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ANALOGICAL REASONING IN TAX LAW – SELECTED ISSUES***

Abstract

Reasoning by analogy is well known in many branches of the law. Nevertheless, in the case of tax law, it is still a live and controversial issue. The application of reasoning per analogiam deals with a dilemma typical of the law and is of great value for practice. It is rare to find legal provisions on the admissibility of the use of analogy in the process of tax law interpretation. Owing to the universal nature of this method of inference, it is possible to analyse and draw conclusions regarding its applicability in the national legal orders of continental legal systems. As part of the analysis, the authors present arguments for and against the use of analogy in tax law. Subsequently, the analysis covers selected legal regulations in which the legislator has or has not explicitly referred to the permissibility of the use of analogy in tax law. This section deals in particular with the regulations of Brazil, Spain, Germany, Poland, and Portugal. The authors have also pointed

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out the distinctiveness of the appropriate application of the legislation and the application of analogy. The article also includes an analysis of selected Belgian, Czech, Polish, and German rulings. The study based on the above leads to the conclusion of a diverse approach to analogy. The research identifies areas of permissibility for the use of analogy in tax law. The authors made use of the comparative and dogmatic-legal methods.

Keywords

tax law; analogy; controversy; loophole

Introduction

The issue of inference from analogy in tax law is controversial and the answer to the question of its applicability is still open. Reasoning *per analogiam* in social terms, owing to its proximity to human nature and initial intuitiveness, is characterized by its universal nature. The issue similarly presents itself in the field of law. Although each system, whether state or international, interferes to a different degree in the way analogy is perceived and used, a number of supra-systemic considerations can be successfully discerned which, in their universality, make it possible to consider the pros and cons of analogy *in genere*. Analogy in law is sometimes referred to as a 'brainstorm of jurists' diction'.[1] According to Bogumił Brzeziński, inference *per analogiam* has good axiological justification, as it is underpinned by the universally accepted desire to treat people equally and fairly and is sometimes referred to as inference *a simile*.[2] This, in turn, is the foundation of modern legal systems, usually expressed in the content of constitutional provisions.[3]

As Giuseppe Zaccaria points out: 'The speculative significance of analogy is, in short, in its bringing to light the structure of being as such and in its relationship with totality: the use of the word analogy refers immediately to diversity, but at the same time to a relationship, a relation; it involves, as the very etymology of the word says, a diversity that

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[1] S. Brewer, "Exemplary Reasoning: Semantic, Pragmatics, and the Rational Force of Legal Argument by Analogy", *Harvard Law Review,* 1996, Vol. 109, No. 5, p. 926.

[2] B. Brzeziński, *Wykładnia prawa podatkowego*, ODDK, 2013, p. 131.

[3] *Ibid*.

is necessarily led back to a point of reference, a centre: *analogos* means nothing other than according to the *logos*, corresponding to *logos*'.[4]

Although the use of reasoning *per analogiam* concerns a dilemma typical of legal theory, it is of great value for practice. Methods of legal interpretation often give the right meaning to legal institutions. Without these methods, the law would often be, at best, a collection of prohibitions, precepts, and directives that would be difficult to apply. Indeed, in the context of the legal system, the process of subsumption should not be forgotten. The application of the law does not consist only of the indication of a rule, but refers to the reconstruction of a legal norm applicable to a specific state of facts by means of interpretation and legal inferences. A distinction can also be made between situations in which the analysis of legal rules does not allow the desired legal norm to be perceived directly. This is, in some simplification, the phenomenon of a legal gap or legislative vacuum.[5] Reasoning *per analogiam* is one method of closing gaps in the law[6] and this function is by far the most frequently used in practice.

Despite the existence of the phenomenon of analogy from time immemorial, in the context of tax law this issue is still considered controversial. In view of the above, the research problem can be presented by means of the following question: should the use of reasoning *per analogiam* be permissible in tax law? The presentation of arguments for and against analogy in tax law will contribute to answering the above query. The analysis, owing to its reliance on the fundamental features of this inference, can be called universal and, in principle, applies to most continental legal systems. The analysis is based on a study of legal acts, jurisprudence, the literature, and comparative legal research. The authors have made use of the comparative and dogmatic-legal method.

Civil law and common law are considered the two most dominant legal systems in the world. The considerations made in this article re-

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[4] G. Zaccaria, "Analogy as legal reasoning. The hermeneutic foundation of the analogical procedure", in P. Nerhot (ed.), *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and* Linguistics, Springer Science+Business Media Dordrecht, 1991, p. 44.

[5] On the notion of a gap seen in this way writes M. Siota Álvarez, *Analogia e interpretacion en el derecho tributario*, Marcial Pons, 2010, p. 39.

[6] *Ibid*.

fer to selected issues of European countries, i.e. Spain, Portugal, Germany, Czech Republic, Belgium, and Poland, and one country from South America, *i.e.* Brazil. The Spanish, Portuguese, German, Czech, Belgian, Polish, and Brazilian legal systems are based on Civil Law tradition. The authors do not refer to the common law system. Finally, the authors are aware that the countries highlighted differ considerably, not only in terms of history or culture, but above all in terms of jurisdiction and legal order. However, the authors' aim was to find some commonalities that can be put forward with regard to the analogical reasoning.

I. Difference Between Extensional Interpretation, a Reference in a Law to the Appropriate Application of Other Legal Provisions and Reasoning by Analogy

First and foremost it is worth pointing out the distinction between analogy and extensional interpretation.[7] Some note that the above mentioned do not have the same argumentative structure, but on the contrary, both methods lead to the same outcome, they justify the extension of regulation to a case that is not expressly addressed in the law.[8] According to Damiano Canale and Giovanni Tuzet: "«extensive interpretation» makes reference either to the interpretive process that extends the standard meaning of an interpreted legal provision, or to the outcome of this process. On the contrary, «analogical reasoning» denotes an argumentative technique inferentially articulated".[9]

Secondly, the issue of analogy in the context of the appropriate application of regulations should be pointed out. The authors advocate a strict distinction between these concepts, which will be shown main-

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[7] Brzeziński, *supra* note 2, p. 131-132.

[8] D. Canale, G. Tuzet, "Analogical Reasoning and Extensive Interpretation", *ARSP: Archiv für Rechts- und Sozialphilosophie*, 2017, Vol. 103, No. 1 (2017), available at: https://ssrn.com/abstract=2887922 [last accessed: 4.9.2024].

[9] *Ibid*., p. 13.

ly on the basis of Czech and Polish regulations.[10] The constitution of the Czech Republic of December 16, 1992[11] does not expressly mention analogy. In tax matters, it is worth noting Article 11(5) of the aforementioned Czech Constitution, according to which taxes and fees can be established only by law. The principle of statutory exclusivity in various scopes has been located in a total of fifteen constitutions of European Union countries[12]. The Czech literature emphasizes that most representatives of the doctrine believe that analogies serve to fill gaps in the law, i.e. it does not exclude their existence, even in public law.[13] P. Mates emphasizes that 'Quite often we can encounter the expression "*obdobně*" in legal regulations (e.g. in the Administrative Code we can encounter it in almost forty provisions). Is it an expression that predicts the use of analogy or is it a mere economy of the legislator who refers to another place of the law to be used here?'.[14] P. Mates points out the lack of uniformity in the Czech literature on the subject, but he himself responds that there is no gap when the legislator gives precise instructions on how to proceed based on a specific provision.[15] The authors share this view. As M. Radvan points out: 'In the Czech Republic, there is a general act dealing with the tax administration called Act no. 280/2009 Sb., Tax Procedural Code, as amended. It is used in situations when there is no spe-

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[10] The analysis of tax issues from the perspective of the Czech Republic and the Republic of Poland is not an isolated phenomenon in the literature. *See* D. Czudek, J. Kubíček, W. Morawski, M. Wilmanowicz-Słupczewska, "Sugar-dating (sponsoring): income tax consequences of sexual relations in Polish and Czech law", *Prawo i Więź* 2023, vol. 3, p. 637-662; M. Radvan, "Taxes on Communal Waste in the Czech Republic, Poland and Slovakia", *Lex Localis – Journal of Local Self-Government*, 2016, vol. 14, No. 3, p. 511–520.

