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Legal Pragmatism – A Useful and Adequate Explanatory Model for Danish Adjudication on Tax Avoidance?[1]

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Abstract: The author explores whether legal pragmatism may function as a useful and adequate explanatory model for the case law on tax avoidance unfolding in the Danish Supreme Court. In doing so, the underlying ideas of philosophical and legal pragmatism are initially re-visited while the general interpretational approach of the Danish judiciary is briefly outlined. Subsequently, the general approach to interpretation of Danish tax law is presented and the prevailing opinions on tax avoidance in the Danish doctrine are touched upon. This provide the necessary foundation for the following legal analysis of the Danish Supreme Courts' case law on tax avoidance. Based on this analysis, it is concluded that legal pragmatism may actually function as a useful and adequate explanatory model for the Danish Supreme Court's case law on tax avoidance. Awareness of this pragmatic inclination may facilitate a better understanding of the Danish Supreme Court's approach in difficult cases on tax avoidance and enhance the possibilities of predicting the outcome of such cases.

1 Introduction

At a conference some years ago, a prominent member of the Danish Supreme Court stated that tax avoidance cases – in a figurative sense – had their own shelf in the court's giant bookcase. Implicitly, the judge thereby sent a clear message that taxpayers should not expect the chances of winning such cases to be high, as the Supreme Court – particularly in tax avoidance cases – sees it as part of their job to create law. Broadly speaking, the Danish Supreme Court thereby aims to protect the underlying systematism and policies of the Danish tax system.[2]

I personally attended the conference, and at the time, the statement provoked me. How could a distinguished member of the Supreme Court say such a thing? What about the importance of the rule of law and – in particular – legal certainty? However, the statement also made me curious and this article may be seen as a late result of this curiosity.

In the Danish scholarly literature, the topic of tax avoidance has been the subject of a long-standing debate. Briefly explained, some scholars have argued for the existence of a court developed legal doctrine labelled the *the doctrine of reality* (in Danish *realitetsgrundsætningen*), whereas other scholars have maintained that such doctrine does not exist. Instead, the second group of scholars argue that the courts solve tax avoidance cases through ordinary interpretation methods, in which the avoidance aspect is an integral feature.[3]

In my view, this protracted scholarly debate has not always been fruitful, and therefore, I started wondering whether another and more convincing explanatory model could be found. As the work and style of Danish courts are often characterized as common sense based, down-to-earth and practical,[4] my attention was drawn to *legal*

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1 This article is partially based on a shorter article published in Danish. See P.K. Schmidt, *Retspragmatisme og skatteundgåelse*, Kritisk Jus 3 (2020), p. 208–221

2 See J. Pedersen, *Omgåelse og misbrug i skatteretten – før, nu og i fremtiden*, in *Den evige udfordring – omgåelse og misbrug i skatteretten* (J. Bundgaard et al. eds., Ex Tuto 2015), p. 107-134, who explicitly mentions this episode. Traditionally, however, Danish judges are perceived as being more inclined to finding law rather than to creating law. See T. Jensen, *Domstolenes retsskabende, retsudfyldende og responderende virksomhed*, Ugeskrift for retsvæsen B, p. 441 et seq. (1990).

3 For a more on this debate see section 4.2. below.

4 For more on the general approach of the Danish judiciary see section 3 below.

pragmatism as a possible and more expedient explanatory model for the case law on tax avoidance unfolding in the Danish courts.

In short, legal pragmatism, among other things, emphasizes judicial awareness of and concern for consequences. Moreover, it exhibits an understanding for the need to ground judgements in facts and consequences rather than in conceptualisms and generalities, and it appreciates reasonableness as an important part of adjudication.[5]

In a dissertation from 2004, *Sverre Blandhol* convincingly argues that legal pragmatism offers an interesting foundation for a basic theory for Nordic legal research and adjudication.[6] One of the main reasons is that several prominent Nordic legal writers through time have shown a strong inclination towards what presently can be labelled as pragmatist legal thinking. In addition, it plays a role that pragmatism – as an overall philosophical branch of theory – from its very beginning has taken inspiration from legal thinking. In other words, pragmatism does not come from the outside, and it does not – as for example Scandinavian legal realism did – try to force law into an already defined theory of science (natural science). Accordingly, legal pragmatism treats law on its own terms and may help remove the artificial barrier between legal theory and the applied legal method by its strong focus on actual actions and consequences.[7]

Against this background, the article explores whether legal pragmatism may function as a useful and more adequate explanatory model for the case law on tax avoidance that is actually produced by Danish courts.[8] In order to do so, the underlying ideas of philosophical and legal pragmatism are outlined in section 2. Here, both American and Nordic legal pragmatism are touched upon. The reason for including American legal pragmatism is that modern legal pragmatism originates from the United States and has gained a strong and elaborate foothold in American scholarly writings on law. Moreover, American legal pragmatism and Nordic legal pragmatism share a common foundation, i.e. the Roman rhetorical-pragmatic tradition.[9]

In section 3, the general interpretational approach of the Danish judiciary is briefly explained in order to provide a necessary basis for the subsequent and more thorough analysis of Danish case law on tax avoidance in section 4.

Section 4 contains the main analysis. Initially, the Danish courts' general approach to interpreting tax law is outlined and subsequently the above-mentioned discussion on the possible existence of a court-developed doctrine of reality is touched upon. Following this, a legal analysis of the Supreme Court's decisions in tax avoidance cases is carried out.[10] The study solely focuses on judgements in cases with a rather strong element of tax avoidance, and "ordinary" tax cases – as well as cases on pure tax evasion and tax fraud – are therefore not part of the study.[11] The reason behind focusing on tax avoidance cases is that such cases are typically quite complicated, thereby leaving room for the court to include a broader range of legal sources and considerations. In addition, this focus provides the necessary foundation for discussing whether legal pragmatism may function as a better and more adequate explanatory model for the case law on tax

5 For more on the origin and contents of (legal) pragmatism see section 2 below.

6 S. Blandhol, *Nordisk rettspragmatisme: Savigny, Ørsted og Schweigaard om vitenskap og metode* (Jurist- og Økonomforbundets Forlag 2005).

7 See also S. Blandhol, *Pragmatismens aktualitet i rettsvitenskap og retsanvendelse*, Tidsskrift for rettsvitenskap, p. 365-391 (2004).

8 Considering the aim of legal theory I agree with J. Christoffersen, *Pragmatisme i spændingsfeltet mellem ret og retfærdighed*, Ugeskrift for retsvæsen B, p. 349 et seq. (2019), when he – quite simply – observes that the aim is to provide a better understanding of what law is and how it is actually applied. In other words, the basic objective of legal theory is not necessarily to produce something new, but to ameliorate the comprehension of the practical application of the law.

9 Inter alia the writings of Roman philosopher and lawyer *Cicero*. See S. Blandhol, *Nordisk Rettspragmatisme – idehistorisk perspektiv*, in *Pragmatism v. principfasthet i nordisk förmögenhetsrätt* (j. Kleineman ed., Jure 2019), p. 25-47.

10 As the analysis is restricted to a legal analysis of the published judgements, this study does not include an assessment of sociological and institutional factors, even though it is acknowledged that such factors may also play a role in explaining the decision making of the Supreme Court in tax cases. See instead H.L. Bentsen et al., *Confronting SKAT in the Højesteret: An investigation into how EU Law, Precedent, Litigant Resources, and Structural Reforms shape Tax Decisions*, FIRE-Journal 1, p. 1-30 (2019). Moreover, as the legal analysis is restricted to cases with a rather strong element of tax avoidance, the article does not pretend the cover a full analysis of the general relationship between Danish tax law and private law. For such a discussion see instead J. Bundgaard, *Skatteret & civilret* (Forlaget Thomson 2006) and N. Vinther, *Civilrettens styring af skatteretten* (Jurist- og Økonomforbundets Forlag 2004).

11 The borders between tax avoidance and tax evasion can at times be blurred. In a Danish context, the term tax avoidance covers acceptable or ordinary tax planning, but is also used to refer to tax planning that is considered undesirable, such as tax optimizations that are within the letter of the law, but contrary to the spirit of the law. In contrast, tax evasion may be characterized as behaviour that is not in line with the applicable tax law, and tax fraud is a form of deliberate evasion of tax that is generally punishable by law. See J. Bundgaard & P.K. Schmidt, *Denmark*, in *Tax Avoidance Revisited in the EU BEPS Context* (A.P. Dourado ed., IBFD 2017), at. p. 261-283 with references.

avoidance unfolding in the Danish courts and for normatively assessing the courts' approach in such cases.

In section 5, a few preliminary observations are made concerning the expected impact of the statutory general anti-avoidance rule recently adopted by the Danish legislator. The discussion is kept quite brief, as the Danish courts have not yet delivered any judgements concerning this statutory rule.

Sections 6 contains a summary and the main conclusions.

