arrangement proceedings are divided into three stages: (i) preparing arrangement proposals, (ii) adopting and approving the arrangement, and (iii) supervising its implementation. According to § 217 of the InsO, participants in the proceedings are insolvency creditors (*Insolvenzgläubiger*) and creditors entitled to separate satisfaction (*absonderungsberechtigter Gläubiger*). Other subjects holding the taxpayer's liabilities based on any other entitlement cannot participate in the arrangement. Nonetheless, it does not preclude a unilateral cancellation of the liabilities by a third party in order to support the adoption of the arrangement.[32]

The right to submit an arrangement proposal is held by the taxpayer, insolvency administrator, or any creditor, including the tax authority. The taxpayer may submit the proposal together with a request to open insolvency proceedings. The creditors may also submit the proposal through the administrator appointed for this purpose by the creditors' meeting. The proposal consists of declaratory and constructive parts. The former part describes the recovery measures, and the latter determines how to transform legal positions of the taxpayer and creditors. Nonetheless, the InsO does not list examples of possible elements of the proposal, but there are no formal restrictions to assume that the cancellation of the taxpayer's existing debts may be part of an arrangement proposal.[33] This also applies to tax liabilities of the taxpayer.

The proposed arrangement should treat the creditors belonging to one group equally, but the terms proposed to the creditors belonging to other groups may or even should differ. Thus, an important part of the proposal is the division of the creditors into groups. The principle of prohibition of worsening the position of a creditor in arrangement proceedings (*Verschlechterungsverbot*) is a safeguard against harming the creditor in these proceedings. According to this principle, a creditor who votes against the arrangement must be satisfied to a greater extent in arrangement proceedings that in hypothetical liquidation proceedings.[34] The submitted proposal is subject to the control of the court, which pursuant to § 231 point 1 of the InsO refuses ex officio any proposal that is (i) unlawful, (ii) manifestly unacceptable to the creditors, or (iii) impossible to implement.

After submission of arrangement proposals, the court sets the date of the creditors' meeting. Voting on the proposals should take place at the creditors' meeting, where each group of creditors votes separately. Pursuant to § 244 point 1 of the InsO, in order to adopt the arrangement, it is required to obtain a double absolute majority in each group, i.e. to obtain the joint support of a major-

[32] Ulrich Foerste, *Insolvenzrecht* [Insolvency Law], (Munich: C.H. Beck 2008), 235.

[33] Andrea Buth, Michael Hermanns (eds.), *Restrukturierung, Sanierung, Insolvenz. Handbuch* [Restructuring, Recovery, Insolvency: Handbook], (Munich: C.H. Beck 2014), 790.

[34] Foerste, *Insolvenzrecht*, 237.

ity of the members of a given group and the members of a given group holding a majority of liabilities. Achieving such a majority in all creditor groups is often very complex. Thus, the prohibition of obstruction (*Obstruktionsverbot*) was introduced in § 245 of the InsO. This prohibition allows the adoption of the arrangement without obtaining an objective majority of the creditors in favour of the arrangement. The prohibition is important for the role of the tax authority in arrangement proceedings because it makes it easier to adopt the arrangement without the support of the tax authority. The legal doctrine indicates that the majority rule in insolvency proceedings is not an element of political or trade union democracy but a technical order to facilitate a solution for many mutually uncoordinated creditors.[35] Such an opinion suggests that creditors' positions on the proposal concerning the arrangement are of secondary importance. It is more important to adopt the arrangement, so voting on it is a formality. Pursuant to § 245 of the InsO, the arrangement is to be considered as adopted despite not obtaining the double absolute majority in all creditor groups if the following three conditions are jointly met:

1. the group voting against the arrangement would not be satisfied to a higher degree in hypothetical liquidation proceedings than in the arrangement under consideration;
2. the group voting against the arrangement participates to a reasonable extent in the distribution of economic values; and
3. the necessary majority of creditor groups voted in favour of the arrangement.

The arrangement must also be approved by the taxpayer, which is done by not objecting to the arrangement. However, an objection of the taxpayer is deemed ineffective if (i) the arrangement provides for no worse conditions for the taxpayer that the hypothetical liquidation proceedings, and (ii) no creditor receives more than their foregoing liabilities under the arrangement.

The arrangement adopted by the creditors requires the court's approval. The court examines ex officio whether the arrangement has been correctly adopted. At the request of the creditor who voted against the arrangement, the court determines if the creditor's position as a result of the adopted arrangement is better off than in liquidation proceedings. The burden proof in this respect is on the creditor.[36] The creditor has the right to appeal against the court's decision approving or refusing to approve the arrangement. When the court's order approving the arrangement becomes final, it enters into force.

The arrangement has a legal effect on all the taxpayer's creditors, including those who did not submit their liabilities to the insolvency table and did not participate in the proceedings.[37] The cancellation of tax liabilities under the ar-

[35] Ibid., 244.
[36] Ibid., 249.
[37] Ibid., 248.

rangement does not lead to the expiry of these liabilities. The cancellation should be understood here as the prohibition of set-off or enforcement of these tax liabilities. As a result of the entry into force of the arrangement, tax liabilities are transformed into unenforceable natural obligations of the taxpayer. These obligations may be claimed from other persons who are also obliged to fulfil them, such as guarantors or co-debtors.[38] Tax liabilities that are to be paid under the arrangement may be collected by the tax authority through enforcement proceedings.[39]

Failure to fulfil the arrangement by the taxpayer in relation to the creditors whose liabilities have already been partially cancelled results in a revival (*hinfällig*) of these liabilities. Pursuant to § 255 point 1 of the InsO, failure to fulfil an arrangement also occurs if the taxpayer does not pay mature liabilities under the arrangement despite the creditor's written request for payment within at least two weeks.

2.2. Position of the tax authority

German law does not regulate in any specific statutory provision the issue of the tax authority's position in arrangement procedure. Such a situation suggests the existence of a prerogative in this respect. In practice, the role of the tax authority in arrangement proceedings is often formally similar to the position of private law creditors. This opinion is supported by the legal nature of actions taken by the tax authority in arrangement proceedings. Filing a request to open insolvency proceedings is a discretionary procedural act of the tax authority and not an administrative act.[40] The legal literature indicates that submission by the tax authority of a request to open insolvency proceedings, which is intended solely for liquidation of the taxpayer, constitutes a violation of the discretion vested in this authority.[41] Similarly, submitting tax liabilities to the insolvency table is not an administrative act.[42]

The tax authority is a public administration authority, and discretion cannot be understood as arbitrariness. The tax authorities have repeatedly indicated that, from their point of view, tax liabilities can only be cancelled in accordance with tax regulations, i.e. § 163 and 227 of the AO. However, at present insolvency law regulations overlap with tax law regulations, leading to a situation where tax liabilities may be cancelled without the consent of the tax authority. Hence, it is

[38] Fritsch, in Koenig, *Abgabeordnung*, 1788.
[39] Franceska Werth, in Klein, *Abgabeordnung*, 1518.
[40] Fritsch, in Koenig, *Abgabeordnung*, 1754.
[41] Ibid., 1754.
[42] Ibid., 1765–1766.

now accepted that not only provisions of the AO are applicable to tax cancellation, but also provisions of other statutes may apply.[43]

A decision of the tax authority to support the arrangement is at the discretion of the authority itself. The decision is an insolvency procedural act, not an administrative act.[44] When making the decision, the authority should not only be guided by the provisions of § 227 of the AO but also by the objectives set out by the insolvency law. The tax authority must consider, in addition to the fiscal interest of the State in collection of taxes, the public interest in recovery and further operation of the taxpayer's enterprise. The tax authority should also follow the guidelines contained in the General Administrative Regulation on enforcement in accordance with the AO.[45] Pursuant to sec. 61 point 4 of the regulation, it is primarily economic issues that should support the adoption of an insolvency arrangement. The authority may not agree to the arrangement if (i) due to the taxpayer's past behaviour, the taxpayer is expected not to fulfil their tax liabilities, (ii) the arrangement is unlikely to be implemented, or (iii) the tax authority would be in a better position in liquidation proceedings. Nonetheless, the tax authority must substantiate the existence of the above negative conditions in a particular case.[46]

The minister of finance confirmed the above guidelines in a letter of 17 December 1998.[47] Pursuant to sec. 9.2. of that letter, the decision on supporting the arrangement must be based primarily on economic grounds. When deciding to support or reject the arrangement proposal, the tax authority, acting within its discretion, should follow the provisions of § 163 and § 227 of the AO taking into account the objectives of insolvency law. However, if an arrangement proposal provides less favourable conditions concerning tax liabilities than liquidation proceedings, the tax authority should oppose this proposal.

The aggrieved taxpayer is entitled to file a complaint for performance (*Leistungsklage*) with the court against the unfavourable decision of the tax authority to support the arrangement.[48] The right to file a complaint for performance strengthens not only the position of the taxpayer but also the role of the courts

[43] Gerber, *Stundung und Erlass*, 59–60.

[44] Werth, in Klein, *Abgabeordnung*, 1518.

[45] Allgemeine Verwaltungsvorschrift über die Durchführung der Vollstreckung nach der Abgabenordnung (Vollstreckungsanweisung – VollstrA) [General Administrative Regulation on the exercise of enforcement under the Fiscal Code (Enforcement Guideline–VollstrA)] of 13 March 1980, Federal Tax Gazette 1980, part I, 112.

[46] F. Werth, in F. Klein (red.), op. cit., 1518.

[47] Schreibe vom Bundesministerium der Finanzen über Behandlung von Ansprüchen aus dem Steuerschuldverhältnis im Insolvenzverhalten [Letter from the Federal Ministry of Finance on the treatment of claims arising from tax obligations in insolvency proceedings] of 17 December 1998, no. IV A 4–S 0550–28/99, Federal Tax Gazette 1990, part I, 1500.

[48] Fritsch, in Koenig, *Abgabeordnung*, 1788.

in cancelling tax liabilities. In sec. 61 point 1 of the regulation and sec. 9.1 of the letter mentioned above, it is indicated that the tax authority may exert an influence on the drawing up of the arrangement and its content at the creditors' meeting. Unfortunately, these documents say nothing about the participation of the tax authority in informal negotiations of the arrangement. The approval of the arrangement by the court (with the support or opposition of the tax authority) precludes subsequent tax cancellation under § 163 or § 227 of the AO.[49] The regulation indicates that the tax authority is bound by specific guidelines included therein on whether tax authority should support the arrangement proposal. These guidelines, however, are not contained in a parliamentary statute but in an internal administrative guideline which, as noted in Chapter II, is not formally a source of law.

2.3. Consumer arrangement

German insolvency law provides for a separate regulation on consumer insolvency proceedings, which also allows for the cancellation of tax liabilities. These proceedings are dedicated to a consumer (*Verbraucher*), i.e. a natural person who enters into a legal transaction for purposes that predominantly are outside their business activity. In addition, a person who has previously engaged in self-employed business activity (*Alt-Unternehmer*) may also benefit from consumer insolvency if their assets are comprehensive (less than 20 creditors) and their debts do not arise from employment.

Before filing a request to open insolvency proceedings, the consumer is obligated to make an out-of-court attempt to settle their debts (*Schuldenbereinigung*) within six months prior to filing the request. To this end, the taxpayer must prepare and present to the creditors a proposal of the arrangement. The InsO does not contain criteria that would help to assess whether the taxpayer's proposal is serious and credible.[50] The taxpayer may propose, among other measures, the cancellation of tax liabilities. According to opinions expressed in the legal literature, it is even possible to present a so-called 'zero arrangement,' i.e. an arrangement providing for full cancellation of liabilities if justified by specific circumstances, e.g. a problematic financial situation of the taxpayer combined with a serious chronic illness.[51] Adoption of the proposed arrangement requires the consent of all creditors. Furthermore, pursuant to § 305a of the InsO, it is assumed that the opening of enforcement by the creditor against the taxpayer after submitting the arrangement proposal is tantamount to rejecting this proposal.

[49] Werth, in Klein, *Abgabeordnung*, 1518.

[50] Claus Ott, Mihai Vuia, in Kirchhof, et al., *Münchener Kommentar*, 1211.

[51] Foerste, *Insolvenzrecht*, 294.

After its adoption, the arrangement is a settlement within the meaning of § 779 BGB, to which contract law provisions apply.[52]

The attempt to settle the taxpayer's debts also includes tax liabilities. Guidelines on the participation of the tax authorities in such out-of-court proceedings are set out in a letter of the Federal Ministry of Finance of 11 January 2002.[53] The letter contains a detailed list of documents that the taxpayer should submit if the arrangement proposal also concerns tax liabilities. The ministry allows the tax authority to participate in negotiations with the taxpayer and the other creditors. The legal basis for the possible tax cancellation is §§ 163 or 227 of the InsO considering the objectives of insolvency law. Thus, the existence of a prerogative in this case is excluded.

According to the above-mentioned letter, an honest taxpayer should have the right to a new start in the economic sphere after a period of observation and partial payment of liabilities. Although tax cancellation may be based on both provisions (§§ 163 and 227 of the InsO), the ministry excludes the possibility to cancel tax liabilities due to inequity in the objective sense (*sachliche Unbilligkeitsgründe*), i.e. on grounds arising from the content of the law itself. As the ministry points out in the letter, the principle of equity in a subjective sense must be understood differently in consumer insolvency than in other proceedings. This difference is justified by the fact that the institution of tax cancellation is aimed at the objectives of insolvency law. Thus, the tax authority is not limited by the case-law regarding the interpretation of §§ 163 and 227 of the InsO, which also applies to the understanding of the concepts of the need for cancellation (*Erlassbedürftigkeit*) and dignity of cancellation (*Erlasswürdigkeit*). Consequently, it is permissible to conclude the arrangement and de facto cancel tax liabilities even when tax liabilities are not the cause of the critical situation of the taxpayer or the insolvency is the fault of the taxpayer. Such factual circumstances in non-insolvency cases would preclude cancellation of tax liabilities under §§ 163 and 227 of the InsO. The ministry allows concluding an arrangement that provides for, e.g. only one payment or no payment to the creditors, i.e. the tax authority is permitted to cancel all tax liabilities in full under the arrangement.

When concluding the arrangement presented by the taxpayer, the tax authority must ask itself whether arrangement proceedings before the court or consumer liquidation proceedings combined with debt relief will be a better solution for the fiscal interest of the State than the arrangement in question. The tax authority should analyse whether the amount of the anticipated payments under the

[52] Ott, Vuia, in Kirchhof, et al, *Münchener Kommentar*, 1208–1209.

[53] Schreibe vom Bundesministerium der Finanzen über Kriterien für die Entscheidung über einen Antrag auf außergerichtliche Schuldenbereinigung (§ 305 Abs. 1 Nr. 1 InsO) [Letter from the Federal Ministry of Finance on the criteria for decision on out-of-court arrangement proposal (§ 305 para. 1 no. 1 InsO] of 11 January 2002, no. IV A 4-S 0550-1/02, Federal Tax Gazette 2002, part I, 132–134.

arrangement takes into account the requirement to satisfy all creditors equally and whether the arrangement gives the taxpayer the possibility of a fresh start. According to these guidelines, even the fulfilment of all conditions provided for therein does not obligate the tax authority to conclude an arrangement.

The guidelines are as follows:

1. the taxpayer must use all their assets and anticipated future income to satisfy their debts;
2. the proposed payments should be appropriate to the taxpayer's assets and income, as well as their age;
3. all creditors will be satisfied in equal amounts;
4. the taxpayer will fulfil the presented arrangement in full and on time; and
5. there are no statutory conditions specified in § 290 of the InsO, the occurrence of which would rule out the possibility of debt relief.

Pursuant to sec. II.1 of a letter of the Federal Ministry of Finance of 23 July 2003,[54] the tax authority does not need additional permission from the Ministry of Finance to support the arrangement. Granting a consent for the arrangement by the tax authority is not an administrative decision since it is a procedural act (*Verfahrenshandlung*).[55] An administrative decision on cancellation of tax liabilities is issued upon fulfilment of the arrangement.[56] According to the legal literature, a negative or positive declaration on support of the arrangement is not an administrative decision but should be associated with the issuing of an administrative decision on tax cancellation.[57] The concluded arrangement is an example of tax cancellation made through civil law settlement under § 779 BGB. Nonetheless, the cancellation of tax liabilities is formally based on an administrative decision issued after the fulfilment of the arrangement. The legal literature emphasises that the arrangement (settlement) itself has no direct effect on the tax authority.[58] However, it is hard to imagine a situation where a decision on tax cancellation is not issued after the taxpayer has fulfilled all their obligations under the arrangement. The arrangement is binding on the tax authority under civil law.

[54] Schreibe vom Bundesministerium der Finanzen über Mitwirkung des Bundesministeriums der Finanzen bei Billigkeitsmaßnahmen bei der Festsetzung oder Erhebung von Steuer, die von den Landesfinanzbehörden im Auftrag des Bundes verwaltet werden [Letter from the Federal Ministry of Finance on the involvement of the Federal Ministry of Finance in equity measures in assessment or collection of tax administrated by the regional tax authorities on behalf of the federal government] of 15 February 2007, no. IV 3-S 0336/07/10010-02, Federal Tax Gazette 2017, part I, 283.

[55] Werth, in Klein, *Abgabeordnung*, 1518.

[56] Fritsch, in Koenig, *Abgabeordnung*, 1792.

[57] Axel Becker, 'Die Beteiligung des Finanzamtes am außergerichtlichen Schuldenbereinigungsverfahren nach § 305 Abs. 1 Nr. 1 InsO' [Participation of the tax authorities in the out-of-court arrangement proceedings pursuant to § 305 para. 1 no. 1 of the InsO], *Deutsche Steuer-Zeitung* 11 (2001), 385.

[58] Fritsch, in Koenig, *Abgabeordnung*, 1792.

Lack of support for the arrangement proposal from all creditors in out-of-court proceedings entitles the taxpayer to file a request to open insolvency proceedings. Once the request is filed, the court, after hearing the taxpayer, may suspend the opening of liquidation proceedings and conduct arrangement proceedings.[59] In such a case, the court directs the arrangement proposal to all taxpayer's creditors. They should take a position on the proposal within a month and verify the list of creditors presented by the taxpayer. Pursuant to § 307 point 2 of the InsO, failure to take a position by the creditors is deemed to be consent to the arrangement. If the creditors do not wish to accept or express objections to the arrangement, the court may grant the taxpayer an additional period of time to revise the proposal. While granting this period, the court may give the taxpayer binding and even far-reaching guidelines regarding the revision. As soon as the taxpayer presents the revised proposal, it is again sent to the creditors, who have one month to take a position on the matter.

Under § 308 point 1 of the InsO, the arrangement is adopted if no creditor objects to the proposal or the objection has been replaced by the court order. The possibility of replacing a creditor's objection is a significant difference compared to out-of-court proceedings.[60] Unlike the vote on the insolvency arrangement referred to in § 244 of the InsO (insolvency arrangement proceedings for entrepreneurs), these proceedings require unanimity of the creditors. It is possible, however, to apply the prohibition of obstruction, i.e. the court may assume that the arrangement has been adopted despite the objections of some creditors, as these objections are unjustified. In view of the State's fiscal interest, it is not possible to simply outvote the tax authority in the consumer arrangement proceedings. Nonetheless, as in the case of insolvency arrangements for business entities, the court, by referring to the prohibition of obstruction, is entitled to approve the arrangement despite the tax authority's objection.

If the creditors accept the arrangement, it must be approved by the court's order. The approved arrangement is a court settlement and constitutes an enforcement order. Moreover, the request to open insolvency proceedings filed together with the application for debt relief is deemed to be withdrawn. The arrangement affects the creditors participating in the proceedings.

