ESI Preprints **Not Peer-reviewed**

The Application of Anti-Abuse Provisions to Inheritance and Gift Tax Law using the Example of German Inheritance and Gift Tax

Philippe Linseis, PhD
Attorney at Law, Tax Advisor

Doi: 10.19044/esipreprint.8.2025.p1

Approved: 08 August 2025
Posted: 10 August 2025

Cite As:
Linseis, P. (2025). *The Application of Anti-Abuse Provisions to Inheritance and Gift Tax Law using the Example of German Inheritance and Gift Tax*. ESI Preprints.
https://doi.org/10.19044/esipreprint.8.2025.p1

Abstract

Most tax systems have explicit or case-law-based anti-abuse provisions. In Germany, such a regulation was legally standardized in § 42 AO. In the past, literature and case law in this context have mostly dealt with cases from income tax law. However, as will be shown below, anti-abuse legislation also plays an important role in inheritance and gift tax law. Special features arise here, above all, from the different taxation depending on the degree of kinship, which is not known in the income tax law and benefits for business assets in § 13a ErbStG. The aim of the article is to investigate the application of the general anti-abuse provision to inheritance tax law by analyzing legal literature and case law. Findings show that there is only very little literature or case law that explicitly deals with the topic. Nevertheless, as result, it can be stated that general anti-abuse provisions are, without limitation, applicable to inheritance and gift tax law and have high practical relevance.

Keywords: Inheritance Tax Law, Gift Tax Law, Anti-Abuse Legislation

Introduction

§ 42 AO was developed based on a decision of the highest financial court in 1919. In this decision, the court indicated that there was no rule that stipulated that a construction that was only used to avoid taxes must be taxed

in the same way as a regular construction. Since the last major amendments to § 42 AO in 2008, it has used the following wording:

§42 AO - Abuse of tax planning schemes

1. *It shall not be possible to circumvent tax legislation by abusing legal options for tax planning schemes. Where the element of an individual tax law's provision to prevent circumventions of tax has been fulfilled, the legal consequences shall be determined pursuant to that provision. Where this is not the case, the tax claim shall, in the event of an abuse within the meaning of subsection (2) below arise in the same manner as it arises through the use of legal options appropriate to the economic transactions concerned.*
2. *An abuse shall be deemed to exist where an inappropriate legal option is selected which, in comparison with an appropriate option, leads to tax advantages unintended by law for the taxpayer or a third party. This shall not apply where the taxpayer provides evidence of non-tax reasons for the selected option which are relevant when viewed from an overall perspective.*

As far as can be seen, there is no literature that specifically deals with the topic of anti-abuse provisions in the field of inheritance and gift tax law. But it is possible to draw conclusions from literature which generally deals with anti-abuse provisions in tax law or inheritance tax.

In 2016, a general anti-tax avoidance rule was adopted as part of the anti-tax avoidance directive of the EU. Some authors have dealt with this. Luc de Broe and Dorien Beckers (2016) describe how ECJ case law developed a concept of anti-abuse jurisprudence and analyzed the concept. Öner (2016) also investigated the efficiency of the general anti-abuse rule of the Anti-Tax Avoidance Directive and found difficulties when applying the rules. Freedman (2014) argues that general anti-avoidance or anti-abuse provisions are an essential part of a modern tax system.

Researchers who focus more on the inheritance tax don´t specifically address anti-abuse provisions. Gerzog (2014), for example, discusses the advantages or disadvantages of an inheritance tax compared to the existing estate tax in the US. Others like Pedersen and Böyum (2020) consider the problem from a philosophical point of view, especially how it is justified to collect taxes from the family after a death.