2 Pragmatism as a theory of (legal) science

2.1 Philosophical pragmatism

The origin of pragmatic philosophy is usually ascribed to the three American philosophers: *Charles Sanders Pierce* (1839-1914), *William James* (1842-1920), and *John Dewey* (1859-1952).[12] (New York Paragon 1979, originally published in 1929). Even though their views and methods were diverse, they had in common a turning away from the traditional philosophical agenda of the West, i.e. in essence *Plato* and the tradition of deductive logic.[13] Moreover, philosophical pragmatism can be viewed as an aspiration to construct an alternative to the then dominant schools of philosophical thought: German rationalism and British empiricism.[14] Pragmatism took a backlash in popularity around 1940 but was rehabilitated around 1980 by philosophers such as *Richard Rorty*.[15]

The core tenets of philosophical pragmatism can be boiled down to two basic concepts: a method of inquiry and a theory of truth. The first basic concept implies that knowledge is not acquired simply by observing but by doing. In other words, pragmatism replaces the spectator conception of knowledge with an operative one, as pragmatism is mostly preoccupied with actions and consequences. The second basic concept argues for an instrumental conception of truth which entails that knowledge is relied upon only as long as it is useful, i.e. only as long as it adequately explains the phenomenon in question. Put differently, truth is what works and truths can change.[16] Altogether, pragmatists are thus anti-fundamentalists, in the sense that they refuse any idea of certain knowledge, and pluralists, as they acknowledge that there can be several adequate ways to understand a given situation.[17]

2.2 American legal pragmatism

Oliver Wendell Holmes (1841-1935), who was a United States Supreme Court Judge, is typically seen as the founding father of American legal pragmatism.[18] Holmes was a member of the so-called *Metaphysical Club*, which also included Charles Sanders Pierce and William James (mentioned above in section 2.1), and in 1881 he published a book titled *The Common Law*, in which he criticized the then prevailing mode of analyzing common law concepts as if they were essentialist notions of timeless provenance with a necessary internal structure. Instead, Holmes employed historical analysis and concluded that "*The life of the law has not been logic: it has been experience*".[19]

In an article published in 1897 called *The Path of Law*, Holmes continued his pragmatist quest and, among other things, argued that law is a social tool and therefore concerned with consequences rather than with moral truths.[20] Moreover, he reasoned that social scientific methods are essential to evaluating the consequences of law, that law is relative to public opinion, that history illuminates but should not dominate law, and that law ultimately is a prediction of what judges will do with a case if presented to them.[21]

12 Among their main works are C.S. Pierce, How to Make Our Ideas Clear, Popular Science Monthly 12, p. 286–302 (1878), reprinted in The Essential Pierce *(Indiana University Press* 1998), W. James, Pragmatism - a new name for some old ways of *thinking and The Meaning of Truth – a sequel to pragmatism, reprinted in Pragmatism and The Meaning of Truth* (Watchmaker Publishing 2011, originally published in 1910), and J. Dewey, *Reconstructions in Philosophy* (The Beacon Press 1971, originally published in 1920), and J. Dewey, *The Quest for Certainty – A Study of the* Relation of Knowledge and Action

13 R. Posner, *Legal Pragmatism*, 35 Metaphilosophy 1/2 , p. 147-159 (2004).

14 B.Z. Tamanaha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction*, 41 American Journal of Jurisprudence, p. 315-355 (1996).

15 R. Rorty, *The Philosophy and the Mirror of Nature* (Princeton University Press 2018, originally published in 1979). See also S. Blandhol, *Hva er pragmatisme?*, Tidsskrift for Rettsvitenskab, p. 491-524 (2005).

16 Tamanaha, supra n. 14.

17 More pragmatist characteristics can be listed, see e.g. Blandhol supra n. 5, who lists 10 significant characteristics of pragmatism.

18 Tamanaha, supra n. 14.

19 O.W. Holmes, *The Common Law* (Wilder Publications 2018, originally published in 1881).

20 O.W. Holmes, *The Path of Law*, 10 Harvard Law Review 8, p 457 et seq. (1897).

21 Posner, supra n. 13.

Another central figure within American legal pragmatism was *Benjamin Cardozo* (1870-1938), who published his book *The Nature of the Judicial Process* in 1921.[22] Cardozo's reasoning followed the lines of thinking of Holmes, and he was particularly interested in the various methods by which judges, having identified the rule or principle potentially applicable to the case at hand, try to "*fix the bounds of and the tendencies of development and growth*" of that principle.[23] However, in comparison with Holmes, Cardozo seems more moderate, as he does not deny the relevance of more traditional legal reasoning but argues that it should be supplemented with economic and in particular sociological methods.[24]

A second wave of American legal pragmatism started to gather momentum in the 1990s with the writings of scholars like *Brian Tamanaha* and probably most famously *Richard Posner*.[25] According to Posner, the core of (modern) legal pragmatism is pragmatic adjudication, i.e. heightened judicial awareness of and concern for consequences, and thus a disposition to ground judgements in facts and consequences rather than in conceptualisms and generalities. Hence, the ultimate criterion of pragmatic adjudication is reasonableness, as law should be understood as a social tool oriented to social ends. Having said that, pragmatism should not be seen as a synonym for ad hoc adjudication, but it requires a judge to consider systemic consequences and not merely case-specific consequences. However, Posner also stresses that only in exceptional circumstances will the pragmatic judge give controlling weight to the systemic consequences.[26]

2.3 Nordic legal pragmatism

Philosophical pragmatism may not have left a significant footprint in European philosophy, but it seems clear that pragmatism has influenced European legal theory.[27] In a Nordic context, pragmatist traits have been salient in legal thinking at least since the early nineteenth century when *Anders Sandøe Ørsted* (1778-1860) published his work *Haandbog over den danske og norske Lovkyndighed*.[28] In his book, Ørsted turned against the two predominant and strongly hierarchical views of that age, i.e. 1) that valid law solely follows from statutory laws and customary law (tacitly) accepted by the legislator, or 2) that law should be deduced from overall concepts and legal doctrines (inspired by German natural law thinkers).[29] According to Ørsted, these two views were incomplete and he argued that law originates from multiple sources that arise from the resolutions of real life problems.[30] In other words, Ørsted was preoccupied with the practical application of law based on reasonableness and justice.[31]

Traces of Ørsted's pragmatic thoughts can be retrieved, to a larger or lesser extent, in the writings of several other prominent Nordic legal scholars, in particular Danish and Norwegian academics such as *Anton Martin Schweigaard* (1808-1870), *Frederik Stang* (1808-1884) *Viggo Benzon* (1861-1937) og *Carl Ussing* (1857-1934).[32] However, the pragmatist protagonists also received criticism from various central actors, including from proponents of Scandinavian legal realism such as *Alf Ross* (1899-1979).[33] Scandinavian legal realism achieved political importance in Scandinavia as well as importance for Scandinavian jurists' conception of legal reasoning, but it appears that it did not strongly influence the actual research results of legal scholars and the practical application of the legal method. Moreover, even though Ross was inspired by logical positivism, pragmatist elements were also present in his works.[34]

22 B. Cardozo, *The Nature of the Judicial Process* (Yale University Press 1929).

23 See also C.L. Barzun, *Three Forms of Legal Pragmatism*, 95 Washington University Law Review 5, p. 1003-1034 (2018).

24 S. Schaumburg-Müller, *Amerikansk pragmatisme og realistisk retsteori*, in *Retsfilosofi – centrale tekster og temaer* (O. Hammerslev & H.P. Olsen eds., Hans Reitzels Forlag 2011), p. 343-346.

25 Among their main works are Tamanaha, supra n. 14 and R. Posner, *The Problems of Jurisprudence* (Harvard University Press 1990). See also their later monographies; B. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001), and R. Posner, *Law, Pragmatism and Democracy* (Harvard University Press 2004).

26 Posner, supra n. 13. Legal pragmatism has received criticism from various sides. For more on this criticism see section 4.5.

27 C. Munk-Hansen, *Retsvidenskabsteori*, p. 140 (Jurist- og Økonomforbundets Forlag 2018).

28 A.S. Ørsted, *Haandbog over den danske og norske lovkyndighed* (Coldin 1822).

29 Munk-Hansen, supra n. 27, p. 151.

30 For a thorough analysis of nordic legal pragmatism and its historical roots see S. Blandhol, supra n. 6.

31 It has correctly been argued that one cannot read Ørsted without observing the immense influence his activities as a judge had on his perception of the nature of law. See K. Waaben, *Alf Ross 1899-1979: A Bibliograhical Sketch*, 14 European Journal of International Law 4, p. 661-674 (2003).

32 S. Blandhol, supra n. 9.

33 See e.g. Alf Ross' most famous work, A. Ross, *Om ret og retfærdighed* (Hans Reitzels Forlag 2013, originally published in 1953).

34 Blandhol, supra n. 6, p. 74. *Jonas Chrisoffersen* has argued that Blandhol's statement is not adequate, as Ross' view on the application of law actually was distinctly pragmatist. See J. Christoffersen,

In more recent years, legal pragmatism has experienced increased interest in Nordic legal literature, for example within the writings of *Jørgen Dalberg-Larsen*, *Sverre Blandhol* and *Steen Schaumburg-Müller*.[35] Blandhol has argued in favor of the existence of a "school" for Nordic legal pragmatism with traces back to Ørsted, but not all scholars agree that such a distinct "school" exists and that pragmatism is an adequate label for the general Nordic tradition of legal thought.[36] However, the unifying and predominant view appears to be that pragmatist thinking is a significant ingredient in Nordic legal science and adjudication – historically as well as presently.[37]

3 The general approach of the Danish judiciary

Denmark is a constitutional monarchy. Section 3 of the constitution thus stipulates that legislative authority is vested in the King and the parliament (*Folketinget*), the government has the executive authority and the judicial authority belongs to the courts.[38]

With respect to the judiciary, the constitution in section 64 states that judges, in the performance of their duties, shall be governed solely by the law. However, it is clear that the wording should not be taken literally. As a result, the concept *law* should be understood not only as formal statutory provisions but as all legal sources traditionally accepted as part of the Danish legal tradition.[39]

Former Supreme Court President and law professor *Børge Dahl* has argued that Danish courts are and should be characterized by a pragmatic approach, real considerations and common sense, because judges do not only work for the court but for law and not least justice. Accordingly, when Danish judges are presented with difficult cases, considerations about reasonableness and justice will and should play a role. In other words, in order to cope with the relationship between a rule and the reality, Danish judges employ *broader considerations* (in Danish *reelle hensyn* or *forholdets natur).*[40]

Other authors agree with Dahl. For example, *Jonas Christoffersen* explains that Danish adjudication is pragmatic as references are regularly made to legal figures such as proportionality, reasonableness, justification, real considerations, overall assessments and the particular facts of the case.[41] Further, *Bernhard Gomard* stresses that the Danish courts' role is not reduced to assessment of evi-

Jura og Politik – tanker om formalisme, idealisme og pragmatisme, in *Festskrift til Mads Bryde Andersen* (H. Udsen et al. eds, Jurist- og Økonomforbundets Forlag 2018), p. 757-778. See also H. Lando, *Alf Ross and the Functional Analysis of Law*, in *Erhvervsretlige emner* 1917-2017 (V.P. Kohli & P.A. Nielsen eds., Jurist- og Økonomforbundets Forlag 2017), p. 43-68, who explains that Alf Ross did not see the work of judges as merely a mechanical application of legal sources to cases, and that Alf Ross aknowledged that especially the higher levels of adjudication are engaged in creating precedent that makes practical sense. Hence, Ross insisted that in order to do so the judge must understand how law affects behavior.