When deciding on support for the arrangement proposal, the starting point for the tax authority is §§ 163 and 227 of the InsO, although due to the objectives of insolvency law, the authority is not bound by the conditions of these paragraphs.[61] If the tax authority refuses to accept the arrangement, the taxpayer has the right to file a complaint for performance with the court.

[59] Ibid., 1793.

[60] Hannlis Achelis, Anka Scharrff, Ivonne Schemmerling, in: Reinhard Bork, Gerrit Hölzle, *Handbuch Insolvenzrecht* [A Handbook of Insolvency Law], (Cologne: RWS Verlag 2014), 910.

[61] Fritsch, in Koenig, *Abgabeordnung*, 1793.

As in the case of insolvency arrangement for entrepreneurs, there is no explicit statutory provision that would entitle the tax authority to participate in consumer arrangement proceedings. The above analysis concerning insolvency arrangement for entrepreneurs suggests that also in the case of consumer insolvency arrangement the right of the tax authority to support or reject the arrangement is, in fact, a prerogative of the tax authority. It is worth noting that if insolvency arrangement is concluded with a consumer in Germany based on § 305 point 1(1) of the InsO, not until the arrangement is fulfilled are tax liabilities cancelled on the basis of an administrative decision.

It must also be considered that the participation of the German tax authorities in arrangement proceedings is not intended to grant the taxpayer a privilege. The letter of the Federal Ministry of Finance mentioned above specifies when and under what terms the tax authority may support the arrangement proposal. The proposal may be supported if such support is in the State's fiscal interest or it complies with §§ 163 or 227 of the AO. The tax authority should consider the objectives of insolvency law, but by taking them into account the authority should not be contrary to the need to protect the State's fiscal interest. Moreover, as indicated in Chapter V, tax cancellation under § 163 and § 227 of the AO is a dispensation.

Unlike the regulation on the participation of the tax authority in arrangement proceedings, the provisions of German insolvency law concerning insolvency arrangement are not of a dispensation nature. These provisions, although formally addressed to all taxpayers, regardless of whether or not conducting a business activity, have essential features of privilege. This position is supported by the following arguments: (i) the insolvency arrangement is primarily applicable in typical cases, (ii) there is no restriction on the frequency of using this institution, and (iii) the court has the right to approve the arrangement despite the tax authority's objection.

The replacement of the creditors' objection with a court order strengthens the role of the courts in cancelling tax liabilities at the expense of tax authorities. Furthermore, replacing the creditors' objection relativises the neutral condition for tax cancellation, i.e. the consent of a statutorily defined majority of creditors to adopt the arrangement. Finally, it is worth emphasising once again the position expressed in the German legal literature that in insolvency proceedings the majority rule is a technical order to facilitate a solution for uncoordinated creditors and not a form of protection of the creditors' interests, including the fiscal interest of the tax authority, and thus of the State.

3. Reorganizace

The possibility of adopting insolvency arrangement under Czech (Czechoslovak) law was already provided for in the Act of 27 March 1931,[62] which introduced liquidation, arrangement, and action Pauliana proceedings. However, this statute was repealed on 1 January 1951 and its provisions on arrangement proceedings were never applied in practice.[63] On 1 January 2008, the institution of insolvency arrangement was restored to the Czech legal system with the entry into force of the new Insolvency Law Act of 30 March 2006.

Currently, the insolvency arrangement (*reorganizace*) is regulated in §§ 316-364 of the Insolvency Act (IZ). The purpose of the proceedings pursuant to § 316 point 1 of the IZ is to satisfy the creditors while preserving the activity of the taxpayer's enterprise and ensuring the implementation of restructuring measures under the control of the creditors.

Arrangement proceedings are only available to entrepreneurs regardless of their legal form.[64] The conditions for opening arrangement proceedings depend on the size of the taxpayer's enterprise. In the case of entrepreneurs with an annual turnover of less than CZK 50,000,000 or with fewer than 50 employees, prior consent of creditors is required to open arrangement proceedings. These taxpayers must attach to the request for the opening of insolvency proceedings not only a preliminary proposal but also (i) the consent of a majority of the secured creditors, and (ii) the consent of a majority of the unsecured creditors to the submission of a preliminary proposal. In the legal literature, such preliminary, out-of-court proceedings are called preliminary restructuring (*předpřipravená reorganizace*).[65]

Insolvency arrangement may provide for any measures that are legally permissible and lead to higher satisfaction of the creditors than liquidation proceedings. However, the essential principle of equal satisfaction of the creditors must be maintained. On the other hand, this principle does not preclude the court from approving an arrangement in which specific creditors are satisfied to a greater extent.[66] The arrangement may provide for, among other measures, the cancellation of tax liabilities.

[62] Zákon, kterým se vydávají řády konkursní, vyrovnací a odpůrčí [Act on bankruptcy, composition and resistance] of 27 March 1931, Collection of Laws and Ordinances 1931, No. 64.

[63] Stanislava Černá, Ivana Štenglová, Irena Pelikánová, Jan Dědič, *Obchodní právo – podnikatel, podnikání, závazky s účasti podnikatele* [Commercial Law: Entrepreneur, Business Activity, and Related Obligations], (Prague: Wolters Kluver ČR 2016), 366.

[64] Resolution (usnesení) of the Supreme Court (Nejvyšší soud) of 30 June 2015, no. 29 NSCR 50/2013, Collection of the Supreme Court's Decisions, no. 96/2015.

[65] Michal Žižlavský, Jan Kozák, in: Jan Kozák, Alexandr Dadam, Lukáš Pachl, *Insolvenční zákon a přepisy související. Komentář* [Insolvency Act and Related Regulations: Commentary], (Prague: Wolters Kluwer ČR 2016), 1170.

[66] Ibid., 1168.

Arrangement proceedings consist of three stages. At the first stage, the court opening insolvency proceedings decides on the admissibility of arrangement proceedings. This stage ends with the court order on this issue. Then, the arrangement proposal is adopted by a vote of the creditors. This stage finalises the court order to approve the arrangement. At the third and the last stage, the taxpayer implements the arrangement.

3.1. Admissible conditions for arrangement proceedings

An application for permission to open arrangement proceedings may be submitted by the taxpayer or any creditor, including the tax authority, although the taxpayer has priority in this respect. Anyone applying for the opening of the proceedings must do so in good faith that all conditions for approving the insolvency arrangement will be met. In the legal literature, good faith is associated with the honest intention of the applicant.[67]

The court decides on the admissibility of arrangement proceedings. The court rejects the application for the opening of the proceedings if:

1. the facts of the case suggest that the application is motivated by fraudulent intent (*nepoctivý záměr*);
2. the application was submitted by a person whose another application on the same matter had already been decided;
3. the creditors' meeting did not accept a creditor's application to open arrangement proceedings.

If the arrangement proposal is already submitted at this stage, the court limits the review to its formal aspects. A legal remedy against the rejection of the application may only be sought by the person who submitted the application. By contrast, a legal remedy against a favourable decision on the admissibility of arrangement proceedings is not available.

The concept of fraudulent intent is relatively vague, and its content is determined by the court in individual cases. Unfortunately, the IZ does not define the concept of fraudulent intent and does not characterise it in any other way.[68] The legislator limits itself in Art. 326 point 1 of the IZ to giving examples of fraudulent intent that are of a formal nature. According to this article, the following facts indicate fraudulent intent: (i) assets of the taxpayer or member of the taxpayer's executive body have been the subject of insolvency proceedings within the last five years, or (ii) the taxpayer or member of the taxpayer's executive body have been lawfully convicted of economic offence or offence against property

[67] Kozák, in: Kozák et al., *Insolvenční zákon*, 1177.

[68] Luboš Smrčka, in: Jiřina Hásová, Tomáš. Moravec, *Insolvenční zákon. Komentář* [Insolvency Act: Commentary], (Prague: C.H. Beck 2014), 1234.

within the last five years. These examples show that the condition of fraudulent intent is limited under this article to two situations where the taxpayer cannot take advantage of arrangement proceedings. The concept of fraudulent intent as understood under the above article is not a general clause, which allows classifying arrangement proceedings as a dispensation, since such a concept in no way takes into account atypical cases.

3.2. Adoption of insolvency arrangement

After the court has given a favourable decision on the opening of arrangement proceedings as a way of conducting insolvency proceedings, an arrangement proposal should be submitted to the court. The most important part of the proposal concerns the measures that will be taken to solve the taxpayer's financial problems. In § 341 point 1 of the IZ, the legislator lists examples of the above measures, which include, among others, the cancellation of part of the taxpayer's liabilities, including incidental liabilities. The proposal must also indicate the exact amount of cancelled liabilities for each creditor, including the amount of tax cancellation. In order to determine the extent of satisfaction of the liabilities and facilitate voting at a creditors' meeting, the proposal should allocate the creditors into groups. Each group must comprise the creditors in a similar position and, in principle, with compatible economic interests. In practice, all unsecured creditors may be included in one group if they are to be satisfied in the same amount.[69]

In order to adopt the arrangement, the court convenes a creditors' meeting. Pursuant to § 347 point 1 of the IZ, the arrangement is considered adopted if it has been supported by the double majority in each group, i.e. the majority of creditors has voted for it and these creditors hold at least half of total amount of liabilities. In the case of the group comprising shareholders (or partners) of the taxpayer, a majority of shareholders holding two-thirds of the share capital is required under § 347 point 2 of the IZ. It is worth noting that voting on adoption of the arrangement is independent of the prior voting on the opening of arrangement proceedings (preliminary arrangement). A creditor is allowed to agree on the preliminary arrangement and then vote against the insolvency arrangement.[70]

Following the creditors' meeting or voting outside the meeting, the court approves the adopted arrangement if the following conditions are jointly met:

1. the arrangement complies with the IZ (e.g. division of the creditors within creditor into groups is correct) and other provisions of the law;

[69] Resolution (*usnesení*) of the High Court [*Vrchní soud*] in Olomouc of 4 August 2010, no. 2 VSOL 264/2010-B-175, unpublished, www.kraken.slv.cz.

[70] Michal Žižlavský, Jan Kozák, in: Kozák et al., *Insolvenční zákon*, 1278.

2. all circumstances of the case allow to reasonably assume that the arrangement is not motivated by fraudulent intent;
3. all creditor groups have adopted the arrangement;
4. as a result of the implementation of the arrangement, each creditor will obtain the same or higher satisfaction of their liabilities than in the case of liquidation proceedings (the so-called 'best interest test'); alternatively, creditors will agree to a lower satisfaction; and
5. liabilities arising after the opening of insolvency proceedings have been or will be satisfied immediately after the entry into force of the arrangement unless the creditor agrees otherwise.

Despite the objection of some creditor groups, the court may approve the arrangement assuming that the facts are different if the following conditions are jointly met:

1. the arrangement has been adopted by at least one group of the creditors;
2. liabilities are treated equally within each group;
3. the arrangement is fair for each group; and
4. it can be expected that the arrangement will not ultimately lead to the reopening of insolvency proceedings and liquidation of the taxpayer's assets unless the arrangement itself provides for the liquidation of the taxpayer's assets.

On the other hand, it must be assumed that if all creditor groups have adopted the insolvency arrangement, the court does not verify whether liabilities are treated equally within all groups, and the arrangement is fair for all creditors.[71] Hence, it cannot be ruled out that the tax authority has been outvoted within its creditor group, and then the court will refuse to verify whether liabilities are treated equally within each group.

The IZ introduces a specific criterion for assessing the fairness of an arrangement that is very formal. According to § 349 points 1–2 of the IZ, the arrangement should be considered fair if (i) it guarantees to the creditors voting against the arrangement the satisfaction of their liabilities in an amount not lower than the entire principal amount of their liabilities plus interest up to date of adoption of the arrangement, or (ii) the arrangement does not provide for any satisfaction of liabilities of the taxpayers' shareholders (partners). In practice, the first condition can only be satisfied in a few cases, which are usually due to the financial situation of the taxpayer. The fulfilment of the second condition is only seemingly obvious. Lack of satisfaction of the taxpayer's shareholders is understood restrictively in the Czech Republic. Consequently, if the taxpayer is a company, it is necessary to cancel all existing shares and provide the taxpayer with new share capital in the amount required by the law.[72]

[71] Resolution (*usnesení*) of the High Court (*Vrchní soud)* in Prague of 28 July 2009, no. 1 VSPH 343/2009-B-103, *Obchodněprávní revue* 9 (2009).

[72] Resolution (*usnesení*) of the High Court (*Vrchní soud*) in Olomouc of 10 September 2015, no. 2 VSOL 387/2015-B-68, unpublished, www.kraken.slv.cz.

The order approving the arrangement may be challenged by any creditor who has voted against it. Otherwise, the order denying approval of the arrangement may be challenged by the taxpayer, the person submitting the arrangement proposal, and any creditor voting in favour of the arrangement. After the arrangement is approved pursuant to § 353 point 1 in conjunction with § 355 point 1 of the IZ, the taxpayer regains the right to dispose of their enterprise under the supervision of the receiver and the creditors' council.

A lawfully approved arrangement may be revoked in situations listed in § 362 points 1–2 of the IZ, and in the cases mentioned in § 363 point 1 of the IZ it may be converted into liquidation proceedings. The quashing of the arrangement is ex tunc, i.e. the legal relationships between the taxpayer and the creditors are restored as if the arrangement has never been adopted.[73] The conversion into liquidation proceedings is ex nunc, therefore it does not affect measures provided for in the arrangement, including tax cancellation. As a result, the subject matter of liquidation proceedings will be liabilities shaped by the insolvency arrangement (insolvency arrangement as novation),[74] despite the failure of the taxpayer to implement the arrangement.

After the implementation of the arrangement, the court, at the request of the taxpayer, issues an order on notification of this implementation. The order is declaratory and cannot be challenged by any remedy.[75]

3.3. Position of the tax authority

Czech law does not provide a specific legal basis for the tax authority to decide whether to support or reject the arrangement proposal, and there is no guidance on this point. Thus, it indicates the existence of a de facto quasi-prerogative of the tax authority in this respect. Moreover, such a situation should be considered as atypical given the frequency with which the minister of finance applies internal administrative guidelines to regulate similar tax issues in detail.[76]

[73] Kozák, in: Kozák et al., *Insolvenční zákon*, 1326.

[74] Richter, Insolvenční právo, 520.

[75] Kozák, in: Kozák et al., *Insolvenční zákon*, 1337–1338.

[76] Pokyn GFŘ-D-21 k promíjení příslušenství daně [Guideline GFŘ-D-21 on cancelling accessory tax liabilities] of 16 February 2015, no. 4260/15/7100-40123, https://www.financnisprava.cz/assets/cs/prilohy/d-zakony/Pokyn_GFR_D-21.pdf, accessed 28 February 2020; Pokyn GFŘ-D-29 k prominutí pokut za nepodaní kontrolního hlášení [Guideline GFŘ-D-29 on cancelling penalties for not filing control statements on time] of 8 August 2016, no. 111096/16/7100-20116-050484, https://www.financnisprava.cz/assets/cs/prilohy/d-zakony/Pokyn_GFR_D-29.pdf, accessed 27 March 2020; Pokyn GFŘ-D-33 ke stanovení daně paušální částkou [Guideline GFŘ-D-33 on assessing tax liabilities in lump sum] of 19 December 2017, no 135888/17/7100-10111-401062; Finanční zpravodaj [Financial Bulletin] 1 (2018), https://www.mfcr.cz/cs/legislativa/financni-zpravodaj/2018/financni-zpravodaj-cislo-1-2018-30728, accessed 27 March 2020.

In the Czech Republic, only entrepreneurs may benefit from the institution of insolvency arrangement, and smaller entrepreneurs must additionally obtain the prior consent of the majority of creditors to a preliminary arrangement when applying to open arrangement proceedings. On the other hand, only a simple majority of the creditors holding at least half of the liabilities is needed to adopt the arrangement. Therefore, it is an institution that allows for the cancellation of tax liabilities, especially for larger entrepreneurs, which indicates the existence of a group privilege.

The general clause of fraudulent intent formally limits the possibility of taking advantage of this privilege. However, as indicated above, this clause is only a narrow condition applicable in typical cases—the taxpayers with fraudulent intention within the meaning of one of the cases listed in § 326 point 2 of the IZ should not be allowed to use the institution of insolvency arrangement. It does not in any way determine whether the taxpayers with honest intention should be granted tax cancellation under the insolvency arrangement. In addition, there are no guidelines for the tax authorities on adopting the arrangement providing for the application of general clauses. This situation justifies the view that the Czech institution of insolvency arrangement may not be classified as a dispensation. Nonetheless, it should be stressed that the fraudulent intention clause in § 326 point 2 of the IZ limits the possibility of using the arrangement more often than once every five years. This frequency limitation precludes classification of this institution as simply a privilege.

When adopting the arrangement, the position of the tax authority is relatively weak in Czech law. Above all, the arrangement requires the support of only a majority of the creditors. Moreover, the objection of a given group of the creditors may be replaced by a court order, i.e. there may be a situation where the court approves the arrangement despite the lack of support from a simple majority of the creditors. This makes it relatively easy to outvote the tax authority where it is against the proposal, including tax cancellation.

4. Voluntary arrangement

Companies in England could already enter into insolvency arrangements with their creditors under the Companies Law 1908. Based on this statute, the adoption of the arrangement required the support of the creditors holding three-quarters of the taxpayer's liabilities. This arrangement was binding on all creditors, but the procedure leading to its conclusion was lengthy and costly.[77] Currently, this institution is regulated in sec. 896–901 of the Companies Act 2006 as a formal arrangement, which is also available to companies that are not in insolvency.

[77] Vernon Dennis, *Insolvency Law Handbook*, (London: The Law Society 2013), 84.

Unfortunately, as stressed in the legal literature, this institution is still unattractive and unused.[78]

Insolvency arrangement may also be adopted on the basis of the Deeds of Arrangement Act 1914. The adoption of insolvency arrangement requires, in that case, the support of a simple majority of the creditors, but the arrangement is not binding on the creditors who vote against it. The adopted arrangement is to be entered to the relevant register—the Insolvency Service's Insolvency Practitioner Unit in Birmingham. The last such arrangement was registered in 2004.[79] Thus, this form of arrangement is, in fact, a dead institution.

The third option to adopt insolvency arrangement is debt management plan, which is popular among people with financial problems. However, this institution is not regulated in statutory law, although in recent years there have been proposals to regulate it by a statute. The plan rarely includes tax cancellation and is not binding on creditors who oppose its adoption. Moreover, such a plan is carried out for many years. Plans lasting even 20 years are not uncommon.[80]

Given the above, the form of insolvency arrangement that will be analysed in the following section is a voluntary arrangement that is regulated in the Insolvency Act 1986. This act separately regulates the adoption of an insolvency arrangement with a natural person (individual voluntary arrangement, IVA) and with a legal person (company voluntary arrangement, CVA).

4.1. Individual Voluntary Arrangement

The arrangement with a natural person is governed by Art. 252–263g of the IA. The IVA was introduced in 1986 as an institution for indebted entrepreneurs. Currently, 90% of the IVAs concern non-business liabilities.[81] If no bankruptcy petition has been filed and the court has not appointed an insolvency practitioner for the taxpayer, they may, at any time, initiate IVA proceedings. The taxpayer's insolvency is not a prerequisite for opening arrangement proceedings, although it is unlikely that the creditors will agree to enter into an arrangement with a solvent taxpayer.[82]

An essential element of any application to initiate IVA proceedings is the recommendation by the taxpayer of a nominee, whose task is to assist the taxpayer in the preparation of an arrangement proposal and supervise the implementa-

[78] Vanessa Finch, David Milman, *Corporate Insolvency Law*, (Cambridge: Cambridge University Press 2017), 412, and Louis Doyle, Andrew Keay, *Insolvency Legislation: Annotations and Commentary*, (Bristol: Lexis Nexis 2017), 24.

