



Lund University

School of Economics and Management  
Department of Business Law

### **Cross-border taxation of employee stock options**

- Is the Swedish Supreme Administrative Court's ruling in case 1480-15 and 1483-15 regarding taxation of employee stock options supported by the case law provided by the European Court of Justice?

**By: Ida Olofsson**

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Name of the supervisor: Cécile Brokelind

Name of the examiner: Oskar Henkow

Author's contact information:

ida.anna.elisabeth.olofsson@hotmail.com

mobile: 0703-804663

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## **Abbreviation list**

ECJ	Court of Justice of the European Union
EEA	European Economic Area
ITA	Income Tax Act
OECD	Organisation for Economic Cooperation and development
P.	Page
Para	Paragraph
Prop	Proposition
TFEU	Treaty on the Functioning of the European Union

## Summary

The aim of this thesis is to present issues related to cross-border taxation of employee stock options and critically inquiring whether the Swedish Supreme Administrative Court's reasoning about comparable situations in the two rulings concerning taxation of stock options is supported by ECJ case law.

On 4<sup>th</sup> of November 2015, the Supreme Administrative Court in Sweden issued two rulings concerning taxation of foreign earned income from employee stock option and share programs that was earned before the employee moved to Sweden and became a Swedish tax resident, but was actually paid to the employee after that point. The Supreme Administrative Court found that taxation in Sweden of the foreign earned compensation was discriminatory and contrary to EU law, although the Swedish law granted a credit for foreign taxes levied abroad. The court ruled that the Swedish tax exemption rules were contrary to the free movement of workers in article 45 TFEU since the rules only granted exemption to individuals who were subject to unlimited tax liability in Sweden, which led to that non-resident taxpayers were treated worse than resident taxpayers. Hence, different rules were applied to comparable situations. Although the rulings were very welcomed and clarified that foreign earned employment income may be exempted under the Swedish domestic law, the rulings also created new legal questions with regards to equal taxation of residents and non-residents in the application of the Swedish exemption rules.

In the rulings the Swedish Tax Agency expressed concern about the comparability and stated that it is questionable whether the comparison that the court made is the most relevant for assessing whether the Swedish measure restricts the free movements of workers. Clearly, the Swedish tax agency and the Supreme Administrative court had different option with regards to what situations should be compared. However, neither the court nor the Swedish Tax Agency referred to a source of law to support their respectively comparison or explained why such comparison should be the most relevant comparison. It is therefore interesting to analyse in detail what situations the Swedish court compared, what reasons the court found to conclude that the situations are comparable and if EU law supports this comparability. Also, whether the difference in treatment can be neutralized by granting a credit for foreign taxes levied abroad and whether the courts rulings actually solved the issues related to the Swedish employee stock option rules and the timing mismatch in taxing employments benefits. Finally, whether the Swedish Supreme Administrative court interpretation of EU law is covered by the *acte éclairé* and *acte clair* doctrine, or whether the court should have asked for a preliminary ruling in the ECJ in order to ensure a uniform interpretation of EU law.

# 1. Introduction

## 1.1 Background

Direct taxation is not fully harmonized on the European Union level why Member States have sovereignty and exclusively competence for direct taxation. Because of their sovereignty they are free to decide which type of tax they levy and determine the taxable base as well as the tax rate in the area of direct taxation.<sup>1</sup> Member States must nonetheless exercise that competence consistently with EU law such as the fundamental freedoms, principles established by the treaties and ECJ case law and avoid any discrimination due to nationality.<sup>2</sup>

The taxation of benefits resulting from stock options differs in various EU Member States. Member States “generally tax the benefits resulting from employee stock options as income from employment either at (i) granting, (ii) vesting, (iii) exercising or (iv) the subsequent alienation of the shares acquired. Some jurisdictions may even tax employee stock options at more than one moment.”<sup>3</sup> Member States different country rules for taxing income from employee stock options may create cross-border double taxation. “Cross-border double taxation occurs when two different countries subject the same item of income or property to tax for the same period and in the hands of the same taxpayer”.<sup>4</sup> A taxpayer may for example be confronted with taxation in more than one jurisdiction when the taxpayer relocates his residence or place of work after having received stock options. There is no general EU measure to eliminate or mitigate double taxation. However, the Court of Justice of the European Union (ECJ) has ruled that in the absence of an EU-wide measure to relieve double taxation, EU Member States retain the power to define by double taxation treaty, or unilaterally, the criteria for allocating their power of taxation between them.<sup>5</sup> Hence, most EU Member States have entered into bilateral tax agreements with other jurisdiction to relieve double taxation when it occurs.<sup>6</sup>

Most Member States tax treaties follow Article 15 OECD Model Convention with respect to the taxation of employment income. Article 15 states that “salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable

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<sup>1</sup> Wolfgang, Schön, “Neutrality and Territoriality – Competing or Converging concepts in European Tax law?”

<sup>2</sup> C-270/83, *Commission v France* (“*Avoir Fiscal*”), para.13.

<sup>3</sup> Pötges, P.G Frank & Jakobsen, Marcel, “Cross-Border Taxation of Employee Stock Options:How to Improve the OECD Commentary-Part 1, International, 2007. P. 407.

<sup>4</sup>European Commission, [https://ec.europa.eu/taxation\\_customs/frequently-asked-questions/citizens-web-site-faq/double-taxation\\_en](https://ec.europa.eu/taxation_customs/frequently-asked-questions/citizens-web-site-faq/double-taxation_en).

<sup>5</sup> See for example cases; judgments in Gilly, C-336/96 and Gschwind, C-391/97.

<sup>6</sup>European Commission, [https://ec.europa.eu/taxation\\_customs/frequently-asked-questions/citizens-web-site-faq/double-taxation\\_en](https://ec.europa.eu/taxation_customs/frequently-asked-questions/citizens-web-site-faq/double-taxation_en).

only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State”.<sup>7</sup> Hence, the article allows both the resident state and the state where the employment is actually exercised, i.e. ”the place where the employee is physically present when performing the activities for which the employment income is paid”<sup>8</sup>, to tax the employment income. This is especially of relevance, for instance, when a taxpayer changes state of residence after the time the work is performed but before the income is made available to the income earner.