[11] Ústava České republiky ze dne 16. prosince 1992, č. 1/1993 Sb, Constitution of the Czech Republic of 16 December 1992, No. 1/1993 Coll.

[12] B. Brzeziński, M. Wilmanowicz-Słupczewska, "Przepisy dotyczące problematyki opodatkowania w konstytucjach państw członkowskich Unii Europejskiej", *Studia Iuridica*, 2023, vol. 94, p. 19.

[13] P. Mates, "Analogie ve správním právu", *Správní právo*, 2011, roč. 44, č. 6, p. 343, original extract: 'V současnosti vychází většina autorů z toho, že analogie slouží k překlenutí mezer v právu, tedy jejich existenci nevylučuje, a to ani v právu veřejném'.

[14] *Ibid*., original extract: 'Poměrně často se můžeme v právních předpisech setkat s výrazem „obdobně" (např. ve správním řádu se s ním lze setkat skoro ve čtyřiceti ustanoveních). Je to výraz, kterým je predikováno použití analogie nebo jde o pouhou úsporu zákonodárce, který odkazuje na jiné místo zákona, které zde má být použito?'.

[15] *Ibid*., p. 345-346.

cial regulation in a special tax act.'[16] In the above mentioned text of the Czech law[17] it is difficult to find the legislature's use of the phrase "*analogie*" (*i.e.* analogy). Nevertheless, the law repeatedly uses the aforementioned institution of appropriate application of the provisions.[18]

The Constitution of the Republic of Poland of April 2, 1997 does not contain constitutional provisions directly indicating the possibility or prohibition of analogy in Polish tax law. Among other things, constitutional provisions provide for the principle of statutory exclusivity in the imposition of taxes and fees. According to Article 217 of the Constitution, the imposition of taxes, other public tributes, the determination of subjects, objects of taxation, and tax rates, as well as the principles of granting reliefs and remissions and categories of subjects exempt from taxes shall be done by law. The Polish Tax Ordinance does not explicitly regulate the possibility or prohibition of analogy in tax law. However, the Tax Ordinance provides for the construction of the appropriate application of regulations. The Polish legislator in the Tax Ordinance has used the phrase "shall be applied accordingly" more than 170 times. In addition, other legal acts also contain provisions indicating the appropriate application of the provisions of the Tax Ordinance.[19] In the Polish literature, one can find different positions on the qualification of

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[16] M. Radvan, *Czech Tax Law*, University Press, 2020, p. 87.

[17] Czech Zákon č. 280/2009 Sb., Zákon daňový řád ze dne 22. července 2009 (Act No. 280/2009 Coll., the Tax Code Act of 22 July 2009).

[18] For instance: § 107 (7) Czech Zákon č. 280/2009 Sb. Zákon daňový řád – 'Při stanovení hotových výdajů spočívajících v náhradě jízdného, stravného a náhradě prokázaných výdajů za ubytování se použijí obdobně příslušná ustanovení zákoníku prace.' [§ 107 (7) Act No. 280/2009 Coll., the Tax Code Act – The relevant provisions of the Labour Code shall apply *mutatis mutandis* to the determination of out-of-pocket expenses consisting of reimbursement of travel and subsistence expenses and reimbursement of proven accommodation expenses].

[19] For instance, pursuant to Article 31 of the Polish *ustawa z dnia 13 października 1998 r. o systemie ubezpieczeń społecznych* [Act of 13 October 1998 on the social insurance system (i.e. Journal of Laws 2023, item 1230, as amended): "The following shall apply *mutatis mutandis* to dues for contributions:] art. 7a, art. 12, art. 26, art. 29 § 1 i 2, art. 33–33b, art. 38a, art. 51 § 1, art. 55, art. 59 § 1 pkt 1, 3, 4, 8 i 9, art. 60 § 1, art. 61 § 1, art. 62 § 3 i 5, art. 62b § 1 pkt 2 i § 3, art. 72 § 1 pkt 1 i 4 i § 2, art. 73 § 1 pkt 1 i 5, art. 77b § 1 i 2, art. 91, art. 93, art. 93a–93c, art. 93e, art. 94, art. 97 § 1 i 1a, art. 97a § 1–3, art. 98 § 1 i § 2 pkt 1, 2, 5 i 7, art. 100, art. 101, art. 105 § 1 i 2, art. 106 § 1–3, art. 107 § 1, 1a, § 2 pkt 2 i 4 i § 3, art. 108 § 1, 3 i 4, art. 109 § 1 w zakresie art. 29, art. 109 § 2 pkt 1, art. 110 § 1, § 2 pkt 2 i § 3, art. 111 § 1–4 i § 5 pkt 1, art. 112 § 1–5, art. 112b–114, art. 115–117, art. 117d, art. 117e, art. 118 § 1 oraz

analogy and the appropriate application.[20] However, the authors of this study take the position of strictly distinguishing between analogy and appropriate application of the law. The authors share the view that: 'In the case of a typical analogy *legis*, there is no delegation expressed in the legislation for the application of specific provisions, the process of its application is more complicated and responsible than in the case of the proper application of legal provisions. This is because, first of all, the applying entity must verify whether there is a gap, identify its extent, check whether it is permissible to fill it, and, finally, choose how to fill it. In this case, there is no legislative guidance and no formal power and thus no explicitly expressed power to apply a particular legal unit, which is present in the case of the appropriate application of a provision. Consequently, these concepts cannot be combined. In the case of an appropriate application of the law, the law application entity acts within the authority of the legislator and has certain indications at its disposal - it has the certainty that it can act in this manner, as well as an indication of the provisions which it should at most modify to a certain extent. Likewise, it does not run the risk of finding in the future that the loophole does not exist after all. Finally, in this case there is no question of a loophole. It is impossible to assume that the legislator omitted a regulation or forgot to regulate. In the case of analogy, the person applying the law selects the provisions himself, whereas in the case of the appropriate application of provisions, he is practically unable to make a mistake in deciding whether to apply the provisions accordingly or not - he has a statutory guideline at his disposal. This is because the legislator has provided a specific solution - it informs which provisions are relevant and refers to them'.[21]

The appropriate application of the provisions was also referred to by the Dutch legislator. Pursuant to Article 2(6) of the General law on state taxes (*Algemene wet inzake rijksbelastingen*), [22] the provisions of the tax law

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[and] art. 119 ustawy z dnia 29 sierpnia 1997 r. – Ordynacja podatkowa [Act of 29 August 1997 - Tax Ordinance]".

[20] See: M. Słupczewski, *Rozumowanie per analogiam w prawie podatkowym,* Wolters Kluwer, 2023, p. 85-88.

[21] *Ibid*., p. 88-89.

