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In Search of a Strategy for the Interpretation of Tax Law by Courts[3]

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Abstract

Legal certainty is one of the fundamental values of a democratic state governed by the rule of law, and striving to achieve it at the highest possible level is highly desirable. An essential factor influencing the degree of legal certainty is the predictability of judicial decisions. This is particularly significant for taxpayers, as it reduces the level of legal uncertainty. It is also relevant from a macroeconomic perspective, as a lack of legal certainty hampers a country's potential for growth.

This paper analyses the state of Polish administrative courts' practice of interpreting tax law, which the authors consider unsatisfactory. It also offers a critical review of selected scholarly views on specific issues related to the core subject addressed.

Keywords: tax law, legal certainty, administrative courts, tax law interpretation.

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I. When thinking of such an eminent figure of the Polish legal environment as Professor Andrzej Kabat, what stands out first and foremost is the universality of his scientific output and his close ties with legal practice. The latter involves primarily his long and fruitful judicial activity as a judge of the Supreme Administrative Court. And it is by all means relevant to add that Professor Kabat's contributions to the science of law had already been recognised earlier.[4]

When considering a subject worthy of this figure, his involvement in both scholarly and judicial activities leads to a search for issues that bring the science of law and the practice of law together. Such an issue has been – and will most likely continue to be – the interpretation of law.

Recent years have seen the publication of many interesting monographs on specific issues of tax law interpretation, such as the formulation and definition of tax law concepts[5] and the use of analogy in tax law.[6] On the other hand, problems of a more general nature, concerning the tax law interpretation strategy or the elements of such a strategy, are not very often considered nowadays. This does not mean, however, that these issues are absent from scientific discourse. Actually, they are addressed incidentally, in many different, often dispersed, written sources, but this is exactly why it is reasonable to explore the studies dealing with them in more detail.[7]

The issue of law interpretation strategies certainly deserves to be analysed in more depth.[8] For instance, the knowledge how concepts are defined is surely valuable, but equally valuable would be a thorough discussion on the boundaries of respecting the statutory definitions in tax law. It is useful to understand the principles governing reasoning by analogy, yet it would also be a good idea to

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4 *Ius et Lex. Professor Andrzej Kabat memorial book*, Olsztyn 2004.

5 A. Halasz, *Definicje pojęć prawnych w ustawodawstwie dotyczącym podatków obrotowych*, Wrocław 2019.

6 M. Słupczewski, *Rozumowanie per analogiam w prawie podatkowym*, Warszawa 2023.

7 See, for example, B. Wojciechowski, A. Olczyk, *Spór o metodę wykładni prawa podatkowego. Analiza porównawcza strategii interpretacyjnej w rozpoznawaniu tzw. trudnych przypadków w orzecznictwie TK i NSA*, [in:] *Funkcjonowanie sądownictwa administracyjnego na tle zmian koniunktury gospodarczej: perspektywa ekonomicznej analizy prawa perspektywa ekonomicznej analizy prawa*, Warszawa 2022; D. Gajewski, K. Joński, *Ocena Skutków Regulacji (OSR) jako źródło ustalania celu prawodawczego w wykładni prawa podatkowego*, [in:] *Funkcjonowanie sądownictwa administracyjnego na tle zmian koniunktury gospodarczej: perspektywa ekonomicznej analizy prawa perspektywa ekonomicznej analizy prawa*, Warszawa 2022; Z. Tobor, *Strategia interpretacyjna jako środek komunikacji prawodawcy i sądów*, „Państwo i Prawo" 2019, 11.

8 One of the earlier studies on this topic: B. Brzeziński, *O potrzebie sformułowania sądowej strategii interpretacji ustaw podatkowych*, [in:] *Sądownictwo administracyjne gwarantem wolności i praw obywatelskich 1980–2005*, Warszawa 2005, p. 44 *et seq.*

"agree" on the conditions under which such reasoning could be deemed acceptable in the context of tax law. In other words, the question arises as to the strategy of interpretation of the provisions of tax law, including the role of various methods of interpretation, their potential hierarchy, and the interrelations between the principles and rules of tax law interpretation.

The doctrinal discourse is complemented here by juridical discourse, albeit in a specific way. This is due, among other reasons, to the fact that courts are not, as a rule, tasked with constructing interpretative strategies, but with issuing lawful and socially acceptable judgements. If elements of interpretative strategies were to be looked for within the judicial decisions issued by administrative courts in tax matters, what is left, *nolens volens*, is to reconstruct them from the reasoning presented in the statements of reasons or, at times, even from the operative parts of the rulings (in situations where the statement of reasons does not reflect the reasoning that, logically speaking, would lead to the decision and properly support it).

The following considerations address selected, substantively diverse threads of the discussion on the interpretation of tax law. The nature of the study and the intention to publish it in the jubilee book dedicated to such an eminent figure in the field of science and practice of administrative and tax law as Professor Andrzej Kabat justifies, in our view, a certain eclecticism in the approach adopted. The assumption of the eclectic nature of the issues addressed in the study is intended to highlight the significance of the problems raised, which – given the limitations arising from the convention of the anniversary publication – can only be briefly outlined. The future will show whether the issues taken up below are further developed by other authors.