[79] Dennis, *Insolvency Law*, 33.

[80] Ibid., 58–60.

[81] Ibid., *Insolvency Law*, 615.

[82] Ibid., 35.

tion of this arrangement. The nominee may only be a licensed insolvency practitioner.[83] The proposal is presented by the taxpayer, but it must be assessed in a report by the intended nominee, who not only helps to prepare the proposal but also verifies its viability.[84]

The proposal can take one of two forms. The first form is a composition, under which the creditors agree to cancel part of their liabilities, in return for which the taxpayer undertakes to repay the remaining liabilities. The second form is a scheme of arrangement, in which the creditors agree to something other than cancellation. The creditors may agree, for instance, to a moratorium on repayment or to repayment in instalments, in exchange for which the taxpayer undertakes to repay liabilities in full. In the case of a scheme of arrangement, a supervisor may be appointed for the taxpayer's assets.[85] In practice, taxpayers are often determined to enter into an arrangement in the form of a composition, which provides for the cancellation of part of the liabilities.[86] It is not acceptable to propose a 'zero' composition, i.e. one that offers nothing to creditors, even a very small payment.[87] As regards the content of arrangement proposals, many creditors, in particular tax authorities, banks, and credit card companies, demand that the provisions of the arrangements are standardised.[88]

After the submission of the arrangement proposal, the nominee is ex officio obliged to organise and convene a creditors' meeting.[89] During the meeting, any creditor has the right to submit a modification to the proposal. Such modification, however, requires the consent of the taxpayer. The nominee may also adjourn the meeting before voting on the IVA proposal.[90] The secured creditors do not participate in voting at the meeting. Adoption of the arrangement requires the support of the creditors holding three-quarters of liabilities by value. If the required majority cannot be reached, the meeting may be adjourned by up to 14 days.

Within four days after the end of the creditors' meeting, the chairman of the meeting is obliged to file with the court a report on the proceedings and results of the meeting. In the case of approval of the arrangement, the chairman should attach to the report the terms under which the arrangement was adopted. The purpose of this action is to report the arrangement to the public register of IVAs maintained by the Secretary of State. The arrangement is binding on all entities entitled to vote at the meeting, regardless of their actual participation in the meeting.

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[83] Doyle, Keay, *Insolvency Legislation*, 400.
[84] Dennis, *Insolvency Law*, 40.
[85] Ibid., 34.
[86] Doyle, Keay, *Insolvency Legislation*, 399.
[87] Inland Revenue Commissioners v Bland, [2003] EWHC 1068; [2003] BPIR 1274.
[88] Dennis, *Insolvency Law*, 37.
[89] Doyle, Keay, *Insolvency Legislation*, 413.
[90] Ibid., 416.

The creditors and the taxpayer may seek a judicial remedy against the arrangement within 28 days after submitting the report to the court. When deciding on the remedy, the court is entitled to make extensive use of its discretionary power. It is assumed that the court is obliged to take a positive decision on the remedy in exceptional cases, e.g. when, according to the arrangement, the tax authority receives 30% of its original liabilities and the other creditors receive 100%.[91] Pursuant to sec. 262(1) of the IA, the remedy may be based on one of two reasons: (i) the arrangement unfairly prejudices the interest of a particular creditor, or (ii) there are material irregularities concerning the creditors' decision procedure. It is not permissible to challenge the arrangement itself. Furthermore, the irregularity must affect the decision taken by the creditors' meeting.[92]

The following cases can serve as examples of unfair prejudice: (i) the cancellation of liabilities of a co-debtor or guarantor, or (ii) forcing the spouse of the taxpayer to renounce her claims (liabilities) based on the marriage, which could be asserted in liquidation proceedings. The mere adoption of an arrangement that satisfies a specific class of creditors to a lower extent than liquidation proceedings is not an example of unfair prejudice against other classes of creditors.[93]

Pursuant to sec. 262(4) of the IA, if the court accedes a remedy, it may take one of the following decisions:

1. revoke or suspend any decision of the creditors' meeting; or
2. instruct a specific person to check whether the creditors' meeting has accepted a revised or original proposal.

According to s. 263(2) of the IA, when an arrangement enters into force, the nominee implementing the arrangement changes their name to the supervisor. This change is automatic.[94] Then, the supervisor should, as soon as reasonably possible, be put in possession of the taxpayer's assets covered by the arrangement.

The supervisor is obligated to inform the taxpayer, all creditors, and the Secretary of State about implementation or termination of the arrangement within 28 days. The termination takes place when the taxpayer fails to fulfil their obligations under the arrangement. In that case, the court may declare the taxpayer insolvent.

Practitioners take the view that debtors often treat the IVA procedure as an attempt to avoid paying their debts. Sometimes debtors create spurious liabilities by colluding with third parties to bring real creditors down to the position of minority creditors.[95] On the other hand, IVA remains a popular way for natural persons in the UK to deal with the problem of insolvency. IVA is

[91] Ibid., 431.
[92] Ibid., 428.
[93] Ibid., 427.
[94] Ibid., 435.
[95] Dennis, *Insolvency Law*, 35.

chosen more often than debt relief through bankruptcy proceedings or a debt relief order.

English law does not restrict access to the arrangement by the introduction of a general clause. There are also no restrictions as to the frequency of using this institution. On the other hand, an arrangement must be accepted by three-quarters of the creditors, and this acceptance cannot be replaced by a court order. Therefore, it is hard to classify this arrangement as a privilege or dispensation. Tax cancellation through an arrangement depends on obtaining support for the IVA from the statutory majority of creditors. Thus, it is impossible to adopt an arrangement that was not supported by the statutory majority of the creditors but was approved by the court. This has a positive impact on the position of the tax authority in these proceedings.

4.2. Arrangement for legal persons–CVA

Pursuant to sec. 1-7B of the IA 1986, the taxpayer may enter into a company voluntary arrangement (CVA) with creditors. Compared to IVA, this arrangement is not very popular and in practice plays the role of pre-trial proceedings in relation to other insolvency proceedings.[96]

Only the taxpayer may apply for the opening of arrangement proceedings.[97] Like IVA, the arrangement proposal may be presented in one of two forms: a composition or scheme of arrangement. In practice, the taxpayers usually propose the composition, offering to repay part of liabilities in exchange for the cancellation of the remaining part.[98]

Arrangement proceedings start with the taxpayer instructing an insolvency practitioner to act as their intended nominee. The taxpayer together with the nominee prepare an arrangement proposal.[99] In practice, the proposal is usually prepared by the nominee.[100] The taxpayer must additionally draw up a state of affairs providing detailed information about their enterprise. The nominee then submits the proposal and state of affairs to the court within 28 days. Together with these documents, the nominee also presents a report on whether it is reasonable to expect the proposal to be approved and implemented and whether the creditors' meeting should be held. Although the intended nominee is indicated by the taxpayer, the nominee is also accountable to the creditors. As soon as the nominee files the proposal with the court, the court confirms the filing date. The

[96] Ibid., 84.
[97] Brenda Hannigan, *Company Law*, (London: LexisNexis, 2003), 705.
[98] L Doyle, Keay, *Insolvency Legislation*, 25.
[99] Dennis, *Insolvency Law*, 87.
[100] Doyle, Keay, *Insolvency Legislation*, 1036.

nominee convenes the creditors' meeting no earlier than 14 days and no later than 28 days from the filing of the proposal.[101]

The adoption of the arrangement requires the support of the creditors holding three-quarters of the taxpayer's liabilities. Furthermore, the arrangement is deemed not to be adopted if more than 50% of the creditors not associated with the taxpayer are against the arrangement. In addition, the arrangement must be supported by the majority of the taxpayer's shareholders. Since the taxpayer's shareholders must also support the arrangement, it is said in the literature that 'the proposal is made to the company, not by the company.'[102] This difference is essential given that the proposal is adopted not only by the taxpayer's creditors but also by their shareholders.

The creditors and shareholders of the taxpayer may, within 28 days of the creditor's meeting, challenge before the court the meeting's decision to adopt or refuse to adopt the arrangement. As in the case of IVA, a remedy may be sought based on two types of objections: (i) unfair prejudice against the interest of a creditor, member, or contributor of the taxpayer, and (ii) material irregularity at or in relation to the meeting or relevant qualifying decision proceedings. Provided that the court considers a remedy to be justified, it may (i) revoke or suspend any decision of the creditors' meeting, or (ii) instruct a specific person to check if the creditors' meeting has accepted a revised or original proposal. The court, however, is not entitled to give guidelines or make modifications concerning the proposal.[103] When assessing the filed remedy, the court takes into account the amount of the applicant's liabilities. A remedy filed by a creditor holding significant taxpayer's liabilities is more likely to succeed. In the case of an objection regarding unfair prejudice, the court also considers the extent of satisfaction of the applicant. In particular, the court considers how much the creditor would receive if liquidation proceedings were opened against the taxpayer.[104] As regards material irregularities, the remedies in practice mainly concern the exercise of voting rights at the creditors' meeting.

An objection of unfair prejudice must relate to the provisions of a particular arrangement and not to the institution of the arrangement itself.[105] When examining the appeal, the following must be taken into account: (i) unfair prejudice results directly from the arrangement,[106] and (ii) the court must consider all circumstances of the case before establishing the existence of unfair prejudice.[107] Unequal treatment by itself should lead to verification of the cause of the in-

[101] Dennis, *Insolvency Law*, 88–89, 92–93.
[102] Ibid., 90.
[103] Alpa Lighting Ltd, Re, [1997] BPIR 341.
[104] Dennis, *Insolvency Law*, 235.
[105] Doyle, Keay, *Insolvency Legislation*, 50.
[106] Debtor, Re (No. 222 of 1990), ex p. Bank of Ireland, [1992] BCLC 137.
[107] Re A Debtor (No 101 of 1999) [2001] 1 BCLC 54 at 63d (Ferris J).

equality and not directly to the conclusion that there is unfair prejudice.[108] It is worth noting that the mere fact that a given creditor or class of creditors will obtain less satisfaction under the arrangement than it would obtain in liquidation proceedings does not constitute unfair prejudice.[109] Such extent of satisfaction may be considered as an unfavourable solution for the creditors, including the tax authority, compared to other legal systems.

The arrangement, once adopted by the creditors' meeting, is binding for all creditors except the secured ones.[110] The company voluntary arrangement 'is a statutory contract between a company and its creditors, under which an insolvency practitioner will have power and duties.'[111] With the approval of the arrangement, the nominee automatically becomes the supervisor of its implementation, unless the court decides otherwise.[112] The assets covered by the arrangement are impressed with a trust in favour of the creditors.[113]

Within 28 days from the full implementation of the arrangement, the supervisor is obliged to inform of this fact the registration authority of the taxpayer, i.e. the Companies House. The supervisor also informs all creditors covered by the arrangement. The supervisor should submit information on the implementation together with a report on its progress. The supervisor's report on the implementation is commonly referred to as 'the certificate of due completion.'[114]

From the point of view of classification into privilege and dispensation, company voluntary arrangement (CVA) is similar to individual voluntary arrangement (IVA). Arrangement proposals must be supported by the creditors holding three-quarters of the taxpayer's liabilities and the creditors not related to the taxpayer holding half of the liabilities. Such a double majority limits the possibility to use the arrangement to 'easily' cancel tax liabilities. As in the case of IVA, there is no constraint on the frequency of using this institution.

At this point, it is worth noting the unique role that the nominee plays in arrangement proceedings in England. In practice, it is the nominee and not the court that conducts arrangement proceedings, deciding on their course. The role of the court is limited to that of an appeal authority. Bearing in mind the thesis formulated in the Introduction on the role of the tax authority and court in tax

[108] In the case of Re A Debtor (No 101 of 1999), the court assumed that there was unfair prejudice of the tax authority in the case. According to the arrangement, the majority of the creditors with liabilities of GBP 440,000 would be satisfied in full, and tax liabilities (GBP 77,000) would be partially cancelled. In the court's view, the preference for private creditors over the tax authority was not economically justified.

[109] Doyle, Keay, *Insolvency Legislation*, 51.

[110] Dennis, *Insolvency Law*, 224.

[111] Insolvency Practitioners' Handbook, (London: Insolvency Practitioners Association 2017), 55.

[112] Doyle, Keay, *Insolvency Legislation*, 58.

[113] Ibid., 1057.

[114] Ibid., 1062.

cancellation, in the case of England the role of the nominee should also be considered.

4.3. Position of the tax authority

The issue of arrangement proceedings falls within the competence of a specialised tax office in Worthing—HMRC Enforcement and Insolvency Service. This tax office includes an organisational unit dealing exclusively with arrangement proceedings—HMRC Voluntary Arrangements Service (VAS), which was set up in 2001.[115] The existence of VAS indicates that the tax authority in England is prepared to participate in arrangement proceedings.

The statutory provisions of both insolvency and tax law do not contain a specific legal basis or guidelines for the tax authority regarding participation in arrangement proceedings. Nonetheless, this issue is subject to administrative guidelines and interinstitutional agreements. Two documents are particularly important in this respect: VAS Helpsheet HMRC 11/11 of 15 December 2011[116] and the Straightforward Consumer IVA Protocol of 20 June 2016.[117]

The VAS Helpsheet was published in 2011, and its validity was confirmed by the tax authorities during the R3's (The Association of Business Recovery Professionals) Small Practice Group Forum held on 17–18 November 2016.[118] It refers to arrangement proposals made by business entities, including both natural and legal persons. The subtitle of the helpsheet indicates that this guidance is intended to support businesses in temporary financial difficulties. In practice, the helpsheet is a two-page document written in clear and concise language. According to the guidance, an arrangement proposal should be sent directly to the tax authority in Worthing without involving the court, nominee, or locally competent tax authority. Direct communication with the tax office in Worthing underlines the autonomous status of the tax authority in arrangement proceedings.

At the beginning, the helpsheet indicates that each arrangement proposal is considered on an individual basis and will receive initial support of the tax authority if:

[115] Vanesa Finch, David Milman, *Corporate Insolvency Law: Perspectives and Principles*, (Cambridge: Cambridge University Press 2017), 427.

[116] 'VAS Helpsheet HMRC 11/11', *HM Revenue & Customs*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/366661/vas-factsheet_1_.pdf, accessed 27 March 2020.

[117] 'The Straightforward Consumer IVA Protocol 2016 version', ClearDebt, https://cleardebt.co.uk/wp-content/uploads/iva_protocol_2016.pdf, accessed 27 March 2020.

[118] 'Company Voluntary Arrangement and IVAs – HMRCs Commercial Approach', Antony Batty & Company LLP, https://antonybatty.com/hmrcs-commercial-approach-company-voluntary-arrangement/, accessed 27 March 2020.

1. the taxpayer is honest in their financial disclosure;
2. the proposal makes an optimised and achievable offer to the creditors;
3. a provision is made for payment of all future debts on time;
4. the proposal treats all creditors within the same class equally;
5. there are no exceptional reasons for rejection; and
6. the taxpayer will consider the concerns of the tax authority about the proposal.

Provided the preliminary criteria are met, the tax authority should commence talks (negotiations) with the taxpayer. The tax authority may propose a modification of the proposal or request the taxpayer to present technical amendments that will not affect the taxpayer's obligations. Moreover, the tax authority reserves the right to contact other creditors of the taxpayer to discuss with them the content of the arrangement proposal. Before the tax authority decides to vote for or against the proposal, the taxpayer should also complete documentation listed in the helpsheet and explain in detail the reasons for past non-payment of tax liabilities as well as inform of changes made to ensure payment of post-approval tax liabilities.

The final section of the helpsheet lists the situations in which the tax authority will most likely not support the arrangement proposal, including the following:

1. evasion of statutory liabilities by the taxpayer or past association with contrived insolvency;
2. payment of other creditors whilst withholding sums due to the tax authority;
3. any proposal that requires sale of tax liabilities or does not provide cash dividends;
4. failure to meet any obligations under a prior voluntary arrangement; and
5. exclusion of creditors who are entitled to receive the same treatment as all others within their class.

At the taxpayer's request, the tax authority explains the reasons for rejecting the arrangement proposal. At the end of the helpsheet, there is a statement that the provided information is for guidance only and reflects the position of the tax authority at the time of its preparation. The helpsheet is without prejudice to any right to appeal the decision of the tax authority to support or reject arrangement proposals. Finally, it is worth noting the result of a survey conducted by R3 in 2016.[119] Forty-nine per cent of the respondents stated that the tax authority was not helpful regarding an arrangement and often did not agree to a CVA proposal even though it was the best available option.

The assessment of arrangement proposals submitted by consumers is governed by the Straightforward Consumer IVA Protocol in its 2016 version. However, unlike the previous document, it concerns all creditors, not just the tax au-

[119] Finch, Milman, *Corporate Insolvency Law*, 482.

thority. According to sec. 2.1. of the protocol, it is a voluntary agreement, which provides a standard framework for dealing with a straightforward consumer IVA. It applies to creditors such as banks, tax authorities, consumer organisations, and insolvency practitioners.

Sec. 1.1 of the protocol states that its purpose is to support a valid public policy objective by providing debt relief to individuals in financial distress. In practice, the protocol is established to carry out a standard assessment of an arrangement proposal made by 'a straightforward consumer.' Under sec. 3.1 of the protocol, a straightforward consumer should be understood as a person who (i) has a sustainable source of income, e.g. in the form of employment or a regular pension, and (ii) has three or more lines of credit from two or more creditors. Qualification of the taxpayer as a straightforward consumer does not take into account their age, educational background, motivation to take a credit, or amount of their debt. It is worth noting that the concept of a straightforward consumer refers to either moral criteria or general clauses. According to the protocol, a straightforward consumer is a person who has a stable source of income and regularly uses a credit institution. Such a definition of a straightforward consumer indicates who is likely to benefit from a possible privilege.

An essential element of the protocol is the establishment of the IVA Standing Committee, which meets regularly three times a year and assesses the arrangement proposals made by consumers, including the taxpayers. The Committee is composed of representatives of insolvency practitioners (9 persons), creditors (8 persons), and consumers (3 persons). The tax authorities have one seat on the committee as a creditor. Another important element of the protocol is the introduction of the Standard Conditions for Individual Voluntary Arrangements, which constitute Annex 4 to the protocol.

However, pursuant to sec. 13.1, the protocol does not ultimately determine whether the creditor will support an arrangement. On the other hand, the protocol provides the tax authority with a legal framework for active participation in arrangement proceedings. The protocol also expresses strong support for the public policy on debt relief for individuals in financial distress. This support indicates which criteria should guide the actions of the parties to the protocol, including the tax authority, when deciding whether to support an arrangement proposal.

Statutory regulations on arrangement procedures (IVA and CVA) do not contain a general clause that would limit the use of these proceedings. On the other hand, they introduce a neutral criterion of the statutory majority of creditors, which cannot be replaced or changed by a court order. Nonetheless, the documents mentioned above indicate that the tax authority should also by guided by economic and social objectives when deciding for support to an arrangement proposal. This guidance is particularly apparent in the case of arrangements with consumers under IVA, which is popular anyway among consumers. Thus,

tax cancellation under an insolvency arrangement in English law is a privilege granted to the entire social group, i.e. consumers and credit institutions, including banks. This position is confirmed by the definition of a straightforward consumer, which actively encourages people to take out loans.

English law also does not contain a specific statutory legal basis for the tax authority to participate in arrangement proceedings. However, as indicated in Chapter V, it is justified to refer to general statutory provisions empowering the tax authorities to carry out tax administration, e.g. to sec. 1(1) of the Tax Management Act 1970. The VAS Helpsheet HMRC 11/11 and the Straightforward Consumer IVA Protocol presented above clearly shows that the English tax authorities are actively involved in arrangement proceedings. This fact allows to assume that the tax authority taking actions within the framework of arrangement proceedings, including deciding on support for an arrangement proposal, acts on the basis of a governmental prerogative, as is the case with administrative cancellation discussed in Chapter V.