35 J. Dahlberg-Larsen, *Pragmatisk retsteori* (Jurist- og Økonomforbundets Forlag 2001), Blandhol, supra n. 6, and S. Schaumburg-Müller, *Fem retsfilosofiske teser* (Jurist- og Økonomforbundets Forlag 2009).

36 J. Evald, *Den Juridiske Tradition*, in *Festskrift til Bent Iversen* (T. Iversen et al. eds., Jurist- og Økonomforbundets Forlag 2019), p. 137-162.

37 Munk-Hansen, supra n. 27, p. 161-162, Schaumburg-Müller, supra n. 24, p. 351, and Christoffersen supra n. 34. M.B. Andersen, *Nordisk formueret mellem pragmatisme og principfasthed*, 133 Tidsskrift for Rettsvitenskap 1, p. 39-72 (2020) appears to take an intermediate position by arguing that the Nordic legal tradition do show signs of pragmatism, but that it is questionable whether the Nordic tradition can be seen as more pragmatic than other legal systems. See also J.P. Christensen, *Hvad kan man egentlig bruge juridisk litteratur til i praksis?*, Ugeskrift for retsvæsen B, p. 312 et seq. (2019), who states that modern legal research is characterized by its practical aim and that law – as legal science – right from the beginning had the down-to-earth objective of being useful for the resolution of practical legal problems.

38 Constitutional Act of Denmark (*Danmarks Riges Grundlov*), Law no. 169 of 5 June 1953. See also M. Ørberg and P.K. Schmidt, *The Principle of Legality in the Context of Danish Tax Law*, in *Constitutional Principles of Taxation* (J.H. de Sequieira et al. eds., Editora Forum, forthcoming 2021). Importantly, the King does not personally hold the legislative powers mentioned in the constitution as the government exercises the King's constitutional authority in this regard. See M.H. Jensen et al., *Dansk Statsret* (DJØFs forlag 2016), p. 61 and 131.

39 See Jensen, supra n. 2.

40 B. Dahl, *Juridisk argumentation og retsanvendelse*, in *Liber Amicorum Peter Møgelvang Hansen* (B. Dahl et al. eds., Ex Tuto 2016), p. 61-78. Dahl gives several examples of supreme court decisions in which such considerations has played an important role, including Danish Supreme Court [Højesteret], 18 February 2013, U.2013.1416, Danish Supreme Court [Højesteret], 14 February 2013, U.2013.1332, Danish Supreme Court [Højesteret], 26 April 2012, U.2012.2399, Danish Supreme Court [Højesteret], 2 July 2008, U.2008.2394, and Danish Supreme Court [Højesteret], 6 March 1997, U.1997.691. For a thorough analysis of the use of real considerations in mainly a Norwegian context see S. Blandhol, *De beste grunner – relle hensyn i juridisk argumentasjon* (Gyldendal Juridisk 2013). The Danish term *forholdets natur* is sometimes also translated into English as *the nature of things*. See e.g. J. Evald, *Law, Method and Values*, 40 Scandinavian Studies in Law, p. 73-94 (2000).

41 J. Christoffersen, supra n. 8. See also J.S. Christensen, *Højesteret og erhvervslivet*, in *Højesteret 350 år* (P. Magid et al. eds., Gyldendal

dence and legal subsumption, as tradition, pragmatism and common sense are important parts of the courts' reasoning.[42]

However, the above-mentioned authors also appear to agree that Danish courts cannot be labelled as dynamic nor activist. Accordingly, the courts generally respect the division of powers enshrined in the constitution, and within this confinement, the courts try to accommodate the need for fruitful evaluation (not abrupt revolution). Hence, the space for new legal developments at the level of the courts is not indefinite nor necessarily very large.

4 Interpretation of tax legislation and case law on tax avoidance

4.1 Interpretation of tax law – the doctrinal perspective

Section 43 of the Danish constitution prescribes that no taxes shall be imposed, altered or repealed except by statute.[43] This principle of legality reflects three basic aspects for tax regulation in Denmark: 1) administrative tax regulation, such as executive orders and regulations, cannot be in conflict with statutory law, 2) executive orders cannot constitute an independent basis for taxation, and 3) tax authorities are only allowed to impose taxes if a legal basis for taxation can be found in statute.[44]

The last aspect of this principle of legality has caused a considerable debate, which was particularly intense in the late 1990s after the Supreme Court had decided against the Danish Ministry of Taxation in a number of prominent cases.[45] As a consequence of the lost cases, the ministry published an announcement in which it was concluded that the Supreme Court by its decisions had underlined that a clear statutory legal basis is a precondition for imposing tax. The ministry also argued that the Supreme Court's decisions apparently showed – at least with respect to situations not involving avoidance and abuse – that the interpretation of tax statutes cannot be extended beyond what is actually stated in the wording of the statute and perhaps also in the *travaux préparatoires*. In continuation of this, the ministry also deduced that uncertainty concerning the scope or reach of a provision normally should entail that the provision should be subject to an expansive interpretation, if this is in the interest of the taxpayer.[46]

That taxation should presuppose a clear statutory basis has also been advocated in the Danish scholarly literature. *Jan Pedersen* has in his earlier writings argued that section 43 of the constitution prescribes such a requirement.[47] However, at the same time, he added that the requirement does not prevent interpretation based on analogy and that interpretation of tax legislation does not differ from the interpretation of other kinds of administrative law.[48] Considering these modifications, it has been argued that it is quite hard to see what is actually left of the postulated requirement for a clear statutory basis.[49]

In a dissertation from 2003, *Jakob Graff Nielsen* initially classified section 43 of the constitution as belonging to a broader group of legal areas where a requirement

2011), p. 340, who argues that the Supreme Court's approach within the corporate area has been practical and based on reason.

42 B. Gomard, *Idealisme, pragmatisme og realisme i dansk ret og retsvidenskab*, Ugeskrift for retsvæsen B, p. 345 et seq. (2000). For an interesting account of the how a judge works and reasons see P. Walsøe, *Retsfilosofien og dens betydning i dommerens hverdag*, in *Dommeren i det 20. åhundrede*, p. 415-426 (2000).

43 See also Ørberg & Schmidt, supra n. 38.

44 J. G. Nielsen, *Legalitetskravet ved beskatning* (Forlaget Thomson 2013), p. 355.

45 See for example Danish Supreme Court [Højesteret], 20 August 1996, TfS 1996, 642 (*Freddi Riisgaard Jørgensen*), Danish Supreme Court [Højesteret], 30 August 1996, TfS 1996, 653 (*Bjarne Krause-Kristensen)*, and Danish Supreme Court [Højesteret], 14 August 1996, TfS 1996, 654 (*Bo P.H. Krøll)*.

46 Danish Ministry of Taxation [Skatteministeriet], 9 january 1998, TfS 1998, 137. For more about the case law of the Supreme Court in the late 1990'ies see also I.A, Strobel, *Skattevæsenets problemer med lovhjemmel*, Skattepolitisk oversigt, p. 134 et seq. (1998), J. Pedersen, *Virksomhed i selskabsform*, Revision & Regnskabsvæsen SM, p. 307 et seq. (1998), N. Schiersing, *Om hjemmelsspørgsmålet i skattesager*, Skattepolitisk oversigt, p. 61 et seq. (1999), A. Michelsen, *Legalitetsprincippets bæredygtighed over for transaktioner foretaget udelukkende eller hovedsagelig i skattebesparelsesøjemed*, Revision & Regnskabsvæsen SM, p. 150 (1999), and Erik Werlauff, *Let us pretend*, Tidsskrift for skatter og afgifter 237 (1999).

47 J. Pedersen in H. Zahle (ed.), *Grundloven – Danmarks Riges Grundlov med kommentarer* (Jurist- og Økonomforbundets forlag 2006), p. 319 and 324-326. See also J. Pedersen, *Grundlovens § 43: "Ingen skat kan pålægges, forandres eller ophæves uden ved lov" – pas, kørekort og nummerpladegebyrer*, Tidsskrift for skatter og afgifter, p. 413 et seq. (1992).

48 References were made to Danish Supreme Court [Højesteret], 7 May 1940, U.1940.644 (*Luftkaptajn Charles Bramsen*), Danish Supreme Court [Højesteret], 20 December 1979, U.1980.121 (*Peter Viggo Axel Ehlers)*, and Danish Supreme Court [Højesteret], 19 March 1996, U.1996.775 (*Lis Walther*).