Legal options for tax planning schemes

The wording "legal options for tax planning schemes" not only refers to civil law constructions but also public law constructions and even exclusive tax law constructions. In principle, all legal options for tax planning schemes can be subsumed under this wording and are affected by

an anti-abuse regulation. On the other hand, § 42 AO cannot be applied if no economic circumstances are affected, only a legal relationship without any economic background. For example, a marriage establishes a legal relationship between spouses. Due to several implications of this legal relationship in tax law (e.g., a lower splitting tariff), married couples are taxed at a lower rate. However, this does not constitute a tax planning scheme under § 42 AO. This result seems questionable in the context of inheritance tax if a marriage is arranged shortly before an individual's death solely to avoid paying taxes; for example, an old and wealthy widower could, in theory, marry his great-niece (which is legally permissible), who would inherit his entire fortune. Due to the legality of same-sex marriage, the same would be possible with his great-nephew. Only marriages with direct descendants (i.e., children) or between siblings are prohibited. In any case in which the marriage is valid under civil law, § 42 AO cannot be applied.

The freedom of contract or private autonomy allows taxpayers to choose the most advantageous contractual forms for their transactions. They are also free to use legal entities, if appropriate. The legal system only limits these opportunities by defining rules and regulations. However, within these limitations, taxpayers are generally free to make their own decisions. The civil law construction is the starting point for tax treatment. Tax law, in principle, does not prevent advantageous civil law constructions. If different civil law constructions are possible, it is acceptable to consider the tax implications of different constructions and choose the ones with the most beneficial taxation. There has even been discussion about the constitutional right to "optimized tax design."

Legality of circumventing transactions

Circumventing transactions aim to produce economic success, which conflicts with the objective of burdensome tax regulation, especially a prohibition norm or other burdening rule, such as formal requirements or permission requirements. By circumventing the prohibiting or complicating rule, economic success can presumably be achieved at all or at least easier. The contracting parties can also attempt to achieve the application of a beneficial regulation which normally wouldn´t be applicable. There is no general prohibition in civil law to use circumventing transactions. § 42 AO only orders to withhold the desired beneficiary taxation. Tax law can be circumvented by every taxpayer. For example, foreign taxpayers with limited tax liability can also circumvent tax law.

Legal definition of abuse (§ 42 Abs. 2 S. 1 AO)

§ 42 Abs. 2 AO contains a legal definition of abuse that replaces the previously developed definition in the jurisprudence. For the application of §

42 AO, it is not enough for tax-saving options to be used. Rather, legal options must be misused. Abuse means choosing an inappropriate legal construction to achieve a desired economic goal and reduce taxes.

Inappropriate legal constructions

A basic condition for abuse is for the legal construction to be inappropriate. The term "inappropriate" is not defined in the law itself because it is not useful to define; this would require a definition with more indeterminate or uncertain legal terms. Legislators' decision not to define the term also allows further development in the jurisprudence. § 42 AO does not evaluate the appropriateness of the economic behavior itself because there is no authorization within the section for this. If the tax-saving construction serves an economic purpose, there is no control over whether the design option is appropriate. However, the design option is inappropriate if it serves no economic purpose at all, if it lacks a rational economic reason, or if it reduces taxes and is not justifiable through any economic or other rational non-fiscal reasons. It is not necessary for the contracting parties to use a specific construction to implement a transaction; however, absurd legal constructions or tricks are inappropriate. It is also relevant whether a well-informed and wise person would choose the construction to achieve the economic objective, given the economic circumstances. According to the traditional view, the legal system attempts to provide legal constructions that are as simple as possible for all economic transactions. Therefore, the simplest available legal construction that can be used to achieve a desired economic result is also the appropriate legal construction. Appropriate legal constructions are simple, functional, transparent, and economic. Inappropriate legal constructions are circumstantial, complicated, artificial, uneconomic, unnatural, strange, unnecessary, absurd, unclear, impractical, irrational, and ineffective. Most inappropriate constructions are not an honest expression of what is really wanted to achieve. Appropriate constructions are designed to achieve the objective in a direct way, while inappropriate legal constructions often rely on detours that are not easily explainable. Vague legal terms and general clauses can offer only a certain degree of legal certainty. They cannot provide absolute certainty about the future application of the law. If vague terms are used to describe the character of a transaction, this is only an indication of an appropriate or inappropriate transaction. Unusual and inappropriate transactions must be separately considered and not treated as equivalent. An unusual legal construction is not automatically inappropriate. However, an unusual legal construction is a strong indication of an inappropriate construction, while a typical legal construction is an indication of an appropriate transaction. The taxpayer does not have any duty to design a construction in a manner that incurs taxes. On the contrary, all