II. In contemporary literature on the interpretation of tax law, one can find views suggesting that when interpreting the provisions of this law, the dispute over the way the law should be interpreted is more pronounced than in any other field of law. This dispute is said to occur between proponents of positivist theories and legal-naturalist theories. It is supposed to involve the search for an answer to the fundamental question of the concepts of law and its limits, which is claimed to be inextricably linked to the way the law is interpreted. More specifically, it is about determining which arguments and rules are permissible, justifiable – in terms of their correctness, rationality, and, ultimately, acceptability by the argumentative community within which they are formulated. The authors stress that this debate does not constitute an antinomy, although the result of an interpretation may sometimes stand in contradiction to another interpretative outcome.[9]

[9] B. Wojciechowski, A. Olczyk, *op. cit.*, p. 123.

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It cannot be ruled out that an in-depth analysis of the statements of reasons of judgements issued in tax cases makes it possible to formulate theses such as those presented above. Nevertheless, the aforementioned dispute between "positivists" on the one hand and "naturalists" on the other is hardly discernible. In any case, there are no clear traces of it in the views of legal scholars, academics, and commentators dealing with tax law.

As far as the judicial practice is concerned, it seems that it is usually possible to qualify the stance taken in a judgement in a particular case as the positivist thinking about the law or as the legal-naturalistic line of legal reasoning. This does not yet give a reason to claim that there is a dispute in this area, as the concept of dispute implies the existence of separate views on a particular phenomenon and the exchange of arguments in favour of the position of each adversary, as well as of arguments against the position of the other party to the dispute.

The analysis of the judicial decisions issued in tax cases leads to the conclusion that there are no symptoms of disputes, or at least no signals of disputes in the content of statements of reasons of existing judgements. If an administrative court repeats and reuses the reasoning of judgements already passed earlier in cases of the same type, it often reinforces its own argumentation by referring to the latter, and even duplicating the already existing argumentation. If, on the other hand, a judgement offers a reasoning different from those of earlier judgements, the court most often avoids polemics with the dissenting position (carefully justifying then its own standpoint). And this applies not only to divergences in the linguistic interpretation of the text of the normative act, but also to contextual issues, where the potential differences in the approach to the problem to be interpreted are likely to surface in a more obvious manner.

Decisions not to question the arguments of first-instance court judgements being revoked by the court are a significant weakness of most second-instance administrative court judgements. This is because the idea justifying the legal possibility to overturn a judgement of a court of first instance is that the judgement of a court of first instance can be defective. If this defectiveness consists in a misinterpretation of the law, the second instance court should make effort to polemicise effectively against the arguments in the contested judgment. Instead, what we get in the resulting reverse and remand decision is a presentation of the cassation court's own line of argumentation. This argumentation, however, should only occur after the defectiveness – or at least the material weakness – of the argumentation of the first-instance court has been demonstrated. Meanwhile, this is not the case and the party to the dispute as well as the outside observer have the irresistible impression that there are two possible ways of interpreting the law (i.e. one presented in the judgement of the court of first instance and the other – in the

judgement of the court of second instance). The latter prevails, but only on an authoritative basis – and in purely formal terms (because the adjudicating panel consists of judges with a given level of exegetical ability). Hence, the conclusion, which is difficult to negate, is that if the panels of judges "swapped" places in the judicial structure, judgements issued by second instance courts would be different. The case would be even different if second instance courts dealt convincingly with the arguments of first instance courts. Then, to put it emphatically, the law would prevail – not the court.

Not every difference of opinion within the judicial practice reveals itself in the context of the philosophical understanding of the law and is the result of a clash between positivist and legal-naturalist views. If, however, a court does not argue with another court's interpretation of the law, it is all the more difficult to look for signs of a philosophical dispute here.

III. In reviewing the contemporary trends in interpretation of the law, authors distinguish between a formalist standpoint and an interpretive strategy referred to as one "discursive in nature."[10]

The formalist standpoint is said to be marked, in simple terms, by references to linguistic interpretation in the process of interpreting tax law, the final and intransgressible point of which is the reference to the principle *in dubio pro tributario* and resolving interpretative doubts in favour of the taxpayer.

The other attitude, called the "interpretive strategy," is characterised, as already mentioned, by discursiveness and inclusiveness. Within the framework of this strategy, the linguistic interpretation of tax law is only the starting point, the first stage of interpretation in chronological terms. Here, linguistic interpretation is not decisive and imperative. Quite the contrary: the text of the act or legal provision being interpreted is only the starting point of the thought process of interpretation of the law, and the process of interpretation is based on the principle of *interpretatio cessat in claris* (interpretation ceases when "everything is clear"). Such interpretation takes place with the use of every permissible method, and thus manifests itself in the form of various types of legal reasoning performed within the rules of linguistic, functional, or systemic interpretation.