Different country rules for taxing employee stock options create particular problems. Especially since stock options are often taxed at a time that is very different from the time when the employment services are rendered. In a tax treaty context, deferred remuneration such as income from employee stock option emphasises the necessity of determining the time when the income is earned. When different countries tax the benefits at different times, this may result in the usual problem of relieving double taxation.<sup>9</sup> “The problem of relieving double taxation is partly addressed by the fact that the application of the relief of double taxation provisions of the OECD Model Convention is not restricted in time, i.e. relief must be given even if the State of residence taxes at a different time than the State of source.”<sup>10</sup>

The issues related to cross-border taxation of employee stock options can be illustrated by the following example: Employee A, who is resident in state C, worked one year in state Y. Part of the remuneration that A derived from his employment in State Y was stock options. Under State Y law, the employment benefit resulting from stock options is taxed when granted, i.e. employee A is taxed in year one on the value of the employee stock options when granted in state Y. In State C, the employment benefits resulting from stock options are taxed when the option is exercised. Employee A exercises the option in year 3, when he is taxed in State C. The condition in Article 15 for taxation by the source State (State Y) is that the income concerned is derived from the exercise of employment in that State. Hence, state Y can therefore tax the income in accordance with article 15. However, article 15 also allows the resident state (State C) to tax the income, even if part of the income is attributable to work aboard. Since State Y already taxed the same benefit two years earlier, how will relief from double taxation be granted? Could state C argue that State Y has taxed a different event and therefore deny relief?<sup>11</sup> And if relief is granted, how much relief must be given to neutralize the difference in treatment?

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<sup>7</sup> Article 15 OECD

<sup>8</sup> Commentary to article 15 OECD Model Convention, article 1.

<sup>9</sup> OECD “Cross-boarder income tax issues arising from employee stock-options plan”, p.6-7.

<sup>10</sup> OECD “Cross-boarder income tax issues arising from employee stock-options plan”, p.7.

<sup>11</sup> OECD “Cross-boarder income tax issues arising from employee stock-options plan”, p.6-7.

Consequently, the existence of the Member States different tax systems creates possibilities for cross-border activities on the one hand and complications on the other. It is, however, not in conflict with the Treaty on the Functioning of the European Union (TFEU) if the tax system of a Member State is more beneficial than the tax system of another.<sup>12</sup> “The different treatment constitutes discrimination if the tax system of a Member State, including tax treaties, subjects its own nationals and nationals of other Member States to a different treatment, with the effect that nationals of the other Member States are subject to a worse treatment”.<sup>13</sup> The ECJ has faced question concerning whether Member States domestic tax legislation is compatible with the fundamental freedoms found in the TFEU in more than two hundred decisions, excluding cases on indirect taxation or State aid. The wide-reaching judicature of the ECJ on the interaction between Member States domestic tax legislation and the fundamental shows the settled conflict between the concept of a closer integration of the Internal Market within the European Union, and on the other hand, the ongoing sovereignty of the Member States in the area of direct taxation.<sup>14</sup>

It is now almost 30 years since the ECJ in its judgment in *Avoir Fiscal*<sup>15</sup> ruled that the Member States' direct taxes could be assailed with the fundamentals freedoms. The court's landmark decision in the *Avoir Fiscal* case represented a turning point in the development of the ECJ's jurisprudence on the fundamental freedoms, as taxation had previously been thought to be comfortably outside their reach. Since then, the ECJ case law on the field of direct taxation has grown and the area of direct taxation in the EU looks today very different. The comparability of the national tax legislation with the fundamental freedoms is today one of the first issues checked by legal academics and practitioners in any cross-border tax case, and continues to be a powerful driver for changes to existing tax law in Member States and affects how the Member States choose to design new tax rules.<sup>16</sup> However, despite three decades of legal development, it is often difficult to determine whether the Member States national tax rules are compatible with the fundamental freedoms in TFEU.<sup>17</sup>

When assessing whether a national measure of a Member State are compatible with the fundamental freedoms, the ECJ has developed a consistent three-step methodology; a comparability test, a disadvantage test

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<sup>12</sup> Helminen, Marjiaana, "EU tax law-direct taxation-2015, online books", P.3

<sup>13</sup> Helminen, Marjiaana, "EU tax law-direct taxation-2015, online books", p.3.

<sup>14</sup> Wolfgang, Schön, "Neutrality and Territoriality – Competing or Converging concepts in European Tax law?", IBFD, 2015.

<sup>15</sup> C-270/83, *Commission v. France (Avoir Fiscal)*

<sup>16</sup> Werner, Haslehner "Avoir Fiscal and it's legacy after Thirty Years of Direct Tax Jurisprudence of the Court Of Justice", p.374.

<sup>17</sup> Johansson, Jesper "EU-domstolens restriktionsprövning i mål om de grundläggande friheterna och direkta skatter", p. 19.

and a justification test. Discrimination occurs if the rules of a Member States place a taxpayer in a cross border situation at a disadvantage compared to taxpayers in a different, but comparable, situation. Many of the problems with determining whether the rules of a Member States are compatible with the treaty freedoms relate to the comparability test.

On 4<sup>th</sup> of November 2015, the Supreme Administrative Court in Sweden issued two rulings concerning taxation of foreign earned income from employee stock option and share programs that was earned before the employee moved to Sweden and became a Swedish tax resident, but was actually paid to the employee after that point. The Supreme Administrative Court found that taxation in Sweden of the foreign earned compensation was discriminatory and contrary to EU law, although the Swedish law granted a credit for foreign taxes levied abroad. The court ruled that the Swedish tax exemption rules were contrary to the free movement of workers in article 45 TFEU since the rules only granted exemption to individuals who were subject to unlimited tax liability in Sweden, which led to that non-resident taxpayers were treated worse than resident taxpayers.<sup>18</sup>Hence, different rules were applied to comparable situations. Although the rulings were very welcomed and clarified that foreign earned employment income may be exempted under the Swedish domestic law, the rulings also created new legal questions with regards to equal taxation of residents and non-residents in the application of the Swedish exemption rules.

In the rulings the Swedish Tax Agency expressed concern about the comparability and stated that it is questionable whether the comparison that the court made is the most relevant for assessing whether the Swedish measure restricts the free movements of workers. Clearly, the Swedish tax agency and the Supreme Administrative court had different option with regards to what situations should be compared. However, neither the court nor the Swedish Tax Agency referred to a source of law to support their respectively comparison or explained why such comparison should be the most relevant comparison. It is therefore interesting to analyse in detail what situations the Swedish court compared, what reasons the court found to conclude that the situations are comparable and if EU law supports this comparability. Also, whether the difference in treatment can be neutralized by granting a credit for foreign taxes levied abroad and whether the courts rulings actually solved the issues related to the Swedish employee stock option rules and the timing mismatch in taxing employments benefits. Finally, whether the Swedish Supreme Administrative court interpretation of EU law is covered by the *acte éclairé* and *acte clair* doctrine, or whether the court should have asked for a preliminary ruling in the ECJ in order to ensure a uniform interpretation of EU law.