[22] Algemene wet inzake rijksbelastingen van 7 februari 1959, Staatsblad van het Koninkrijk der Nederlanden 301/1959, Gewijzigd 10 mei 2023 Stb. 2023, 183 35261 (Gen-

attaching legal effects to the conclusion, existence, dissolution, or termination of a marriage shall apply *mutatis mutandis* to the conclusion, existence, dissolution, or termination of a registered partnership. Nevertheless, the possibility of analogous application of tax law exists only if it is beneficial to the taxpayer.[23]

II. Arguments for the Use of Reasoning *per Analogiam* in Tax Law

The first category of arguments concerns the advantages of using analogy in tax law: analogy can be an effective and non-delaying method of interfering with unconscious omissions or legislative negligence. Moreover, it is a method with a high degree of flexibility in its application and has a beneficial effect on procedural economy. Analogy makes it possible to find a solution in the absence of a standard and the need to resolve a tax-legal condition, at the same time with the unquestionable assumption of the impossibility of creating a complete and 'loophole-free system'. It is a solution particularly appreciated when the legislative quality in tax law is low. What is more, the application of the legislative analogy is supported by the consideration of the requirement of completeness of regulations creating a specific legal institution.[24] Approval of the use of analogy can also be found in more general issues, as there is now a noticeable demand for a 'multifaceted interpretation of the law, rather than limiting itself to mere legalism and formal legal security'.[25] The analogous model of applying the law can also be a way of limiting the discretionary power of

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eral Law on State Taxes of February 7, 1959, Official Gazette of the Kingdom of the Netherlands 301/1959, Amended May 10, 2023 Stb. 2023, 183 35261).

[23] H. Kloosterhuis, *Van overeenkomstige toepassing. De pragma-dialectische reconstructie van analogie-argumentatie in rechterlijke uitspraken*, Universiteit van Amsterdam, 2001, p. 166.

[24] This is, for instance, indicated in Polish jurisprudence: Judgment of the Polish Provincial Administrative Court in Kraków of 19 February 2020 in case I SA/Kr 1373/19, judgment of the Supreme Administrative Court of 8 January 2020 in case II FSK 368/18.

[25] J. Stelmach, B. Brożek, *Sztuka negocjacji prawniczych,* Warszawa, Wolters Kluwer, 2011, p. 9, [quoted after] R. Mastalski, *Tworzenie prawa podatkowego a jego stosowanie*, Wolters Kluwer, 2016, p.10.

the judiciary.[26] An argument from analogy (similarity) or *argument a simili* is one of the most common used arguments in a legal discourse.[27]

As practice shows, analogy is also definitely a way of supplementing and developing tax law to the extent necessary for the functioning of the legal system and the realisation of constitutional objectives. In addition, certain circumstances pose not only challenges for those applying the law, but also risks for the participants in the proceedings. They concern the discretionary power of the judge, judicial slackness, or the presence of vague concepts. One has to wonder whether, in the context of the above issues, analogy is still a controversial phenomenon? After all, the courts are in any case entrusted with a certain degree of competence in assessing the compatibility of applied legal norms with normative acts of a higher order, so in their creative activity, judges are obliged to observe the same precepts and prohibitions.

Moreover, the use of analogy in law is a remedy for the legislator's mistakes in the form of inconsistent regulation. One might wonder who should remove loopholes – courts, tax authorities, or legislator? It is crucial to distinguish between the perspective of the legislator and the court. The legislator can influence the application of analogy *ex post* and for the future. A court deciding a specific case has a limited field of action owing to a specific jurisdiction, unlike the legislator who constructs norms. The courts should certainly uphold independence even during the process of legislation. Independence refers to the guarantee of judicial independence and the impartiality of the courts to ensure an unbiased assessment of the facts.[28] On the issue of administrative bodies, it is worth referring to the systemic construction from which the possibility of reviewing the decisions of administrative bodies by way of judicial review arises. The legislator has the possibility to influence the judicial practice in the field of analogy and has the possibility to introduce an appropriate legal regulation in the case of improper application of analogy in specific cases. This regulation would take the form of a special norm. Those applying the law would be obliged to comply with the results of the interpretation of the newly created provision.

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[26] M. Koszowski, "Legal Analogy as an Alternative to the Deductive Mode of Legal Reasoning", *The Indonesian Journal of International & Comparative Law*, 2017, vol. 1, p. 73-87.

[27] J. Stelmach, B. Brożek, *Methods of Legal Reasoning*, Springer, 2006, p. 156.

[28] A. Mudrecki, *Rzetelny proces podatkowy*, Wolters Kluwer, 2015, p. 141-142.

There are also noticeable points that require explicit emphasis. The legislator's silence, insofar as it does not concern the taxability of a given legal state, does not relieve the authorities and the courts of their duty to decide the case. These entities must use all possible means to reconstruct the legal norm by analogy, which seems to be the right solution.

The use of analogy in tax law has an indirect influence on the shape of statutory law and, in principle, the steps taken in this regard are effective. In practice, these steps generally take place by highlighting gaps and seeking solutions in the non-linguistic wording of the provision. A side consequence cannot be overlooked either. This concerns the tremendous influence of decisions based on analogy on the legislator and thus giving inspiration to create good, or at least necessary, law.[29]

In addition, the issue of administrative bodies should also be considered. Unlike judges, these are entities with no analogical preparation for adjudication and lack the necessary experience in this area. The above refers to the situation when the court does not act cassationally and does not give instructions on the directions to use analogy. This is the case when the analogy resulting from the decision of the tax authority has not been subject to the court's review or when the taxpayer has not successfully raised an appeal. In this context, a dichotomous division can be made based on the criterion of the taxpayer appealing against the decision. On the one hand, the failure of the taxpayer to raise an appeal may be due to the fact that an issued ruling was satisfactory to the taxpayer. It may be presumed that the authority used the analogy correctly. On the other hand, it is not difficult to imagine a situation where a taxpayer does not challenge a decision for formal reasons or as a result of lack of awareness of his rights and does not attempt to change the decision.

Moreover, analogy can also be understood as a method of self-integration, as by means of it we reach the order integrated by the nation itself (general principles, analogy with other applicable laws).[30]

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[29] For instance – Polish Rządowy projekt ustawy - Ordynacja podatkowa z dnia 4 czerwca 2019 r., Government draft law - Tax Ordinance of 4 June 2019. The draft of the new Polish Tax Ordinance, to the extent that the proponent proposes regulations aimed at filling the gaps which, in the course of the application of the law, were eliminated through the application of analogy, *print no. 3517.*

[30] Siota Alvarez, *supra* note 5, p. 32.

In addition, the use of analogy addresses the main problem of any legal system, that is, innovation while maintaining its structure, i.e. enabling the use of fixed norms in a system undergoing transformation[31] and immediate response to a newly created need.

As a final note, it should be noted that the absence of a provision prohibiting the use of reasoning *per analogiam* in tax law is generally tantamount to the permissibility of such reasoning. However, any use of analogy must respect the principles of tax law.

The above discussion regarding the arguments for the use of reasoning *per analogiam* in tax law leads to a further question: is analogy in fact as controversial as it might seem on the surface and as it has been assumed over the years? Or is a perfect legal syllogism by definition doomed to failure? This question also relates to the issue of references in tax law systems to extra-legal systems of judgement and value, i.e. general referencing clauses, value clauses, and discretionary and interpretative slack. Looking at the aforementioned issues from the right side and finding common features with those legitimized by the system provides the opportunity to see reasoning *per analogiam* in tax law as an issue that is no longer so controversial, and that provides a basis for considering its admissibility in practice.

III. Arguments Against the Use of Reasoning *per Analogiam* in Tax Law

The second part of the consideration relates to counter-arguments. Indeed, the issue of the use of reasoning *per analogiam* has not only its brightnesses, but also its shadows. In this respect, it is worth pointing at the outset to the work of Lech Morawski, who distinguishes several categories of arguments against the use of precedent in law.[32] Although Lech Morawski's argumentation concerns law in a broad sense and the concept of precedent, nevertheless these considerations can be partially, but successfully, transformed and adapted to tax law and for the use of

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[31] *Ibid*., p. 32.

[32] L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Wydawnictwa Prawnicze PWN, 1999, p. 221.

the issue of reasoning *per analogiam*.[33] For, in general, the issues are similar, i.e. they focus on the break from the rule of statutory lawmaking.