Notwithstanding the doubts presented above as to the obviousness of the dispute between positivism and naturalism in the sphere of tax law interpretation, there are other observations to be considered here. The juxtaposition of the "formalist

[10] B. Wojciechowski, A. Olczyk, *op. cit.*, p. 124. The title "comparative analysis of the strategies of interpretation" in the body of the article loses its comparative factor, as what is compared *de nomine* is the "formalist attitude" on the one hand and the "interpretative strategy" on the other.

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stance" on the one hand and the "interpretative strategy" on the other hand is inaccurate – and to a considerable degree. Taking a formalist stance in the process of interpreting the law is also a strategy – and an expressive one at that.

Let us assume that interpretive formalism means strict linguistic interpretation. To base interpretation on such an interpretive formalism implies the use of all the textbook elements of strategy – making an initial assumption, identifying potential consequences, applying the correct *modus operandi*, and accepting the practical outcomes of previous choices.

The above is no different from implementing a non-formalist strategy. Thus, in the case of both formalist and non-formalist approaches, there exists a strategy. And it may be implemented consciously, as a matter of choice and decision on the part of the interpreter. It may also be the case that the interpreter is not aware of acting in line with a strategy, but watching the way in which they act allows makes it possible to subject them to a certain strategy (more precisely – to a model of a strategy). Yet, another issue to consider is whether the judicial decisions of administrative courts in Poland are made and issued within the framework of any strategy. Perhaps the apparent dispute between positivists and legal-naturalists is only an ascertainment of the fundamental incoherence and randomness of the choice of the interpretative path of individual adjudicating panels of provincial administrative courts and the Supreme Administrative Court.

A different view may be taken on this issue and it may be argued that the judicial practice of administrative courts has gone a long way from adjudicative formalism (understood as strict linguistic interpretation) to a more liberal interpretation, taking into account a broader interpretative context and a wider range of methods of interpreting the law.[11] Such a view is generally legitimate, and the reason for this evolution is first and foremost the increasing complexity of tax law and the overall mess in the textual layer of normative acts. The first reason is objective and so deeply rooted that it would be difficult to expect an improvement in the existing state of affairs. The other reason is largely subjective (depending on the intellectual prowess of the legislators), except that, for the time being, there are no visible driving forces that could lead to an improvement in the situation. And yet, this is by no means a lost cause.

The problem here is not the change in the meaning (significance) of various interpretative contexts, but the fact that their selection for solving a particular interpretative problem is often a matter of complete chance. If one were to look for some elements of strategy in this approach, it usually involves operating fairly consistently with EU law and CJEU decisions, used as an interpretative context.

[11] See: B. Wojciechowski, A. Olczyk, *op. cit.*, p. 125.

Yet, the importance of these factors is so obvious that it would be difficult – in the situation of Poland's membership in the European Union – to imagine ignoring this context.

Where EU law or CJEU decisions are not made use of, the selection of the interpretative context is considered by the administrative courts to be a kind of unique, *sui generis* prerogative of individual judicial panels. Neither do they seek to develop general concepts of an interpretative strategy, nor is it possible to reconstruct such a strategy from the statements included in the reasoning of the judgements issued. There is also no internal dialogue between the panels examining the same category of cases. A statement according to which a panel of judges "does not share the views expressed in another judgement" made in a similar case means nothing, and in any case does not contribute to the legal discourse. Moreover, courts consider themselves exempt from the obligation to discuss the interpretative concept of the party ultimately losing the case. They are entirely satisfied with either constructing a seemingly correct interpretative narrative themselves or making use of the interpretative proposal put forward by the party ultimately winning the case – which in itself is by no means objectionable.

Hence the conclusion that a different interpretative hypothesis from the one ultimately expressed in the court's interpretative decision and, subsequently, in the ruling issued in the case is not treated as an element of the interpretative context.

IV. L. Leszczyński argues that the application of the argument of purpose will be broader in those areas of administrative law which have a clear context for the implementation of a specific policy of managing or organising social life.[12] According to the authors of one of the quoted articles, tax law should be considered such an area.[13]

Just as it is possible to agree with L. Leszczyński's observation, the view that tax law has a "clear context of managing or organising social life" is fundamentally wrong. Tax law does not manage social life (or if it does, it is to a marginal extent), but it takes advantage of the fact that social life produces certain values (tangible or intangible), which can be expressed in monetary terms and whose seizure by public law institutions and use to satisfy the collective needs of society is considered rational at the current stage of society's development. Tax law may sometimes contain incentives to control social behaviour, but these are incidental, secondary, and do not constitute the essence of this law.

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12 L. Leszczyński, *Wykładnia celowościowo-funkcjonalna przepisów prawa administracyjnego*, [in:] L. Leszczyński, M. Zirk-Sadowski, B. Wojciechowski, *Wykładnia w prawie administracyjnym, Systlem prawa administracyjnego*, Warszawa 2015, p. 311.