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<sup>18</sup> HFD 2015 ref 60.

## 1.2 Aim

The aim of this thesis is to present issues related to cross-border taxation of employee stock options and critically inquiring whether the Swedish Supreme Administrative Court's reasoning about comparable situations in the two rulings concerning taxation of stock options is supported by ECJ case law.

## 1.3 Method and material

For achieving the purpose of the thesis a traditional legal dogmatic research method will be used. The aim of this method is to determine the law as it stands today by national and international legislation, principles, case law and literature.<sup>19</sup> With regards to the aim of this thesis the relationship between Swedish domestic law and international EU Law will be analysed. Although, direct taxation falls within the competence of each Member State, the Member States must exercise that competence consistently with EU law and avoid any discrimination due to nationality.<sup>20</sup> Hence, in order to determine whether the Swedish Supreme Administrative Court's reasoning concerning comparable situations in the two rulings is supported by ECJ case law, it must be established what constitute objective comparable situations in international law. As regards to international law, the most relevant legal source of law that will be used is primary Union law and ECJ case law. Since the concept of comparable situations has been established in ECJ case law the analysis of this thesis will focus on the ECJ case law as source of law.

As the thesis is intending to make an analysis from the perspective of Swedish law, the Swedish internal legislation and case law will be presented to determine the legal position in Sweden regarding taxation of resident and non-resident taxpayers and taxation of employee stock options.

Since this thesis concerns taxation of individuals who moves cross borders to work there is typically a situation of international double taxation, both the source and the residence state levy tax on the same income. To eliminate double taxation many jurisdiction have entered into bilateral tax agreements with other jurisdiction to avoid or mitigate double taxation. Double tax treaties between Member States usually follow the OECD model convention. Therefore, the OECD model convention and soft law such as the Commentary and relevant reports from the OECD will also be used in this thesis as guidance. In addition, reference to the relevant existing academic literature will be made.

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<sup>19</sup> Duma.S, "Legal Research in nternational and Eu tax Law", Kluwer, 2014, p.18.

<sup>20</sup> C-270/83, *Commission v France ("Avoir Fiscal")*, para 13. Duma.S, "Legal Research in nternational and Eu tax Law", Kluwer, 2014, p.18.

## 1.4 Delimitation

This thesis mainly concerns discriminatory treatment and the concept of discrimination with regards to EU law in direct tax matters. The question as to whether the discrimination can be justify and if so, on what ground, will not be addressed if it is not relevant for the inquiry on equal treatment or comparability. This thesis focuses on the comparability test and only the basic elements of the disadvantage test will be presented.

The two cases from the Swedish Supreme Administrative court at issue concerns taxation of employee stock option and share programs in the hands of the taxpayers. This thesis does not deal with social security issues related to stock options.

## 1.5 Outline

The thesis is divided into the following chapters: *Chapter 2* is presenting an overview of the Swedish national law with regards to taxation of non-resident and resident taxpayers, tax exemption rules and the Swedish employee stock option rules. In *Chapter 3*, two rulings from the Swedish Supreme Administrative court concerning taxation of employee stock options will be presented. The chapter will end with some general comments with regards the outcome of the rulings and the courts reasoning about comparable situations. Also, new legal questions which has aroused as a consequence of the rulings will be presented and analysed in short. *Chapter 4* is presenting the principle of non-discrimination and the basic steps used by the ECJ when determine whether a national measure constitutes prohibited discrimination. The chapter will end with a presentation of some ECJ case law with regards to comparable situations. The chapter aims at presenting what situations ECJ compares, what constitute comparable situation, how is it determined and what impact has the national measure at issue. *Chapter 5* is analysing the issues related to cross-border taxation in light of the Swedish Supreme Administrative rulings. The court's reasoning concerning comparable situation will also be critically analysed in relation to ECJ case law. This is followed by a final conclusion in *Chapter 6*.

## 2 Swedish law

### 2.1 Introduction

This chapter provides an overview of the Swedish national laws for the taxation of resident and non-resident taxpayers. In addition to the presentation of the Swedish law, international established principles with regards to resident and source taxation will be presented. This chapter focuses on examine the aim and the purpose of the Swedish six-month rule and the one-rule as well as the Swedish employee stock option rules. Hence, the current law as it stands to today as well as the history and the development of the law will be presented and analysed. The chapter also explains how the Swedish tax system deals with Swedish residents employed abroad, non-residents employed in Sweden, as well as foreign expatriates and presents issues that arise in these situations with regards to the Swedish stock option rules and the timing mismatch in taxing employment benefits.

### 2.2 The residence principle and source principle

One basic principle of international tax law is the distinction between resident taxation (unlimited tax liability; world wide taxation) and source taxation (limited tax liability; territoriality taxation). The ide of worldwide taxation is that a person who is resident or established in one state is benefiting from social, economic, cultural and physical infrastructure and public expenditure of that state and also typically deriving most of there income from that state, why the persons should contribute in accordance to their ability to pay.<sup>21</sup> A resident person should therefore be taxed on its worldwide income in the jurisdiction of residence. By contrast, source taxation is applied to non-residents. Source taxation is based on the ide that the state offering the “economic opportunity to earn income should have the prior right to tax the income, wherever the beneficiary may reside”.<sup>22</sup> An other factor by limiting taxation of non-residents to their sourced income, is that the “source of income is the only connecting factor for recovery of the tax to be paid by non-residents, as no residence state will allow extraterritorial enforcement in it’s territory by the source state, and the source state cannot easily gather the information necessary for assessing non residents on their worldwide income”.<sup>23</sup>

Accordingly, “the resident taxation focuses on the person of the taxpayer and his overall ability to pay, whereas source taxation focuses on the fact that the income is generated within a certain territory”.<sup>24</sup> If both approaches

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<sup>21</sup> Terra/Wattel, ”*European Tax law*”, 2008, p. 716.

<sup>22</sup> Terra/Wattel, ”*European Tax law*”, 2008, p. 716.

<sup>23</sup> Terra/Wattel, ”*European Tax law*”, 2008, p. 716.