49 J. P. Christensen, *Skatteretten, Grundloven og Højesteret*, in *Festskrift til Jan Pedersen*, ed., (Jurist- og Økonomforbundets Forlag 2011), p. 72-75.

of clear statutory basis has to be respected (e.g. criminal law and legislation interfering with citizens' private life).[50] However, after a thorough examination of court cases related to taxation, he concluded that case law concerning this matter was nuanced and that the requirement of a clear statutory basis was not absolute. Moreover, he argued that analogical interpretation is possible and that there is no maxim according to which tax legislation has to be interpreted in favor of the taxpayers or in favor of the tax authorities.[51] According to Jacob Graff Nielsen's findings, it could therefore be argued that it is difficult to see what is actually left of the postulated requirement of a clear statutory basis.[52]

Jens Peter Christensen has criticized the views originally presented by both Jan Pedersen and Jakob Graff Nielsen.[53] Thus, Jens Peter Christensen argues that it would be more appropriate to state that section 43 of the constitution does not say anything about how clear the statutory basis should be. Secondly, the courts' assessments of the requirement for a clear statutory basis varies to such a degree that abstract assertions about the existence of such a requirement do not make sense. What matters according to customary administrative law is the extent or intensity of the specific government interference and not the fact that the interference generally could be categorized as a matter of tax. Thus, tax legislation should be interpreted along the same lines as other kinds of legislation interfering with for example the citizens' private lives. Jens Peter Christensen places emphasis on the fact that the underlying aim of section 43 of the constitution historically was to regulate the power relationship between the parliament and the administration. Hence, the main idea behind article 43 was not to provide protection for the individual citizens but to regulate the relationship between the institutions of government.[54] As a result, the conclusions presented by Jens Peter Christensen appears convincing.[55]

Despite these (previous) disagreements, the present doctrine largely appears to agree on the general characteristics for interpretation of Danish tax legislation.[56] Accordingly, the Danish courts' interpretation of tax legislation has generally been described as non-formalistic, which implies a method of interpretation whereby the courts pay attention to the actual wording of the provision but also to; other sources of law, including the travaux préparatoires, the objective and historical background of the rule, the coherence of the tax regulations, established case law, principles from other areas of law, and broader considerations.

Jan Pedersen et al. thus describe the courts' approach to interpretation of tax provisions as characterized by the application of diverse sources of law that go beyond the actual wording of the provisions and statements in the travaux préparatoires. Hence, the courts apply an outcome-based and realistic approach, in which considerations concerning reasonableness and practicality also play a role.[57]

Despite the plurality of legal sources, some prioritization of the various legal sources appears to take place. Accordingly, the interpretation is mainly based on the wording of the provision in question and clear statements in the travaux préparatoires.[58] However, in more complicated

50 Nielsen, supra n. 44, at p. 264.

51 Ibid., at p. 354. On the use of analogy in interpretation of Danish tax legislation see also A.B. Hermann, *Skatterettens analogi – et debatoplæg*, Tidsskrift for skatter og afgifter 661 (1998).

52 In his review of the dissertation, Henrik Dam argues that the results of Jakob Graff Nielsen's analyses should have caused the author to reach the more bold conclusion that article 43 of the constitution does not say anything about how clear the statutory basis should be. See H. Dam, *Legalitetskravet ved beskatning*, Ugeskrift for retsvæsen B, p. 290-291 (2003).

53 Christensen, s*upra*, n. 49, p. 72-75, and J. P. Christensen et al., *Grundloven med kommentarer* (Jurist- og Økonomforbundets Forslag 2015), p. 297.

54 In the same vein see also N. Winther-Sørensen, *Beskatning af international erhvervsindkomst* (Thomson Gad Jura 2000), p. 52 et seq. and same author in *Hjemmelsgrundlaget for Skats instruks om sagstilskæring*, SR-Skat, p. 293 et seq. (2018).

55 See also Ørberg & Schmidt, supra n. 38. In this context, it is worth noting that Jan Pedersen seems to have abandoned his previous position. Accordingly, in an article from 2014 he has stated that it is a common misconception that article 43 of the constitution prescribes a stricter requirement for statutory basis within the area of tax law. See J. Pedersen, *Domstolsprøvelse af skattesager – retssikkerhed, statistik og retsanvendelse*, Ugeskrift for retsvidenskab B, p. 251 et seq. (2014). See also J. Pedersen et al., Skatteretten 1 (Karnov Group 2018), p. 117-122.

56 See for example the present version of general text books on Danish tax law such as Pedersen et al., supra n. 55, p. 117-122, and A. Michelsen et al., *Lærebog om indkomstskat* (Jurist- og Økonomforbundets Forlag 2019), p. 124-128.

57 Pedersen et al., supra n. 55, p. 120. See also the older contributions by M. Eggert Møller, *Fortolkning af skattelove*, 34 Revision og Regnskabsvæsen 4, p. 151-174, who also labels the courts' applied method of interpretation in tax cases as realistic, and T. Nielsen, *Indkomstbeskatning I* (Jurist- og Økonomforbundets Forlag 1965), p. 35, who praises the Supreme Court's ability to strive a sensible balance between legal formalism and necessary realism. M. Glistrup, *Skatteret* (Gads Forlag 1957), p. 31, appears less enthusiastic concerning what he describes as the court's tendency to reach its conclusions by piling up concrete facts and circumstances.

58 A. Michelsen et al., supra n. 56, p. 126, with references to Danish Supreme Court [Højesteret], 14 August 1996, TfS 1996, 654 (*Bo P.H.*

cases, other sources of law are also relied upon, including broader considerations.[59]

With respect to the legal source *broader considerations*, it has correctly been observed that the courts do normally not make explicit references hereto in tax cases. In this context, Erik Olsen has found that the courts – in more difficult cases – do not refrain from including considerations of administrative, economic or social nature, including the need for control by the tax authorities or the risk of tax avoidance.[60]

4.2 A court developed anti-avoidance doctrine?

Abuse of tax law has been debated in a Danish context for many years,[61] even though until recently no statutory general anti-avoidance rule (GAAR) existed in Danish tax law.[62] However, this did not mean that avoidance could not be mitigated by the tax authorities as Danish case law contains several examples where courts have struck down the arrangements of a taxpayer, inter alia, by taking the substance of the transaction(s) into account when interpreting and applying the law.[63]

In this context, the so-called *doctrine of reality* has been formulated in the academic literature to explain the longstanding inclination of the courts to place emphasis on the substance of the transaction when interpreting and applying tax provisions.[64] Briefly described, the doctrine states that fictitious or artificial transactions may be set aside for tax purposes if the formal private law basis of an arrangement has been manipulated to such an extent that the underlying substance of the transaction significantly deviates from the outer legal shell.[65]

Nevertheless, not all scholars agree that an actual coherent doctrine of reality can be considered to exist in Danish tax law. Broadly speaking, these scholars instead argue that the inclination of the courts to place emphasis on the substance of an arrangement simply follows ordinary rules for interpretation of the law, according to which the existence of abusive behavior constitutes one of several elements that may be taken into account in the interpretation process – often with significant weight attached to it.[66] Accordingly, in the eyes of these scholars, the existence of a doctrine of reality would be hard to reconcile with the requirement for a statutory basis for taxation prescribed in article 43 of the constitution.[67]

Krøll), Danish Supreme Court [Højesteret], 7 May 1998, TfS 1998, 397 (*Kurt Hall Jørgensen)*, and Danish Supreme Court [Højesteret], 16 June 1998, TfS 1998, 485 (*Aage Haugland*). This tendency does not only apply with respect to tax law, but also to other areas of Danish law. See Evald, supra n. 40.

59 For example it could be argued that broader considerations played an important role in Danish Supreme Court [Højesteret], 4 November 1982, U.1983.8 (*Johannes Kruuse*), in which the Supreme Court accepted an approach used by the tax authorities which reduced the possibility for limited partners of deducting costs and depreciations. See also Supreme Court [Højesteret], 14 December 1969, U.1961.107 (*Herluf Petersen*), in which the Supreme Court tried to delineate the border between deductible business expenses and non-deductible private expenses in a way that would be practically enforceable by the tax authorities.

60 E. Olsen, *Skatterettens kilder*, Skatteorientering Ø.1., p. 16-17 (1998).

61 See for example Glistrup, supra n. 57, at p. 7 et seq., Nielsen, *Indkomstbeskatning I* (Juristforlaget, 1965), at p. 34 et seq., and Aa. Michelsen, *Er der behov for en general omgåelsesklausul i skatteretten, Skattepolitisk oversigt*, p. 96 et seq. (1984) with references. For an overview of the Supreme Court's role in the tax area see J. Stokholm, *Højesterets funktion på skatteområdet siden ca. 1960* in *Højesteret 350 år (*P. Magid et al. eds., Gyldendal 2011), at p. 351-393. For an older contribution see also M. Rubin, *Nogle Ord om Domme i Skattesager*, Ugeskrift for Retsvæsen B (1910), at p. 17-22, who criticizes the use of a *in dubio pro reo principle* in case law on taxation. See also J.H. Danielsen, *Skatteretten* (Nordisk Forlag 1950), at p. 32-33.

62 See section 4.4. below. See also P.K. Schmidt, *Abuse and Avoidance – a contemporary analysis of Danish tax law*, Revue européenne et internationale de droit fiscal 4, p. 489-499 (2018) with references.

63 L. Madsen & A.N. Laursen, *Danish Branch Report* in 103 *Cahiers de droit fiscal international* (International Fiscal Association ed., Sdu Fiscale & Financieële Uitgevers 2018).

64 J. Pedersen, *Skatteudnyttelse* (Gads Forlag 1989). See also J. Pedersen, *Danish Branch Report* in 87a *Cahiers de droit fiscal international* (International Fiscal Association ed., Kluwer Law International 2002).