13 See: D. Gajewski, K. Joński, *op. cit.*, p. 147.

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Tax law does not – it must be emphasised – organise social life, but at most provides – through the legal mechanisms it creates – the financial resources for a public law institution to cover the costs of such organisation. And this circumstance significantly differentiates tax law from administrative law.

We believe that the search for an interpretation strategy for tax law should disregard the functions of the various institutions of tax law. This raises a strategic dilemma: should tax law *en bloc* be subjected to a uniform interpretative strategy (favouring a specific point on the *continuum* between strict linguistic interpretation and a more "liberal" approach), or should the strategy vary depending on the category of provisions in question?

This issue is not new to legal discourse, as the concept of "swinging pro" (a contemporary term) emerged in the West as early as the 19th century. At the time, it was believed – and quite rightly – that the provisions shaping tax obligations and their specifics should be interpreted strictly, even narrowly. The justification for this stance was the intrusive nature of tax law. To make sure that this intrusion is not be excessive – that is, to avoid expanding tax obligations through interpretation, it was deemed necessary to adhere to the principle of as narrow an interpretation as possible of tax law provisions defining the fundamental elements of tax obligations (e.g. taxpayer, taxable subject, tax base), supplemented by the principle of *in dubio pro tributario* (in cases of doubt, in favour of the taxpayer).

At the time, the situation was viewed differently in the case of tax exemptions and reliefs, which were regarded as a form of privilege or legal concession in favour of the taxpayer. The provisions that expressed these exemptions were in a certain opposition to the provisions establishing tax obligations. In the search for a certain interpretative *equilibrium* between provisions imposing tax burdens and those reducing or exempting individuals from the obligation to pay tax, the thesis was formulated that provisions concerning tax exemptions and reliefs should be interpreted in a way that protects the fiscal interest of the state – strictly linguistically and narrowly in cases of interpretative doubts. This corresponded to the principle expressed under the formula *in dubio pro fisco* (in cases of doubt, in favour of the treasury).[14]

Such an interpretative strategy – or rather one of its elements – seemed logical under the conditions of the time. Yet, with the development of tax systems and tax law, such a mechanical approach to interpretative strategy has become largely outdated over time. Nowadays, tax exemptions and relifes (but also other mechanisms that reduce the tax burden) often cease to be mere "privileges" granted to taxpayers, and instead serve as tools for shaping the structure of the tax system

[14] See: B. Brzeziński, *Prawo podatkowe. Zagadnienia teorii i praktyki*, Toruń 2017, p. 536.

(especially the taxable subject and the tax base). Furthermore, exemptions and reliefs are frequently employed by the legislator to achieve various non-fiscal objectives. In such cases, a systematically restrictive interpretation of the provisions establishing them would amount to the state (and its courts) acting against itself and its legislative intentions. This does not, of course, imply the legitimacy of a liberal interpretation of the provisions on tax exemptions and reliefs. But it does support the argument that there is no rationale for the use of restrictive interpretation techniques in these contexts.[15]

V. It has been aptly recognised in the literature dealing with the matter that the judicial decisions of the Constitutional Tribunal, considered over an extended period, show an evolution marked by an increased emphasis on linguistic interpretation compared to other methods of interpretation that take into account various contexts of the functioning of the law. This tends to be criticised, especially given the growing significance of non-linguistic methods of interpreting tax law in the rulings of the Supreme Administrative Court.[16] However, this matter is not as obvious and unidimensional as it may seem.

It is beyond any doubt that "Law is a living organism that responds (or at least should respond – authors' note) to changing social, cultural, and economic contexts (…)." The authors conclude this sentence with the phrase "… especially in its interpretative aspect."[17] However, this view is not entirely convincing, as it does not account for the specificity of tax law and the unique institutions it is composed of. This can be easily explained by comparing, for instance, provisions regulating permits for constructing a garage with regulations determining the (correct) amount of a tax liability.

Suppose building a garage for personal use requires a permit in the form of a decision issued by the relevant authority. The decision is granted once the applicant meets the conditions specified in the legal provisions, which are subject to interpretation that considers various economic, social, and cultural contexts. If these contexts change over time, it may affect the interpretation of the provisions, potentially leading to stricter conditions for obtaining a permit.

The next potential investor-applicant – after the change of the abovementioned contexts – will face a different legal situation, which will mean that they will either have to make a greater effort (compared to the earlier period) to meet the conditions for obtaining a permit, or that they will abandon their plan to build the garage altogether. A change in the context resulting in a change in the interpretation of

15 See: B. Brzeziński, *Wykładnia prawa podatkowego*, Gdańsk 2013, p. 156 *et seq.*

16 B. Wojciechowski, A. Olczyk, *op. cit.*, pp. 124–125.

17 *Ibidem*, p. 146.

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the legislation transforms the legal situation of potential investors-applicants *pro futuro*, as they may only acquire the status of investor in the legal sense.