5. Summary

In all legal systems covered by the analysis, there is no specific direct legal basis in a statutory law that would entitle the tax authority to support an arrangement proposal providing for tax cancellation. In the case of Poland, Germany, and the Czech Republic, such a situation is astonishing because, as indicated in Chapter II, there is no place for the institution of prerogative in these legal systems. On the other hand, Władysław Leopold Jaworski, who was a critic of the positivist approach to the law, indicated that the activity of the administrative authorities (in this case, the tax authorities) is not limited to the application of legal provisions but is a creative activity, only partly defined by statutory law.[120] This position may partly explain the lack of a specific and direct legal basis in a statute in this regard.

The lack of a legal basis in the form of a statute does not preclude that participation of the tax authority in arrangement proceedings is regulated in another way. There are such other regulations in German and English legal systems. In the case of German law, there are letters from the minister of finance, which are internal administrative guidelines. According to these guidelines, when participating in arrangement proceedings, the tax authority should take into account the objectives of insolvency law but should also be guided by the State's fiscal interest and the premises of §§ 163 and 227 of the AO. Given that tax cancellation under §§ 163 and 227 of the AO is a dispensation, insolvency arrangement from the point of view of tax liabilities should also be classified as a dispen-

[120] Jaśkowska, Hauser et al., *Instytucje prawa administracyjnego*, 218.

sation. However, arrangement procedure itself should be classified as a quasi-privilege.

In English law, the participation of the tax authority in arrangement proceedings is subject to regulations drawn up by the tax authority itself or agreements concluded with other entities participating in arrangement proceedings. In these documents, as well as in statutory law, there is no reference to general clauses. There is also no restriction on the frequency of using insolvency arrangement. Therefore, from the perspective of tax liabilities, insolvency arrangement (IVA and CVA) should be classified as a privilege. This opinion is confirmed by the content of the Straightforward Consumer IVA Protocol, according to which the tax authority should also be guided by economic and social objectives when deciding on supporting an arrangement proposal.

In Poland and the Czech Republic, there are no regulations concerning the participation of the tax authority in arrangement proceedings, in particular guidelines on supporting arrangement proposals, although, as indicated in this chapter, the tax authority may potentially be guided by significantly different purposes. Thus, it is hard to classify these institutions from the viewpoint of the tax authority as a dispensation or privilege. It is worth noting, however, that both these systems do not prohibit the repeated use of the institution of insolvency arrangement at short time intervals (in the case of the Czech Republic, the court may consider such behaviour as a sign of fraudulent intention). General clauses adopted by the Polish and Czech legislators limiting access to arrangement proceedings—prohibition of harming creditors (Art. 8 of the Polish Restructuring Law) and fraudulent intent (§ 326 point 1 of the Czech Insolvency Law)—are of a formal nature. They also do not significantly restrict access to these proceedings. Hence, from the perspective of tax liabilities, there is a tendency in Poland and the Czech Republic to classify the institution of insolvency arrangement as a privilege. This position is confirmed by the explanatory statement to the bill of Restructuring Law, which refers directly to economic and social objectives.

The institution of insolvency arrangement strengthens the role of the court in tax cancellation. Arrangement proceedings are conducted under the supervision of the court, and the role of the tax authority is limited to that of a creditor. Moreover, an insolvency arrangement may be adopted despite the opposition of the tax authority if the statutory majority of the creditors supports the arrangement. In Germany and the Czech Republic, the court is entitled to approve an arrangement even if it has not obtained the majority required by the law, as the objection of a particular class of creditors may be replaced by the court's order. This confirms the decisive role of the court in the cancellation of tax liabilities in arrangement procedure, which should be taken into account in tax law regulations. Setting up a specialised tax office that would deal with arrangement proposals and arrangement proceedings, as is the case in England, is also worth considering.

Also noteworthy is the role of the nominee in English arrangement procedure. The nominee performs many functions that are performed by the court in the other compared legal systems, thus reducing the role of the court in tax cancellation.

In the case of insolvency arrangement, tax cancellation is always related to the state of affairs at the time of tax collection resulting from the taxpayer's bad financial situation. The subject of arrangement proceedings is not the creation of tax liabilities but only their collection. It is, therefore, appropriate to assume that tax liabilities should not be cancelled through administrative cancellation (under the provisions of tax law) in the cases where it is possible to adopt an insolvency arrangement. Giving priority to insolvency arrangement is justified by the State's fiscal interest—the burden of cancellation is borne not only by the State but also by private law creditors. However, more emphasis should be placed on the use of administrative cancellation to cancel tax liabilities where it is related to the legal norm on the creation of tax liabilities.

Chapter VIII

Debt relief

The institution of debt relief permits the cancellation of a wide range of tax liabilities when the taxpayer is in a difficult financial situation. As Philip R Wood points out, 'insolvency law plays a fundamental role in credit society … insolvency is the root of financial law.'[1] This view is confirmed, among other things, by the institution of debt relief, which potentially enables the taxpayer to cancel entirely all their due tax liabilities with one court order. Compared to administrative cancellation and insolvency arrangement, debt relief provides for the most extensive tax cancellation. It is, therefore, necessary to analyse this institution from the point of view of tax cancellation.

Unlike the institution of insolvency arrangement, which was already known to all of the compared legal systems in the first half of the 20th century, debt relief in its present form is a relatively new institution of insolvency law. This institution is the product of centuries-long evolution that dates back to the 16th century English insolvency law. In the Bankruptcy Act 1705, the Lord Chancellor was given the power to discharge from debts in certain situations. On the other hand, during that period, non-payment of debts was simultaneously subject to capital punishment in England.[2] The institution of debt relief in its current form, which is the subject of this analysis, was first introduced in the United States with bankruptcy reform in 1978.[3]

This chapter omits an analysis of the institution of prerogative. An analysis in this respect would be pointless as the role of the tax authority in these proceedings in all of the compared legal systems is marginal. Thus, the tax authority

[1] Philip R Wood, *Law and Practice of International Finance*, (London: Sweet & Maxwell 2008), 13.

[2] Petr Smolík, *Oddlužení v právním řádu ČR* [Debt relief in the legal order of the Czech Republic], (Prague: C.H. Beck 2016), 33; In England and Wales in the 1960s, 14% of convicts were sentenced for non-payment of debts. Włodzimierz Szpringer, *Upadłość konsumencka. Inspiracje z rozwiązań światowych oraz rekomendacje dla Polski* [Consumer Insolvency: Inspirations from Global Solutions and Recommendations for Poland], (Warsaw: CeDeWu 2006), 39.

[3] Smolík, Oddlužení, 35.

Table 7. Introduction of the institution of debt relief

No.	Country	Date of introduction
1	Poland	1 October 2003 – entrepreneurs 31 March 2009 – consumers
2	Germany	1 January 1999 – Act of 1994
3	The Czech Republic	1 January 2008
4	England	1 August 1984 – county court administration order 29 December 1986 – Insolvency Act of 1986 19 September 2007 – debt relief order

has no rights that would be based on a prerogative. Debt relief proceedings in the compared legal systems take place in the court. The tax authority does not decide, either directly or indirectly, on tax cancellation within the framework of debt relief. The participation of the tax authority in debt relief proceedings is limited to possible submission of an application to open such proceedings or to seeking a legal remedy against the court's decision on debt relief.

In the context of the previous considerations, it is essential to answer the question of the substantive nature of the institution of debt relief from the tax law perspective. Debt relief, like the institutions discussed earlier, can be analysed from the points of view of a privilege and a dispensation. It is worth noting that the perspective of tax law may differ significantly from the perspective of private law on the cancellation of liabilities through debt relief. From the private law point of view, debt relief is primarily a violation of the principle of pacta sunt servanda,[4] which is a fundamental principle of private law.[5] Tax liabilities are unilateral obligations imposed on the taxpayer, so the principle of pacta sunt servanda is, by its very nature, not known to tax law.

For the same reason as in the case of the chapter on insolvency arrangement, this chapter devotes more attention to procedural aspects than it does to the analysis of administrative cancellation. Moreover, the term 'debt relief' is used alongside the term 'debt relief proceedings.' This change is a consequence of the substantive and procedural nature of debt relief regulations in all of the discussed legal systems.

Particular emphasis must be placed on the distinction between cancellation and debt relief, which at the level of general language (Polish, German, Czech, and English) may have a similar meaning and may, to some extent, be used interchangeably. For the purposes of this book, however, this difference is significant. As already indicated in the Introduction, tax cancellation should be understood

[4] Ibid., 17.

[5] Marek Safian, *Prawo cywilne – część ogólna. System Prawa Prywatnego. Tom* 1 [Civil Law–General Part: System of Private Law, Vol. 1], (Warsaw: C.H. Beck 2012), 345.

as the expiry of the taxpayer's obligation to pay tax liabilities[6] or as permanent refraining from the collection of tax liabilities. Debt relief is an insolvency procedure that results in the cancellation (or permanent refraining from enforcing) of liabilities covered by this procedure to the extent not satisfied in these or other insolvency proceedings.[7]

1. Oddłużenie

The institution of debt relief (*oddłużenie*) was introduced into the Polish legal system on 1 October 2003 with the entry into force of the new Insolvency Law of 28 February 2003. However, this debt relief was only applicable to persons running business activity. Then, on 31 March 2009, the provisions on debt relief for persons not conducting business activity were introduced into the Insolvency Law.[8]

1.1. Scope of debt relief

Currently, the institution of debt relief in respect of persons conducting business activity is regulated in Art. 369–370f of the Insolvency Law as proceedings following liquidation proceedings. In the case of natural persons who do not conduct business activity, debt relief proceedings are regulated in Art. 491^{1}–491^{23} of the Insolvency Law combining liquidation and debt relief proceedings. These combined proceedings are commonly referred to as consumer insolvency proceedings,[9] and this term will also be used in this book. Only natural persons may take advantage of debt relief.

The above division into debt relief for persons conducting business activity and persons not engaged in business activity is dichotomous. According to Art. 491^{1} of the Insolvency Law, consumer insolvency proceedings apply to all natural persons who cannot declare insolvency as persons conducting business activity.[10] All other persons are subject to debt relief proceedings for persons conducting

[6] Dzwonkowski, Kurzac, in Dzwonkowski, *Ordynacja podatkowa,* 4.

[7] Rafał Adamus, *Nowa upadłość konsumencka. Poradnik praktyczny* [New Consumer Insolvency: A Practical Guide], (Warsaw: Difin 2015), 141.

[8] Ustawa o zmianie ustawy – Prawo upadłościowe i naprawcze oraz ustawy o kosztach sądowych w sprawach cywilnych [Act Amending the Bankruptcy and Reorganisation Law Act and the Act on Court Fees in Civil Cases] of 5 December 2008, Journal of Laws 2008, No. 234, item 1572.

[9] Adamus, *Nowa upadłość konsumencka*, 11.

[10] Lewandowski, Wołowski, *Prawo upadłościowe*, 266.

business activity. Therefore, any natural person may benefit from the institution of debt relief.

All liabilities of the taxpayer, including tax liabilities and other public law claims, are covered by liquidation proceedings that precede debt relief.[11] However, not all liabilities are covered by debt relief proceedings. Art. 370 para. 2 and Art. 491[21] para. 2 of the Insolvency Law contain lists of claims that are not subject to debt relief. Most of these claims are private law liabilities, which are outside the scope of analysis in this book. Nonetheless, it is permissible to cancel all tax liabilities, including tax liabilities that are of a quasi-penal nature, such as tax on income from undisclosed sources pursuant to Art. 25b-25g of the Personal Income Tax Act[12] or tax on inheritance and donations at a penal rate of 20% under Art. 15 point 4 of the Inheritance and Donation Tax Act.[13]

There are some significant distinctions between liquidation proceedings of persons conducting business activity and consumer insolvency proceedings. In particular, liquidation proceedings of consumers (which is part of consumer insolvency proceedings) are considerably simplified. On 1 January 2016, a significant approximation of regulations concerning persons conducting and not conducting business activity was achieved. However, for the sake of clarity of the analysis, both types of proceedings will be discussed separately.

1.2. Consumers

Debt relief proceedings are initiated at the request of the taxpayer and may be initiated even if the taxpayer has only one creditor. The proceedings cannot be initiated at the request of the tax authority.

Debt relief proceedings are combined with liquidation proceedings into one procedure. Thus, pursuant to Art. 491[14] para. 1 of the Insolvency Law, the court sets a schedule of repayments towards the creditors or cancels liabilities without setting the schedule only after the final implementation of a division plan, i.e. after the taxpayer's assets have been liquidated. The taxpayer's assets need to be liquidated within consumer insolvency proceedings.

As part of liquidation proceedings, the trustee takes over the taxpayer's assets and liquidates them. The sum obtained from the liquidation of the assets should be used to satisfy the creditors after drawing up a distribution plan.[14] At the stage

[11] Rafał Adamus, in Antoni Witosz, Aleksander Jerzy Witosz, *Prawo upadłościowe i naprawcze. Komentarz* [Bankruptcy and Reorganisation Law: A Commentary], (Warsaw: LexisNexis 2014), 22.

[12] Ustawa o podatku dochodowym od osób fizycznych [Personal Income Tax Act] of 26 July 1991, consolidated text in Journal of Laws 2019, item 1387.

[13] Ustawa z dnia 28 lipca 1983 r. o podatku od spadków i darowizn [Inheritance and Donation Tax Act] of 28 July 1983, consolidated text in Journal of Laws of 2019, item 1813.

[14] Adamus, *Nowa upadłość konsumencka*, 17.

of liquidation proceedings, no liabilities, including tax liabilities, are cancelled; instead, they should be partially satisfied.

After the implementation of the final distribution plan, i.e. the end of liquidation proceedings, a repayment schedule is drawn up and approved according to Art. 491[14] of the Insolvency Law. The schedule covers liabilities in the amounts updated with repayments already made at the stage of liquidation proceedings, i.e. with liabilities satisfied under the distribution plan. Moreover, the schedule specifies how much of the taxpayer's liabilities will be cancelled after its implementation. The schedule also covers liabilities arising after the declaration of insolvency, including expenses temporarily incurred by the State Treasury. Nonetheless, these liabilities are not subject to cancellation at the end of debt relief proceedings but should be paid in full by the taxpayer during the implementation period of the schedule. The schedule should be implemented within a period of not more than 36 months.

It is up to the court to set the schedule. The court decides, at its own discretion, on the conditions for the schedule. Therefore, the tax authority has little influence on the content of the schedule and, consequently, on the scope and conditions for tax cancellation.[15] The court is obliged to hear the taxpayer, trustee and creditors, including the tax authority, but is not bound by their positions.[16] When setting the repayment schedule, the court takes into account the following:

1. the earning capacity of the taxpayer;
2. the cost of living of the taxpayer and their dependents, including their housing needs;
3. the amount of liabilities of the taxpayer; and
4. the feasibility of satisfying them in the future.

Insolvency law does not impose the minimum or maximum amount of repayment under the schedule.

Debt relief is not always associated with the obligation to implement the schedule. Provided that the taxpayer's personal situation clearly indicates that they would not be able to make any repayments under the schedule, the court, pursuant to Art. 491[16] point 1 of the Insolvency Law, cancels liabilities of the taxpayer without setting a repayment schedule, i.e. it cancels liabilities in full. Such cancellation may be justified by e.g. age, illness, infirmity, or handicap, which, on the one hand, limit the earning capacity and, on the other hand, increase the taxpayer's living costs.[17]

[15] Rafał Adamus, Maciej Geronim, Bartosz Groele, *Upadłość konsumencka. Komentarz* [Consumer Insolvency: A Commentary], (Warsaw: C.H. Beck 2017), 282.

[16] Adamus, *Nowa upadłość konsumencka*, 134–135.

[17] Aleksander Jerzy Witosz, *Prawo upadłościowe. Komentarz* [Insolvency Law: A Commentary], (Warsaw: Wolters Kluwer 2017), 1181.

In the course of implementing the schedule, the taxpayer may request the court under Art. 491[19] point 1 of the Insolvency Law to amend the repayment schedule after hearing the creditors if the taxpayer cannot fulfil the obligations set out in the schedule. The court may extend the repayment period by a further period not exceeding eighteen months. Also, the creditors may, pursuant to Art. 491[19] point 3 of the Insolvency Law, apply to the court for amending the schedule if there is a significant improvement in the taxpayer's financial situation for reasons other than a remuneration increase from the taxpayer's personal gainful activities.

The court may *ex officio* or at the request of the creditor revoke the schedule in the cases specified in Art. 491[20] point 1 of the Insolvency Law. Despite the existence of a condition justifying the revoking of the schedule, the court will not revoke it if there are equitable or humanitarian grounds (*względy słuszności lub względy humanitarne*) against such an action. In the case of the revoking of the schedule, the liabilities will not be cancelled.

After the taxpayer has fulfilled all obligations specified in the repayment schedule, the court, pursuant to Art. 491[21] point 1 of the Insolvency Law, issues an order stating that the schedule is implemented, and the taxpayer's liabilities are cancelled. The cancellation also covers tax liabilities arising before the date of insolvency declaration and not satisfied through the implementation of the schedule. Debt relief results in the expiry of these liabilities. If the taxpayer subsequently fulfilled the liabilities covered by debt relief, it would be undue performance referred to in Art. 410 § 2 of the k.c.[18]

1.3. Conditions for consumer debt relief

Debt relief is not available to some consumers due to the circumstances of insolvency. At the stage of assessing an application for declaring insolvency, the court examines the so-called payment morality (*moralność płatnicza*) of the taxpayer.[19] Pursuant to Art. 491[4] point 1 of the Insolvency Law, the court dismisses an application if the taxpayer has caused the insolvency or has substantially increased the level of the insolvency, either intentionally or through gross negligence. On the other hand, the mere recklessness or negligence of the taxpayer does not exclude the right to debt relief.[20]

An absolute condition for the taxpayer to take advantage of debt relief is the absence of willful misconduct or gross negligence causing insolvency or increas-

[18] Ibid., 1202.

[19] Machowska, *Prawo restrukturyzacyjne i upadłościowe*, 479.

[20] Aleksander Jerzy Witosz, 'Przesłanki ogłoszenia upadłości konsumenckiej' [Conditions for declaring consumer insolvency], *Przegląd prawa handlowego* [Commercial Law Review] 2 (2015), 27.

ing its level. The court should examine this condition on the basis of objective and subjective elements. The objective element is the declaration of unlawfulness, i.e. the taxpayer's act or omission is contrary to the law or morality, while the subjective element is the taxpayer's attitude to this act or omission.[21]

Moreover, the access of the taxpayer to debt relief is limited by the occurrence of the relative conditions listed in Article 491[4] points 2–4 of the Insolvency Law. The conditions are as follows:

1. no consumer insolvency proceedings were taken against the taxpayer within ten years before the filing of a new insolvency application except where consumer insolvency proceedings were discontinued at the request of the taxpayer;
2. no repayment schedule set for the taxpayer was revoked due to the taxpayer's failure to comply with it within ten years before the filing of the insolvency application;
3. the taxpayer failed to file a previous insolvency application in time within ten years before the filing of the insolvency application;
4. no duly confirmed legal action was taken by the taxpayer to the detriment of the creditors within ten years before the filing of the insolvency application;
5. no cancellation of all or part of the taxpayer's liabilities in insolvency proceedings occurred within ten years before the filing of the insolvency application unless the insolvency or increased level of the insolvency occurred despite the taxpayer's due diligence; and
6. the taxpayer did not provide any inaccurate or incomplete data in the insolvency application that are relevant to the proceedings.