<sup>24</sup> Terra/Wattel, ”*European Tax law*”, 2008, p. 716.

is applied simultaneously international double taxation will arise, i.e. the foreign sourced income is taxed twice in the hand of the same person. Thus, established international tax law therefore distinguishes between foreign sourced income and domestic sourced income. A general rule is that the taxing right is allocated between the states so that the prior right to tax the sourced income within one jurisdiction to that jurisdiction, requiring the home state of the taxpayer to provide relief to eliminate or mitigate double taxation on the foreign sourced income, “either unilaterally or on the basis of bilateral tax treaty, either exempting the foreign sourced income or crediting the foreign tax against the domestic tax on worldwide income”<sup>25</sup>

### **2.3 Limited and unlimited tax liability**

In accordance with the basic principle of international tax law, Swedish law distinguishes between taxation of residents and non-residents. A person who is tax resident in Sweden is subject to unlimited tax liability in Sweden, i.e. liable to tax all income in Sweden and abroad.<sup>26</sup> A non-resident individual is subject to limited tax liability in Sweden and is only payable on the fact that the source of income is linked to Sweden, why only such income is subject to Swedish taxation.<sup>27</sup> Limited tax liability is negative defined in the Swedish Income tax Act and covers all who are not subject to unlimited tax liability in Sweden.<sup>28</sup>

There are three categories of individuals who are subject to unlimited tax liability in Sweden: individuals who are resident in Sweden, have their habitual abode in Sweden or have substantial connecting links to Sweden and were previously residing in Sweden.<sup>29</sup> The term substantial connecting link is defined in the Swedish ITA in an open-ended list of ten criteria which illustrates the conditions.<sup>30</sup> There is extensive case law on these criteria's, and though case laws it has been established that certain circumstances and criteria's are significant in establishing a substantial connecting link to Sweden: a permanent home in Sweden, family in Sweden or business activities conducted in Sweden.<sup>31</sup> To be considered to have a habitual abode in Sweden a stay of at least six months is required. For there to be a habitual abode one have to spend the night in Sweden. The period of stay is calculated without taking account of the turn of the year and temporary interruptions to the stay in Sweden are irrelevant.

### **2.4 Tax exemption of foreign income**

Swedish law includes two provisions for tax exemption for individuals on

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<sup>25</sup> Terra/Wattel, ”*European Tax law*”, 2008, p. 717.

<sup>26</sup> 3:8. Income tax Act.

<sup>27</sup> 3:18 1 st. 1-2 p. Income tax Act.

<sup>28</sup> 3:17 Income tax Act.

<sup>29</sup> 3:3. Income tax Act.

<sup>30</sup> 3:7. Income tax Act.

<sup>31</sup> HFD 2013 ref 4. and RÅ 2003 ref. 52.

employment income earned abroad, the so-called six-month rule and one-year rule. If the conditions for the six-month rule and the one-year rule are fulfilled, the foreign employment income of such an individual will be tax exempt in Sweden. The exemption from tax liability also covers benefits which the employees receives during the employment abroad,<sup>32</sup> such as bonus, employee stock options<sup>33</sup> and other retroactive payments.<sup>34</sup> Both rules only apply if the individual is subject to unlimited tax liability in Sweden during the stay abroad. Also, in order for the six-month rule to be applicable, the stay in the other country must last for at least six months and the individual cannot spend more than six days per month, or a maximum of 72 days per 12-month period, in Sweden. The employment income earned abroad must also be subject to tax in the other state and the tax exemption only applies to income earned in one foreign country.<sup>35</sup> The rule does not apply if the income has been taxed in the country of employment in breach of the national law or the applicable tax treaty. The one-year rule applies if an individual stay abroad for one year or more, even if the income is tax exempt in the country of employment. Although, the one-year rule requires that the ground for tax exemption in the country of employment is based on national law and not the result of a tax treaty application.<sup>36</sup>

The one-year rule was introduced in the Swedish Income Act before the six-month rule, and the main purpose of the introduction was to prevent that the taxpayer was subject to double taxation on employment income derived abroad, since tax treaties were at that time not as common as today. Another aim was to simplify the tax assessment by already in internal law eliminate double taxation which meant a lighter workload for the Swedish Tax Agency. The individual would also be given the opportunity to review their tax situation in Sweden for work abroad and be able to foresee possible tax consequences in advance.<sup>37</sup> At the time when the six-month rule was introduced the number of tax treaties and the use of foreign tax credit rules had increased significant, why the risk of double taxation was not considered a reason to introduce a tax exemption rule. However, in the preparatory work it was stated that the tax exemption rule was essential to strengthen the Swedish companies international competitiveness since the tax exemption rule did not only constituted a benefit for the employee, but also meant a reduction in salary costs for Swedish companies operating abroad.<sup>38</sup> This is especially important with regards to that Sweden has one of the highest tax rates on personal income in the world. Consequently, in a situation when the six-month rule or one-year rule is not be applicable, the

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<sup>32</sup> Prop. 1989/90:110, p. 684.

<sup>33</sup> RÅ 2004 ref. 50.

<sup>34</sup> Prop.1984/85:175 p. 14.

<sup>35</sup> 3:9 1<sup>st</sup>. Income tax act.

<sup>36</sup> 3:9 2st. Income tax act.

<sup>37</sup> Prop. 1966:127 p.50 and Prop.1984/85:175, p.15.

<sup>38</sup> Prop. 1984/85:175, p. 15 and prop. 1989/90:110 del 1 p. 385.

tax treaty between Sweden and the country at issue will be applied to eliminate double taxation, provided that there is a tax treaty between the countries. The use of internal legislation to eliminate double taxation, i.e. the six-month rule and the one-year rule, makes it however easier for the tax authorities and the taxpayer with regards to both workload and predictability.

## **2.5 Stock options**

Incentive program is a single expression for employee stock option plans and other plans involving financial instruments, pension schemes, profit sharing and so called “competence-accounts”.<sup>39</sup> The general aim of these programmes is to recruit, motivate and reward highly valued employees and to tie them to the company.<sup>40</sup> In principle, these programmes signify that the employee exchanges salary to a future reward, which is dependent on the nature and conditions of the programme at issue.<sup>41</sup> The use of incentive programmes has grown steadily in Sweden over recent years<sup>42</sup> and one of the most common used programs today is the employee stock option plan.<sup>43</sup>

Stock options are normally granted to employees of a company and offer the options holder the right to buy a certain amount of company shares at a predetermined fixed price (strike price) for specific period of time.<sup>44</sup> Unlike regular options, which would be classified as securities, employee stock options are restricted by means of limitations in terms of, for example, that the employee’s must normally wait for a specified vesting period to pass before they can exercise the option and buy the company stock and they often lapse if the employment is terminated. Employee stock option also differs from other regular options and securities since they cannot trade in a secondary market and are generally non-transferable.<sup>45</sup> The idea behind the limitations is, as mentioned above, to align incentives between the employees and shareholders of the company. The shareholders want to see the stock price increase and by rewarding the employees as the stock price increases over time, guarantees that both the employee and the shareholders have the same goals in mind.