The taxpayer's situation is fundamentally different. Burdened with the responsibility of self-calculating taxes, the taxpayer acts based on the known provisions and their interpretations (even if they disagree with them). It can be assumed that the "applicable" interpretation reflects the context in which the tax law functions. However, there is no legal basis requiring taxpayers to act in line with – or even be aware of – extra-linguistic contexts.

A change in the social or economic context in which tax law provisions function is an attractive pretext for changing the interpretation of the law. This could lead to situations where a taxpayer, believing they understand and comply with the laws in force, suddenly finds that the tax authorities and courts have adopted a new interpretation. They learn not only that the provisions are now understood differently, but also that adhering to the previous interpretation is a violation of the law.

Logically, this could be argued against if one recognises that the taxpayer should observe social, economic, and even political changes, and, depending on their own assessment, modify accordingly the interpretation of the legislation that concern them, deviating from the existing interpretation found in administrative acts and court judgements – before the tax authorities and courts do it.

It should be also added that if an investor intending to build a garage seeks only to have it built and then use it, the taxpayer sometimes has to design an entire economic strategy in the context of optimising the tax burden (which is, of course, legitimate and worth supporting). Changing the interpretation of the legislation on the pretext that the interpretative context has changed would not only result in the need to review the amount of tax owed (usually to the disadvantage of the taxpayer) for a past time, but could also ruin the economic strategy adopted by the taxpayer, making the venture they have undertaken simply unprofitable. Surely, this is not what authors who seem to welcome the opportunity to "checkmate" taxpayers with results derived from non-linguistic – especially teleological – interpretations wish to see in the judicial practice.

And while the observation of the growing importance of functional (teleological) interpretation in the decisions of the Supreme Administrative Court is accurate, it is regrettable that little attention has been paid to the implications of this practice for safeguarding taxpayers' rights against "malicious" interpretations of tax law by tax authorities and the overly elaborate reasoning of administrative courts that support such practices.[18]

[18] If social observations, or even just intuitions, have any relevance in assessing the way the legal system works, it seems reasonable to recall that the first two decades of the Supreme Administrative Court's

Concluding this part of the discussion, it seems appropriate to ask the following question: is the shift of the Constitutional Tribunal towards linguistic interpretation not the result of reflection on the systematic weakening of the taxpayer's legal position – not just through legislation, but also through the interpretative practices of tax authorities and often of administrative courts? Perhaps the discretionary interpretative practices of administrative courts, especially the Supreme Administrative Court, are themselves an element of the changing social context highlighted by proponents of its acknowledgement – a context now taken into account by the Constitutional Tribunal.

Finally, at this point it appears only reasonable to quote a pointed yet irrefutable observation – shaped by experiences not only of the Polish tax system – by a distinguished tax law expert: "Proponents of sophisticated, non-linguistic methods of interpreting tax law should remember that what may be interpretative mastery in their hands can become a dangerous weapon in the hands of a tax inspector, often wielded in a discretionary manner."[19]

VI. An interesting issue is the divergence in judicial opinions regarding the nature of the *in dubio pro tributario* principle (Article 2a of the Tax Ordinance) in the context of tax law interpretation. Administrative courts maintain that the *in dubio pro tributario* principle applies only when other applicable methods of interpretation fail to yield a sufficiently clear and convincing result.[20] We fully agree with this view. However, the Constitutional Tribunal takes the position that the principle, as an interpretative rule, is "a directive of functional interpretation that excludes in the process of interpreting public levy regulations any other reasons referring to values or purposes attributed to the legislator."[21] The Constitutional Tribunal thus considers the *in dubio* principle as an instrument of functional interpretation.

Paradoxically, this dispute or divergence of opinions seems to have already been resolved by the legislator. The provision of Article 2a of the Tax Ordinance reads as follows: "Art. 2a. Unresolvable doubts regarding the content of tax law provisions are resolved in favour of the taxpayer." The provision thus establishes the following procedural algorithm:

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functioning saw a significant popularity of conferences (scientific, educational, or having the form of professional training) organised under the theme "The Supreme Administrative Court as a Defender of Taxpayer Rights" (or similarly titled and themed). In the 21st century, however, the slogan of defending taxpayer rights in the context of administrative court activity has gone out of use.

19 W. Shön, *Interpretation of Tax Statutes in Germany*, [in:] *Interpretation of Tax Law and Treatises and Transfer Pricing in Japan and Germany*, Kluwer 1998, p. 78.

20 See: B. Wojciechowski, A. Olczyk, *op. cit.*, p. 144.

21 Constitutional Tribunal's judgement of 13 December 2017 (SK 48/15).

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First, there is a provision that requires interpretation. Second, interpreting the provision raises doubts (it is possible to construct various interpretative hypotheses based on it, supported by arguments of similar significance). Third, in such a situation, the provision mandates interpretative activity aimed at resolving the doubts that arose in the first phase of interpretation. Fourth, the second phase of interpretation proves ineffective in that the doubts that arose in the first phase of the interpretative process cannot be eliminated. Finally, the decision made should be in favour of the taxpayer.