The relative conditions listed above, despite their occurrence, may be ignored by the court if there are equitable or humanitarian reasons for doing so. As Aleksandra Machowska stressed, the court is not just permitted but obliged to declare insolvency if it is justified on equitable or humanitarian grounds.[22] The legislator uses the term 'equitable and humanitarian reasons,' but it is consistent with the term 'principles of equity and humanitarianism' (*zasady słuszności i humanitaryzmu*). This position is confirmed in the legal literature[23] and case-law, where these terms are used interchangeably.[24]

'Equity' and 'humanitarianism' are vague terms referring to basic principles of justice.[25] The legal literature points out that the principle of equity is the origi-

[21] Machowska, *Prawo restrukturyzacyjne i upadłościowe*, 483.

[22] Ibid., 487.

[23] Witosz, 'Przesłanki ogłoszenia upadłości konsumenckiej', 30.

[24] Order (*postanowienie*) of the District Court (*Sąd Okręgowy)* in Bydgoszcz of 5 February 2018, no. VIII Gz 3/18, Legalis no. 1814327, order (*postanowienie*) of the District Court (*Sąd Okręgowy*) in Warsaw of 16 January 2018, no. XXIII Gz 1198/17, Legalis no. 1749848, and order (*postanowienie*) of the District Court (*Sąd Okręgowy*) in Szczecin of 27 August 2017, no. VIII Gz 139/15, Legalis no. 1814346.

[25] Machowska, *Prawo restrukturyzacyjne i upadłościowe*, 487.

nal form of justice[26] and refers to the broad concepts of honesty and loyalty in the legal system as well as to Christian values.[27] During the socialist economy, the principle of equity was replaced by the principles of community coexistence (*zasady współżycia społecznego*), which is why current analyses of the principle of equity often use the case-law on the principles of community coexistence.[28] As the District Court in Toruń indicated in its order of 9 August 2017,[29] equitable considerations occur when commencement of debt relief proceedings will have a beneficial effect on the social relationships of the taxpayer. In this respect, the court examines whether the opening of insolvency proceedings, and in particular debt relief, will comply with generally accepted standards of justice, universally accepted norms, and the common good.

The legal literature emphasises that the principle of equity should be applied very carefully and only in cases where civil law implements distributive justice, i.e. it helps to allocate the rights and duties according to specific criteria, e.g. personal qualifications, needs, merits, or income.[30] Such caution is in line with the needs of the institution of tax cancellation understood as a dispensation. It follows that cancellation should be an exception to the obligation to perform (pay) own liabilities.

It is hard to establish the content of the humanitarian principle for the purposes of debt relief proceedings, as this principle does not exist directly in private law; instead, it originates from public law and is based on Art. 40 of the Polish Constitution and Art. 3 of the European Convention on Human Rights.[31] It also has an established position in criminal law. According to Art. 3 of the Penal Code,[32] Art. 4 of the Executive Penal Code,[33] and Art. 12 of the Fiscal Penal Code,[34] penalties and other penal measures are applied while taking into account the principle of humanitarianism. The District Court in Toruń also refers to humans rights, indicating that the humanitarian reason must be interpreted

[26] Gurgul, *Prawo upadłościowe*, 940.

[27] Stanisław Rudnicki, in: Stanisław Dmowski, Stanisław Rudnicki, *Komentarz do Kodeksu cywilnego. Księga pierwsza. Część ogólna* [A Commentary to the Civil Code: Book One: General Part], (Warsaw: LexisNexis Polska 2011), 281.

[28] Witosz, *Prawo upadłościowe*, 1148.

[29] Order (*postanowienie*) of the District Court (*Sąd Okręgowy*) in Toruń of 9 August 2017, no. VI Gz 154/17, Legalis no. 1814342.

[30] Gurgul, *Prawo upadłościowe*, 940.

[31] The Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, Collections of Laws 1993, No. 61, item 284.

[32] Kodeks Karny [Penal Code] of 6 June 1997, consolidated text in Journal of Laws 2019, item 1950.

[33] Kodeks karny wykonawczy [Executive Penal Code] of 6 June 1997, consolidated text in Journal of Law 2020, item 523.

[34] Kodeks karny skarbowy [Fiscal Penal Code] of 10 September 1999, consolidated text in Journal of Law 2020, item 19.

as respect for human dignity.[35] Nonetheless, it should be noted that tax law does not refer to this principle.[36] While acknowledging that the principle of humanitarianism is not synonymous with the principle of equity, it is justified to agree with the view that the principle of humanitarianism applies primarily to the critical financial situation of the taxpayer regardless of other circumstances of the case, such as the taxpayer's fault. As indicated above, the principle of equity allows a person who does not meet the relative conditions for the opening of debt relief proceedings to enter these proceedings. This is allowed because all circumstances of the case support it, including the taxpayer's present behaviour and the interest of the creditors. If the principle of humanitarianism has meaning other than the principle of equity, these terms must have different denotations, i.e. different sets of designators. As pointed out by Aleksander Jerzy Witosz, one of the consequences should be to allow a person in extreme poverty to take advantage of debt relief even if this is absolutely unjustified from the point of view of the principles of social coexistence.[37]

The presented position on the understanding of the principle of humanitarianism is confirmed by the judgment of the NSA of 10 June 2015[38] concerning non-tax budget receivables (*in fine*). In this judgment, the NSA contrasts the principle of humanitarianism with the principles of justice and equality. According to the court, it is permitted to depart from the idea of justice and equality before the law in order to cancel non-tax budget receivables on the grounds of the principle of humanitarianism. The person who was the subject of the above judgment lived on the poverty line and accepted a fixed penalty notice. The District Court in Toruń adopted a similar position as regards the understanding of humanitarian reasons in the case concerning debt relief, indicating that these reasons should be interpreted in the context of the material situation (high level of poverty) and life situation (serious illness) of the taxpayer. Therefore, debt relief for humanitarian reasons is justified if failure to grant it would expose the taxpayer to a level of suffering that is contrary to morality.[39]

Provided that the above interpretation is correct, it should be assumed that a taxpayer in extreme poverty can apply for debt relief even if simultaneously violating the principles of social coexistence, e.g. by trying to conceal their assets

[35] Order (*postanowienie*) od the District Court (*Sąd Okręgowy*) in Toruń of 9 August 2017, no. VI Gz 154/17, Legalis no. 1814342.

[36] As an exception, Art. 22 para. 2 point 1 of the Tax Ordinance Act states that the tax authority may exempt the payer from the obligation to collect tax liabilities from the taxpayer if their collection threatens important interests of the taxpayer, in particular their existence.

[37] Witosz, 'Przesłanki ogłoszenia upadłości konsumenckiej', 30.

[38] Judgment (*wyrok*) of the NSA of 10 June 2015, no. II GSK 1092/14, Central Database of Administrative Court Rulings.

[39] Order (*postanowienie*) of the District Court (*Sąd Okręgowy*) in Toruń of 9 August 2017, no. VI Gz 154/17, Legalis no. 1814342.

or providing other false information in an insolvency application.[40] A taxpayer in extreme poverty who has not personally caused insolvency or increased its level, either intentionally or through gross negligence, should have the right to take the opportunity of debt relief regardless of all other circumstances of the case. This interpretation of the principle of humanitarianism is difficult to accept with regard to its effects, even assuming that the primary objective of introducing consumer insolvency was the idea of a fresh start, which aims to solve the taxpayer's financial difficulties and allow them to start living without the burden of past debts. On the other hand, perhaps the presented issue is more a problem of combined introduction of the principles of equity and humanitarianism into the Insolvency Law than of interpretation of the principle of humanitarianism. However, this unknown will be ultimately explained by the case-law.

The issue of the admissibility of debt relief for humanitarian reasons raises the question of the limits of tax cancellation. Following the above interpretation of humanitarian reasons, it should be possible to cancel tax liabilities arising or unpaid in connection with criminal activities, e.g. tax liabilities arising from the so-called 'dummy invoices' under Art. 108 of the Goods and Services Tax Act or tax liabilities arising in connection with the taxpayer's knowing participation in the so-called 'carousel fraud.' Another extreme case would be tax cancellation due to the critical state of the taxpayer's assets where the amount of tax is 'wasted.' Debt relief in such cases seems unlikely, even abstract, but is theoretically acceptable and cannot be excluded. The question of the admissibility of debt relief (cancellation) in such cases may only be answered by the courts in the future.

The principle of humanitarianism extends the possibility of using debt relief. From the point of view of public law, this extension should be regarded as a privilege addressed to the group of poor people, who may thus benefit from debt relief, but this is not justified by reasons of equity. It is worth noting here that a distinctive feature of the institution of dispensation is the use of general clauses to determine situations where a dispensation should be applied. However, it is highly questionable whether humanitarian reasons may be considered as such a general clause. Moreover, the principle of humanitarianism is not a principle of Polish tax law. Finally, the use of humanitarian considerations enables the taxpayer to repeatedly use the institution of debt relief, which is a distinctive feature of the institution of privilege. This suggests that consumer insolvency in Poland is a privilege.

1.4. Entrepreneurs

Unlike in the case of consumer insolvency, debt relief for natural persons conducting business activity is not integrated with liquidation proceedings into

[40] Gurgul, *Prawo upadłościowe*, 940.

a single procedure. Within 30 days from the publication of the court order closing liquidation proceedings, the taxpayer who is a natural person conducting business activity may, pursuant to Art. 369 point 1 of the Insolvency Law, apply for setting a repayment schedule and cancellation of the remaining part of liabilities not satisfied in liquidation proceedings.

However, as in the case of debt relief for consumers, an absolute condition for taking advantage of debt relief is the absence of willful misconduct or gross negligence of the taxpayer causing insolvency or increasing its level. The taxpayer must also, pursuant to Art. 369 para. 3 of the Insolvency Law, meet the relative conditions set out in the following closed list:

1. there is no evidence in the case showing that there are circumstances constituting grounds for depriving the taxpayer of the right to conduct business activity or to act as a member of the management board or supervisory board, etc.;
2. the taxpayer has duly performed the obligations imposed on them in liquidation proceedings;
3. during the ten years prior to the date of filing the insolvency application, no insolvency proceedings had been conducted against the taxpayer in which all or part of the liabilities were cancelled, unless the insolvency occurred despite the taxpayer's due diligence;
4. during the ten years prior to the date of filing the insolvency application, no taxpayer's repayment schedule had been revoked for failure to comply with the obligations imposed on the taxpayer under the schedule; and
5. during the ten years prior to the date of filing the insolvency application, the taxpayer had not performed any legal actions to the detriment of the creditors, provided that any detriment had to be lawfully confirmed.

Despite the failure of the taxpayer to meet one of the above conditions, the court, pursuant to Art. 369 para. 3 *in fine* of the Insolvency Law, should open debt relief proceedings if they are justified by equitable or humanitarian reasons. The terms 'equity' and 'humanitarianism' have already been analysed in the previous section concerning consumer insolvency. These terms have the same meaning in both types of proceedings.

Provided that the court accepts an application for debt relief, it should, in accordance with Art. 370a paras. 1 and 3 of the Insolvency Law, issue an order setting a repayment schedule. As in the case of consumer debt relief, the court determines to what extent and how long the taxpayer will repay the creditors and to what extent the liabilities will be cancelled after implementation of the schedule. The taxpayer's motions do not bind the court in this respect. The schedule is determined for a period of not more than 36 months. According to Art. 370a para. 2 of the Insolvency Law, liabilities arising after the declaration of the insolvency are also part of the schedule, but these liabilities must be paid in full. The taxpayer and the creditors, including the tax authority, may seek a legal remedy

against the court's order regarding the schedule. Pursuant to Art. 370b of the Insolvency Law, they may also file a cassation appeal with the Supreme Court.

During the period of its implementation, the repayment schedule may be amended under Art. 370d paras. 1–2 of the Insolvency Law if the taxpayer is unable to meet the obligations imposed by the schedule or if the financial situation of the taxpayer improves significantly for reasons other than an increase in remuneration for work or business activity conducted by the taxpayer. In the former case, the court may extend the repayment by 18 months.

The court revokes the order concerning the repayment schedule in cases specified in Art. 370e of the Insolvency Law. However, the court should not revoke it if there are equitable or humanitarian reasons against such action. After the schedule has been fulfilled, the court, pursuant to Art. 370f para. 1 of the Insolvency Law, issues an order on fulfilment of the schedule and cancellation of liabilities, including tax liabilities.

1.5. Debt relief before the reform in 2016

As already indicated at the beginning of this chapter, the regulation on debt relief for persons conducting business activity was significantly amended on 1 January 2016. The previous regulation of debt relief was contained in Art. 369–370 of the Insolvency Law, which was much less detailed than the current one. A discussion of the already repealed legal regulation is important for analysing tax cancellation from the perspective of the institutions of privilege and dispensation, and more specifically, for an analysis of the evolution from the institution of dispensation towards the institution of privilege.

Pursuant to Art. 369 para. 1 of the Insolvency Law as previously defined, at the request of the taxpayer, in the order closing liquidation proceedings, the court was entitled to cancel in full or in part the taxpayer's liabilities not satisfied in liquidation proceedings, including tax liabilities, under the following conditions:

1. insolvency was the result of exceptional circumstances beyond the taxpayer's control;
2. evidence collected in the case showed an absence of circumstances constituting grounds for depriving the taxpayer of the right to conduct business activity or to act as a member of the management board or supervisory board, etc.; and
3. the taxpayer diligently performed the obligations imposed on them in liquidation proceedings.

The above-mentioned exceptional circumstances beyond the taxpayer's control were to be understood as those circumstances that were not the results of the taxpayer's intentional or unintentional misconduct. The circumstances may have

resulted from objective (external) reasons, such as natural disasters, changes in state tax or custom policy unannounced in advance as well subjective (internal) reasons, such as serious illness. In the light of the above circumstances, only the taxpayer who was not held responsible for insolvency could take advantage of debt relief. Moreover, the legal literature stressed that it was not sufficient for the taxpayer to fulfil all obligations imposed on them in liquidation proceedings. A necessary prerequisite for taking advantage of debt relief by the taxpayer was a satisfactory performance of these obligations.[41]

Debt relief was also not permittable if, within the previous ten years, the taxpayer had been declared insolvent, or the court had refused to open insolvency proceedings due to the lack of sufficient assets to cover costs of the proceedings. Unlike the regulation in force since 1 January 2016, it was not allowed to grant debt relief for equitable or humanitarian reasons.

According to Art. 369 para. 1 of the Insolvency Law, if the taxpayer had met all conditions for debt relief, the liabilities were cancelled when the order closing the liquidation proceedings became final. Debt relief did not require setting a repayment schedule.

Since the above conditions for debt relief had to be met jointly,[42] the possibility to cancel liabilities under that regulation was less favourable than under the current regulation. This applied in particular to the strict requirement that insolvency was to be the result of exceptional circumstances beyond the taxpayer's control. Machowska takes a different position. In her opinion, it is the new regulation that is much less beneficial for the taxpayers conducting business activity because, under the previous regulation, as soon as the enumerated statutory conditions were met, the liabilities were unconditionally cancelled without setting any repayment schedule.[43] In the current regulation, such a situation does not occur. It is hard to agree with the opinion of Machowska. In the previous regulation, the possibility to take advantage of debt relief was significantly limited on a personal level compared with the current regulation, where debt relief is available even for humanitarian reasons. Thus, only a few people could benefit from debt relief under the previous regulation.

An analysis of the debt relief regulation that was in force before 1 January 2016 allows us to assume that this regulation was similar to the institution of dispensation. Debt relief was available only in extraordinary cases—insolvency was the result of exceptional circumstances beyond the taxpayer's control, and the taxpayer duly performed the obligations imposed on them in liquidation proceedings. In addition, debt relief was permitted once every ten years, which prevented repeated use of this institution. The classification of that institution

[41] Leszek Guza, in: Witosz, Witosz, *Prawo upadłościowe i naprawcze*, 791.

[42] Feliks Zedler, in: Andrzej Jakubecki, Feliks Zedler, *Prawo upadłościowe i naprawcze* [Bankruptcy and Reorganisation Law], (Warsaw: Wolters Kluwer Polska 2011), 767.

[43] Machowska, *Prawo restrukturyzacyjne i upadłościowe*, 446.

as a dispensation is not affected by the fact that debt relief was not linked to the repayment schedule. The primary purpose of such a schedule was to ensure that creditors were satisfied in the highest possible amount, and not to restrict access to debt relief. Maximum satisfaction of the creditors was important from the point of view of the State's fiscal interest but did not have to determine the use of debt relief in particular cases, especially considering the principle of justice and other principles of law.

The current regulation on debt relief is of a privilege nature, which results from the introduction of the possibility of using debt relief on equitable or humanitarian grounds. The conditions exclude in particular any limitation on the frequency of taking advantage of debt relief. The absence of such a restriction allows the taxpayer to regularly use debt relief. This position is confirmed by Włodzimierz Szpringer, who does not refer to a privilege within the meaning of canon law but states that the system should create the insolvency privilege only for honest consumers who have been hurt by life.[44] At present, humanitarian reasons allow even dishonest consumers to apply for debt relief.

2. Restschuldbefreiung

Debt relief (*Restschuldbefreiung*) was introduced into German law on 1 January 1999 with the entry into force of the new Insolvency Law (InsO). The institution of debt relief is regulated in §§ 286–303a of the InsO as a uniform procedure for every natural person. Debt relief is not available for legal persons or unincorporated entities. No distinction is made between consumers and entrepreneurs, although in the case of consumers debt relief proceedings are preceded by consumer liquidation proceedings, and, in the case of entrepreneurs, by liquidation proceedings on general terms. In practice, it is possible to conduct liquidation and debt relief proceedings in parallel.[45] Debt relief of the taxpayer does not affect any obligations of third parties to fulfil the liabilities of the taxpayer. If co-debtors do not want to pay these liabilities, each of them must apply for debt relief.[46]

2.1. Opening and conduct of the proceedings

A prerequisite for opening debt relief proceedings under § 287 point 1 of the InsO is an application by the taxpayer for debt relief, submitted together with an

[44] Szpringer, *Upadłość konsumencka*, 18.

[45] Ulrich Riedel, in: Alexander Fridgen, Arndt Geiwitz, Burkard Göpfert, *Beck'scher Online-Kommentar InsO* [Beck's Online-Commentary to Insolvency Act], (Munich: C.H. Beck 2016), § 286, 8.

[46] Guido Stephan, in: Kirchhof, et al., *Münchener Kommentar*, 840.

insolvency application or within two weeks after being instructed by the court about such a right. An annex to the application is the taxpayer's declaration of assignment (*Abtretungserklärung*) of their liabilities for the next six years, which jointly may be subject to enforcement and result from commission contracts, including labour contracts. This declaration enables the creditors to satisfy their claims not only from the taxpayer's current assets but also from the taxpayer's future income. The legal literature indicates that this declaration is the essence of debt relief.[47]

During the so-called 'period of good conduct' (*Wohlverhaltensphase*), i.e. within six years after being declared insolvent, the taxpayer must fulfil the obligations listed in § 295 para. 1 of the InsO, which include the following:

1. engage in adequate gainful employment or, if the taxpayer is unemployed, seek such employment and not refuse any reasonable activity;
2. transfer to the trustee half the value of property acquired by the taxpayer by way of succession or with respect to their status as heir;
3. inform the insolvency court and the trustee of any change of residence or place of employment;
4. not conceal the state of assets or a source of income and make a statement in this regard or regarding the efforts to find employment without delay at the request of the insolvency court or trustee without delay; and
5. make payments to satisfy the creditors only to the trustee and not favour any creditor (principle of equality of creditors).

This six-year period is called the period of good conduct because its purpose is not only to ensure partial repayment of the liabilities but also to verify the taxpayer's behaviour during this period and confirm the correctness of their social attitude.

Violation of the above obligations as well as the occurrence of circumstances excluding debt relief in a specific case results, according to § 299 of the InsO, in the issuing of a court order refusing debt relief. However, the court may issue such an order only at the request of a creditor.