Firstly, it is worth referring to what is known as the argument from democracy. It is understood as an objection to lawmaking by individuals, or in this case, the adjudicating representatives of the courts. In tax law, this argument becomes even more important. The substitution of the legislator for the decisions of the adjudicators provides greater scope for infringement than in other areas of law owing to the intrusive nature of tax law. However, it is worth referring at this point to Lech Morawski's commentary indicating that when deciding to whom to entrust lawmaking, *i.e.* whether members of parliament or judges, it would obviously not be a bad idea to entrust the latter.[34] This makes it possible to refute the argument that only parliament has at its disposal professionals ready to produce high-quality legislation.

A further argument, named after the separation of powers, relates to the constitutional tripartite division of powers, which in principle follows from the constitutional regulations. In practice, a split in this area is noticeable. Currently, the mechanism of separation of powers functions as an apparatus defining the principles of political responsibility for the exercise of power and it is not related to the separation of the functions of making and applying law.[35] John Ferejohn and Pasquale Pasquino rightly point out that constitutions are frequently designed to control the exercise of power, using constitutional jurisprudence in particular.[36] Therefore, any concerns arising from views of the exclusivity of the legislature's ability to create the correct norms should be considered to have lost their relevance.

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[33] However, this does not fully apply, for instance, with regard to the argument concerning the independence of the courts, according to which juries should not be bound by the judgments of other courts, owing to judicial independence and being subject only (in the case of Poland) to the Constitution of the Republic of Poland and to laws: Article 178 of the Constitution of the Republic of Poland, 2 April 1997, *Journal of Laws. No. 78, item 483 as amended* (Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., *Dz. U. Nr 78, poz. 483 ze zm.*).

[34] Morawski, *supra* note 32, p. 223.

[35] *Ibid.*, p. 222.

[36] J. Ferejohn, P. Pasquino, "The law of the exception: A typology of emergency powers", *International Journal of Constitutional Law*, 2004, vol. 2, Issue 2, p. 210.

As a counter-argument, the issue of the limits of taxation and the weaker position of the taxpayer should also be pointed out, which is sometimes problematic in the context of analogy. With regard to the limits of taxation, it is emphasized that taxes have to be shaped with due respect for the economic, social, and societal position of the taxpayer and respect for economic rights and freedoms.[37] The individual acting as a taxpayer is weaker in relation to the public authority. Therefore, from a microeconomic perspective, it is important to adapt tax rules to the situation of the individual taxpayer.[38] As an aside, it is worth pointing out that academics have taken up the challenge of establishing an absolute social limit of taxation, the exceeding of which would result in economic disorder: among their works can be distinguished the thesis by Pierre-Joseph Proudhon or the theory of Colin Clark.[39] In practice, sometimes the limits of taxation are created at the law-making level and are determined by the current economic and social situation. The same may be true of reasoning by analogy, but there is less scope for preventing this. Such *ad hoc* 'creation' of tax law may imply a lack of attention to this law-making and, as a consequence, the quality of this adjudication will not be sufficient. As a result, when seeking to adjudicate a case, there is a risk of overstepping the bounds of discretion and falling into an excessive arbitrariness.

In addition, the taxpayer may be obliged to apply a complex inference such as analogy in a situation of two-stage application of the tax law. This is the case when, in the first stage, the taxpayer calculates the tax itself and, later on, the conformity of the calculation of the declared amounts is subject to verification by the tax authority. However, the taxpayer is an entity that most often does not have professional knowledge of tax law. Such an entrustment to use a tool that may not be used correctly would, in turn, be contrary to the foundations of the tax law system.

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[37] A. Gomułowicz, "Ochrona wolności i praw ekonomicznych a granice opodatkowania – zasady i kontrowersje", *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2005, vol. 3, p. 32.

[38] B. Brzeziński, *Prawo podatkowe. Zagadnienia teorii i praktyki*, Dom Organizatora, 2017, p. 58.

[39] M. Weralski, "Współczesna teoria społecznych granic opodatkowania", *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 1962, vol. 4/24, p. 211-218.

The inability of the court to fill legal loopholes owing to the inadmissibility of the law-making activity of courts is another argument against the use of reasoning by analogy in tax law. The use of analogy would also have to be considered inadmissible on the recognition of the non-existence of loopholes. The risk of perceiving gaps too dismissively in order to fill them with a false analogy is also noticeable. As H. Sendler indicates, there is 'the risk that loopholes will be searched too recklessly in order that they may later be filled by the judge's own ideas'.[40] This is a perilous solution because the inference does not concern interpretation but validation, *i.e.* the validity of the standard.

The controversial nature of the use of analogy in tax law is highlighted by the fact that inference by analogy is made on the basis of the judgements of the interpreter. However, this action does not refer to a logical result. It is a reasoning that is the result of a whole chain of assumptions of an evaluative nature, originating not in the rules of logic, but in the assessments accepted by the interpreter.[41] As R. Mastalski rightly recognizes 'The derivation of a norm from a norm is related to evaluative elements, which makes the process of interpreting the law largely subjective, and the results of interpretation depend to a serious extent on the subject interpreting the law himself'.[42] Consequently, the 'objections' to analogy are the existence of a potential risk of a breach of the principle of legal certainty, a violation of legal security, or the occurrence of several reference principles and a failure to guarantee a correct decision by those applying the law.

Another counter-argument is that reasoning *per analogiam*, as well as other legal reasoning, is evaluative and consequently does not always lead to satisfactory and irrefutable conclusions. A threat to the principle of legal certainty is also noticeable in this field. Even the initial circumstance of establishing the existence of a loophole is dependent on the judgement of the law-applicant. It is a sequence of evaluative events in

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[40] H. Sendler, "Überlegungen zu Richterrecht und richterlicher Rechtsfortbildung", *DVB1*, 1998, p. 834, [quoted after] D. Dąbek, *Prawo sędziowskie w polskim prawie administracyjnym*, Wolters Kluwer, 2010, p. 334.

[41] R. Mastalski, *Stosowanie prawa podatkowego*, Oficyna Wolters Kluwer business, 2008, p. 117.

[42] *Ibid*., p. 119.

which one small 'stumble' can lead to the entire process of inference being considered erroneous.

It is also worth emphasizing the forward-looking nature of the jurisprudential results in the case of analogy. In simplification, the norms of statute law have the character of acting for the future. As a rule, jurisprudential advocacy relates to existing events, facts, and historical facts. Nonetheless, the formulation of a legal rule requiring similar cases to be decided in the same way could have an impact on future rulings. This may or may not again result in the risk of an excessive increase in the role of the courts, as the possibility of reviewing the courts by examining the reasons for judgments should not be forgotten. Overstepping the boundaries involves encroaching on the matter envisaged for the legislative bodies. The above creates a 'new constitutional situation', whereby the courts become constitutional guarantors not only of the executive, but also of the legislature.[43]

As a further argument against the use of analogy in tax law, there is less permissible flexibility in the use of extra-linguistic interpretations such as purposive and systemic interpretations in tax law. Also in tax law, restraint in the use of legal inferences is desirable.[44]

With regard to the tax administration, there is a concern due to the fact that the administration, when ruling on the obligations and rights of taxpayers towards this administration, is, in a certain sense of the word, a judge in its own case, and this situation raises the risk of not observing a proper degree of objectivity when making assessments.[45]

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[43] Dąbek, *supra* note 40, p. 714.