The logic of this algorithm is straightforward. The *in dubio pro tributario* principle and its application as a decision-making act can only occur after the process of legal interpretation has been completed. It is a process that, unfortunately, fails to clarify the meaning of the provision – despite this being the goal of interpretation. This means that the principle in question is not an element of legal interpretation, but rather a component (or stage) of the process of applying tax law. If so, it cannot be considered an instrument falling within the scope of functional (or teleological) interpretation.

The perception of this reality may be somewhat obscured by the fact that the principle of resolving doubts in favour of the taxpayer is, quite rightly from an educational perspective, discussed in textbooks and systemic studies alongside issues of legal interpretation. This is not the only such case, however. For strictly utilitarian reasons, conflicts of laws principles are also discussed in conjunction with interpretative issues, despite not serving the interpretation of legal provisions as such, but rather aiding in the selection of the normative content to be subjected to interpretative processing.

VII. The literature dealing with the subject highlights that a comprehensive interpretation of legal provisions – understood as the use of both linguistic and contextually available non-linguistic methods – is well-suited to an open, dynamic, and pluralistic legal system. Such a system encompasses not only the national context, but also European and international dimensions. Paradoxically, according to some authors, a stronger reliance on functional interpretation (intentional and teleological arguments) better ensures the preservation of values such as coherence, uniformity, and legal certainty than strict adherence to linguistic arguments – which often fail to align with either the legislator's intent or the existing social and economic realities.[22] Applying these non-linguistic contexts can reveal the actual and legislatively intended meaning of the interpreted provision, while giving primacy to linguistic context is misguided. The principle of *interpretatio cessat in*

[22] B. Wojciechowski, A. Olczyk, *op. cit.*, p. 146.

claris (interpretation ends where clarity begins) does not imply a rivalry between different interpretative contexts, but rather the obligation to carry out a comprehensive interpretation that incorporates all available types of arguments and interpretative rules.

The above statements are intriguing enough not to be left without any remarks. The first issue worth considering is terminology, especially the meaning of the phrase *interpretatio cessat in claris*. There is no doubt that it can – as the authors suggest – refer to a directive to end (or interrupt) the interpretative process once all possible methods and tools of interpretation have been exhausted. However, in the literature, this formula is quite often treated as final for linguistic interpretation and, considered as such, means that the attainment of clarity (*claritas*) on linguistic grounds is sufficient for the formulation of an interpretative decision, or even – in an extreme variant – the attainment of this clarity entails the prohibition of further interpretation.

In this situation, it seems more reasonable to use a different formula to define the directive of a comprehensive interpretative strategy that exhausts all available methods of interpretation, namely *omnia sunt interpretanda*, which means that everything can be subject to interpretation. This formula is not entirely precise either. Still, it makes it possible to eliminate the ambiguity of the formula *interpretatio cessat in claris*. Consequently, it can be assumed that the clarificatory concept of legal interpretation can be labelled with the formula *interpretatio cessat in claris*, and the derivative concept with the formula *omnia sunt interpretanda*.

The other matter concerns the substance. Is it actually true that "a stronger reliance on functional interpretation (intentional and teleological arguments) better ensures the preservation of values such as coherence, uniformity, and legal certainty than strict adherence to linguistic arguments – which often fail to align with either the legislator's intent or the existing social and economic realities"?

It is possible to accept that teleological interpretation serves the coherence of law well, as it enables the elimination of certain competing interpretative approaches arising from the linguistic context. It is also easier to align its outcomes with the system's axiological framework, enhancing the impression of consistency.

Does teleological interpretation (referred to here, somewhat misleadingly, as functional interpretation)[23] improve the uniformity of the law? If this were the case, the Supreme Administrative Court, driven by the principles of teleological interpretation, would deliver displays of unification of the understanding of legal

[23] In the literature there is a proposal to distinguish between teleological (purpose-oriented or goal-oriented) interpretation, where the context for interpretation is the goal of the legislator or the act, and functional interpretation, aimed at maintaining or restoring the proper functioning of legal institutions. See: B. Brzeziński, *Wykładnia prawa podatkowego*, *op. cit.*, pp. 116–117.

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provisions using the tools typical of this method. It cannot be presumed that the idea of legal coherence is foreign to this judiciary. Also, there are no normative restrictions on the application of teleological interpretation, while the views of legal scholars and commentators dealing with tax law tend to be only moderately favourably inclined thereto. However, contemporary judicial decisions of the Supreme Administrative Court still fall short of achieving uniformity, and this assertion requires no proof.

Legal certainty, an unquestionably desirable quality, does not necessarily reach its peak with the increasing prominence of functional (or teleological) interpretation. If linguistic interpretation allows for the construction of a single interpretative hypothesis (or several, but with one predominating), then a widespread adherence to the results of linguistic interpretation translates into significant legal certainty. In such a situation, challenging the outcome of linguistic interpretation with arguments drawn from systemic interpretation – even if those arguments are well-founded – undermines legal certainty.