2.2. End of proceedings

After a six-year period of good conduct, the court, by virtue of an order pursuant to § 300 para. 1 of the InsO, grants debt relief to the taxpayer. At the request of the taxpayer, debt relief may be granted earlier if (i) no claims against the taxpayer have been filed or all claims have been satisfied; (ii) three years of the period of good conduct have passed, and at least 35% of the taxpayer's liabilities have been satisfied; or (iii) five years of the period of good conduct have passed,

[47] Foerste, *Insolvenzrecht*, 258.

and the taxpayer has duly performed obligations imposed on them. Before the reform of the Insolvency Law, which entered into force on 1 July 2014,[48] there was one uniform period of good conduct, i.e. six years. Moreover, the bill of the Insolvency Law proposed a period of seven years (at the stage of legislative work, even an eight-year period was postulated).[49] In 2014, the motivation discount (*Motivationsrabatt*), which allowed reducing the period of good conduct to one year provided that the taxpayer repaid the relevant percentage of their debt, was repealed. It is worth noting that the said reform of 2014 aimed at increasing public revenues, but on the other hand it was anticipated that the shortened three-year period would apply to 15% of debt relief proceedings.[50]

Debt relief is effective against all the taxpayer's creditors and results in a permanent prohibition on enforcing the 'cancelled' liabilities. This also applies to claims in respect of liabilities that were not filed in insolvency proceedings. Debt relief does not concern liabilities arising after the opening of insolvency proceedings. The prohibition of enforcement is, however, not equal to the expiry of these liabilities. They turn into incomplete obligations (*unvollkommene Verbindlichkeiten*), also called natural obligations (*Naturalobligationen*).[51] Thus, if the taxpayer satisfies a 'cancelled' liability by mistake, they will not be entitled to claim a refund.[52] After debt relief has been granted, the creditors may, without limitation, pursue the liabilities covered by debt relief from co-debtors or guarantors.

It should be pointed out that not all liabilities related to tax collection are subject to debt relief. Pursuant to § 302 of the Insolvency Law, fines and liabilities arising from tax evasion, among others, are excluded from debt relief.

Once a court order on debt relief becomes final, it is, in principle, irrevocable. Nonetheless, debt relief may be revoked at the request of the creditor in cases specified in § 303 of the InsO. An application on revoking debt relief, depending on the reason of revoking, may be filed within six months or one year after the court order on debt relief becomes final.

2.3. Conditions for debt relief

Debt relief is the right of every natural person, thus anyone may apply for it as long as they meet all the conditions set out in the InsO.[53] The availability of this

[48] Gesetz zur Verkürzung des Restschuldbefreiungsverfahrens und zur Stärkung der Gläubigerrechte [Act on shortening out-of-court insolvency arrangement proceedings and strengthening the rights of creditors] of 15 July 2013, Federal Law Gazette 2013, part I, No. 38, 2379–2385.

[49] Ott, Vuia, in Kirchhof, et al, *Münchener Kommentar*, 1198.

[50] Martin Ahrens, 'Die Reform des Privatinsolvenzrechts 2014' [The Reform of Private Law in 2014], *Neue Juristische Wochenschrift* [New Legal Weekly] 26 (2014), 1842,1845.

[51] Hannlis Achelis, Ivonne Schemmerling, in: Bork, Hölzle, *Handbuch Insolvenzrecht*, 851.

[52] Foerste, *Insolvenzrecht*, 270.

[53] Stephan, in: Kirchhof, et al., *Münchener Kommentar*, 838.

institution makes it significantly different from administrative cancellation under §§ 163 and 227 of the Fiscal Code, granting of which is based on the discretion of the tax authority. As the legal literature indicates, even people sentenced to life imprisonment are entitled to benefit from the institution of debt relief.[54] On the other hand, the general availability of debt relief is limited in specific cases in order to prevent fraudulent exercise of this right.

According to § 1 para. 2 of the InsO, the institution of debt relief should only be available to the honest (*redliche*) taxpayers. More specifically, § 290 of the InsO lists the following conditions denying the right to debt relief:

1. a final conviction of the taxpayer for criminal offences specified in §§ 283-283c of the Penal Code[55] (offences connected with insolvency) carrying a sentence of at least 90 daily rates of fine or three months' imprisonment within the period of the last five years;
2. intentionally or through gross negligence, providing incorrect or incomplete written information about own financial situation in order to obtain a loan, take advantage of public funds, or avoid making payments to public funds within the last three years;
3. intentionally or through gross negligence, impairing the satisfaction of the creditors within the last three years by creating spurious obligations, squandering own assets, or delaying the declaration of insolvency, regardless of the prospect of economic recovery;
4. intentionally or through gross negligence, infringing the taxpayer's obligation under the InsO to cooperate or provide information;
5. intentionally or through gross negligence, providing incorrect or incomplete information in the declarations annexed to the insolvency application or in the list of the taxpayer's property, income, their creditors and claims against the taxpayer; and
6. through the taxpayer's own fault, not fulfilling the obligation to engage in adequate gainful employment, thus making it challenging to satisfy the creditors.

The court considers the above conditions for refusing debt relief only at the request of the creditor who has submitted liabilities to the insolvency table. The creditor must also substantiate the occurrence of circumstances excluding the right to debt relief. It does not matter whether the creditor has a particular interest in blocking debt relief because, for instance, they were harmed by an unfair action of the taxpayer.[56] An example of providing incorrect or incomplete information about one's financial situation to avoid making payments to public funds is giving false information in tax returns. However, the case-law points out that,

[54] Ibid., 839–840.

[55] Strafgesetzbuch [Penal Code] of 15 May 1871, Federal Law Gazette 1998, part I, No. 75, pp. 3322–3334.

[56] Foerste, *Insolvenzrecht*, 259.

in order to refuse debt relief, the court must not only prove that the taxpayer's action was objectively tax evasion, but it is also required to analyse the taxpayer's subjective position in this respect.[57]

The conditions presented above are supplemented by further negative conditions resulting from § 287a para. 2 of the InsO. Pursuant to this provision, debt relief is not available to the taxpayer who:

1. has benefited from debt relief within the last ten years or has been refused debt relief within the last five years because of the taxpayer's failure to fulfil the obligations imposed on them during debt relief proceedings; or
2. has been denied debt relief under § 290 para. 1 points 5–7 of the InsO within the last three years.

In light of the above considerations, it should be assumed that the institution of debt relief under German law is similar to the institution of dispensation. Debt relief proceedings consist of two stages: (i) the taxpayer's assets are liquidated in the liquidation proceedings, and then (ii) the taxpayer allocates their income within the period of good conduct to the trustee in order to pay off own debts. The taxpayer may take advantage of debt relief only once every ten years. Moreover, debt relief is not aimed directly at a particular social group but at every natural person on an equal basis, regardless of their status and the structure or amount of their debts.

On the other hand, debt relief does not apply to atypical cases. The negative conditions for debt relief included in the InsO eliminate only extreme cases, where debts result from, e.g. criminal activity. Thus, debt relief is also used in many typical consumer debt cases. It is worth noting that consumer associations and consulting institutions have repeatedly criticised the lack of separate debt relief proceedings for consumers only. In their opinion, the current uniform debt relief proceedings are too complicated, costly, and do not sufficiently take into account the specific nature of consumer issues.[58] This opinion may indicate a willingness to extend the use of debt relief further and transform that institution into a privilege.

3. Oddlužení

The institution of debt relief (*oddlužení*) was introduced into the Czech legal system on 1 January 2008 with the entry into force of the currently applicable Insolvency Act (IZ) of 30 March 2006. The institution is regulated in a separate chapter of the IZ in §§ 389–418 concerning the manner of resolving insolvency (*způsob řešení úpadku*) by debt relief as an alternative to liquidation and arrange-

[57] Resolution (*Beschluss*) of the BGH of 20 December 2007, no. IX ZB 189/06, BeckRS 01219.

[58] Szpringer, *Upadłość konsumencka*, 31.

ment proceedings.[59] Pursuant to § 148 para. 3 of the IZ, if the taxpayer files an application for debt relief, the court should incorporate the order consenting to debt relief into the order declaring insolvency.

3.1. Scope of debt relief

Since debt relief is a functionally separate procedure from liquidation and arrangement procedures, the range of entities that may benefit from this institution is also regulated separately. Debt relief proceedings are generally unavailable to entrepreneurs for whom the legislator provides arrangement proceedings.[60] That is why, in the legal doctrine, debt relief proceedings are called consumer insolvency.[61] Pursuant to § 389 para. 1 of the IZ, the following entities have debt relief capacity, i.e. they are entitled to take advantage of debt relief: (i) legal persons who are not recognised as entrepreneurs under the IZ and have no debts arising from business activity, and (ii) natural persons without debts arising from business activity. Legal persons that may benefit from debt relief are, for instance, associations, public utility companies, housing cooperatives, and foundations.[62] Debt relief does not cover financial charges (penalties) imposed in criminal proceedings or compensation claims for intentional actions of the taxpayer.

Pursuant to § 389 para. 2(b) of the IZ, as an exception, the taxpayer who has debts resulting from their business activity may benefit from debt relief if:

1. the creditors agree to include these liabilities into debt relief;
2. these liabilities have already been the subject of liquidation proceedings and have not been satisfied; or
3. these liabilities are secured (they do not participate in debt relief).

The terminology used in Czech insolvency law differs from that in the other legal systems, which requires some clarification. Debt relief (*oddlužení*) in Czech law only means the consent to open debt relief proceedings (*rozhodnutí o schválení oddlužení*). Opening the proceedings does not result in debt cancellation. Debt relief proceedings governed by Czech law consist of three phases.[63] In the first phase, the court decides on opening debt relief proceedings (*povolení oddlužení*). In the second phase, the creditors' meeting or the court decides how the taxpayer's liabilities are to be cancelled (*způsob oddlužení*).[64] These phases are separated

[59] Hana Erbsová, in: Jiřina Hásová, Tomáš Moravec, *Insolvenční zákon. Komentář* [Insolvency Act: A Commentary], (Prague: C.H. Beck 2014), 1377.

[60] Smolík, Oddlužení, 17.

[61] Richter, Insolvenční právo, 527.

[62] Smolík, Oddlužení, 139.

[63] Ibid., 8.

[64] Resolution (*usnesení*) of the Supreme Court (*Nejvyšší soud*) of 29 August 2010, no. 29 NSCR 6/2008, Collection of the Supreme Court's Decisions, no 61/2011.

from each other by a period of time. The second phase may begin only after the end of the period during which the creditors lodge claims for liabilities. In the third phase, debt relief is implemented, i.e. part of liabilities is repaid by the taxpayer. Pursuant to § 414 para. 1 of the IZ, the actual debt relief (discharge) takes place after the asset liquidation and fulfilment of the instalment schedule. It is the exemption of the taxpayer from the obligation to pay liabilities (*osvobození od placení pohledávek*).

3.2. Opening debt relief proceedings

A prerequisite for opening debt relief proceedings is an application for insolvency declaration filed with the court together with an application for debt relief or earlier. This means that the taxpayer must be insolvent or threatened by insolvency to take advantage of debt relief.[65] Only the taxpayer, and not the tax authority, may apply for debt relief. The taxpayer should do it together with filing an insolvency application or within 30 days from receiving an insolvency application concerning them and filed by another person, e.g. a creditor. In the application, the taxpayer must, inter alia, state their expected income over the next five years and disclose income from the previous three years. The taxpayer may attach to the application a donation agreement or a pension agreement signed by a person who wishes to help the taxpayer.[66]

3.3. Conditions for debt relief

An application submitted to the court is subject not only to formal control but also to substantive control as regards the admissibility of debt relief for the taxpayer. Pursuant to § 395 para. 1 of the IZ, the court dismisses the application if the circumstances of the case point to the following:

1. the application has been filed with a dishonest intention (*nepoctivý záměr*);
2. the taxpayer does not guarantee minimum repayment, i.e. the official receiver's remuneration, maintenance under statutory law, and the equivalent of the official receiver's remuneration paid to the other creditors;[67]
3. the taxpayer has taken advantage of debt relief within the last ten years;
4. the taxpayer's application for debt relief has been dismissed due to the taxpayer's dishonest intention within the last five years; or

[65] Smolík, Oddlužení, 60.

[66] Erbsová, in: Hásová, Moravec, *Insolvenční zákon*, 1416.

[67] Christian Grym, 'Co přinese oddlužovací novela insolvenčního zákona', Bulletin advokacie (2019), http://www.bulletin-advokacie.cz/co-prinese-oddluzovaci-novela-insolvencniho-zakona, accessed 27 March 2020.

5. the taxpayer has withdrawn their previous application for debt relief within the last three months.

The first two conditions are of a prerequisite nature, i.e. if they are fulfilled, the court is forced to dismiss an application. The last three conditions are of a relative nature, i.e. the court may not dismiss an application if the occurrence of these conditions is the result of clearly justified circumstances (*zvláštní zřetele hodný*).

The so-called 'zero' debt relief, i.e. cancellation of 100%, is not allowed. It is worth noting that until 31 May 2019, the court would dismiss the application if the taxpayer did not guarantee a minimum repayment amounting to 30% of all unsecured liabilities, unless the creditors agreed to lower satisfaction.[68] The requirement to satisfy 30% of liabilities was quite restrictive. Therefore, its replacement with the obligation to repay the official receiver's remuneration, statutory maintenance, and the equivalent of the official receiver's renumeration paid to the other creditors is considered a significant extension of the applicability of the institution of debt relief. On the other hand, it cannot be ruled out that in the case of taxpayers with smaller debts, the obligation to repay the above amounts can be a more restrictive condition than repaying 30% of all unsecured liabilities.[69] It is also worth noting that earlier regulation required satisfaction of at least 45% of non-preferential liabilities, including interest for the last two years before the insolvency declaration.[70]

The legislator does not specify the term 'dishonest intention' as it is a vague concept that should be clarified by the court in each case.[71] This position is confirmed by the Supreme Court in its resolution of 28 July 2011,[72] which points out that 'dishonest intention' is a stand-alone general clause with a relatively unspecified hypothesis. In addition, the High Court in Olomouc indicates that dishonest intention must be interpreted strictly objectively.[73] Nonetheless, the concept of dishonest intention should not only refer to the mere fact of applying for debt relief but must also refer to the overall behaviour of the taxpayer and their attitude towards creditors, assets, and income.[74]

[68] The obligation to satisfy at least 30% of liabilities was to ensure active participation of the taxpayer in the debt relief proceedings. Moreover, such debt relief was to be a fair compromise between the taxpayer and the creditors, 'a give-and-take'. Smolík, Oddlužení, 29, 165.

[69] Grym, 'Co přinese oddlužovací'.

[70] Smolík, Oddlužení, 29.

[71] Petra Poličenská, Radka Feberová, *Musíš znát… Exekuční a insolvenční právo* [You must know… Enforcement and Insolvency Law], (Prague: Wolters Kluwer ČR 2016), 108.

[72] Resolution (*usnesení*) of the Supreme Court (*Nejvyšší soud*) of 28 July 2011, no. 29 NSCR 14/2009-B-65, Collection of the Supreme Court's Decisions, no. 14/2012.

[73] Resolution (*usnesení*) of the High Court (*Vrchní soud*) in Olomouc of 25 October 2013, no. 1 VSOL 680/2013, unpublished, www.kraken.slv.cz.

[74] Jirmásek, 'S poctivostí oddlužení dojdeš', 812.

For the purposes of arrangement proceedings, § 326 para. 2 of the IZ provides two examples where applying for the opening of arrangement proceedings may be made with a dishonest intention. According to this provision, a dishonest intention may be assumed if:

1. insolvency proceedings have been conducted on assets of the taxpayer or a member of their statutory body within the last five years; or
2. the taxpayer or a member of their statutory body has been lawfully convicted of economic offence or offence against property within the last five years.

Furthermore, according to legal literature, the following situations may be considered as a dishonest intention:

1. previous criminal activities of the taxpayer;
2. sale by the taxpayer of their assets to limit the possibility of satisfying the creditors;
3. licentious behaviour (*nezřízené jednání*) of the taxpayer, concealment by the taxpayer of assets or liabilities in an inventory, or failure to disclose all sources of income, including foreign ones;[75]
4. submission by the taxpayer of irresponsible or inaccurate offers as regards the manner of conducting debt relief;
5. unwillingness of the taxpayer to accept a decline in living standards due to debt relief;
6. taking actions by the taxpayer solely to reduce the satisfaction of the creditors within debt relief;
7. hedonistic purposes of taking loans that are the cause of the taxpayer's insolvency, such as going on exotic holidays, buying luxury goods, and organising family celebrations or weddings;[76]
8. taking out loans whose final beneficiary is a third party;[77]
9. absence of attempts to pay debts before filing an application for debt relief, e.g. by taking unpaid leave or self-financing a private hobby;[78]
10. offering to repay debts exclusively in the form of assistance by a third party;[79]
11. failure to disclose all debts by the taxpayer, including foreign ones; and
12. failure to disclose all assets or income.[80]

The case-law indicates that dishonest intention is to be understood as a legal action taken by the taxpayer to sell off their assets to narrow down the choice of

[75] Zdeněk Strnad, in: Kozák et al., *Insolvenční zákon*, 1456.

[76] Smolík, Oddlužení, 155–157.

[77] Resolution (*usnesení*) of the High Court (*Vrchní soud*) in Olomouc of 29 September 2011, no. 2 VSOL 433/2011-A-13, unpublished, www.kraken.slv.cz

[78] Resolution (*usnesení*) of the High Court (*Vrchní soud*) in Prague of 8 January 2013, no. 1 VSPH 1775/2012-B-18, unpublished, www.kraken.slv.cz.

[79] Resolution (*usnesení*) of the High Court (*Vrchní soud*) in Prague of 27 August 2012, no. 3 VSPH 848/2012-B-20, unpublished, www.kraken.slv.cz.

[80] Jirmásek, 'S poctivostí oddlužení dojdeš', 816–818.

the manner of debt relief.[81] On the other hand, in the opinion of the High Court in Olomouc, not every committed criminal offence excludes debt relief, hence the circumstances of each case must be assessed individually.[82] Furthermore, the High Court in Prague indicates that, when verifying the honesty of intention, the taxpayer's behaviour in the period before the submission of a debt relief application, including their consumer behaviour, should not be taken into consideration.[83] Such constraint on the verification process in a sense undermines the above list. Nonetheless, given the above analysis, it is reasonable to assume that (dis)honest intention should be examined in the light of the circumstances before an application for debt relief is filed. Moreover, the court should not follow the one-size-fits-all approach in this respect,[84] which indicates the court's willingness to also consider atypical cases when deciding on the admissibility of debt relief.

An application for debt relief should be dismissed if the results of the proceedings conducted so far show a reckless or negligent approach of the taxpayer to their obligations. In the case-law, this criterion is linked to the maxim of Roman law *vigilantibus iura scripta sunt* (the laws of the vigilant are written),[85] thus indicating more universal importance of this criterion. One example of recklessness is a situation where the taxpayer has not picked up their mail from the creditors so the taxpayer is confused about their obligations.[86]

To sum up the above consideration the taxpayer must meet jointly the following five conditions in order to open debt relief proceedings:

1. have debt relief capacity, i.e. be a natural or legal person not conducting a business activity;
2. file an application for debt relief;
3. have an honest intention in applying for debt relief;
4. be able to satisfy the official receiver's remuneration, maintenance under statutory law, and the equivalent of the official receiver's remuneration paid to the other creditors;
5. demonstrate a lack of recklessness or negligence concerning debt relief proceedings.[87]

[81] Resolution (*usnesení*) of the Supreme Court (*Nejvyšší soud*) of 30 January 2014, no. 29 NSČR 88/2013, Collection of the Supreme Court's Decisions, no. 46/2014.