[44] J. Oniszczuk, *Podatki i inne daniny w orzecznictwie Trybunału Konstytucyjnego,* Warszawa, 2001, p. 28 [quoted after] A. Bielska-Brodziak, "O „specyfice" wykładni prawa podatkowego" in T. Pietrzykowski (ed.), *W kręgu teorii prawa i zagadnień prawa europejskiego*, Wyższa Szkoła Humanitas w Sosnowcu Instytut Europeistyki, 2007, p. 14.

[45] J. Małecki, "Kilka uwag o prawotwórczej roli Naczelnego Sądu Administracyjnego w sprawach podatkowych" in E. Ruśkowski, W. Konieczny (eds.), *Podatki w orzecznictwie sądowym. Zjazd Katedr Prawa Finansowego - Wigry 95*, Konieczny i Kruszewski, 1996, p. 71.

IV. Theoretical Considerations of the Legal Sources of Limitations on the Use of Analogy

It is worth presenting a theoretical consideration of the various existing and potential legal sources of limitations on the use of analogy. Stella Vosniadou and Andrew Ortony state that 'analogical reasoning involves the transfer of relational information from a domain that already exists in memory (usually referred to as the *source* or *base* domain) to the domain to be explained (referred to as the *target* domain)'.[46] The relevance of the use of reasoning *per analogiam* in tax law stems from the complexity of the issue. There are arguments both for and against the use of reasoning *per analogiam* in tax law. Looking at tax law as a coherent system, analogy finds its support in the internal consistency of the law, which, for example, in Spanish law is referred to as the *la coherencia interne del Derecho*,[47] *i.e.* the completeness of the tax system.

Bartosz Brożek indicates four aspects of any analogical argument:[48]

- the problem situation,
- *prima facie* similarity,
- relevant similarity, and
- the solution.

It is also worth pointing out the possibility of setting limits to the use of analogy. Firstly, it is possible to establish general rules that those using reasoning *per analogiam* are obliged to follow. However, in practice, it is difficult to imagine the possibility of creating a synthetic catalogue of general recommendations, owing to the necessity of each time carefully analysing the issue of admissibility and the specific manner of applying analogy. Therefore, this solution should be regarded as inappropriate. Secondly, it seems more reasonable to abstractly define the

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[46] S. Vosniadou, A. Ortony, "Similarity and analogical reasoning: a synthesis", in: S. Vosniadou, A. Ortony (eds.), *Similarity and analogical reasoning*, Cambridge University Press, 1989, p. 6.

[47] R. Falcon y Tella, M. A. Grau Ruiz, "Analogía y fraude de ley (I): concepto de analogía y fundamento de su" in: R. Falcon y Tella (ed.), *Derecho Tributario: Parte General*, Portalderecho, 2002, p. 1.

[48] B. Brożek, "Analogical arguments", in: G. Bongiovanni, G. Postema, A. Rotolo, G. Sartor, C. Valentini, D. Walton (eds.), *Handbook of Legal Reasoning and Argumentation*, Springer, 2018, p. 370.

limits of the application of analogy on the basis of the applicable norms, mainly of a constitutional nature. It is sometimes pointed out that 'The limit of analogy *legis* is, *inter alia*, when an exceptional provision could be the basis for an argument *a contrario*'.[49] The third way is the most practical and interesting in terms of demarcation. It is an attempt to enumerate a negative category of events in which analogy in tax law is not permissible, as well as those in which it is accepted. The last way refers to an attempt to create a catalogue of sets of rules or cases in which the use of analogy is permissible and desirable.[50]

Of course, there are also situations where the use of analogy should be deemed inadmissible. The above is possible, for instance, in the absence of an actual loophole, which makes the use of an analogy impossible.[51] This will also be the case if there is no similarity between the facts that could justify the use of an analogy. On the other hand, where all the circumstances of the case are found to be identical to the standard being compared (where all the features of the objects being compared are common),[52] then recourse to analogy is not justified. This means only that the applicable norm exists.

It is also possible to prohibit the application of analogy resulting from the law. According to Bogumił Brzeziński, this prohibition may take one of three different forms. First, such a prohibition can be explicitly expressed in the provisions of the law and applies to all or part of the fields. Secondly, the prohibition may be found in the wording of the provision that is the source of the norm (an injunction to apply it to

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[49] M. Gutowski, P. Kardas, *Wykładnia i stosowanie prawa w procesie opartym na* Konstytucji, C.H. Beck, 2017, p. 280.

[50] B. Brzeziński, "Analogia legis a przepisy ogólne prawa podatkowego", in: B. Brzeziński, J. Głuchowski, C. Kosikowski, R. Mastalski (eds.), *Księga pamiątkowa ku czci Profesora Apoloniusza Kosteckiego. Studia z dziedziny prawa podatkowego,* TNOiK, 1998, p. 26.

[51] For instance, Italian judgment: La Corte di giustizia tributaria di secondo grado di Potenza, con la sentenza n. 08.02.2024 (The Second Instance Tax Court of Justice of Potenza, with sentence no. 02.08.2024), original excerpt: 'Orbene, nel caso in esame il ricorso all'analogia resta precluso in radice, per difetto del suo presupposto essenziale costituito dalla presenza di un vuoto normativo'. [However, in the case in question the use of analogy remains fundamentally precluded, owing to the lack of its essential prerequisite constituted by the presence of a regulatory void], source: https://www.linkedin.com/pulse/imposta-di-registro-ed-interpretazione-analogica-vittorio-de-bonis-ujtef/ [last accessed: 4.9.2024].

[52] M. Walasik, *Analogia w prawie procesowym cywilnym*, LexisNexis, 2013, p. 399.

a particular situation). Finally, the prohibition may have a cultural (not formal-legal) basis.[53]

It is also unacceptable to fill specific gaps by means of analogy. For example, those caused by the absence of implementing provisions. This principle applies without exception.[54] Using an analogy in the absence of a normative act, such as a regulation, would go beyond the definition of gap-filling. It could even lead to the unacceptable occurrence of the 'creation' of a whole block of regulations. It is also worth pointing out the inadmissibility of the use of analogy with respect to norms of law which are not universally applicable. The use of analogy may not take place when resolving tax and legal disputes to bases which do not constitute sources of universally binding law, such as OECD guidelines. Reasoning from analogy is allowed to fill legal gaps, but it should not be used to create taxes, offences or exemptions.

V. The Use of Analogy in Legal Regulations – Selected Issues

In this section, the authors will present an analysis of selected existing legal solutions. Bogumił Brzezinski and Agnieszka Olesińska note that, for instance, Austria and Germany do not explicitly contain the principles of tax law in the general tax law.[55] In such circumstances, the principles of tax law can be derived from the provisions of tax law in general.[56] Within the German tax law system, it is worth pointing out the German tax regulation, i.e. Abgabenordnung (AO) mit Anwendungserlass zur Abgabenordnung (AEAO).[57] According to Section 1(1) of the AO,

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[53] Brzeziński, *supra* note 38, 540.

[54] Brzeziński, *supra* note 2, p. 134.

[55] B. Brzeziński, A. Olesińska, "Toward a New General Tax Law in Poland", *European Taxation*, 2015, vol. 12, p. 584.

[56] Brzeziński, Olesińska, *supra* n. 55, p. 584.