### **2.5.1 Time of taxation**

Taxation of income from an incentive program is typically a question about when the income is to be taxed and the classification of the type of income, since these factors effect how much tax that will be levied. As mentioned above, employee stock options are considered as a taxable benefit, which is

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<sup>39</sup> Maria Hilling, “taxation of workers”.

<sup>40</sup> Skatteverket, “*incitamentsprogram*”.

<sup>41</sup> Silfverberg, “*Några aspekter på kontantprincipens tillämpning på tjänsteinkomster*”, SN 2007 p. 596.

<sup>42</sup> Svenskt Näringsliv, promemoria ”Marknadsmisbrukslagstiftningen och aktierelaterade incitaments.

<sup>43</sup> Skatteverket, “*incitamentsprogram*”.

<sup>44</sup> 44:11 Income tax act.

<sup>45</sup> Skatteverket, “*incitamentsprogram*”.

taxed in the category of employment income and the taxation is progressive. The main rule under the Swedish tax system is that income from employment is taxable on cash basis. It implies that income is taxable when it is disposable.<sup>46</sup> Thus, national tax legislation is applicable on any payment made to an individual while a resident of Sweden and no adjustments are made on the grounds that the income may have been earned while the individual was regarded a non-resident.<sup>47</sup>

The time of taxation for employees stock options is however an exemption from the main rule. Employee stock options are not taxed when granted, i.e. when the employee is assigned to the options. Taxation occurs the day when the options are exercised and converted into shares, i.e. the day the employee can exercise the option and buy the company stock.<sup>48</sup> In situations in which an employee is offered the opportunity to purchase financial instruments at a price below market value, i.e. the strike price, the difference between the offered price and the market price on that day will define the value on which the employee has to pay income tax and the company has to pay social security contributions.<sup>49</sup> Therefore, if an EU national moves to Sweden and exercises the options, the time of taxation will occur when the individual is resident in Sweden, why Sweden has the right to tax the whole income, regardless of the fact that the income is earned in an other country.

### **2.5.2 History behind the Swedish employee stock option rules**

The current Swedish stock option rules came in to force in January 2009 and are stated in chapter 10-paragraph 11-second subsection ITA. The rules were created because the former rules were considered incompatible with EU law and considered to violate the free movements. The major difference between the current and the former employee stock option provision is the time of taxation when an option holder moves in or out of Sweden. The former provisions meant that an individual in possession of employee stock options when moving out of Sweden is taxed on departure as if the person exercised his option, provided that the options were vested at the time the employee left Sweden.<sup>50</sup> Hence, the individual had to pay tax on an unrealized benefit; so called exit-taxation. The purpose of the exit taxation was to ensure that options earned in Sweden also were taxed in Sweden in case the taxpayer left Sweden, i.e. to prevent tax avoidance.<sup>51</sup>

Exit tax-type provisions included in the tax systems of EU Member States, such as the former Swedish stock option rule, have been very questionable from the perspective of the right of EU nationals to leave a country since

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<sup>46</sup> 10:8 Income tax Act

<sup>47</sup> Hilling Maria, "taxation of workers in Sweden" and Kammarrättens dom mål nr 5579-10.

<sup>48</sup> Skatteverket "incitamentsprogram" 10:11 2st income tax act

<sup>49</sup> 10:11 Income tax act

<sup>50</sup> 11:16 2st income tax act (old provision)

<sup>51</sup> Prop. 2007/08:152, p. 20 ff.

these provisions typically restrict a person from crossing the border and exercise the freedom of free movement.<sup>52</sup> For this reason, the Swedish exit taxation was abolished in 2009 due to that similar exit tax provisions in other Member States had been rejected by the ECJ in cases such as *Lasteyrie du Saillant*<sup>53</sup> and *N*<sup>54</sup>. The argument put forward was that workers who performed work in Sweden and received stock options would possibly refrain from moving out of the country, as this would result in taxation of a not yet realized income.<sup>55</sup> The Swedish Tax Authority's opinion concerning exit taxation has also been established in a ruling from the Swedish Administrative Court of appeal and therefore new legislation was needed.<sup>56</sup>

In the preparatory works to the new legislation presented by the Swedish government, the legislator found that the removal of the exit tax could result in double taxation or double non-taxation, why they had to modify the scope of the rules concerning tax liability of employment benefits attributable to stock options.<sup>57</sup> Two different methods for the new legislation were discussed and analysed; the proportion method (allocation method) and the method of extended tax liability. The method that the legislator chose to introduce and that is now applicable is the method of extended tax liability. Their arguments were that this method was the most suited for the purpose of the legislation and the best way to prevent tax avoidance.<sup>58</sup> However, many experts expressed that they preferred the proportion method since this method is accepted internationally. They were of the opinion that a proportion method would increase the harmonization of different countries tax systems, which would enhance the predictability and facilitate the free movement and efficiency of the European Union's internal market.<sup>59</sup>

Extended tax liability means that national tax legislation is applicable on any payment made to an individual while resident in Sweden and that no adjustments are made on the grounds that the income may have been earned while the individual was regarded a non-resident. This approach differs from the OECD Model Convention which is based on the proportionality principle, i.e. that the benefit shall be taxed in the state which the stock option benefit is derived from and that the taxing right should be calculated in proportion of the number of days during which employment has been exercised in that country to the total number of days during which the employment services from which the stock option is derived has been

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<sup>52</sup> Marjaana Helminen, "EU tax law – direct taxation – 2015 – online books", p.7.

<sup>53</sup> C-9/02, *Lasteyrie du Saillant*

<sup>54</sup> C-470/04, *N*

<sup>55</sup> Prop. 2007/08:152, p. 21.

<sup>56</sup> Kammarrättens dom mÅlnr 5579-10.

<sup>57</sup> Proposition 2007/08:152 p. 24.

<sup>58</sup> Proposition 2007/08:152 p. 27.