[82] Resolution (*usnesení*) of the High Court (*Vrchní soud*) in Olomouc of 18 January 2008, no. 2 VSOL 181/2008-A-14, unpublished, www.kraken.slv.cz.

[83] Resolution (*usnesení*) of the High Court (*Vrchní soud*) in Prague of 18 February 2013, no. 1 VSPH 223/2013-B-15, unpublished, www.kraken.slv.cz.

[84] Poličenská, Feberová, *Musíš znát…*, 109 and Jirmásek, 'S poctivostí oddlužení dojdeš', 813.

[85] Resolution (*usnesení*) of the Supreme Court (*Nejvyšší soud*) of 26 October 2010, no. 29 NSČR 16/2010, Collection of the Supreme Court's Decisions, no. 79/2011.

[86] Resolution (*usnesení*) of the High Court (*Vrchní soud*) in Prague of 2 August 2010, no. 3 VSPH 494/2010-B-19, unpublished, www.kraken.slv.cz.

[87] Smolík, Oddlužení, 113.

The court decides on the opening of debt relief proceedings as well on declaring the taxpayer's insolvency. The decision is made in the form of a court order against which no legal remedy is available. If the taxpayer has filed for insolvency, the court should jointly decide on the declaration of insolvency and admissibility of debt relief. Under § 397 para. 1 of the IZ, in the case of doubt as to the admissibility of debt relief, the court should decide in favour of the taxpayer, i.e. the court should give its consent to debt relief.

3.4. Method of debt relief

Pursuant to § 398 para. 1 of the IZ, debt relief may be carried out using one of the following methods: (i) liquidation of the taxpayer's assets, or (ii) jointly liquidation of assets and implementation of the instalment schedule (*splátkový kalendář*). Before 1 June 2019, debt relief could be carried out through the instalment schedule without liquidation of assets. The legal literature even emphasised that such a combination merging the results of liquidation proceedings with the instalment schedule violated human dignity.[88] According to Petr Smolík, debt relief based on the instalment schedule accounted for about 90% of all cases.[89] At present, the dominating method of debt relief is asset liquidation combined with the instalment schedule.

Only the taxpayer's assets acquired up to date of the court's order consenting to debt relief are subject to liquidation. Assets acquired later by the taxpayer are not subject to liquidation, except for assets derived from donations or inheritances and assets not disclosed by the taxpayer on the list of assets.[90]

When implementing the instalment schedule, the taxpayer is obliged to repay their creditors by making monthly payments for a period of five years. The amount of the established payments should correspond to the amount that would be enforced on the taxpayer in enforcement proceedings, so it even constitutes the maximum payment. Within the framework of debt relief based on the instalment schedule, no assets are liquidated either before or after the opening of debt relief proceedings.

The taxpayer may apply to the court for determining a lower monthly payment. However, the courts take an assertive approach to reducing the amount of monthly payments, as exemplified by the judgment of the High Court in Prague of 30 April 2013. In this judgment, the court accepted only a nominal reduction of the monthly payment, even though the taxpayer was to satisfy about 80% of

[88] Ibid., 196.

[89] Ibid., 195.

[90] Strnad, in: Kozák et al., *Insolvenční zákon*, 1472.

all liabilities.[91] An even more restrictive point of view was expressed by the High Court in Olomouc, which considered the expected repayment of 100% of the liabilities as an insufficient justification for reducing the monthly payments.[92]

After the creditors' meeting or the court's approving of debt relief, the creditors and the trustee may seek a legal remedy against it. The remedy may be based on statutory conditions for rejection or dismissal of a debt relief application.[93] The court must first decide on all remedies and verify all conditions for debt relief before deciding whether to grant debt relief. The court order becomes enforceable upon its publication in the Insolvency Register (*Insolvenční rejstřík*).

The taxpayer must perform the obligations specified in § 412 of the IZ during the implementation of an instalment schedule. Within the period of implementation of the schedule, the court may, upon a request or ex officio, change the implementation conditions for the schedule if there are significant changes relevant to the amount of monthly instalments, such as a decrease in the taxpayer's income or the occurrence of a new maintenance obligation.

In principle, the taxpayer is obligated to repay their debt under the instalment schedule in five years, which can be called a period of good behaviour, as the taxpayer must also fulfil other obligations imposed on them by the court, e.g. attend social consultations for up to 100 hours. Unless the taxpayer repays 30% of all liabilities during this period, they will have to demonstrate to the court that they have made every effort to repay the creditors. The five-year period may be shorted in two cases: if the taxpayer repays all liabilities, or if they repay 60% of the liabilities within the period of three years.

3.5. Completion of debt relief proceedings

After the obligations have been fulfilled, the court, at the request of the taxpayer, confirms their fulfilment in its order. No legal remedy is available against that order. This order is equivalent to the order ending liquidation proceedings.[94] At the taxpayer's request, the court should also issue a separate order releasing the taxpayer from the payment of liabilities covered by debt relief and not satisfied

[91] The total value of liabilities of the debtor was CZK 2,489,719.39, and the amount of the monthly payment was to be CZK 33,277, which would lead to the satisfaction of about 80% of all debts. The court found the amount to be too high given the taxpayer's work-related expenses, such as commuting to work. Therefore, the court reduced the monthly payment to CZK 30,277. Resolution (*usnesení*) of the High Court (*Vrchní soud*) in Prague of 30 April 2013, no. 36 INS 7725/2009-B-52, unpublished, www.kraken.slv.cz.

[92] Resolution (*usnesení*) of the High Court (*Vrchní soud*) in Olomouc of 20 March 2013, no. 2 VSOL 218/2013, unpublished, www.kraken.slv.cz.

[93] Smolík, Oddlužení, 167.

[94] Strnad, in: Kozák et al., *Insolvenční zákon*, 1542.

by the taxpayer. The court may not issue this order of its own motion. Submission of an application for the release is also admissible at a later date, but the taxpayer bears the risk that a creditor may initiate enforcement proceedings against them. Within the period between the issuing of the court's order that confirms the fulfilment of the obligations imposed in debt relief proceedings and the issuing of the court's order that releases the taxpayer from payment of the liabilities, the creditors are entitled to enforce these liabilities.[95]

Release of the taxpayer from the obligation to pay should not be interpreted as the expiry of the liabilities. As the Supreme Court points out, liabilities are transformed into natural obligations, and their legal status is similar to that of expired liabilities. On the other hand, the lack of obligation of the taxpayer to fulfil the liabilities does not affect the rights and obligations of a third party in this respect if this entity is also obliged to fulfil these liabilities, e.g. guarantors.[96]

In the situations listed in § 418 para. 1–3 of the IZ, the court may revoke the already granted debt relief. The result of the revocation is the transformation of debt relief into liquidation proceedings. However, the already undertaken debt relief measures remain in force.[97] In the case of asset liquidation, the possibility of revocation introduces, in fact, a period of good behaviour of the taxpayer. While revoking debt relief, the court issues an order opening liquidation proceedings. As in the other stages of these proceedings, the interpretation of the conditions for revocation is not favourable to the taxpayer. The legal doctrine indicates that failure to comply with the obligations imposed within debt relief proceedings is to be understood as a breach of the obligations established in a court order on debt relief.[98]

The legal regulations mentioned above justify the conclusion that the institution of debt relief under Czech law is extensive and based on case reasoning, unlike the regulations of the other legal systems. The classification of debt relief in Czech law as a dispensation may be supported by the fact that this institution is related to the clause of dishonest intention. The (dis)honest intention of the taxpayer is verified by the court at all stages of the proceedings, also during the period of good behaviour. Unfortunately, the clause of dishonest intention is understood formally and based on case reasoning, which makes it challenging to apply it to atypical cases. Moreover, the clause is a negative condition as it indicates when debt relief may not apply, but it does not specify when this institution does apply. Therefore, it may be assumed that the clause of dishonest intention is, in fact, a restriction designed to counteract the widespread use of this privilege rather than an argument for classifying debt relief as a dispensation.

[95] Smolík, Oddlužení, 239.

[96] Decision (*rozhodnutí*) of the Supreme Court (*Nejvyšší soud*) of 24 November 2010, no. 29 Cdo 3509/2010, Collection of the Supreme Court's Decisions, no. 63/2011.

[97] Erbsová, in: Hásová, Moravec, *Insolvenční zákon*, 1650–1651.

[98] Strnad, in: Kozák et al., *Insolvenční zákon*, 1556.

The obligation to repay at least the statutory minimum of debts (the official receiver's remuneration, maintenance under statutory law, and the equivalent of the official receiver's remuneration paid to the other creditors) in order to benefit from debt relief should be understood as an attempt to limit the use of this privilege. It is worth noting that in the past, the taxpayer was obliged to repay at least 30% of the liabilities. The limitations forcing partial satisfaction of liabilities even within debt relief bring this institution closer to insolvency arrangement (repayment of the statutory minimum, cancellation of the rest). From the point of view of the institution of dispensation, such a restriction should be assessed critically, as it excludes the possibility of debt relief in the most critical situations, e.g. when the taxpayer is completely unable to repay their debts. Undoubtedly, in such situations, the institution of dispensation should apply.

The limitation of the availability of debt relief to non-business-related liabilities and the obligation to repay the statutory minimum debt indicates that the Czech legislature treats the institution of debt relief as a privilege whose scope the legislator seeks to limit. This position may also be supported by the introduction of a limitation on the frequency of using this institution to no more than once every ten years. The limitation of frequency prevents constant use of this institution. Finally, the amendment of the debt relief regulation introduced in 2019 proves that both contradictory tendencies are present to shape the institution of debt relief as a privilege and as a dispensation.

4. Debt relief

4.1. Bankruptcy process

Currently, debt relief in England is regulated in the Insolvency Act 1986 as part of the bankruptcy procedure, which integrates the liquidation procedure with debt relief (discharge) procedure for natural persons. The legal literature emphasises that modern English bankruptcy proceedings combine the institution of financial rehabilitation with collective enforcement on behalf of creditors.[99]

A bankruptcy petition may be filed by the taxpayer or a creditor, including the tax authority. The petition may be submitted not only by a person domiciled in England but also, pursuant to sec. 265(1) of the IA, by a person who has been conducting business in England for at least three years. The only basis for declaring bankruptcy is the inability to pay debts.

The IA introduces the rule that the court has the right to reject a bankruptcy petition if it considers the petition to be against the law or for other legitimate

[99] Dennis, *Insolvency Law*, 63–64.

reasons. A sufficient condition to initiate bankruptcy proceedings is the inability of the taxpayer to pay their debts. The court retains the discretion to reject a petition. Such authority is granted to the court primarily to prevent the taxpayer from taking advantage of debt relief to avoid repayment of liabilities.[100] Therefore, the taxpayer's subjective feeling that they are unable to pay liabilities is irrelevant. In the Re a Debtor case,[101] for instance, the court rejected the petition of the debtor who had been previously ordered by the court to pay compensation of GBP 2,400 to a third party in weekly instalments of GBP 1.25. The court determined that the taxpayer was able to pay such compensation and the attempt to declare bankruptcy was aimed at avoiding the payment of compensation.

With the issue of a bankruptcy order, the court appoints a trustee to conduct bankruptcy proceedings. The function of the trustee may only be performed by a person who is a licensed insolvency practitioner, but unlike an official receiver, is not a court administration employee.

After the declaration of bankruptcy, the assets of the taxpayer are automatically vested in the trustee as the bankrupt's estate. The vesting does not affect ownership and the items listed in sec. 283(2-3) of the IA are excepted from it. The task of the trustee is to satisfy the taxpayer's creditors from the assets taken under control. The process of satisfying the creditors, including possible asset liquidation, takes place independently from debt relief (discharge) of the taxpayer. It is not uncommon for the trustee to liquidate the taxpayer's assets for the benefit of the creditors after the taxpayer has been discharged from bankruptcy.[102]

Assets acquired by the taxpayer after the commencement of bankruptcy are not, in principle, subject to bankruptcy proceedings and they are not vested in the trustee. However, the trustee may make a notice that a specific asset of the taxpayer will be deemed part of the bankruptcy estate. It concerns, in particular, extraordinary income such as inheritance.[103] Similarly, concerning income from work, the court may issue an Income Payments Order (IPO) at the request of the trustee. An IPO entitles the trustee to claim part of the taxpayer's income for the benefit of the creditors. Nonetheless, as a result of issuing an IPO, the income of the taxpayer and their family may not fall below a guaranteed minimum. The order may be issued only before the taxpayer is discharged and for a period of up to three years after the date of bankruptcy. This period may also cover a period after the taxpayer's debt relief. In practice, the trustee often uses IPOs.[104]

Pursuant to sec. 279 of the IA, the taxpayer is discharged at the end of the one-year period after the bankruptcy commences. The court may extend this period at the request of the trustee for a specific further period or until the fulfil-

[100] Ibid., 75.

[101] Re a Debtor (no. 17 of 1966), [1967] WLR 1528, [1967] Ch 590.

[102] Dennis, *Insolvency Law*, 310.

[103] Ibid., 434.

[104] Ibid., 448–449.

ment of a specified condition. Such an extension may be ordered if the taxpayer fails to meet an obligation imposed on them, e.g. (i) the taxpayer does not cooperate with the trustee, (ii) the assets are not disclosed, or (iii) the assets are not released.[105] In the original version of the IA, debt relief (discharge) was allowed after three years. The subject of cancellation (discharge) in the current version of the IA are liabilities existing as at the date of declaration of bankruptcy, except for the liabilities listed in sec. 281(2–6). The discharge does not affect the obligation of a third party, such as a co-debtor or guarantor, to repay liabilities subject to debt relief.

It is worth noting that in 1976 the Cork Committee, which worked on the introduction of debt relief, proposed debt relief after five years, with the possibility of a faster discharge after ten months. Moreover, the committee suggested distinguishing between culpable and non-culpable bankrupts. In order to ensure that the behaviour of the debtors was not detrimental to the institution of debt relief, the committee also recommended the introduction of verification of the commercial morality of the debtors, disciplinary measures, and restriction on taking advantage of debt relief. Parliament rejected these recommendations, pointing out the cost of their introduction.[106] A comparison of the committee's position with the current debt relief regulation in the IA confirms a tendency to transform the institution of debt relief towards a privilege, which has continued over several decades.

4.2. Debt relief order

In the case of taxpayers who have small debts and do not have significant income or assets, an alternative regulation to debt relief under bankruptcy proceedings is a debt relief order (DRO) regulated in sec. 251a–251x of the IA.[107] The DRO was introduced by the Tribunals, Courts and Enforcement Act 2007, and entered into force on 6 April 2009. The DRO also covers tax liabilities.

A debt relief order is available to a natural person who jointly meets the following conditions:

1. owes less than GBP 15,000;
2. has a monthly income surplus of less than GBP 50 left over after reasonable expenses;
3. has no movable property worth more than GBP 300, and in the case of a car, worth more than GBP 1,000;
4. lives, works, or owns property in England or Wales, or has lived, worked, or owned property in England or Wales within the last three years;

[105] Ibid., 301.
[106] Ibid., 298.
[107] Ibid., 60.

5. has not applied for the DRO in the last six years;
6. is not subject to bankruptcy or arrangement proceedings (IVA) and has not been declared an undischarged bankrupt.

The taxpayer submits an application for a DRO via an intermediary such as Citizens Advice or StepChange Debt Charity. The application is verified and registered by the official receiver. The IA provides for a number of presumptions as to whether the taxpayer is insolvent or whether liabilities should be covered by the DRO. The creditors are informed about the registration of the application.

Any person identified in a DRO application as a creditor may challenge the initiation of the proceedings. The creditor may raise objections within 28 days from the date on which they become aware of the DRO. The objections are submitted to the official receiver who decides whether to uphold them. The official receiver may dismiss the DRO application if the objections are legitimate.

As soon as the application is registered, a moratorium on creditor enforcements comes into effect. The moratorium may last one year, but the official receiver can extend it. During the moratorium, the taxpayer is obliged to inform the official receiver about any increase in income and acquisition of assets. However, the taxpayer is not obliged to repay the debt, e.g. through the repayment schedule. At the end of the moratorium, the liabilities disclosed in the DRO application are cancelled. The DRO has no effect on the rights and obligations of the taxpayer's co-debtors.

4.3. County court administrative order

Another alternative to debt relief under bankruptcy proceedings is the institution of a county court administration order, which is regulated in sec. 112–117 of the County Courts Act 1984. An administrative order is available to the taxpayer whose liabilities are confirmed by a county court or High Court ruling. In order to obtain a court order prohibiting the enforcement of the taxpayer's liabilities, the taxpayer must jointly meet the following conditions:

1. have a total debt of less than GBP 5,000 plus interest and other costs;
2. have debts to at least two creditors;
3. demonstrate that they are able to pay instalments regularly; and
4. be unable to repay all or part of the debts covered by a county court or High Court judgment.[108]

After the taxpayer has submitted the application, the court informs all creditors about the submission and schedules a hearing to be held not earlier than 14 days after informing the creditors. The creditors have the right to object to the

[108] 'Options for paying off your debts', *GOV.UK*, https://www.gov.uk/options-for-paying-off-your-debts/administration-orders, accessed 27 March 2020.

taxpayer's application within seven days of being informed of that application. The court hears the taxpayer and creditors, considers the creditors' objections, and decides on instalments that the taxpayer should pay.[109] After the order is issued, it is added to the Register of Judgments, Orders and Fines. The taxpayer is obligated to make one payment a month to their local court. The court divides this money between the creditors who cannot take any further action against the taxpayer without the court's permission.

If the court finds that the taxpayer is unable to repay all liabilities, it may cancel (discharge) part of the liabilities pursuant to sec. 117(2) of the Act. The cancellation (discharge) does not take place until the taxpayer pays in a timely manner all sums determined in the order.[110] The taxpayer may apply for a certificate of satisfaction.

The possibility of taking advantage of debt relief in England is not limited by a general clause in any of the proceedings under examination (bankruptcy process, debt relief order, and county court administration order). In the case of bankruptcy proceedings, after vesting the assets in the trustee, the liabilities may be cancelled within 12 months of insolvency declaration. Under this plan, the taxpayer does not have to make additional payments, for instance, as part of the repayment schedule. Moreover, there is no limit on the frequency of using the institution of bankruptcy proceedings. Thus, debt relief is readily available in England compared to other countries. In the case of non-business-related debts not exceeding GBP 15,000, cancellation is even easier through a debt relief order. Hence, it should be assumed that the institution of debt relief in England, in particular the debt relief order, is a privilege of consumers and financial institutions.

The classification of debt relief as a privilege of consumers and financial institutions indirectly confirms the position of Stanisław Gurgul, who indicates that England does not, in principle, follow the requirements of the concept of responsible lending. As a result, England represents a liberal concept of debt relief known as a 'fresh start,' which stands in contrast to the continental model of an 'earned fresh start.'[111] It is worth noting that an important reason for the recent over-indebtedness of individuals in England is the expansion of credit cards and consumer credit systems.[112] This model is also confirmed by systematic amendments to statutory law in England. The majority of the amendments facilitate debt cancellation through debt relief.

[109] 'County Court Administration orders', GOV.UK, https://www.insolvencydirect.bis.gov.uk/technicalmanual/Ch49-60/Chapter%2057/part3/part_3.htm, accessed 27 March 2020, para. 57.64.

[110] Ibid., para. 57.71.

[111] Gurgul, *Prawo upadłościowe*, 967.

[112] Szpringer, *Upadłość konsumencka*, 38.