[57] Abgabenordnung "AO" in der Fassung der Bekanntmachung vom 01.10.2002BGBl. I S. 3866, ber. 2003 S. 61, zuletzt geändert durch Gesetz vom 27.03.2024 (BGBl. I S. 108) m.W.v. 28.03.2024 (Fiscal Code "AO" in the version published on 01 October 2002BGBl. I p. 3866, 2003 p. 61, last amended by the Act of 27 March 2024 (BGBl. I p. 108) with effect from 28 March 2024) and Anwendungserlass zur Abgabenordnung "AEAO" vom 31. Januar 2014, BStBl. 2014 I S. 290, zuletzt geändert 22.3.2024 (BStBl. I, zzz (Application Decree

which states the scope of application, the law applies to all taxes, including refunds, regulated by federal or European Union law, insofar as they are administered by federal tax authorities or state tax authorities, and applies only in accordance with European Union law[58]. In Germany, reasoning by analogy was not allowed until the early 1980s. However views on the use of analogy can already be found in the German case law.[59] Currently, in the Polish Tax Ordinance there is no rule stating explicitly the prohibition or permissibility of the use of analogy. Nevertheless, Polish tax law doctrine representatives propose to formulate and introduce the principle of limited application of analogy to general tax law.[60]

It is possible to distinguish countries whose guiding principles in general tax law take the form of explicit legal provisions, and this is so *inter alia* in the Czech Republic, Spain, and Ukraine.[61] Legal provisions regarding the admissibility of using analogies in the process of interpreting law are rare (with the exception of Latin American countries and some Southern European countries).[62] On the contrary, European constitutional regulations on the imposition of public tributes enjoy a much higher incidence.[63] The analysis of analogical reasoning is not made easier by the fact that courts using analogy rarely state it explicitly.[64]

Nevertheless, the scope of application of inference by analogy can be sometimes modified *expressis verbis* in a law. Such a solution has been provided among others by the Spanish legislature. According to Arti-

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on the Fiscal Code "AEAO" of 31 January 2014, BStBl. 2014 I p. 290, last amended 22.3.2024 (BStBl. I, zzz).

[58] Original extract: '§ 1 Anwendungsbereich Dieses Gesetz gilt für alle Steuern einschließlich der Steuervergütungen, die durch Bundesrecht oder Recht der Europäischen Union geregelt sind, soweit sie durch Bundesfinanzbehörden oder durch Landesfinanzbehörden verwaltet werden. Es ist nur vorbehaltlich des Rechts der Europäischen Union anwendbar'.

[59] M. Słupczewski, W. Morawski, "The use of reasoning per analogiam in tax law in light of constitutional regulatons", in: M. Löhing, M. Serowaniec, J. Wantoch-Rekowski, A. Moszyńska (eds.), *Poland in good constitution? Contemporary issues of constitutional law in Poland in the European context*, Böhlau, Vienna, 2023, p. 157.

[60] Brzeziński, Olesińska, *supra* note. 55, p. 584.

[61] *Ibid*.

[62] Brzeziński, *supra* note 2, p. 136.

[63] A. Bień-Kacała, J. Wantoch-Rekowski, *Komentarz do Konstytucji RP. Art. 84, Art. 217,* Difin, 2022, p. 58.

[64] Brzeziński, *supra* note 2, p. 152.

cle 14 of the Spanish General Tax Law (*Ley General Tributaria*):[65] '*No se admitirá la analogía para extender más allá de sus términos estrictos el ámbito del hecho imponible, de las exenciones y demás beneficios o incentivos fiscales*.', which roughly means: 'Analogy shall not be allowed to extend the scope of the taxable event, exemptions, and other tax benefits or incentives beyond their strict terms'. According to the literal wording of the provision, the Spanish legislator relates the prohibition of analogy to the extension of a taxable event, exemptions, and other tax benefits or incentives beyond their exact conditions. Spanish tax law officials point out that the prohibition refers only to the integration of analogy, but not to an extensional interpretation.[66] Extension interpretation is not subject to these limitations.[67]

Moreover, the actions of the Portuguese legislator are also noteworthy. Switching to the topic of applying reasoning by analogy in Portuguese tax law, it is worth noting Article 11 of the Portuguese General Tax Law (*Lei Geral Tributária*).[68] In this provision, the legislature specifically addressed gaps in interpretation and integration. Sérgio Vasquez emphasizes that the principles of tax law interpretation were established for the first time with the publication of this law[69]. Portuguese recipes the inspiration of the Spanish General Tax Law (*Ley General Tributaria*).[70] According to Article 11(1) of the aforementioned Portuguese law, the general rules and principles of interpretation and application of the law must be followed when determining the meaning of tax laws and qualifying the facts to which they apply. According to Article 11(3) of the Por-

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[65] Artículo 14. Ley 58/2003, de 17 de diciembre, General Tributaria, *Boletín Oficial del Estado (B.O.E); Number: 302/2003; Publication date: 18/12/2003*; (Article 14 of the General Tax Law 58/2003 of 17 December 2003, Boletín Oficial del Estado (B.O.E.); Number: 302/2003; Publication date: 18/12/2003.).

[66] G. Marín Benítez, "La analogía en Derecho tributario: tópicos, controversias y algunas reflexiones críticas. Revista De Contabilidad Y Tributación", *CEF*, No. 350, p. 117.

[67] *Ibid*.

[68] Artigo 11.º Lei Geral Tributária - Interpretação e integração de lacunas, Decreto-Lei n.º 398/98, Diário da República n.º 290/1998, Série I-A de 1998-12-17 (Art. 11 of The General Tax Law - Interpretation and integration of gaps, Decree-Law no. 398/98, Official Gazette no. 290/1998, Series I-A of 1998-12-17).

[69] S. Vasquez, *Manual de Direito Fiscal*, Almedina, Coimbra, 2011, p. 307.

[70] S. Vasquez, *supra* note 69, p. 307.

tuguese General Tax Law, when in doubt about the meaning of the tax provisions to be applied, the economic content of the tax facts must be taken into account. On the other hand, in Article 11(4) of the aforementioned law, the Portuguese legislator explicitly referred to the possibility of applying analogy and stated: '*As lacunas resultantes de normas tributárias abrangidas na reserva de lei da Assembleia da República não são susceptíveis de integração analógica*', which roughly means: 'Gaps resulting from tax rules covered by the Assembly of the Republic's reserve law are not susceptible to analogical integration'. The '*Lei Geral Tributária*' does not generally provide for a prohibition of analogy in the field of tax law.[71]

Another example of regulating the issue of using analogies in tax law directly in the act is the Brazilian legislator. Pursuant to art. 107 of the Brazilian National Tax Code[72] (*Código Tributário Nacional*), tax legislation shall be interpreted in accordance with the provisions of Chapter IV – Interpretation and Integration of Tax Legislation. As follows from Article 108 of the Brazilian National Tax Code, in the absence of an express provision, the authority competent to apply tax legislation shall use successively, in the indicated order i.e. analogy, the general principles of tax law, the general principles of public law, and equity. What is more, the use of analogy may not result in the requirement of a tax not provided for by law and as well, the use of equity may not result in the waiver of payment of a tax due.

Sometimes the wording of a provision is a contributing factor to the discussion on the use of analogy. For instance, Carlo Garbarino points out that 'The *raison d'être* of this debate is found in Article 12 of Preleggi, which provides that: if a case cannot be decided on the basis of a specific norm, one has to look at norms that regulate similar situations or matters; if the case remains perplexed, then the decision is based on the

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[71] Centro de Arbitragem Administrativa (CAAD), Data da decisão: 16.03.2023, Arbitragem Tributária Processo n.º: 416/2022-T Tema: IMT do exercício de 2017 – Transmissão a título oneroso de partes sociais – Analogia (Administrative Arbitration Centre (CAAD), Date of decision: 16.03.2023, Tax Arbitration Case no.: 416/2022-T Subject: IMT for the 2017 financial year – Transfer of shares for consideration – Analogy) https://caad.org.pt/tributario/decisoes/decisao.php?listPageSize=100&listOrder=Sorter_data&listDir=DESC&id=6984.