It should also be considered that, just as linguistic interpretation can lead to the formulation of various interpretative hypotheses, teleological interpretation involves a range of contexts – diverse in scope, whether more distant or closer to the issue at hand, which can sometimes provide contradictory indications regarding the normative content of a provision. In both cases, legal certainty is at risk, and it remains unclear which approach poses the greater threat.

VIII. In the search for information that could help clarify the meaning of tax law provisions, there has recently been attention drawn to documents prepared during the legislative process, referred to as Regulatory Impact Analyses (RIAs) [*Polish term: Ocena Skutków Regulacji*]. These documents explain laws (as well as the reasoning behind them) in the context of the anticipated future effects of new or amended provisions. The literature has raised the issue of the potential usefulness of RIAs for the interpretation of statutory provisions. It has been observed that, since 2010, administrative court rulings have occasionally used information contained in RIAs in this way, and a cautious view has been expressed that such judgements are still rare and that the potential of RIAs in this respect remains underutilised.[24]

It seems, however, that the expectations of making greater use of RIAs in said context may be excessive. If RIAs are meant to serve the purpose of clarifying the objectives of statutory provisions, then the name of this type of document suggests

[24] D. Gajewski, K. Joński, *Ocena Skutków Regulacji (OSR) jako źródło ustalania celu prawodawczego w wykładni prawa podatkowego*, [in:] *Funkcjonowanie sądownictwa administracyjnego na tle zmian koniunktury gospodarczej: perspektywa ekonomicznej analizy prawa perspektywa ekonomicznej analizy prawa*, Warszawa 2022, p. 161.

that it aims to indicate the anticipated effects of the introduced provisions. A Regulatory Impact Analysis is merely a forecast, which may prove accurate to varying degrees – or may not prove accurate at all. If a Regulatory Impact Analysis is objectively incorrect, would a ruling by an administrative court interpreting tax law provisions in alignment with those predicted effects be accurate?

There are also ex-post RIAs, i.e. analyses concerning legislation already in force and the effects of its implementation. Using such documents to interpret the text of a law seems even more questionable. Should the dysfunctionality of certain legal solutions, discovered retrospectively, determine (via a revised interpretation of the provisions) the altered content of legal norms?[25] It appears that functional (teleological) interpretation also has its limits. RIAs undoubtedly serve as a source of indirect, but still valuable knowledge for those interpreting legal provisions. However, considering them a source of interpretative arguments is an overestimation of their value in this regard – especially when it comes to provisions aimed strictly at taxpayers and utilised by them in the process of self-calculating their tax obligations.

IX. A broader observation comes to mind here. The 21st century, in the realm of legal interpretation, has become the century of "legislative materials"[26]. Information about facts useful for interpreting tax law is now sought, if not everywhere, then almost everywhere. Suddenly, documents such as explanatory notes to draft laws, materials from parliamentary sessions and committee meetings, ministerial explanations and clarifications, official interpretations, OECD guidelines, etc., are perceived as credible and substantively significant. This approach bears little relevance to the constitutional assertion made under Article 84 of the Constitution of the Republic of Poland, which states: "Everyone shall comply with his responsibilities and public duties, including the payment of taxes, as specified by statute." This provision is not only a declaration of the form tax law should take, but also an indication that a statute – its content, text – sets the boundaries of tax obligations. Therefore, it cannot be the case that the more ambiguous the statutory text, the more useful and significant supplementary materials, such as explanatory notes – not even to the law itself but merely to its draft – become in interpretative practice.

There is no known instance where an administrative court, relying on a draft law's explanatory notes and treating them as the decisive source of argumentation in a case, has confronted this ultra-liberal stance with either Article 84 of the

25 J. Szymanek, *Ocena skutków regulacji w procesie tworzenia prawa*, INFOS 2021, 5, p. 1.

26 In the United States, this had already occurred much earlier, see: B. Brzeziński, *Zasady wykładni prawa podatkowego w krajach anglosaskich*, Warszawa 2007, pp. 60–63.

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Constitution or the range of sources of law set forth in Article 87 thereof. Unfortunately, the belief that an unclear (uninterpretable) law permits any interpretative balancing act in the rulings of Polish administrative courts is becoming increasingly common.

This phenomenon cannot be considered a positive development. While various pre- and post-legislative materials are surely a significant source of knowledge about social relations and the legislator's proposed way of regulating them through law, it would be naive to advocate for completely "disconnecting" interpreters from the knowledge derived from these materials. Nonetheless, in the realm of tax law regulation, such materials should not have a major, decisive impact on the content of judicial decisions. And there are at least two considerations that support this conclusion.