5. Summary

The debt relief institution is characterised by the constant expansion of the group of recipients who can benefit from this institution and by the new improvements in its use[113] as a result of many reforms, including the following:

1. broadly defined conditions for the admissibility of debt relief have been introduced—equitable and humanitarian reasons in Poland;
2. the period of good behaviour has been shortened—from six years to three years in Germany;
3. the minimum repayment has been reduced—the obligation to repay at least 30% of the creditors' liabilities was repealed in the Czech Republic; and
4. a simplified debt relief procedure has been introduced for taxpayers with relatively lower indebtedness—the introduction of the DRO in England.

Consequently, the debt relief institution is increasingly consistent with the group privilege for consumers and credit institutions. The analysis of this institution also confirms a limited role of the tax authority in tax cancellation through debt relief. The role of the tax authority in debt relief is completely passive. Except for England, the tax authority cannot even raise objections against debt relief.

Debt relief in English law is a model privilege. The taxpayer may repeatedly use bankruptcy proceedings, the use of this institution is not limited by a general clause, and the taxpayer's liabilities are cancelled after 12 months. Debt relief up to GBP 15,000 under the DRO requires neither asset liquidation nor an observation period combined with the repayment schedule. In the case of the asset liquidation within bankruptcy proceedings, the implementation of an instalment plan is not required. Debt relief is dedicated to typical rather than atypical cases, especially those resulting from excessive consumption based on consumer credit.

In the compared legal systems, the taxpayer may increasingly benefit from the institution of debt relief and, consequently, from the cancellation of tax liabilities. As the result of broad access to debt relief, this institution does no longer apply to atypical over-indebtedness situations, but increasingly to typical situations and circumstances, in particular to cases of over-indebtedness caused by excessive consumption based on consumer credit. The broad access to debt relief is not justified by the principle of justice or other fundamental principles of law, including tax law. When indicating the beneficiary of this privilege, it should also be noted that the credit industry was formed in the United States in the 1920s and from the very beginning it was a great promoter of the debt relief institution.[114] This also confirms that lending institutions are beneficiaries of the privilege of debt relief.

[113] Ibid., 34.

[114] Smolík, Oddlužení, 35.

In the case of a natural person not conducting business activity, the share of tax liabilities in the taxpayer's global debt should be relatively small. In fact, tax liabilities are very often paid by the payer on behalf of the taxpayer, e.g. using income from a labour contract. The situation of a person conducting business activity is different. In such a case, debt relief may result in tax cancellation, which will increasingly be of a privilege nature. However, the tax authority does not have a significant impact on tax cancellation through debt relief. Except for England, the tax authorities do not even have the right to file an application to initiate debt relief proceedings. Therefore, it is worth asking whether the state treasuries should participate in financing the privilege of debt relief by giving up their revenues as a consequence of tax cancellation. If the answer is negative, it is advisable to at least partially exclude tax liabilities from debt relief proceedings or indicate the maximum amount of tax liabilities that may be cancelled through debt relief.

Finally, it should be stressed that the debt relief institution does not have to be a privilege. The regulation of debt relief for persons conducting business activity in Poland that was in force until 2016 was a dispensation as it focused on exceptional cases of insolvency caused through no fault of the taxpayer. As a result of legislative changes, this regulation lost its character as a dispensation. Hence, this change must be reflected in tax law.

Conclusions

The comparative analysis of the legal systems of Poland, Germany, the Czech Republic and England carried out in this book concerns the broadly defined tax cancellation, going beyond tax law in the strict meaning. The purpose of the analysis was to discuss in detail the institution of tax cancellation and to demonstrate the validity of the research theses pointed out in Introduction. In the author's opinion, the theses have been confirmed, and the conclusion resulting from the analysis allows putting forward the *de lege ferenda* proposal in the wording of Art. 67a § point 3 of the Polish Tax Code.

1. Cognitive conclusions

1.1. Prerogative

The cancellation of tax liabilities in the compared legal systems may be made on the basis of a prerogative or a statute, although the latter is a dominant basis. The two types of cancellation are mutually exclusive, which means that in each particular country a given form of cancellation is based either on a prerogative or on a statute.

In the case of insolvency arrangement and debt relief, the basis for tax cancellation is always a statute. The situation is different with regard to administrative cancellation, which is a much older institution. Specific cases of administrative cancellation in the 19th century were presented in Chapter V. In Poland, Germany and the Czech Republic, the legal basis for tax cancellation generally is a statute, and in England it is a prerogative. However, this issue is a subject of dispute in the English legal literature. It is worth noting that administrative cancellation in the Czech Republic is limited to interest for late payment; tax liability itself may not be the subject of cancellation. The Czech tax system can operate without the institution of administrative cancellation. Nonetheless, the lack of this institution is criticised in the Czech legal literature.

The existence of a legal basis of tax cancellation in the form of a statute does not guarantee that the parliament has a real impact on the scope of the granted cancellations. According to the carried out analysis, in the case of administrative cancellation, the statutory legal bases contain general clauses, which by their very nature are undefined. The undefined general clauses give full freedom in tax cancellation. Therefore, in the past, these clauses allowed the tax authorities to cancel tax liabilities at their full discretion. Currently, activities of the tax authorities, including the exercise of discretion, are subject to judicial review. In the author's opinion, due to the implementation and development of the institution of discretion, the right to cancel tax liability has been partly shifted from the tax authorities to the courts. However, it has not increased the role of the parliaments in this matter. As a consequence, it allows us to point out the common quasi-prerogative of the tax authorities and the courts as far as tax cancellation through administrative cancellation is concerned.

The above position on quasi-prerogative is also supported by the actual differences in the standards of detail that must be met by a statute imposing or cancelling tax liabilities. A parliamentary statute imposing tax liabilities must specify the taxpayer, the object of taxation, and the rate of taxation. In the case of tax cancellation, statutory regulations in Poland, Germany and the Czech Republic are limited to the determination of an authority entitled to cancellation and undefined general clauses being premises for cancellation.

The above differences in the standards of detail are determined by historical factors. As noted in Chapter II, as a consequence of revolutions and lost wars (e.g. the Glorious Revolution, the Revolutions of 1848), the parliaments obtained the exclusive right to impose tax liabilities, which was essential to the dismantling of the absolute monarchy. With a few exceptions (e.g. Lucius case referred to in Chapter II), tax cancellation was not particularly important for breaking down that form of government. Nowadays, the absolute state belongs to the past. Therefore, there is currently no justification for increasing the level of detail in the statutes on administrative cancellation by introducing a more detailed statutory regulation. Administrative cancellation will probably remain a quasi-prerogative of the tax authorities and the courts, and in the case of Poland and the Czech Republic also of the ministers of finance.

The problem of the quasi-prerogative can be resolved without introducing a more detailed statutory regulation. It may be done by replacing general clauses as a condition for administrative cancellation with a reference to other acts of law, in particular provisions of the constitution. It should be pointed out that in Poland and Germany, the conditions for administrative cancellation have already been interpreted many times by referring to the provisions (principles) of the constitution. Therefore, it seems possible to introduce, e.g. in Art. 67a § 1 point 1 of the Polish Tax Ordinance Act, a direct reference to the provisions of the Polish Constitution or to ratified international agreements, which take pre-

cedence over statutes, including the Tax Ordinance Code. In such a situation, when considering tax cancellation, the tax authority would not interpret the general clauses, but the provisions of the Polish Constitution or ratified international agreements. Similar solutions may be considered under the German and Czech legal systems. This does not apply to the English legal system as there is no written constitution in England.

There is no explicit and unconditional statutory legal basis for the tax authorities in all of the compared legal systems to support arrangement proposals providing for tax cancellation. It is possible to refer to the regulations setting out general tasks and objectives of the tax authorities, but they are only a formal legal basis. Thus, in the author's opinion, the right to support arrangement proposals containing tax cancellation is a quasi-prerogative of the tax authorities. This problem can be solved by introducing the appropriate competence provisions into tax law statutes. In addition, the competence provisions should specify the objectives or even detailed guidelines on the participation of the tax authority in arrangement proceedings.

1.2. Legal norm and factual circumstances

Tax cancellation may take place as a result of the application of a legal norm or the occurrence of specific factual circumstances accompanying the creation or collection of tax liabilities. This division is not expressed explicitly in statutory law of the compared legal systems but is indicated in the German legal literature in connection with cancellation under §§ 163 and 227 of the Fiscal Code of Germany. In fact, this division is also apparent in Polish law, where tax cancellation based on Art. 67a § 1 point 3 of the Tax Ordinance Act usually occurs due to factual circumstances, while tax cancellation based on Art. 22 § 1 of the Tax Ordinance Act takes place due to a legal norm on the creation of tax liabilities.

As shown by the analysis, this distinction between the two types of tax cancellation—one related to a legal norm and the other to factual circumstances—is essential. Tax cancellation under insolvency arrangement and debt relief is always related to factual circumstances at the time of tax collection, i.e. a bad financial situation of the taxpayer. Administrative cancellation may be related to factual circumstances as well as a legal norm. Therefore, it is justified to propose that administrative cancellation be used primarily where potential tax cancellation is related to a legal norm imposing a tax liability. At the same time, insolvency arrangement and debt relief should be applied in cases where the need for tax cancellation is related to factual circumstances. The emphasis on insolvency arrangement and debt relief as a means of cancelling tax liabilities due to factual circumstances should have a positive impact on the State's revenues as the costs associated with cancellation will be incurred not only by the State Treasury but

also by private law creditors. This issue needs to be included in tax law regulations.

1.3. Privilege and dispensation

Tax cancellation in the compared legal systems may take the form of a privilege or dispensation. The atypicality of the purpose of cancellation is crucial in this respect. The classification of the forms of tax cancellation using the institutions of privilege and dispensation indicates not only the possible purpose of tax cancellation, but also the development tendencies of this institution.

Most of the forms of tax cancellation analysed in this book cannot be simply classified as a dispensation or privilege. However, this is not the most important issue. The analysis has shown that the institutions that have recently been the subject of many reforms, i.e. insolvency arrangement and debt relief, are more and more of a privilege nature, as they usually concern typical cases. In the author's view, as far as tax law is concerned, this problem should be mitigated by introducing regulations providing for additional protection of tax liabilities in such proceedings, including the following:

1. introducing condition for debt relief of natural persons conducting business activity that were in force in Poland until 2016 in cases where the taxpayer's tax liabilities covered by debt relief exceed, e.g. EUR 1,000 in total; and
2. introducing an additional qualified majority requirement for the adoption of an arrangement in which tax liabilities exceed, e.g. 25% of the total amount of liabilities covered by the arrangement.

The forms of tax cancellation classified as a dispensation are applicable in atypical cases. Model examples in this respect are §§ 163 and 227 of the Fiscal Code of Germany and Art. 369 of the Polish Insolvency Law in the version effective before 1 January 2016 (debt relief for entrepreneurs). According to the author, the atypicality of a legal or factual situation is essential for understanding the institution of tax cancellation. It answers the question whether it is legitimate to cancel tax liabilities by a decision of the tax authority and not by an amendment to statutory law adopted by the parliament. As noted in Chapter V quoting the German legal literature, a tax statute should regulate typical factual and legal situations, and in the case of a possible atypical situation, the tax authority or the court should have the right to cancel tax liabilities. The author believes that tax cancellation in the form of a dispensation should be part of all legal systems as a safety valve ensuring tax justice in atypical cases not provided for in statutory law.

As has been shown, tax cancellation is, in fact, applied not only to atypical but also to typical cases; however, in such instances, the legal regulation takes on the characteristics of a privilege. The author does not hold a negative view of the

practice of shaping the institution of tax cancellation as a privilege, leaving this issue to the parliament as an element of tax policy of the State. Nonetheless, the parliament should make informed decisions on whether a particular regulation on tax cancellation is to be a dispensation or privilege. This issue is particularly relevant to the debate in the Czech Republic on the reintroduction of administrative cancellation into the Tax Procedure Code. In the author's opinion, all tax systems should include at least the institution of tax cancellation of a dispensation nature, i.e. providing for, as a minimum, the cancellation of tax liabilities in the case of an atypical factual or legal situation. Such a proposal correlates with the nature of parliamentary statute, which in principle regulates typical factual and legal situations. Hence, the Czech regulation, which completely excludes tax cancellation with respect to an atypical legal situation (an atypical legal norm), should be assessed critically. In the Czech Republic, only insolvency arrangement and debt relief can be used to cancel tax liabilities. However, these institutions do not apply to tax cancellation due to a legal norm on the creation of tax liabilities. They only provide for tax cancellation due to factual circumstances of tax collection, i.e. bad financial situation of the taxpayer.

The author proposes *de lege ferenda* to formulate administrative cancellation as a dispensation, i.e. to limit its scope mainly to atypical cases. Such a formulation of administrative cancellation enables to solve the problem of the quasi-prerogative in this respect. In the case of a dispensation, a substantive legal basis for tax cancellation will always be another source of law contained in the legal system, in particular the constitution. In addition, the limitation of administrative cancellation to dispensation may be justified by the existence of insolvency arrangement and debt relief in all compared legal systems. These institutions ensure tax cancellation in typical cases, such as over-indebtedness, so it is not necessary to use administrative cancellation for the same purpose.

1.4. Role of the court

As a result of many years of changes in the compared legal systems, the court has replaced the tax authority as the body deciding on the cancellation of tax liabilities. This fact is confirmed, in particular, by the analysis of the institutions of insolvency arrangement and debt relief, but also by the development of the institution of discretion, which has replaced full discretion. Moreover, further development of the institutions of insolvency arrangement and debt relief makes it highly probable that the actual role of the court in tax cancellation will increase in the future. Similarly in England, it is apparent that the discretion exercised by the tax authority has been the subject of judicial review. The court has increasingly been reviewing activities of the tax authority on the basis of not only the

ultra vires doctrine but also common law, the ECHR, and EU law. These changes have led to the marginalisation of the role of the tax authority in cancelling tax liabilities.

The analysis confirms the dynamics of judicial review over the tax authorities. Currently, judicial review in Poland, Germany, and the Czech Republic covers not only the interpretation of undefined terms (the concept of Bernatzik and Jelinek) and the constraints of discretion (the concept of Tezner) but also increasingly covers the purpose of discretion.

It is currently unfounded to equate the institution of tax cancellation with administrative cancellation, which is only one of three possible forms of tax cancellation. Unfortunately, there is no legal regulation in statutory law concerning the participation of the tax authorities in insolvency proceedings conducted by the courts. In the case of Germany and England, the participation of the tax authorities in these proceedings is subject to internal administrative guidelines adopted by the ministers of finance or by the tax authorities themselves. The author postulates to regulate the participation of the tax authorities in insolvency arrangement and debt relief in a statute, or, in the case of Poland and the Czech Republic, in an internal administrative guideline.

1.5. Summary

Based on the carried out analysis and having regard to the research theses stated in the Introduction, the following conclusions may be presented regarding the institution of tax cancellation:

1. Tax cancellation requires a legal basis in a statute except for administrative cancellation in England (extra-statutory concession);
2. For historical reasons, legal regulations on tax cancellation do not meet and do not need to meet the standards of detail prescribed for legislation imposing tax liabilities;
3. The institution of tax cancellation is composed of two institutions: tax cancellation due to a legal norm on the creation of tax liabilities and tax cancellation due to factual circumstances at the time of tax collection;
4. Under the institutions of insolvency arrangement and debt relief, it is possible to cancel tax liabilities only due to factual circumstances at the time of tax collection; thus, the cancellation of tax liabilities at the stage of their creation remains the domain of administrative cancellation;
5. Tax cancellation may find application in atypical or typical factual and legal situations, which is consistent with the classification of tax cancellation as a dispensation or privilege;
6. Tax cancellation due to an atypical factual or legal situation, i.e. of a dispensation nature, should be a part of any legal system;

7. Tax cancellation may be granted by the tax authority or court, but the importance of the court and its case-law for tax cancellation is growing, which is not taken into account by the current tax law regulations;
8. There is no regulation in the form of a statute concerning the participation of the tax authorities in arrangement proceedings, even though tax liabilities are subject to such proceedings.

2. Practical conclusions

The legislator should consider the following proposals when amending or introducing a legal regulation on administrative cancellation:

1. It is advisable to replace general clauses as conditions for tax cancellation with the condition of violation of a source of law of higher rank than a tax law statute, e.g. the constitution or a ratified international agreement;
2. Each legislator should consciously determine the conditions for possible tax cancellation to shape it as a dispensation or privilege, i.e. tax cancellation should apply to atypical or typical cases; these two forms of tax cancellation should be understood as mutually exclusive;
3. Each legislator should consider the possibility of tax cancellation under insolvency law, i.e. through insolvency arrangement or debt relief;
4. It is necessary to consider the participation of the tax authority in insolvency arrangement proceedings, specifying the guideline on possible support or rejection of arrangement proposals.

Bearing in mind the above proposals, the author suggests replacing the current wording of Art. 67a § 1 point 3 of the Polish Tax Ordinance Act as regards tax arrears with the following text:

1. The tax authority may, at the taxpayer' request, fully or partially cancel the tax arrears if the legal norm on the actual situation of creation or collection of the tax liabilities is atypical and violates the Polish Constitution or a ratified international agreement;
2. In the case of atypical situations, the tax authority may cancel the tax arrears only if it is not possible or reasonable to cancel the tax arrears based on the provisions of the Insolvency Law or the Restructuring Law;
3. The tax authority may support an insolvency arrangement providing for the cancellation of tax arrears in accordance with the Restructuring Law, if the conditions of sec. 1 are met, or the adoption of the arrangement is in the fiscal interest of the State Treasury.

3. Recommendations for further research

Statistical analysis of data on the application of tax cancellation is of particular importance for further research on tax cancellation. Such research goes beyond the scope of this book, which focuses on the analysis of statutory law, case-law and the legal literature in this area. Unfortunately, the results of the analysis show that it may be difficult to obtain reliable and comparable raw data. This problem mainly affects England, where not all extra-statutory concessions are even publicly disclosed by the tax authority.

Another important issue that should be researched is the transparency of tax cancellation and access to public information concerning the reasons and scope of tax cancellation. This problem is especially apparent in English law, but it also concerns other legal systems.

In the author's opinion, it is advisable to undertake research on the protection of tax liabilities in insolvency law proceedings, i.e. in insolvency arrangement and debt relief proceedings classified as privileges. Such research has a particularly practical dimension in the case of tax cancellation for humanitarian reasons, where the subject of cancellation is indirect taxes such as VAT. It cannot be excluded that the taxpayer will be granted tax cancellation in a given situation even though a third party, such as a consumer, has already incurred the economic burden of tax liabilities.

Abbreviations

AO	– Abgabenordnung (Fiscal Code of Germany)
BFH	– Bundesfinanzhof (Federal Fiscal Court)
BGB	– Bürgerliches Gesetzbuch (Civil Code)
BVerfG	– Bundesverfassungsgericht (Federal Constitution Court)
Can. / cann.	– Canon/canons
ECHR	– European Convention on Human Rights
EU	– European Union
IA	– Insolvency Act 1986
InsO	– Insolvenzordnung (Insolvency Law)
IZ	– Insolvenční zákon (Insolvency Act)
k.c.	– Kodeks cywilny (Civil Code)
MF	– Minister of Finance
NSA	– Naczelny Sąd Administracyjny (Supreme Administrative Court)
NSS	– Nejvyšší správní soud (Supreme Administrative Court)
OZ	– Občanský zákoník (Civil Code)
UK	– United Kingdom
WSA	– Wojewódzki Sąd Administracyjny (Voivodeship Administrative Court)

Index

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This book presents the institution of tax cancellation in the legal systems of Poland, Germany, the Czech Republic, and England in the broader context of tax and insolvency law. It focuses on three particular forms of tax cancellation: administrative tax cancellation, debt relief, and insolvency arrangement. The author uses comparative legal analysis, which allows him to go beyond the usual research paradigms and provides a new perspective for a better understanding of the institution of tax cancellation. Despite significant differences between the analysed legal systems, the issues discussed are universal.

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