taxpayers are free to attempt to lower their taxes as much as possible and choose design options that would result in lower taxation. An effort to reduce taxes does not make a design option inappropriate. This is true even if reducing taxes was the only reason to choose a certain design option. However, there must also be a rational economic reason for the construction or a recognizable non-fiscal reason. If the purpose of saving taxes does not exist and there is no reasonable economic purpose, then the construction is inappropriate. An appropriate construction is not possible if economic justification is only claimed, pretended, or faked. The claim to options provided in the law (e.g., 13a Abs. 10 ErbStG, which increases the tax exemptions for inherited or donated business property from 85% to 100% if the taxpayer applies for this and certain conditions are met) without a non-fiscal reason generally does not lead to inappropriateness, because options provided in tax law are passed only for tax reasons. Inappropriateness may occur only if multiple tax options are used in a contrary way. Sometimes, the intended economic result can be achieved through several legal constructions, without one of them necessarily being inappropriate. The taxpayer can choose the most advantageous construction. If the taxpayer selects an appropriate construction, it is irrelevant whether an even more appropriate construction was available. For example, it is not inappropriate for married couples to specify in their last will that the longer-lived spouse will not be the heir of the spouse who dies first, but rather obtain a usufructuary right for the rest of their lives. This would mean a significantly lower inheritance tax for the longer-lived spouse if they only want to use the property until their own death and do not intend to sell it.

Tax benefits

For § 42 AO to be applicable, the inappropriate construction must lead to tax benefits for the taxpayer or a third party. In this context, tax benefits refer to the difference in taxation between two legal constructions, not only in terms of lower taxation but also a later timing for the tax collection. The question of whether a cross-border construction leads to tax benefits cannot be judged only from the perspective of one country; rather, the overall views of the affected countries are decisive. Furthermore, whether the tax benefit was intended by law must be evaluated, which is the case if the taxpayer uses legal tax options provided by legislators or if a certain behavior is encouraged through fiscal benefits. Some have even argued that lawmakers must clearly indicate whether a tax benefit for a certain design option is desired or tolerated. In some cases, lawmakers act in accordance with this argument and describe this requirement in the rule itself. However, in most cases, there is no explicit description in the rule, because the tax benefit is unintended and results from discontinuity in the tax law or a lack

of coordination. If the legislature's intention is unclear, some have argued that it must be clarified by investigating the historical development of the tax regulation and interpreting it in a teleological manner. If this still does not lead to a clear result, it has been argued that § 42 AO cannot be applied in favor of the taxpayer. Thus, the application of § 42 AO should no longer depend on the taxpayer's intention to commit abuse.

Consideration of non-fiscal reasons

Even if an inappropriate construction is assumed, the taxpayer always has an opportunity to exonerate themselves. There is no abuse of design options if the taxpayer can prove that they had considerable non-fiscal reasons for choosing a certain inappropriate construction. In this context, "considerable" does not mean that non-fiscal reasons must dominate because this requirement could be easily implemented in the law by legislators (argumentum e contrario). Conversely, not every non-fiscal reason can be considered a justification for inappropriate design options. Quantitatively speaking, "considerable" means perhaps 10–50% non-fiscal reasons. However, justification for a construction cannot be provided through numbers. The decisive factor is the content of the non-fiscal reasons, which must be evaluated according to the construction's overall circumstances. For instance, considerable non-fiscal reasons include

- avoidance or reduction of liability,
- personal and economic reasons, or
- legal, political, and religious reasons.

