PIOTR BUŁAWA

Tax cancellation

A comparative analysis

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Kup książkę

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dr Piotr Buława

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Introduction

An initial reason for undertaking research on tax cancellation (British English: extra-statutory concession, Polish: *umorzenie zobowiązania podatkowego*, German: *Steuererlass*, Czech: *prominutí daňe*) 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.

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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.

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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.

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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)

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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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