<sup>59</sup> FARs remissyttrande s 2-3, NSDs remissyttrande s 3, Lindberg Lillon och Horvath Alexander, Exitskatten på personaloptioner, Skattemytt nr 4 2007.

exercised.<sup>60</sup>

The fact that the employee stock option benefits are taxed at different times in different countries is a clear source of difficulties. Especially since stock options are often taxed at a time that is very different from the time when the employment services are rendered. Clearly, where different countries tax the benefits at different times, i.e. when the option is granted, when the option vests or when the option is exercised, this may result in the usual problem of relieving double taxation.<sup>61</sup> “The problem of relieving double taxation is partly addressed by the fact that the application of the relief of double taxation provisions of the OECD Model Convention is not restricted in time, i.e. relief must be given even if the State of residence taxes at a different time than the State of source”.<sup>62</sup> To eliminate or mitigate double taxation many jurisdictions have entered into bilateral tax agreements with other jurisdiction. Tax treaties stated in line with the OECD Model Convention, the proportion method is used when allocating the taxing right between the states. When moving to a country where the tax treaty includes the credit method to allocate the taxing power between the states, the use of extended tax liability will result in an overall higher tax burden for the individual than when a proportion method is used directly in national legislation. Even if the State of residence agrees to give a credit, it will usually restrict the credit to the amount of domestic tax levied on the same income (ordinary credit), which will typically result in an overall higher tax burden for the individual than when a proportion method is used directly in national legislation.<sup>63</sup>

## 2.6 Summary

Even though many experts expressed a concern that the new employee stock option rules might be contrary to the free movements of workers the Swedish government chose to stipulate the law in line with the principle of extended tax liability.<sup>64</sup> The Swedish government dismissed the concern by explaining that non-resident and resident individuals are not in a comparable situation.<sup>65</sup>

After the Swedish Supreme Administrative court’s ruling, presented in the next chapter, it is now established that taxation in Sweden of foreign earned income through employee stock options is discriminatory and contrary to EU law and the free movement of workers since the Swedish national law applies different rules to comparable situations which leads to that non-

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<sup>60</sup> OECD Commentarty 12.1 to Article 15 and OECD “Cross-border income tax issues arising from employee stock-options plan”, p.14-15.

<sup>61</sup> OECD, “Cross-border income tax issues arising from employee stock-options plan”, 2004, p.6-7.

<sup>62</sup> OECD, “Cross-border income tax issues arising from employee stock-options plan”, 2004, p.7.

<sup>63</sup> OECD, “Cross-border income tax issues arising from employee stock-options plan”, 2004, p.6-7.

<sup>64</sup> prop. 2007/08:152 p. 28 and NSDs remissyttrande p. 2.

<sup>65</sup> prop. 2007/08:152 p. 28 and NSDs remissyttrande p. 2.

residents are treated worse than resident taxpayers. Hence, it could be argued that the experts concern regarding the Swedish stock options rules should have been taken into account more seriously. It could also be questionable whether the discriminatory treatment was due to the application of the six-month and the one-year rule, which the Swedish court ruled, or if it is due to the framing of the Swedish employee stock options rules, or due the application of both rules simultaneously. In the case from the Supreme Administrative court, the court ruled that the Swedish tax exemption rules were contrary the freedom of movement for workers in article 45 TFEU since the rules only granted tax exemption to individuals who were subject to unlimited tax liability in Sweden, although Swedish law granted a credit for foreign taxes levied in France and Japan respectively. However, as shown in this chapter the timing mismatches when taxing employment benefits in different countries lead as a fact to the same result. Since the Swedish stock option rules are stipulated in line with the method of extended tax liability and not in line with the proportionality method, individuals moving to Sweden are liable to tax the income from employee stock options attributable to work preformed in both Sweden and abroad. Hence, if an EU national moves to Sweden and exercises the options, the time of taxation according to Swedish law will occur when the individual is resident in Sweden, why Sweden has the right to tax the whole income, regardless of the fact that the income is earned in an other country. However, the income will usually also be taxed in the country where the income is derived, i.e. the country where the employment is actually exercised. To relieve the double taxation that will occur in this situation the residence state (Sweden) will typically grant a credit for foreign taxes levied abroad. However, the state of residence usually agrees to give a credit which is equal to the amount of domestic tax levied on the same income, which will typically result in an overall higher tax burden for the individual than when a proportion method is used directly in national legislation.

### **3 Supreme Administrative Court, case 1480-15 and 1483-15**

#### **3.1 Introduction**

In the following chapter the two rulings from the Swedish Supreme Administrative court will be presented. The cases concerns taxation of foreign earned equity based compensation that was earned before the employee moved to Sweden and became a Swedish tax resident, but was actually paid to the employee after that point. The Court found that taxation in Sweden of the foreign earned compensation was discriminatory and contrary to EU law and the free movement of workers since the Swedish national law applied different rules to comparable situations, which led to that non-residents was treated worse than resident taxpayers.<sup>66</sup> Since both cases are similar in facts, circumstance and the courts decision, they will be presented together. The chapter will end with some general comments with regards the outcome of the rulings and the courts reasoning about comparable situations. Also, new legal questions which has aroused as a consequence of the rulings will be presented and analysed in short.<sup>67</sup>

#### **3.2 Facts and legal issue**

The two rulings from the Supreme Administrative court in Sweden concerns two advance rulings from the Board on Advance Tax Rulings that had been appealed to the court. Both cases concern French nationals who had moved to Sweden in the course of their employments and in connection to their relocation to Sweden they became Swedish tax residents. A person who is tax resident in Sweden is according to Swedish national legislation subject to unlimited tax liability in Sweden, i.e. liable to tax all income in Sweden and abroad.<sup>68</sup> Prior to the transfers to Sweden the individuals had worked as employees in France and in Japan respectively. Both employees participated in employee stock option and/or share programs and the vesting periods had been fully or partly fulfilled during their employment abroad, i.e. before they moved to Sweden. The stock option and share programs were taxable in Japan and in France on a pro rata basis. The French individuals wanted know whether the employee stock option and share programmes, attributable to work preformed abroad, will be taxed in Sweden if their options are exercised after moving to Sweden.

According to Swedish law, taxation of employee stock options occurs the day when the options are exercised and converted into shares, i.e. the day the employee can exercise the option and buy the company stock.<sup>69</sup> However, under Swedish domestic tax law, foreign earned employment

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<sup>66</sup> HFD 2015 ref 60.

<sup>67</sup> Stenbeck, Per & Hamnered,Mailn, ”Rättsfallskommentar – begränsning av svensk beskattning av förmåner intjänade utomlands skapar möjligheter för företag med utsändningar till Sverige”, Skattentytt 2016 p. 998.

<sup>68</sup> 3:8. Income tax Act.

<sup>69</sup> Skatteverket, ”incitamentsprogram” and 10:11 2st income tax act.

income may be tax exempt under the so-called six months or the one-year rules if certain conditions are fulfilled.<sup>70</sup> The exemption from tax liability also covers benefits which the employees receives during the employment abroad,<sup>71</sup> such as bonus, employee stock options<sup>72</sup> and other retroactive payments.<sup>73</sup> Both rules only apply if the individual is subject to unlimited tax liability in Sweden during the stay abroad.