Legislators and the financial authorities take the position that an economic reason is missing if the main purpose of a foreign corporation is to protect a domestic corporation's property in times of crisis, facilitate a succession, or provide for the pension of shareholders. This position is criticized in the literature because the protection of property in times of crisis is one of the most reasonable economic purposes that property owners have. However, there is a consensus that the economic behavior itself cannot be investigated if it is appropriate because the financial authorities do not have the competence or capacity to investigate whether certain constructions make economic sense. Conversely, even a complete lack of considerable non-fiscal reasons is only an indication of an inappropriate construction, as the motivation to reduce taxes is legitimate. This motivation is often leveraged by the legislature when passing laws that have an incentive tax-saving effect if the taxpayer behaves in a certain way. Then, a construction cannot be regarded as abuse if it only makes economic sense by considering tax-saving effects or the only motivation for the construction is to reduce taxes.

Intentional abuse

There are different opinions in the literature and the jurisprudence regarding whether the application of § 42 AO requires that an inappropriate tax scheme was chosen by the taxpayer with the explicit intention of circumventing the law. One side argues that the taxpayer's intention (fraudem legis) is necessary. Then, the intention of abuse must be separately examined for each affected tax type while considering the legislators' intention. If the taxpayer does not have any reasonable explanation for an inappropriate construction, abuse can be assumed. In contrast to this opinion, some believe that a separately determined intention to circumvent the law is not necessary for the application of § 42 AO. The application of tax law is an objective matter and does not depend on subjective factors such as intention. These two different opinions only have a minor impact on practice because, if the objective conditions of § 42 AO are fulfilled, this usually means circumstantial evidence for intentional abuse on the part of the taxpayer. Thus, subjective criteria can be assumed in most cases. A different treatment of cases is conceivable if the taxpayer chooses a circumventing construction unintentionally or only because they are inexperienced or unadvised. Then, the two different opinions lead to different results.

Relationship between § 42 AO and special legislation (§ 13a ErbStG)

If the facts of a case fulfill the legal definition of a special abuse norm, the latter is primarily applicable. The legal consequences can then only be derived from this special abuse norm. Thus, the general abuse rule in § 42 AO can only be referred to if no special abuse rule is applicable to the case. In previous cases, the BFH decided that, even if the facts of a special abuse rule are not completely fulfilled, this rule can prevent the application of a general abuse rule. Lawmakers attempted to resolve this problem by changing the wording of § 42 AO in the last reform in 2008 to prevent a general shielding effect of special abuse rules in these cases.

The special abuse rule concretizes the circumstances of an inappropriate construction, so that inappropriateness cannot be judged in a opponent way regarding § 42 AO. It must be evaluated if tax law norms serve the avoidance of abuse and therefore can be regarded as special abuse norms under § 42 AO, by interpreting the norms. It is decisive in what context and systematical position the norm stands. Moreover, the concrete wording or historical development of the norm can be decisive. Individual judgment about whether a rule fulfills the requirements and can be regarded as a special abuse rule is not simple because this is not explicitly formulated in the norm itself.

The following two examples demonstrate the difficulty of a clear delineation. To reduce inheritance or gift tax paid on private property, it is

possible to transform the private property in advance of a donation or inheritance into business property. Then, the subsequent transfer of business property can be made largely tax-free (instead of a high tax on the transfer of private property). To prevent this construction, legislators amended the inheritance and gift tax law and sanctioned such constructions through § 13b Abs. 2 S.3 ErbStG a.F. This regulation was classified as a special abuse rule.

Through § 13a Abs. 3, Abs. 6, and Abs. 10 ErbStG, legislators sanctioned heirs or recipients who reduced the payroll of their companies or sold their companies within five or seven years after the transfer. This rule is not regarded as a special anti-abuse rule because the legislators' intention was to support and protect employment at the companies through a blocking period.