65 See also J. Pedersen, supra n. 2.

66 For criticism of the doctrine of reality see for example Isi Foighel, *Anmeldelse af: "Skatteudnyttelse af Jan Pedersen"*, Revision & Regnskabsvæsen 5, p. 60-62 (1990), T. Nielsen, *Den evige udfordring,* in *Dansk Skattevidenskabelig Forening* 1965-1990 (S. Askholt ed., 1990), at p. 46-69, Aa. Michelsen, *Misbrug og omgåelse i dansk indkomstskatteret*, in *Den Evige udfordring – omgåelse og misbrug i skatteretten*, (J. Bundgaard et al. eds., ExTuto 2015), at p. 135-153, Nielsen, supra n. 44, p. 347, H. Dam, *Rette Indkomstmodtager – allokering og fiksering* (Forlaget Thomson 2005), at p. 451 et seq. S.F. Hansen, *Realitetsgrundsætningens naturgivne retsusikkerhed*, Ugeskrift for Retsvidenskab B 378 (2008), and A.N. Laursen, *Kommentarer til udvalgte afgørelser – Aktieombytning: udbytte eller aktieavance? – nogle bemærkninger om omgåelse mv. (SKM2020.98.SR og SKM2019.232.SR)*, Revision & regnskabsvæsen SM 6 (2020). However, among others former Supreme Court Judge Jørgen Nørgaard has shown support for the doctrine of reality. See. J. Nørgaard, *Højesterets rolle i skattesager*, Juristen 2 (2001), p. 65-69. Also Bundgaard, supra n. 10, at. p. 558, has shown support for the doctrine of reality.

67 Michelsen, supra n. 66, p. 137, and Madsen & Laursen, supra n. 63. In this regard Madsen & Laursen also highlights that the courts

Despite these disagreements in the literature, it appears to be a commonly accepted fact that the courts – one way or the other – are willing to take abusive behavior into consideration when interpreting and applying tax provisions. Against this background, I thus agree with Danish Supreme Court judge, *Jon Stokholm*, who has argued that it seems to be a matter of taste whether the doctrine of reality should be acknowledged or dismissed.[68] In my view, it would therefore potentially be more fruitful to explore whether the pragmatic style of the Danish courts – and in a broader sense legal pragmatism as such – provides a more expedient and reliable model for explaining the case law on tax avoidance unfolding in the Danish courts.

In line with this reasoning, an analysis of the Supreme Court's more recent decisions in tax avoidance cases is carried out in the next section. An important reason for strictly focusing on the Supreme Court's more recent decisions is to make a necessary delineation and prioritization of the vast amount of case law on tax avoidance delivered over time.[69] Other reasons are that decisions from the Supreme Court carry the highest precedential value, that more recent decisions have a preferential position compared to older decisions,[70] and that the Supreme Court over the years has become more willing to elaborate on the reasoning behind its judgements.[71]

4.3 Signs of legal pragmatism in Danish case law on tax avoidance

Several Supreme Court judgements on tax avoidance show strong signs of pragmatic adjudication. A good example is SKM2014.422.HR (*Topdanmark*) which illustrates well how the Court addresses a complicated case on tax avoidance where the plain wording of the relevant provision undoubtedly speaks in favor of the taxpayer but where such a result might seem unreasonable.

Briefly explained, the case concerned a Danish group that – in cooperation with a bank – had entered into a number of oppositely directed forward exchange transactions which led to losses in two of the groups' subsidiaries and to almost equivalent gains in two other subsidiaries. All the Danish group companies were subject to joint taxation. In order to cover the losses in the two loss-making subsidiaries, the parent company injected capital by way of capital increases carried out fully in line with corporate law requirements. Subsequently, but before the shares had been owned in three full years, the shares in the loss-making subsidiaries were sold to other group companies, thereby triggering realization of losses on the shares transferred intra-group. However, the Danish tax authorities refused to accept that the selling group companies could fully deduct these losses.[72]

The Supreme Court started out by consulting the wording of the then applicable provision in section 2(2) of the Danish Act on Capital Gains on Shares, which plainly stated that losses realized by the sale of shares held for less than three years could be offset against taxable gains realized on other shares. According to the rules, such losses should be calculated as the difference between the acquisition price and the selling price (however, the tax au-

are careful not to exercise activities that may create law if the legislature has sought to exhaustively regulate an area, as for example seen in Danish Supreme Court [Højesteret], 7 December 2006, SKM2006.749.HR (*Finwill*). However, against the criticism Jan Pedersen has argued that the doctrine of reality only concerns the preceding determination of the facts and therefore that no statutory basis is needed in order to apply the doctrine. See J. Pedersen et al., supra n. 55, p. 136-138.

68 Stokholm, supra n. 61, at p. 391.

69 When examining the individual judgements, emphasis has been given to illustrating the Supreme Court's style of reasoning and decision-making – i.e. lower priority is given to describing the facts and technicalities of the cases.

70 Accordingly, the analysis in section 4.4 focuses on Supreme Court cases decided in the current millennium, i.e. in or after 2000. Moreover, prioritization has been given to the most controversial and debated decisions. For more on court decisions delivered before 2000, see e.g. J. Pedersen, *Realitetsgrundsætningen* i 10 år, Tidsskrift for skatter og afgifter 142 (2000), and Pedersen, supra n. 64. Another reason for strictly focusing on judgements from the Supreme Court is the fact, that the Supreme Court through time have overruled a significant number of judgements from the high courts concerning tax avoidance. See Stokholm, supra n. 61.

71 Dahl, supra n. 40. See also J.S. Christensen, *Domsskrivning i Højesteret*, in Festskrift til Mads Bryde Andersen (H. Udsen et al. eds., Jurist & Økonomforbundets Forlag 2018), p. 147-162, who argues that the Supreme Court – after the reform of the court system in 2007 – has stepped up its efforts when it comes to writing and substantiating judgements. For more on the modus operandi of Supreme Court before and after the reform see L.P. Christensen, *Højesterets arbejde 1961-2011*, in Højesteret – 350 år (P. Magid et al. eds., Gyldendal 2011, p. 137-189. Despite this development, it must be acknowledged that it is a challenge that the Supreme Court's explanations often are still quite brief, which occasionally makes it hard to deduce what exactly leads the court to its conclusion. Moreover, and as inferred by Dahl, it must be kept in mind that a court's task is to decide cases (i.e. reach a conclusion), and that courts therefore strive to present explanations that support the decision. Despite these reservations, useful insights can in my view still be deduced from the explanations provided in the published case law.

72 Danish Supreme Court [Højesteret], 11 June 2014, SKM2014.422.HR (*Topdanmark*). For a more thorough presentation of the facts of the case and the Supreme Court's decision see A.R. Vang & T. Booker, *Kapitalforhøjelse – realitet og formalitet?*, Tidsskrift for skatter og afgifter 473 (2014).

thorities had refused to take the above-mentioned capital increases into account when calculating the acquisition price).

After having consulted the wording of the relevant provisions, the Supreme Court stated that the transactions did not involve any notable economic risks for the group (as the losses came alongside almost equivalent gains) and that the transactions did not rest on commercial grounds. Moreover, the Supreme Court noted that the transactions were carefully planned, and that the sole purpose and effect of the transactions were to create deductible losses. In conclusion, and based on an overall assessment, the Supreme Court therefore found that the losses – created by the forward exchange transactions and subsequent capital increases in the loss-making companies – were not real losses and therefore not deductible.[73]

The reasoning of the Supreme Court is quite brief, as the Danish adjudication tradition prescribes. However, it appears as if the Court chose a pragmatic approach and decided that this was one of those difficult cases – as mentioned by *Børge Dahl* in Section 3 above – where considerations about reasonableness should play an important role. In other words, it seems to be a good example of a case were controlling weight is given to the systemic consequences and to reaching a reasonable result – i.e. an outcome that prevents taxpayers from manufacturing artificial tax losses.

Another interesting judgement is the Danish Supreme Court's case in SKM2016.16.HR (*TAKS*), which dealt with a case under Faroese tax law.[74] The case concerned the shareholders of a Faroese holding company (*OldCo*) which had established a new Faroese holding company (*NewCo*) with the exact same division of ownership. After the establishment of NewCo, the shareholders transferred all the shares in OldCo to NewCo. The selling price received by the shareholders from NewCo consisted of cash, a note (debt claim), and new shares in NewCo. Before any installments were paid with respect to the shareholders' debt claim, NewCo and OldCo merged with OldCo as the receiving company. Subsequently, OldCo repaid the debt claim.

The Faroese tax authorities (TAKS) argued that a part of the shareholders' sale of OldCo to NewCo (amounting to the sales price minus the contribution in kind in exchange for shares in NewCo) should not be considered a tax-exempt transfer of shares for tax purposes. Instead, this part of the selling price should, in the eyes of the tax authorities, be considered a taxable distribution of dividends, as the shareholders – through the above described arrangements – had created a situation in which cash was taken out of OldCo in the form of repayments of debt without altering the original division of ownership.

The Supreme Court initially looked at section 2 of the Faroese Act on Taxation of Capital Gains which prescribes that all distributions made from a corporation to its owners should be considered dividends. Subsequently, the Court made a reference to the *travaux préparatoires* which stated that all financial benefits should be considered dividends if the shareholders have received the benefits in their capacity as shareholders.

The Supreme Court then carefully considered the facts of the case and noted that OldCo through the years had accumulated a substantial amount of capital and that dividends had not been distributed to the shareholders in a period of several years. Accordingly, the Court found that the objective of the shareholders was to find a way to take out capital without surrendering any property rights to the shares.