[72] Código Tributário Nacional, LEI Nº 5.172, de 25 de Outubro de 1966 (National Tax Code, LAW No. 5.172, of 25 October 1966).

general principles of the legal system'.[73] The subject of the use of analogy in Italian tax law is of interest.[74]

VI. Analogical Reasoning in Practice

"Exemplary reasoning" including reasoning by analogy plays an essential role in both the theory and practice of law.[75] As Jan M. Broekman indicates: 'Current legal studies which include analogy, regard analogy as an outcome of creative institutional forces. They take analogy as the result of courts and judges, and of legal reasoning in general. It means philosophically, that the institution is dominated by specific form, namely the subjectivity and individuality. Courts and judges are in this regard the dominating subjects of the institution'.[76] What is more, 'Analogical reasoning entails a great deal of judical discretion; the adjudicator ultimately decides the question as to whether two issues are similar and deserve the same legal treatment'.[77]

In the Belgian literature on tax matters, J. Van Houtte and I. Claeys Bouuaert emphasize that analogical reasoning is not excluded in order to clarify the question of the legislator's real intention by comparing tax provisions on related subjects.[78] The issue of the use of analogy in tax law also manifests itself in Belgian case law, e.g. on the excise duty pro-

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[73] C. Garbarino, "Legal Interpretation of Tax Law: Chapter 8", in: R. Krever, R. van Berderode (eds.), *Legal Interpretation of Tax*, Kluwer Law International, 2014, p. 213-249.

[74] *See* V. Velluzzi, *Analogia e diritto tributario: note su un'indagine riguardante gli orientamenti della prassi. L'analogia nel diritto tributario: Ricerca sui reali orientamenti della prassi applicativa condotta dagli studenti del Dipartimento di Giurisprudenza dell'Università degli Studi Foggia coordinati dal prof. Guglielmo Fransoni*, CACUCCI EDITORE, 2020, vol. 41, pp. 51-63.

[75] A. Amaya, "Imitation and analogy" in: H. Kaptein, B. van der Velden (eds.), *Analogy and Exemplary Reasoning in Legal Discourse,* Amsterdam University Press B.V., 2018, p. 13.

[76] J. M. Broekman, "Analogy in the law", in: P. Nerhot (ed.), *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and* Linguistics, Springer Science+Business Media, 1991, p. 242.

[77] V. Vadi, *Analogies in International Investment Law and Arbitration*, Cambridge University Press, 2016, p. 36.

[78] J. Van Houtte, I. Claeys Bouuaert, *Beginselen van het Belgisch belastingrecht*, E. Story-Scientia, 1979, p. 184-185.

vided for smoking tobacco, which cannot be applied by analogy to tobacco leaves.[79]

It is worth briefly recalling the division between *analogia iuris*, which creates a new decision-making maxim, and *analogia legis*, which expands the scope of application of an already existing rule.[80] In the judgment of 14 September 2011, the Czech Supreme Administrative Court stated that 'Analogy of law application should be understood as the solution of unregulated relations according to the legal regulation of similar relations. In legal theory, a distinction is made between '*analogia legis*', *i.e.* a situation in which a legal norm contained in the same law and regulating the most similar facts is applied to a factual situation not regulated by a law, and '*analogia iuris*', *i.e.* a situation in which, exceptionally, the legal principles of a given branch of law or even general legal principles contained in the entire legal order can be applied, but only when it is not possible to proceed by *analogia legis*. The use of *analogia iuris* is highly undesirable in public law, whereas the use of *analogia legis* may be used to fill gaps in procedural regulation insofar as this promotes the protection of the rights of the litigants'.[81]

The Czech Constitutional Court has also made an interesting analysis in the judgment of 26 April 2005:[82] 'The lack of procedural regulation of administrative proceedings can be compensated for by the decision-making activity of administrative authorities and the case law of courts by using analogy. However, the doctrine takes very ambiguous positions in this respect.' The court referred, *inter alia*, to the view of P. Průcha, who rejects analogy in general,[83] P. Hajn indicating that certain limitations should be observed when using analogy in public law,[84] M. Kindl formulating the principle that analogy in public law may be used in its favour of one who is not a public authority executor[85] and the

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[79] *Ibid*., p. 185.

[80] Marín Benítez, *supra* note 66, p. 134.

[81] Czech Rozsudek NSS ze dne 14.09.2011, 9 As 47/2011 – 105, Sbirka Nssoud [Judgment of the Supreme Administrative Court of 14.09.2011, 9 As 47/2011 – 105].

[82] Rozsudek Ústavního soudu ze dne 26. 4. 2005, sp. zn. Pl. ÚS 21/04, Sbirka Nssoud [Judgment of the Constitutional Court of 26 April 2005, Case No. Pl. ÚS 21/04].

[83] P. Průcha, *Správní právo. Obecná část*, Brno, 2003, p. 70.

[84] P. Hajn, "Analogie jako právní institut a jako způsob usuzování. Několik poznámek k analogii v právu (nejen) správním", *Právník*, 2003, č. 2, p. 123.

[85] M. Kindl, "Malá úvaha o analogii ve veřejném právu", *Právník*, 2003, č. 2, p. 133.

view of V. Sládeček, who also considers that the use of analogy in administrative law may take place when it brings an unequivocal advantage to a party to a procedure or legal relationship of administrative law.[86] On the basis of the above doctrinal views, the Court pointed out that it is not possible to conclude on the possibility of using analogy to create procedural rules of administrative proceedings in their entirety, but the admissibility of analogy is possible within a limited framework in order to fill gaps in the procedural regulation and only for the benefit of protecting the rights of the parties to administrative proceedings.[87]

An interesting view was expressed by the Czech Supreme Administrative Court in a resolution in a case concerning the refund of a tax overpayment. In short, according to the resolution, the tax legal relationship between the state and the taxpayer is a public law obligation, so the use of civil law analogy in tax law is not permissible.[88] In the opinion of the authors, tax law and civil law are separate branches of law and, therefore, it is generally unacceptable to apply civil law to tax law by analogy. Nevertheless, points of contact between civil law and tax law are often noticeable, e.g. when civil law elements are a component of tax law facts. Pursuant to the judgment of the Polish Supreme Administrative Court of 21 February 2023[89] in a tax case pending before an administrative court which concerns the possibility of using a certain procedural institution, the court may refer to the regulation of Article 5 of the Civil Code in order to assess the legal effects of certain civil law events.

The application of reasoning by analogy also raises the question of whether it can be applied to the advantage or disadvantage of the taxpayer. The Czech Supreme Administrative Court ruled on this issue in its judgment of 24 October 2007,[90] from the principle of legal certainty

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[86] V. Sládeček, *Obecné správní parvo*, Praha, 2005, p. 130.

[87] Czech Rozsudek Ústavního soudu ze dne 26. 4. 2005, sp. zn. Pl. ÚS 21/04, Sbirka Nssoud [Judgment of the Constitutional Court of 26 April 2005, Case No. Pl. ÚS 21/04].

[88] Usnesení pléna Nejvyššího správního soudu ze dne 29. 4. 2004, čj. Sst 2/2003-225, Sbirka Nssoud [Resolution of the Full Chamber of the Supreme Administrative Court of 29 April 2004, no. Sst 2/2003-225].

[89] III FSK 1059/22, Centralna Baza Orzeczeń Sądów Administracyjnych [Central Database of Judgments of Administrative Courts].

[90] Rozsudek Nejvyššího správního soudu ze dne 24.10.2007, čj. 2 Afs 109/2005-56, Sbirka Nssoud [Judgment of the Supreme Administrative Court of 24 October 2007, No. 2 Afs 109/2005-56].

and the principle of predictability of legal regulations, that there arises the prohibition on the use of analogy to the disadvantage of the taxpayer and the principle of the application of interpretations to the advantage of the taxpayer, if the provisions of the tax law are unclear, incomprehensible, imprecise, or the 'gap' in the law allows for several equally convincing interpretations.