Legal consequences

The legal consequence of applying § 42 AO is that the illegal construction is taxed in the same way as it would have been if the taxpayer had chosen a comparable and appropriate legal construction. § 42 AO breaks the principle of § 38 AO by requiring that the real facts do not constitute the basis for the taxation. Therefore, § 42 AO either simulates fictitious appropriate facts for the taxation or maintains the real facts but requires taxation according to the circumvented tax regulation. The purpose of § 42 AO is to prevent tax benefits that were not intended by lawmakers. Each person who takes advantage of improper constructions is affected by legal consequences, even if the constructions were not implemented by the beneficiary. § 42 AO is effective only to the disadvantage of taxpayers. Only if the application of an improper construction leads to higher and lower taxes at the same time can this be summarized (§ 174 Abs. 1 AO). The tax must be paid even if a comparable economic result could be reached through another tax-free construction. The request for a tax decrease cannot be based on § 42 AO. If the construction is regarded as abuse, it is not at all relevant to the taxation, which means that all affected types of tax arise as if an appropriate construction had been chosen from the beginning. However, double taxation based on the real facts and the fictitious facts is not permitted. Taxes that were already paid for the inappropriate construction are counted and considered. All final tax assessments for previous years can be changed again (§§ 173 Abs. 1 AO or 175 Abs. 1 Nr. 2 AO). Apart from these results, § 42 AO has no further impact on civil law constructions. In particular, the contracts remain effective. Further consequences can only result from the interpretation of the contracts (§ 157 BGB), disruption of business fundamentals (§ 313 BGB), or claims for restitution (§ 812 Abs. 1 BGB).

Burden of proof

The tax authorities have the burden of proof to demonstrate that the chosen construction constitutes abuse. By contrast, the taxpayer can provide evidence of non-fiscal reasons for the chosen construction. This entails a two-step investigation process. If there are doubts regarding the abusive character of a construction, this is to the taxpayer's disadvantage. There is no general assumption that only unusual constructions are inappropriate. However, there is an assumption of an inappropriate construction if it is unusual and additional economic or non-fiscal reasons are lacking. Reasons for choosing a special construction can only be considered if the taxpayer informs the tax authorities of these reasons. If there is controversy about whether these reasons are substantial, a court must render a decision.

Conclusion

The anti-abuse provision of § 42 AO generally aims to prevent tax avoidance through inappropriate tax management. § 42 AO also applies without restriction to inheritance and gift taxation. However, the distinction between special statutory anti-abuse provisions in inheritance tax law is sometimes difficult. § 13a ErbStG, for example, provides for restrictions on tax relief for business assets if the transferred business reduces its wage bills or if the business is sold within a certain period after the transfer. These provisions were introduced to preserve jobs, and are not special anti-abuse provisions. Sometimes diversification advantages arise in inheritance tax law depending on the degree of kinship. But a marriage, for example, to avoid inheritance ta,x is no abuse of tax law. The application of § 42 AO in inheritance tax law is therefore limited to cases that are neither regulated by the law itself nor whose tax consequences arise from the law. The transfer of assets to a spouse in order to subsequently transfer them to the children to avoid gift tax may be such a case of § 42 AO.

Conflict of Interest: The author reported no conflict of interest.

Data Availability: All data are included in the content of the paper.

Funding Statement: The author did not obtain any funding for this research.

References:

1. Carle, Thomas: Die Anwendung des neugefassten § 42 AO aus Verwaltungssicht, in: Deutsche Steuer-Zeitung (2008), pp. 653ff.
2. Clausen, Uwe: Struktur und Rechtsfolgen des § 42 AO, in: Der Betrieb (2003), pp. 1589 ff.