Against that background, the Supreme Court found that the transactions did not rest on commercial grounds and that the purpose of the whole arrangement was to find a way to transfer the accumulated capital in OldCo to the shareholders, without triggering any dividends taxation pursuant to section 9(1) of the Faroese Act on Taxation of Capital Gains. In conclusion – and based on an overall assessment – the Supreme Court thus stated that a significant part of the shareholders' sale of OldCo to NewCo should not be considered a tax exempt transfer of shares for tax purposes but instead a taxable distribution of dividends.[75]

73 See also Danish Supreme Court [Højesteret], 3 April 2018, U.2018.2166.H (*Topdanmark 2*) involving the same group and a similar arrangement. In this case the Supreme Court found that it is not of importance, whether the capital increases made to cover the losses in the loss-making companies are carried out subsequently, or whether the subsidiary upfront is equipped with sufficient capital to cover the losses. The reasoning and the wording of the Supreme Court's 2018-decision is almost the same as the reasoning and the wording used in the 2014-case.

74 Danish Supreme Court [Højesteret], 31 March 2015, SKM2016.16.HR (*TAKS*). The Faroese Islands is part of the Kingdom of Denmark, but has been granted extensive *home rule*. Accordingly, The Faroese Islands has its own tax legislation. However, the Danish Supreme Court is still the highest court for handling Faroese legal procedures.

75 See also Danish Supreme Court [Højesteret], 29 August 2019, SKM2019.458.HR (*TAKS 2*) involving the same group of shareholders and the same arrangement, in which the Supreme Court concluded that the shareholders could not benefit from a specific transitional rule.

The Supreme Court's reasoning and result in SKM2016.16.HR (*TAKS*) is perhaps not very surprising when bearing in mind the conclusions drawn by the Supreme Court in the earlier mentioned case SKM2014.422.HR (*Topdanmark)*. Hence, in both cases the Supreme Court based its decision on an overall assessment and relied on the fact that the arrangements did not rest on commercial grounds. However, in light of an earlier judgment from the Supreme Court – SKM.2006749.HR (*Finwill*) – the result perhaps was a bit surprising.[76]

The case from 2006 concerned a company (SellerCo) that wished to sell the shares in a company (TargetCo) to another company (BuyerCo). If SellerCo sold the shares directly to BuyerCo, the capital gain on the shares would be taxable because they had been owned for less than three years. Oppositely, if SellerCo sold the shares back to the issuing company (TargetCo), the proceeds would be considered a tax-exempt dividend since the shares had been owned for at least one year. As a consequence, it was decided that SellerCo should sell the shares back to TargetCo and that the repurchase should be financed by a simultaneous capital increase made by BuyerCo.

The tax authorities tried to set aside this arrangement by considering it one sole transaction (i.e. a taxable sale of shares directly from SellerCo to BuyerCo). However, the Supreme Court decided in favor of the taxpayer and stated that the arrangement had to be accepted as consisting of two separate transactions: a tax-exempt resale of shares and a capital increase.[77]

In the literature, it has been argued that the decision in SKM.2006749.HR (*Finwill*) showed that the tax authorities cannot set aside an arrangement simply because the steps are made in order to obtain a tax advantage if the transactions are in fact based on valid corporate law transactions.[78] However, as described above, the Supreme Court in SKM2016.16.HR (*TAKS*) actually did set aside an arrangement (partially) based on valid corporate law transactions.

The Ministry of Taxation has in the *travaux préparatoires* to a number of recent bills commented on SKM2016.16.HR (*TAKS*).[79] Here, the Danish Ministry of Taxation has expressed the view that valid corporate law transactions also may be set aside pursuant to a general anti-avoidance doctrine exemplified by the Supreme Court's judgement in SKM2016.16.HR (*TAKS*). However, against this view, it has been argued that there are significant differences between the legislation in Denmark and the Faroe Islands as the latter regime does not have the same amount of detailed provisions in place regulating corporate dividend distributions.[80]

In my view, the different outcomes in SKM.2006.749.HR (*Finwill*) and SKM2016.16.HR (*TAKS*) illustrates the pragmatic approach applied by the Danish Supreme Court in cases concerning tax avoidance. Hence, because Danish law contains a vast number of provisions adopted through a parliamentary process – which specifically regulate the treatment of dividends in various situations – the Supreme Court did not find sufficiently compelling reasons to set aside the transactions dealt with in SKM.2006.749.HR (*Finwill*) – despite the fact that the transactions in question were carefully planned in a way to avoid triggering taxation.[81]

However, the circumstances were different in SKM2016.16.HR (*TAKS*) as Faroese law did include such detailed regulation. Accordingly, the need for protecting the overall functioning and integrity of the tax system was more pronounced in the Faroese context. Probably because of this and taking into account the lack of actual commercial reasons, the Supreme Court decided to give controlling weight to the damaging systemic consequences of allowing such tax avoidance.

Another area of Danish tax law that is quite densely regulated concerns taxpayers' carry-forward and utilization of tax losses from previous income years. In 2010, the Supreme Court decided a case (SKM2010.26.HR (*Feri-Lux*)) which again showed that the Court appears to restrict itself from setting aside taxpayers' tax motivated transactions if the area of concern has already been quite densely regulated by specific provisions enacted by the Parliament.

76 DK: Danish Supreme Court [Højesteret], 7 December 2006, SKM2006.749.HR (*Finwill*). See also Schmidt, supra n. 62 with references.

77 See also J. Bundgaard & A.M. Ottosen, *Tax Avoidance and Capital Gains on Securities: Lessons from Recent Danish Supreme Court Cases*, 48 European Taxation 2 (2008), p. 59-69.

78 J. Bundgaard & A.M. Ottosen, *"Elevatormodellen"*, Revision & Regnskabsvæsen 4, p. 32 et seq. (2007), and Madsen & Laursen, supra n. 63. Both contributions also make reference to a decision from 2003, DK: Danish Supreme Court [Højesteret], 30 October 2003, SKM2003.482.HR (*Over-Hold ApS*).

79 See for example Danish Bill [Lovforslag] L 237 (2017/2018), p. 20.

80 A.N. Laursen, *International skatteret 2017-2018*, SR-skat (2018), at p. 255 et seq., and J. Bundgaard, *Hvor langt rækker en skattemæssig tilsidesættelse?*, Taxo 2, p. 31-33 (2019).

81 See also Stokholm, supra n. 61, who states that the Supreme Court paid attention to the fact that the legislator must have been aware that it was possible to carry out a capital reduction immediately followed by a capital increase, as this situation was specifically regulated in the then applicable section 46(2) of the Companies Act. See also Laursen, supra n. 66.

In short, the case concerned a situation where an activity was relocated from one company (A-Co) to another related company (B-Co), among other things in order to carry-forward and utilize tax losses in B-Co. However, the tax authorities tried to gun down this tax planning idea by arguing that B-Co was not the rightful recipient of the income generated by the relocated activity. The Supreme Court initially noted that the relocation of the activity was motivated by commercial as well as tax-optimizing reasons. Against that background – and with explicit reference to the then applicable provision regulating utilization of tax losses in section 15 of the Tax Assessment Act – the Court ruled in favor of the taxpayer and concluded that the relocation of the activity should not be set aside for tax purposes.

Accordingly, the judgement appears to illustrate that when the legislator has adopted detailed provisions in order to deal with specific situations (e.g. certain kinds of tax avoidance), it is not the task of the Supreme Court to repair or stretch out the wording of such detailed provisions by referring to broader anti-avoidance deliberations.[82] Put differently, the Supreme Court appears to give controlling weight to rule of law considerations in such situations – including predictability for taxpayers and the separation of powers – and not to possible systemic consequences of accepting such tax motivated behavior.[83]

On the other hand, when the legislator has not specifically addressed a given issue, the Supreme Court appears to find more room for including broader considerations of various kinds when deciding a case. A good example of this is SKM.2010.123.HR (*A ApS*), which briefly explained, concerned a company that had issued a convertible bond with certain atypical features to a bank and used the proceeds to invest in other bonds. The High Court had ruled in favor of the tax authorities and the Supreme Court confirmed the High Court's conclusion as well as its reasoning.

The Court stated that the loan arrangements in question included no risks for the involved parties and that the transactions did not rest on commercial grounds, as the only reason for entering into the arrangements was to obtain a tax benefit (deductible interest payments combined with tax exempt capital gains). Accordingly, and based on an overall assessment, the Court found that the interest payments in question, which the taxpayer originally had deducted, lacked reality for tax purposes.[84]

Examples of judgements in which the Supreme Court has placed emphasis on deliberations concerning lack of commercial grounds and/or lack of reality also involves tax motivated bodies of agreements related to investments through (limited) partnerships,[85] successive transfers of contracts,[86] and tax motivated transfers of assets and businesses between related parties.[87]

In conclusion, the case law analyzed above displays that the Supreme Court, in cases on tax avoidance, actually do show judicial awareness of and concern for consequences. Moreover, the case law exhibits an understanding for the need to ground judgements in facts and consequences rather than in conceptualisms and generalities, and it appears to (silently) appreciate reasonableness as an important part of adjudication. In other words, the case law of the Supreme Court does show strong signs of legal pragmatism.

4.4 Normative assessment

It has been shown above that the Danish judiciary generally applies a pragmatic approach and more specifically that the Danish Supreme Court's case law on tax avoidance displays strong signs of legal pragmatism. Against this background, it will now be discussed whether this is actually a good thing. For that reason, a normative assessment will be made.

82 Danish Supreme Court [Højesteret], 27 October 2009, SKM2010.26.HR (*Feri-Lux*). See also Laursen, supra n. 80. See also Michelsen, supra n. 66, at. p. 144, Stokholm, supra 61, and Bundgaard & Schmidt, supra n. 11.