Since the French employees concerned had not been Swedish residents before they relocated to Sweden, i.e. not subject to unlimited tax liability, they could not benefit from the tax exemption rules. Hence, the foreign earned equity based compensation was subject to taxation in both the source state (territoriality taxation) and in the resident state (world-wide taxation) under the domestic law in both countries.<sup>74</sup> Under the applicable double tax treaties, which were stated in line with the OECD Model Convention, the source state had the right to tax income received under the programs based on the period of employment in these countries.<sup>75</sup> However, at the point of taxation the residency of the individuals had shifted to Sweden, why Sweden had the right to tax the individuals' worldwide income, including the foreign earned equity based compensation. Accordingly, Sweden claimed to tax the entire income at that point, granting a credit for foreign taxes levied in France and Japan respectively.<sup>76</sup>

The legal question in the two cases were whether the Swedish exemption rules, the so called six-month rule and the one-year rule, were contrary to EU law and the free movement of workers in article 45 TFEU since the rules only granted exemption to individuals who were subject to unlimited tax liability in Sweden.

### **3.3 Court's decision**

The Supreme Administrative Court referred to Article 45 TFEU, which concerns the free movement for workers within the EU. The freedom prohibits any discrimination based on nationality of workers of a member state. This includes remuneration, employment and other conditions of work and employment. The free movement of workers grants that national workers of one Member State shall enjoy, in the territory of another members State, the same benefits as nationals working in that state.<sup>77</sup> The freedom prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other

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<sup>70</sup> 3:9 1-2 subsection Income Tax Act.

<sup>71</sup> Prop. 1989/90:110, p. 684.

<sup>72</sup> RÅ 2004 ref. 50.

<sup>73</sup> Prop.1984/85:175 p. 14.

<sup>74</sup> HFD 2015 ref 60.

<sup>75</sup> Article 15 OECD.

<sup>76</sup> HFD 2015 ref 60.

<sup>77</sup> Lang, Pistone, Schuch, and Staringer, *Introduction to European Tax Law: Direct Taxation*, p. 48-49.

criteria of differentiation, lead in fact to the same result.<sup>78</sup> The court stated that such covert discrimination would typically be at hand, if a national tax measure makes a distinction between two categories of taxpayers which are in a comparable situation that generally disfavours nationals of other EU member states, as compared to the states own citizens.<sup>79</sup> The court continued to explain that a Swedish national who takes up employment abroad will often remain a Swedish tax resident and subject to unlimited tax liability and so be able to benefit from the exemption rules. Since the French individuals in the relevant cases were not Swedish tax residents while they were working abroad, the exemption rules were not applicable. The court stated that such difference in treatment may be assumed to disfavour foreign citizens, since they as a rule are Swedish non-residents before moving to Sweden. The court concluded that levying Swedish taxes on the foreign source earned income in these cases would be a discriminatory measure which is prohibited under Article 45 TFEU and cannot be justified, without any further explanation. Accordingly, the income is not to be taxed in Sweden.

The Supreme Administrative Court did not refer to any specific justification ground that could justify the Swedish measure. The Board on Advance Tax Rulings did however state that the difference in treatment of residents and non-residents can not be compensated by granting a credit for foreign taxes levied in France and Japan since the income paid to residents is tax exempt in Sweden regardless if the income is taxed in the other state.<sup>80</sup> The difference in treatment could neither be justified by the need to maintain a balanced allocation of taxing rights between the Member States or the cohesion of the tax system since Sweden can not be regarded as having any legitimate tax claims on income earned by a foreign national, who had no ties to Sweden, during his work in another country.

### **3.4 Summary**

Different tax treatment of residents and non-residents is not acceptable in regard to such matters in relation to which a resident and a non-resident are from an objective perspective in a comparable situation. In the two rulings from the Supreme Administrative Court, the court ruled that non-residents and residents who receive foreign earned income from employee stock option and/or share programs are in comparable situations. In the rulings the court made a comparison with the situation of the French nationals and a person who is resident in Sweden and takes employment abroad for a period of time and then comes back to Sweden. However, the Swedish tax Agency claimed that the comparison shall be made between an Swedish national who moves abroad to work and thus becomes subject to limited tax liability

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<sup>78</sup> Schumacker para. 26.

<sup>79</sup> Schumacker para. 30.

<sup>80</sup> C-540/07, para. 36–37.

in Sweden. In a situation like this, the taxpayer does not meet the conditions for the application of neither the six-month or one-year rule. The same applies to a person residing in another Member State and who receives income that was earned before the employee moved to Sweden and became a Swedish tax resident, but was paid to the employee after that point. The two situations are thus treated equally. The Tax Agency expressed that it is questionable whether the comparison that the Board on Advance Tax Rulings and the Supreme Administrative court made is the most relevant for assessing whether the Swedish measure restricts the free movement of workers. Clearly, the Swedish tax agency and the Supreme Administrative court had different option with regards to what situations should be compared. However, neither the court nor the Swedish tax agency referred to a source of law to support their respectively comparison or explained why such comparison should be the most relevant comparison. It is therefore interesting to analyse in detail what situations the Swedish court compared, what reasons the court found to conclude that the situations are comparable and if EU law supports this comparability. However, in order to make this analysis it must first be established what constitute objective comparable situations in international law.

After the court's ruling, it is now established that EU nationals who receives foreign earned compensation may benefit from tax exemptions under the six-month rule and the one-year rule. However, it is still unclear whether Swedish nationals who moves abroad and becomes subject to limited tax liability can benefit from the exemption rules. It should also be noted that the court made no difference in their reasoning in the two cases at issue, although the income which was scrutinized was earned in a Member State, France and in a third country, Japan. Despite this significant difference the Swedish Supreme Administrative court assessed the cases basically the same. The Court's argument for making this assessment is that the court believes that the use of the free movement takes place when the French citizens are moving to Sweden. Thereby the court is avoiding a more complex assessment of the EU's internal and external situations.

## 4 EU law

### 4.1 Introduction

Direct taxation falls within the competence of each Member State and because of their sovereignty they are free to decide which type of tax they levy and determine the taxable base as well as the tax rate in the area of direct taxation.<sup>81</sup> Member states must nonetheless exercise that competence consistently with EU law and avoid any discrimination due to nationality.<sup>82</sup> Rules regarding equal treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.<sup>83</sup> EU law consist of a general non-discrimination provision,<sup>84</sup> a provision of free movement and residents,<sup>85</sup> and five fundamental freedoms; freedom of establishment,<sup>86</sup> the freedom to provide services<sup>87</sup> and the free movement of goods,<sup>88</sup> workers<sup>89</sup> and capital.<sup>90</sup> These freedoms are directly applicable in the internal market within the European Union and any national legislation of a Member State that infringes the fundamental freedoms is prohibited.<sup>91</sup> Discrimination prohibited by the TFEU can arise only through the application of different rules to comparable situations or the application of the same rule to different situations, with the consequence that one of the nationals is subject to a worse treatment.<sup>92</sup> In many cases, however, it is very difficult to determine as to when, for example, taxpayers who are residents of two different Member States are in a comparable situation. In the following chapter the principle of non-discrimination will be presented. The basic steps used by the ECJ, when determine whether a national measure constitutes prohibited discrimination will also be presented. The chapter will end with a presentation of some ECJ case law with regards to comparable situations. The presentation aims at determining what situations ECJ compares, what constitute comparable situation, how is it determined and what impact has the national measure at issue.