First, legislative materials are a relatively unreliable source of knowledge regarding the intentions of the creators of a legal act (participants in the legislative process). Even A. Bielska-Brodziak, an advocate of seeking legislative intent in legislative materials, acknowledges this.[27] The views, opinions, and proposals expressed in the various documents created during the drafting of a laws are sometimes mutually contradictory, which stems from the nature of the legislative process. Consequently, it is not always clear which of these views should "retain their validity" once the law enters into force (as an interpretative context), and which of them should not be granted such validity. Legislative materials are also susceptible to manipulation – sometimes containing content placed there deliberately to serve as a 'reservoir' of arguments in future legal disputes.[28] Second, the taxpayer, as the direct target audience of tax law provisions, is obliged to be familiar with these provisions. Any suggestions that the taxpayer is also required to be aware of the interpretative context, particularly the historical one – which legislative materials are a part of – should be strongly resisted.

X. A final note concerns the notion of interpretative strategy in judicial rulings. In legal discourse, we can see a rather convenient, play-safe stance, according to which such a strategy exists and is applied in practice. However, this perspective – if limited to Polish judicial rulings in tax cases – does not fully reflect reality, or at least not entirely.

Legal discourse tends to exhibit a *pars pro toto* approach, implicitly assuming that a particular element of an interpretative strategy – even if significant – is the

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27 A. Bielska-Brodziak, *Śladami prawodawcy faktycznego*, Warszawa 2017.

28 On the American experience in this regard, see: B. Brzeziński, *Zasady wykładni prawa podatkowego w krajach anglosaskich*, *op. cit.*, p. 61.

entire strategy. Consequently, the choice of prioritising literal interpretation or adopting a more balanced approach that accepts a broader contextual setting of provisions in a specific case is treated as a distinct interpretative strategy. In reality, however, this choice (if it even occurs, given that context can be accepted to varying extents) represents merely the starting point or foundational element of an interpretative strategy. An interpretative strategy should encompass far more components, and its model structure has been outlined by M. Zieliński in his book.[29] While this is, of course, not the only conceivable strategy, it demonstrates how complex and multifaceted a legal interpretative strategy can be. And it is certainly not simply the preference for either literal interpretation or an alternative concept.

In the tax-related rulings of Polish administrative courts, it is difficult to discern even the outline of a coherent interpretative strategy for tax law. The courts themselves rarely (if ever) declare such a strategy, and efforts to reconstruct one yield unsatisfactory results. Furthermore, even the choice between (to simplify) prioritising literal interpretation and treating it in a more balanced manner alongside other methods of interpretation is not explicitly signalled in the reasoning of the judgements made.

Working out an interpretative strategy for tax law remains a task yet to be accomplished. Courts can avoid this task and continue, as they do currently, to engage in juggling all sorts of arguments within the context of justifying a ruling rather than solving a legal problem. At this point, it is only advisable to recall a famous and widely cited statement from a ruling by the Supreme Administrative Court: "The sole criterion for selecting a method of interpretation should be the correctness of its results, not a dogmatic assumption of the inherent 'superiority' of one type of interpretation over another."[30] Z. Tobor poses a couple of necessary questions in light of the above, asking what is the "correct result" of the chosen interpretative method, why – logically – the result should determine the selection of methods, and, finally, who determines that result.[31]

It must be acknowledged that sometimes knowing the desired outcomes can positively affect the selection of an appropriate modus operandi for achieving them. This is true, for instance, in industries like construction. However, in construction, there is no dispute between the project owner (investor) and the contractor over how many floors a building should have, as this is determined by the construction design. Yet, it is completely different in the case of disputes between taxpayers and tax authorities.

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29 M. Zieliński, *Wykładnia prawa. Zasady. Reguły. Wskazówki*, Warszawa 2017.

30 Supreme Administrative Court's judgement of 09.01.2018, (II FSK 3389/15).

31 See: Z. Tobor, *Strategia interpretacyjna jako środek komunikacji prawodawcy i sądów*, *op. cit.*, p. 52.

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Years ago, when people were puzzled by significant discrepancies in the Supreme Administrative Court's rulings issued in identical cases, judges of the court – presumably jokingly – explained that this was tangible proof of the independence of administrative court judges. Following this jocular tone, one might say that citizens – parties to court disputes – embraced this explanation with enthusiasm. The only caveat to this jest is that such an approach on the part of courts diverts public interest away from games of chance, which are a decent source of state revenue (via gambling taxes), and redirects that interest in randomness, unpredictability, and element of surprise toward the rulings of tax courts.

Z. Tobor advocates for the establishment of a judicial strategy for legal interpretation, viewing it as a chance to improve the coherence of the legal system.[32] He highlights another aspect of such a strategy's existence (in the future), unrelated directly to the protection of taxpayers' rights, but tied to the rational law-making process. If the parliament were aware of the principles of legal interpretation under an adopted interpretative strategy, it could draft legislation in a manner that accounts for the interpretative conventions used by the courts. This would likely enhance the effectiveness of law. Nevertheless, the predictability of judicial rulings is particularly significant for taxpayers, as it reduces legal uncertainty. Legal certainty, in turn, is one of the fundamental values of a democratic state governed by the rule of law, and striving to achieve it at the highest possible level is by all means desirable.

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