83 Another example in this vain is Danish Supreme Court [Højesteret], 30 October 2003, SKM2003.482.HR (*Over-Hold ApS*) which also concerned utilization of tax losses. See also Laursen, supra n. 66.

84 Danish Supreme Court [Højesteret], 28 January 2010, SKM2010.123.HR (*A ApS*). The judgement appears to be in line with previous judgements from the Supreme Court concerning various tax motivated loan arrangements. See for example Danish Supreme Court [Højesteret], 17 November 2004, SKM2004.477.HR (*Uffe Elander*), Danish Supreme Court [Højesteret], 17 November 2004, SKM2004.476.HR (*Preben Normand Madsen*), and Danish Supreme Court [Højesteret], 20 January 2000, TfS 2000, 148 (*Carsten Glenting*).

85 See Danish Supreme Court [Højesteret], 24 August 2007, SKM2007.605.HR (*A kommanditist*), Danish Supreme Court [Højesteret], 20 May 2003, SKM2003.273.HR *(Jan Aage Jensen and Ole Nørh*), Danish Supreme Court [Højesteret], 13 december 2000, TfS 2000, 1011 (*Simon Bent Sørensen*), and Danish Supreme Court [Højesteret], 6 April 2000, TfS 2000, 374 (*Carsten Bo Petersen*).

86 Danish Supreme Court [Højesteret], 20 August 2002, SKM2002.484.HR (*Fyns Erhvervsrevision A/S*).

87 Danish Supreme Court [Højesteret], 27 June 2003, SKM2003.318.HR (*ApS SPKR 4 nr. 2861*), and Danish Supreme Court [Højesteret], 11 January 2001, TfS 2001, 155 (*Einer Valdemar Simper*).

In the literature, it has been argued that the general pragmatic approach of the Danish judiciary is commendable, as neither (excessive) formalism nor idealism should establish a foothold. Hence, on the one hand, the pragmatic approach entails an expedient balancing act between acknowledging the significance of traditional legal sources and interpretation methods (like formalism) and, on the other hand, the significance of accommodating flexibility and openness towards underlying values (like idealism).[88]

However, in connection to cases on tax avoidance, the Supreme Court's pragmatic approach has occasionally received criticism in the Danish literature. One example of which is the criticism put forward by *Ann Rask Vang* and *Thomas Booker* of the Supreme Courts' judgement in SKM2014.422.HR (*Topdanmark)*.[89] They argue that even though it may appear reasonable that the Supreme Court assists the tax authorities in their fight against taxpayers' tax avoidance arrangements, it is simply not the Supreme Court's rightful task. Hence, if the legislator finds that there is a need to combat such kinds of tax avoidance, appropriate legislation should put in place.

In contrast, *Jon Stokholm* has – with reference to the Supreme Court's judgement in TfS 2000, 1011 (*Simon Bent Sørensen*) – argued that a reasonable judgement from the Supreme Court can be a more supple and expedient way of regulating tax avoidance, as it may be difficult to draft a provision that adequately separates the taxpayers' desirable behavior from their undesirable behavior.[90] Nonetheless, a valid objection against such a pragmatic approach to handling tax avoidance is that it harms the taxpayers' possibilities of predicting the consequences of their actions.[91]

In addition, it must be acknowledged that applying *reasonableness* as the litmus test in difficult cases on tax avoidance is not unproblematic. Hence, different people have different ideas about what is reasonable, and a particular commitment to reasonableness will therefore not dictate particular legal doctrines or case outcomes.[92]

Against that criticism, it may be argued that this is actually the point – there is no master concept that will generate correct answers to difficult legal questions, and therefore judges should focus on facts and consequences when deciding a case.[93] However, how should it be decided which consequences are desirable and which are not? Without an answer to this question, it may be hard to see how pragmatism can serve as a guide to decision making at all.[94]

Nonetheless, with respect to Danish tax law, there seems to be a basic consensus concerning the main underlying principles of the tax system. These include the need for ensuring sufficient revenue for the welfare state, appropriate income distribution, legitimacy, efficiency, neutrality, and legal protection of taxpayers (for example by acknowledging the importance of predictability and by securing that the tax charge reflects the taxpayers' abilities to pay).[95]

88 Christoffersen, supra n. 8. See also Dahl, supra n. 40, who concludes that the Danish courts are – and should be – characterized by a pragmatic approach, as Danish judges do not only work for the law, but for law and justice.

89 Vang & Booker, supra n. 72. For more on the case SKM2014.422.HR (*Topdanmark)*, see section 4.3 above.

90 Stokholm, supra n. 61. Interestingly, in Sweden the Supreme Administrative Court has traditionally applied a more formalistic interpretive approach, which has made it difficult to mitigate tax avoidance through interpretation. As a consequence, Sweden adopted a statutory GAAR long before Denmark. See e.g. R. Påhlson, Kringgåendefrågan i svensk inkomstskatterätt, in *Den evige udfordring – omgåelse og misbrug i skatteretten* (J. Bundgaard et al. eds., Ex Tuto 2015), p. 81-104, and D.T. Ostas & A. Hilling, *Global Tax Shelters, the Ethics of Interpretation, and the Need for a Pragmatic Jurisprudence*, 53 American Business Law Journal 4, p. 745-785 (2016).

91 See Munk-Hansen, supra n. 27, for more on legal pragmatism and the problem of its inherent lack of providing adequate predictability. For a discussion about legal certainty and tax avoidance in a Danish context see J. Bolander & P.K. Schmidt, *Retssikkerhed og omgåelse i skatteretten – den evige diskussion om forudberegnelighed contra bekæmpelse af misbrug*, in *Den evige udfordring – omgåelse og misbrug i skatteretten* (J. Bundgaard et al. eds., Ex Tuto 2015), p. 23-52.

92 See Ilya Somin's critic of Richard Posner's legal pragmatism in I. Somin, *Richard Posner's democratic pragmatism and the problem of ignorance*, 16 Critical Review 1, p. 1-22 (2004), and I. Somin, *Pragmatism, democracy, and judicial review: Rejoinder to Posner*, 16 Critical Review 4, p. 473-481 (2004).

93 R. Posner, *Law Pragmatism, and Democracy: Reply to Somin*, 16 Critical Review 4, p. 465-471 (2004).

94 Somin, supra n. 92, who notes that a theory that incorporates everything ultimately proves nothing. Oppositely, see B.E. Butler, Legal Pragmatism: Banal or Beneficial as a Jurisprudential Position, 3 Essays in Philosophy 2 (2002), who in an American context argues that legal pragmatism is a more descriptively accurate and empirically sound model than the more classical legal model.

95 Pedersen et al., supra n. 55, p. 40-46, and Michelsen et al., supra n. 56, p. 49-55. See also Bundgaard, supra n. 10, p. 143 et. seq., who argues that the underlying central principles are of great significance in connection to the assessment of the relationship between Danish tax law and private law. However, he also adds that such individual principles cannot alone be used to decide a concrete case.

An understanding of these basic considerations and principles may, in my view, sufficiently equip the courts with the tools needed to carry out the necessary balancing act and reach reasonable judgements in difficult cases on tax avoidance.[96] In my opinion, this is also reflected in the Danish Supreme Court's more recent decisions in cases on tax avoidance, which the court has generally handled in a quite systematic and sensible way.[97]

Moreover, as the Supreme Court's case law on tax avoidance do in fact show strong pragmatic signs, I would argue that legal pragmatism may function as a useful and coherent explanatory model for the case law on tax avoidance actually unfolding in the Danish courts. In addition, as the Supreme Court's interpretation and application of the law in cases on tax avoidance do exhibit a number of particular features – including the weight attached to (lack of) commercial grounds, reality, economic risk and the eye for the systemic consequences) – awareness of the Court's pragmatic approach do add value in the process of understanding and predicting the behavior of the Supreme Court in cases on tax avoidance. These particular features may be overlooked if the Court's approach to tax avoidance is trivialized as instances of ordinary interpretation, or oppositely placed on a pedestal and conceived as a consequent application of a court-developed general anti-avoidance rule.[98]

In conclusion, I would therefore argue that legal pragmatism may function as a convincing and adequate explanatory model for the case law on tax avoidance actually unfolding in the Danish courts.

5 The new statutory general anti-avoidance rule

In 2015, Denmark introduced a general anti-avoidance rule (GAAR) in Section 3 of the Danish Tax Assessment Act aiming at mitigating corporate taxpayer abuse of certain EU directives as well as Danish tax treaties.[99] Additionally, in December 2018, the scope of the provision was expanded in order to implement the GAAR prescribed in the EU Anti-Tax Avoidance Directive (ATAD).[100] Accordingly, Section 3 of the Danish Tax Assessment now both contains an OECD-inspired so-called principle purpose test (PPT) as well as a GAAR based on Article 6 of the ATAD (EU-GAAR). Moreover, is worth noting that the implemented EU-GAAR applies also to purely domestic situations, and that the traveaux preparatoire clearly states that the new statutory rules should not limit the possibility for setting aside arrangements based on other grounds.[101] Thus, the court developed doctrine on tax avoidance analyzed in section 4.4. above will still apply – yet now side-by-side with the PPT and the EU-GAAR.[102]

The Danish PPT is formulated in line with the wording of the recommendation from the OECD, which later also was used in Article 7(1) of the Multilateral Instrument and Article 29(9) in the OECD Model (2017).[103] Accordingly, the PPT in Section 3(5) of the Tax Assessment Act states that taxpayers shall not be granted the benefits of a tax treaty if it is reasonable to conclude – with regard to all relevant facts and circumstances – that obtaining that benefit was

96 See also Posner, supra n. 93, who notes that his form of pragmatism is relative to the prevailing norms of particular societies. His form of pragmatism thus provides local rather than universal guidance to action, and its local utility therefore depends on the degree to which the society is normatively homogeneous.