The Czech Constitutional Court in its judgment of 15 December 2003[91] referring to the current Charter of Fundamental Rights and Freedoms (*Listina základních práv a svobod*) pointed out that when the law allows for a dual interpretation, it cannot be ignored that, in the field of public law, state authorities can only do what the law expressly allows them to do. Public authorities, when levying and enforcing taxes in accordance with the law, are obliged to examine the substance and meaning of fundamental rights and freedoms and, in case of doubt, to proceed more leniently (principle *in dubio mitius*).

The authors agree with the relevance of respecting the principle of certainty of tax law and the principle of prohibition of application of analogy to the taxpayer's disadvantage. At this point, in the comparative legal aspect, it is worth pointing to the principle of resolving doubts to the advantage of the taxpayer resulting *expressis verbis* from Article 2a of the Polish Tax Ordinance, according to this provision 'Doubts that cannot be removed as to the content of tax law provisions shall be resolved to the advantage of the taxpayer'.

It is also worth referring to selected rulings of the German Federal Fiscal Court (Bundesfinanzhof; hereinafter: 'BFH") based in Munich. According to the BFH ruling of 28 October 2020,[92] analogy presupposes a regulatory gap, *i.e.* a situation where a certain matter is regulated by law, but does not contain any provisions for cases that should be regulated according to the basic idea and system of law. The BFH, based on existing German case law, has also indicated that the standard needs to be completed,[93] but crucially, even a clear formulation of the law does not exclude the existence of a loophole. What is more, BFH emphasized

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[91] Nález Ústavního soudu, IV.ÚS 666/02 ze dne 15. 12. 2003, Nalus Usoud [Constitutional Court ruling of 15 December 2003].

[92] Urteil vom 28. Oktober 2020, X R 29/18, ECLI:DE:BFH:2020:U.281020.XR29.18.0 [Judgment of 28 October 2020].

[93] Also, the judgment of BFH of 26 August 2010 – III R 47/09, BFHE.

that the supplementation of the standard cannot conflict with the legislator's intended restriction of certain facts.

In the BFH judgment of 2 November 2022, owing to the uniqueness of the tax group provisions and the absence of a noticeable loophole, the use of analogy was deemed to be excluded.[94] According to the BFH ruling of 2 February 2001 VIII B 56/00, BFH/NV 2001, 817 the term 'exclusively' is not subject to an expansive interpretation or reasoning by analogy.[95] Furthermore, even if there were a regulatory gap, it could not be closed by analogy to the disadvantage of the taxpayer.[96] Analogy is excluded when it can be inferred from the circumstances that there is a conscious legislative decision to a certain extent.[97]

According to the German BFH judgment of 3 December 2019[98] 'The explicitly unplanned regulatory gap required for analogy exists only if the law, measured in terms of its own intention and associated teleology, is incomplete and therefore requires completion, and its completion does not conflict with the intended legal limitation of certain facts'.[99]

The BFH in its judgment of 22 December 2011[100] pointed out the incompleteness of legal policy, *i.e.* loopholes that do not contradict the legal plan, but are simply perceived by a lawyer as undesirable from the point of view of legal policy. According to the court's position, on the basis of the principle of separation of powers, these loopholes cannot be closed by the courts, as closing them remains the task of the legislator. What is more, BFH emphasized that an analogous application of a provision occurs when there is an unplanned gap in the law, provided that

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[94] Urteil vom 02. November 2022, I R 29/19, ECLI:DE:BFH:2022:U.021122.IR29.19.0 [Judgment of 02 November 2022].

[95] Beschluss vom 25. September 2018, GrS 2/16, ECLI:DE:BFH:2018:B.250918.GRS2.16.0 [Decision of 25 September 2018].

[96] ECJ submission of March 13, 2019, IR 18/19, ECLI:DE:BFH:2019:VE.130319.IR18.19.0 - https://www.bundesfinanzhof.de/de/entscheidung/entscheidungen-online/detail/STRE201910213/.

[97] Urteil BFH vom 27. November 2019, XI R 35/17, ECLI:DE:BFH:2019:U.271119.XIR35.17.0 [BFH judgment of 27 November 2019].

[98] Urteil BFH vom 03. Dezember 2019, VIII R 34/16, ECLI:DE:BFH:2019:U.031219.VIIIR34.16.0 [Judgment of 03 December 2019].

[99] Urteil BFH vom 03. Dezember 2019, VIII R 34/16, ECLI:DE:BFH:2019:U.031219.VIIIR34.16.0.

[100] Urteil BFH vom 22. Dezember 2011, III R 5/07, BFHE.

the statutory regulation for a specific situation applies to another situation that is not covered by the law and differs to a negligible extent.

R. Zimmermann indicates that 'The concept of a "gap" ("*Lücke*") is of paramount importance for German legal methodology in the area of development of the law. It refers first and foremost to the level of immanent development of the law where it designates the unintended incompleteness of a statute'.[101]

Conclusions

The article presents a number of arguments for and against the use of analogy in tax law. These considerations can be given a universal character in the context of the prevalence of the loophole problem that affects every (civil law) legal system.

The totality of the counter-arguments presented, assessed even cumulatively, is not so convincing as to firmly deny the possibility of using analogy in tax law and seek to marginalize its role altogether. Clarifying the permissibility of the use of reasoning *per analogiam* in tax law may have the effect of encouraging the use of analogy and would make it easier to draw the line between expansive interpretation and analogy. Direct references to analogy in legislation in various forms have been made, for instance, by legislators in Brazil, Spain, or Portugal. Even the clearest formulation of the law does not exclude the existence of a loophole. However, certain limitations should be observed when using analogy in tax law. The analysis of selected regulations and case law leads to the conclusion that analogical reasoning is not excluded:

- in order to clarify the question of the legislator's real intention by comparing tax provisions on related subjects,
- to fill gaps (especially by *analogia legis*) in the procedural regulation and only for the benefit of protecting the rights of the parties to administrative proceedings,
- when a regulatory gap required for analogy exists if the law, measured in terms of its own intention, is incomplete and there-

[101] R. Zimmermann, "Legal Methodology in Germany", *The Edinburgh Law Review*, 2022, No. 26.2, p. 179.

fore needs to be supplemented, and its completion does not contradict the intended legal restriction of certain facts.

On the other hand, it is not possible to reach a conclusion on the possibility of using analogy to create procedural rules of administrative proceedings in their entirety and to use the analogy to the disadvantage of a taxpayer. In the absence of a noticeable loophole, the use of analogy is excluded. Analogy deserves to be characterized as a permissible method of legal inference in tax law and it would be valuable to regulate its matter based on statutory or constitutional provisions, as is unfortunately rarely the case. Ultimately, on the basis of the analysis of selected judgments, it should be stated that reasoning *per analogiam* in tax law is a positive phenomenon and shows that strict formalism is not sufficient. Sometimes a shift from passivism to judicial activism is necessary. In view of the growing, but still low, level of awareness of legal practitioners in this matter, it must be recognised that the process of the formation of analogy as a method of reasoning in tax law is not yet complete. The evolutionary process, which has already lasted for several decades, is progressing, and changing socio-economic relations and new trading needs will intensify the development of analogy. Consequently, reasoning *per analogiam* exists in tax law and an attempt to introduce general prohibitions on its use will not be the right solution. This is because the problem will not disappear, and the jurisprudence and tax authorities, instead of using the developed canons and principles of applying analogy, will continue to use this method under the guise of other concepts.

As Benjamin Franklin used to say, in this world nothing can be said to be certain, except death and taxes. It seems that legal loopholes can also be included in the above enumeration. Gaps in the law will always exist, just as there will always be a need to use analogy as a method of closing them. It is better to accept its existence and seek to guard its limits than to deny its applicability in practice.