3. Crezelius, Georg, Vom Missbrauch zum Misstrauen: Zur geplanten Änderung des § 42 AO, in: Der Betrieb (2007), pp. 1428 ff.
4. De Broe, Luc/Beckers, Dorien: The General Anti-Abuse Rule of the Anti-Tax Avoidance Directive: An Analysis Against the Wider Perspective of the European Court of Justice´s Case Law on Abuse of EU Law, EC Tax Review, (2017), pp. 133 ff.
5. Drüen, Klaus-Dieter: Tipke/Kruse: Kommentar zur Abgabenordnung und Finanzgerichtsordnung, Köln: Verlag Dr. Otto Schmidt (2019)
6. Freedman, Judith: Designing a General Anti-Abuse Rule: Striking a Balance, Asia-Pacific Tax Bulletin (2014), pp. 167 ff.
7. Füllbier, Andree: Wertpapierleihgeschäfte als Missbrauch von rechtlichen Gestaltungsmöglichkeiten i.S.d. § 42 AO? in: Betriebsberater (2012), https://online.ruw.de/suche/bb/Wertpapierleihgesch-als-Missb-von-rechtl-Gestaltun-f59fab728790c1f8c3dec742bb308c60 (Accessed on 5.4.2019).
8. Gerzog, Wendy, What´s wrong with a Federal Inheritance Tax, Real Property, Trust and Estate Law Journal (2014), pp. 163 ff.
9. Hahn, Hartmut, Wie effizient ist § 42 AO neuer Fassung, in Deutsche Steuer-Zeitung (2008), No.14, pp. 483 ff.
10. Heintzen, Markus: Die Neufassung des § 42 AO und ihre Bedeutung für grenzüberschreitende Gestaltungen, in: Finanz-Rundschau Ertragsteuerrecht (2013), pp. 599.ff
11. Hey, Johanna: Spezialgesetzgebung und Typologie zum Gestaltungsmissbrauch, in: Rainer Hüttermann (Ed.), Gestaltungsfreiheit und Gestaltungsmissbrauch im Steuerrecht, Bonn: Otto Schmidt (2010), pp. 139 ff.
12. Hübschmann, Walter/Ernst Hepp/Armin Spitaler: Kommentar zur Abgabenordnung und Finanzgerichtsordnung, Köln: Stotax (2019)
13. Leisner-Egensperger: Das Verbot der Steuerumgehung nach der Reform des § 42 AO, in: Deutsche Steuer-Zeitung (2008), pp. 358–365
14. Lenz, Christofer/Torsten Gerhard: Das Grundrecht auf steueroptimierende Gestaltung, in: Betriebs-Bberater, Vol. 62 2007), pp. 2429 ff.
15. Öner, Cihat, Comparative Analysis of the General Anti-Abuse Rule of the Anti-Tax Avoidance Directive: An Effective Tool to Tackle Tax Avoidance ?, EC Tax Review (2020), pp. 38 ff.
16. Pedersen, Jörgen/Steinar, Böyum, Inheritance and the Family, Journal of Applied Philosophy (2019), pp. 299 ff.
17. Schwarz, Bernhard/Armin Pahlke: Kommentar zur Abgabenordnung, München: C. H. Beck (2019)

18. Sieker, Susanne: Missbrauchsabwehr, in: Klaus Dieter Drüen/Johanna Hey/Rudolf Mellinghoff (Eds.), 100 Jahre Steuerrechtsprechung in Deutschland 1918-2018, Festschrift für den Bundesfinanzhof, München, C. H. Beck (2018), pp. 385 ff.
19. Vogel, Klaus: Künstlergesellschaften und Steuerumgehung, Steuer und Wirtschaft, Köln: Schmidt (1996), pp. 248 ff.
20. Wedelstädt von, Alexander: Die Änderungen der Abgabenordnung durch das Jahressteuergesetz 2008, in: Der Betrieb (2007), pp. 2558 ff.
21. Wendt, Michael: § 42 AO vor dem Hintergrund der Rechtsprechung, in: Rainer Hüttermann (Ed.), Gestaltungsfreiheit und Gestaltungsmissbrauch im Steuerrecht, Bonn: Otto Schmidt (2010), pp. 117 ff.
22. Wienbracke, Mike: Die Genese fiskalischen Misstrauens, in: Der Betrieb (2008), pp. 664 ff.