97 Please note, as also indicated in section 1, that this study only focuses on cases with a relatively strong element of tax avoidance. Accordingly, my conclusion should not be seen as a general statement covering the Supreme Court's approach in all matters of tax law. Hence, I do acknowledge the challenges connected with the very low overall success rate of the taxpayers in cases decided by the Danish Supreme Court. For more on that discussion see Bentsen, supra n. 10, L. Hulgaard, *Dommeres vota i skattesager 2002-2011 – en statistisk undersøgelse*, Tidsskrift for skatter og afgifter 132 (2014), Pedersen, supra n. 55, and B. Dahl, *Dommerne holder sig til loven – en kommentar til advokat Lida Hulgaards undersøgelse af dommeres vota i skattesager*, Tidsskrift for skatter og afgifter 185 (2014).

98 Hence, even though I do not agree with Jan Pedersen that the doctrine of reality is the best available explanatory model for the case law on tax avoidance actually unfolding at the Danish courts, I do concur with Jan Pedersen's observation that the Supreme Court's case law on tax avoidance is characterized by a particular style of adjudication. See section 4.2 above and Pedersen, supra n. 55.

99 Danish Law [Lov] no. 540 of 29 April 2015. See also Danish Bill [Lovforslag] L 167 (2014/2015).

100 Danish Law [Lov] no. 1726 of 27 December 2018. See also Danish Bill [Lovforslag] L 28 (2018/2019) and Council Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

101 Bill L 28 (2018/2019), supra n. 100, para. 2.3.3.

102 In case both the ATAD-GAAR and the PPT would be applicable at the same time, the ATAD-GAAR should take precedence. See Section 3(6).

103 OECD: The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (2016) and the OECD Model (2017). Denmark signed the Multilateral Instrument on 7 June 2017. For more on Denmark's ratification of the multilateral instruments see P.K. Schmidt, *Danish Branch Report*, in 105 *Cahiers de droit fiscal international* (International Fiscal Association ed., Sdu Fiscale & Financieïe Uitgevers forthcoming 2020).

one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit. However, this does not apply if it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the tax treaty.

Section 3(1-4) of the Tax Assessment Act is devoted to implementing Article 6 of the ATAD (the EU-GAAR). These provisions state that arrangements or a series of arrangements should be set aside when calculating the tax liability if they have been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the tax legislation, and if they are not genuine with regards to all relevant facts and circumstances. Moreover, the provisions add that an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons, which reflect economic reality.

It is not the purpose of this article to fully analyze the wording and legal effects of the Denmark's implementation of the PPT and the EU-GAAR.[104] Moreover, as both provisions are quite new, the Danish courts have not yet delivered any judgements concerning these new statutory provisions. Hence, it is still too early to determine whether and how exactly these new provisions will alter the way the Danish courts, including the Supreme Court, have traditionally addressed cases on tax avoidance. Anyway, a few preliminary observations will be made of relevance for the discussions in section 4.3 and 4.4 above.

The scopes of both the PPT and the EU-GAAR are not particularly clear, yet it is clear that the provisions have brought additional complexity into the interpretation of the Danish tax legislation. Accordingly, it is no surprise that the new provisions have been harshly criticised in the Danish literature. *Jan Pedersen* has for example called section 3 of the Tax Assessment Act a legal monstrosity, and he fears that section 3 will cause more problems than it will solve. In short, he thus argues that the introduction of a statutory GAAR will limit the Danish courts' access to assessing individual tax avoidance cases based on the case specific circumstances and the relevant underlying legal provisions.[105]

Only time can tell whether Jan Pedersen's dire predictions will come through. However, for a number of reasons, I am less concerned. For example, the fact that a statutory GAAR may undermine legal certainty for taxpayers should not be a great surprise as this may be seen as a common and inherent challenge posed by GAARs.[106] In addition, it could be argued that certainty is not even the right yardstick against which to evaluate a statutory GAAR. Thus, if the statutory GAAR produces a test that is workable for the compliant majority, but not as susceptible to manipulation as, for example, more mechanical specific anti-avoidance provisions (SAARs), the damage should allegedly be considered rather limited.[107]

Finally, it should be kept in mind that the traditional frame for handling tax avoidance cases developed by the Danish Supreme Court – as presented in section 4.3 above – is not particularly clear neither. Accordingly, in my view, both the existing court-developed frame for handling cases on tax avoidance and the new section 3 of the Tax Assessment Act – with its broad and elastic wordings – provide sufficient and needed leeway for the courts to take the case specific circumstances and the relevant underlying legal provisions into consideration. In other words, I expect that the Danish Supreme Court will be able to continue its pragmatic style under the new statutory provision while at the same time paying sufficient attention to the PPT's OECD origin and the EU-GAAR's ATAD origin.

Obviously, it could then be questioned why a statutory GAAR should be introduced if it suffers from many of the same weaknesses as the already existing court-developed

104 For a thorough analysis of the available administrative case law see e.g. Schmidt, supra n. 62. See also P.R. Bjare & S. Sønderholm, *Den nye generelle omgåelsesregel i ligningslovens § 3*, SR-Skat, p. 110 et seq. (2019), J. Bundgaard et al., *Status på omgåelsesklausulen i ligningslovens § 3 – ved overgangen til skatteundgåelsesdirektivets GAAR*, Skat Udland 173 (2019), Madsen & Laursen, supra n. 53, and J. Bundgaard et al., *First Domestic Decisions on the 2015 Parent-Subsidiary Directive GAAR Implementation: Guiding Principles for EU Member States?*, 46 Intertax 8/9, p. 716-724 (2018).

105 Pedersen, supra n. 2, at p. 118-120. See also Michelsen, supra n. 66, who fears that section 3 will lead to significant legal uncertainty, and Laursen (2020), supra n. 66, who finds that the new GAARs have contributed to a nervous climate in Danish tax.

106 J. Prebble, *Kelsen, the Principle of Exclusion of Contradictions, and General Anti-Avoidance Rules*, in *Philosophical Foundations of Tax Law* (M. Bhandari ed., Oxford University Press 2017), p. 79-98. See also A.P. Dourado, *No Taxation without Representation in the European Union: Democracy, Patriotism and Taxes*, in *Principles of Law: Function, Status and Impact in EU Tax Law* (C. Brokelind ed., IBFD 2014), who argues that a case-by-case analysis of abuse of law leads to a more equitable result, but is burdensome and brings uncertainty.

107 J. Freedman, *Defining taxpayer responsibility: In support of a general anti-avoidance principle*, British Tax Review 4, p. 332-357 (2004). Along the same lines, see R.S. Avi-Yonah & O. Halabi, *U.S. Treaty Anti-Avoidance Rules: An Overview and Assessment*, University of Michigan Law & Economics Working Paper no. 45, p. 2. They argue that evidence generally suggests that a GAAR is not a significant disincentive in respect of legitimate transactions.

tradition. However, apart from the fact that the EU-GAAR probably had to be implemented in order for Denmark to live up to its EU law obligations, a statutory GAAR entails two important benefits compared to the court-developed frame. First, it makes it possible to skip the (academic) discussion on whether a Danish anti-avoidance doctrine exists at all. Second, a broad statutory GAAR demonstrates to citizens and taxpayers that the democratically elected legislator actually has intended to give the tax authorities, and ultimately the courts, sufficient and needed leeway to take the case specific circumstances and the relevant underlying legal provisions into consideration when dealing with tax avoidance cases. Hence, a statutory GAAR may increase citizens' and taxpayers' overall sense of justice and at the same time provide the courts with enough leeway to clamp down on tax avoidance.[108]

6 Conclusions

Legal pragmatism emphasizes judicial awareness of and concern for consequences. Moreover, it exhibits an understanding for the need to ground judgements in facts and consequences rather than in conceptualisms and generalities, and it appreciates reasonableness as an important part of adjudication.

Overall, Danish adjudication is pragmatic and the style of the Danish courts can be described as common sense based, down-to-earth and practical. This characterization also applies to the courts' general approach to interpretation and application of tax law. Considering cases on tax avoidance in particular, the case law analyzed in the article displays that the Supreme Court actually does show judicial awareness of and concern for consequences. Moreover, the case law exhibits an understanding for the need to ground judgements in facts and consequences rather than in conceptualisms and generalities, and it implicitly appears to appreciate reasonableness as an important part of adjudication. In other words, the case law of the Danish Supreme Court does show strong signs of legal pragmatism.

Against that background, I would argue that legal pragmatism may function as a useful and coherent explanatory model for the case law on tax avoidance actually unfolding in the Danish courts. In addition, as the Supreme Court's interpretation and application of the law in cases on tax avoidance do exhibit a number of particular features – including the weight attached to (lack of) commercial grounds, reality, economic risk and the eye for the systemic consequences – awareness of the Court's pragmatic approach do add value in the process of understanding and predicting the behavior of the Supreme Court in cases on tax avoidance. These particular features may be overlooked if the Court's approach to tax avoidance is trivialized as instances of ordinary interpretation, or oppositely placed on a pedestal and conceived as a consequent application of a court-developed general anti-avoidance rule.

In conclusion, I would therefore argue that legal pragmatism may function as a convincing and adequate explanatory model for the case law on tax avoidance actually unfolding in the Danish courts.

108 See also D.R. Jensen, *Misbrugsprincippet – djævelen i skyggerne*, in *Den evige udfordring – omgåelse og misbrug i skatteretten* (J. Bundgaard et al. eds., Ex Tuto 2015), p. 53-79, who argues that a statutory GAAR may enhance the citizens' perceived sense of justice.