### 4.2 Concept of discrimination

The concept of discrimination used by the ECJ is based on the Aristotelian concept of equality witch states that “things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to

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<sup>81</sup> Wolfgang, Schön, “Neutrality and Territoriality – Competing or Converging concepts in European Tax law?”

<sup>82</sup> C-270/83, *Commission v France* (“*Avoir Fiscal*”), para.13.

<sup>83</sup> Case C-279/93 *Schumacker* para. 26.

<sup>84</sup> Article 18 TFEU

<sup>85</sup> Article 21 TFEU

<sup>86</sup> Article 49 TFEU

<sup>87</sup> Article 56 TFEU

<sup>88</sup> Article 28 TFEU

<sup>89</sup> Article 45 TFEU

<sup>90</sup> Article 63 TFEU

<sup>91</sup> Lang, Pistone, Schuch and Staringer, “*Introduction to European tax law*”, P. 46.

<sup>92</sup> Case C-279/93 *Schumacker* para. 30.

their unlikeness”.<sup>93</sup> The term “equal treatment” should however not be interpreted literally since the term includes that a person or a situation shall not be treated less favourable than the object of comparison.<sup>94</sup> In applying the Aristotelian understanding of discrimination, the ECJ has developed a consistent three-step methodology when handling an alleged breach of the principle of non-discrimination.<sup>95</sup> However, it should be emphasized that the court, before taking the three steps presented below, first verifies whether the fundamental freedoms guaranteed under TFEU are applicable. In order for the freedoms to be applicable, it is necessary that the situation involves a cross-border element, i.e. that the individual who is claiming protection under the free movement provisions has a link with at least two Member States. This is important since purely internal situations do not fall within the scope of application of the freedoms.<sup>96</sup>

The first step consists of determining whether the taxpayers that are being compared are in a comparable situation. In order to establish whether two situations are comparable, the ECJ verifies whether the characteristics that are relevant to the measure at issue are identical. If they are not, the situations are incomparable.<sup>97</sup>

The second step consists of determining whether there has been a difference in treatment between the situations at issue. If there is a difference in treatment of two comparable situations, there is discrimination. On the other hand, if there is no difference in treatment of two incomparable situations, there is no discrimination.<sup>98</sup>

In the final and third step of the analysis, the court determines whether the discrimination can be justified. The justification test is always carried out after it has been established that it is a matter of discrimination. Although the justification test is carried out after it has been established that there is discrimination and is in principle, separate from the finding of discrimination, the line between the justification test and the discrimination test as such may be difficult to view. This is due to that arguments pertaining to the justification of a discriminatory measure often have some relation to the existence of a difference in treatment or to the comparability of the situation.<sup>99</sup>

### **4.3 Constricting Comparable situations**

When examining if a national legislating is infringing EU law, the ECJ first determine if two situations are comparable. “The core of a discrimination test is the comparison of two groups or situations, which consists of

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<sup>93</sup> Bammens, Neils, “*the principle of non-discrimination in international and European Tax Law*”, p.503.

<sup>94</sup> Bammens, Neils, “*the principle of non-discrimination in international and European Tax Law*”, p.527.

<sup>95</sup> Bammens, Neils, “*the principle of non-discrimination in international and European Tax Law*”, p.503.

<sup>96</sup> Terra/Wattel, “*European Tax law*”, 2008, p. 32.

<sup>97</sup> Bammens, Neils, “*the principle of non-discrimination in international and European Tax Law*”, p.503.

<sup>98</sup> Bammens, Neils, “*the principle of non-discrimination in international and European Tax Law*”, p.503.

<sup>99</sup> Bammens, Neils, “*the principle of non-discrimination in international and European Tax Law*”, p.503.

identifying the relevant characteristic and then determining whether those characteristics are identical”.<sup>100</sup> The two groups that are typically referred to are the object and the subject of comparison. Thus, to begin a comparison the first step is to identify the suitable object and subject of comparison.<sup>101</sup> “The subject on comparison is the situation or category which is protected by the non-discrimination rule, while the object of comparison is the situation or category which is used as the benchmark in assessing whether discrimination has occurred”.<sup>102</sup> A typical example could be that the subject of comparison is a non-resident taxpayer and the object of comparison would then typically be a resident taxpayer. The choice of a non-resident taxpayer as compared to a resident taxpayer implies that the residence of the object and the subject of comparison differ, whereas their character as taxpayer (the taxpayers obligation to pay taxes under the Member state’s legislation at issue) is identical. The object and subject of comparison are always each other’s mirrors. Hence, when choosing an object and a subject of comparison two characteristics have already been included in the comparison, one characteristic which is identical and one which is different. However, it should be noted that the subject and object of comparison comparative attributes do not only control the comparison of two situations. Other characteristics are also normally included in the comparison, which renders the subject and object of comparison either comparable or incomparable. Hence, the determination of the characteristics is therefore essential in the discrimination test.<sup>103</sup>

#### **4.4 ECJ case law – comparable situations**

Resident and non-resident taxpayers are as a rule not in a comparable situation in relation to direct taxation.<sup>104</sup> This incomparability is generally explained by the difference that exists between these categories with respect of their respective ability to pay, i.e. that residents usually earn the majority of his income in the state of residence and that only a small part is earned in the source state, which means that the person’s ability to pay in the source state differ from that of a resident of the source state. Due to the taxpayer’s different position of both states, it is normally up to the resident state to take into account the taxpayers’ personal and family circumstances.<sup>105</sup> However, in the *Schumacker*<sup>106</sup> case the ECJ held that the situation is different if the individual earns the majority of his income in the source state, why the source state in this case should take the taxpayers personal and family circumstances into account. The case concerned a Belgian national, Mr Schumacker, who lived in Belgium with his family. Mr Schumacher got

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<sup>100</sup> Bammens, Neils, “the principle of non-discrimination in international and European Tax Law”, p.572.

<sup>101</sup> Bammens, Neils, “the principle of non-discrimination in international and European Tax Law”, p.572.

<sup>102</sup> Bammens, Neils, “the principle of non-discrimination in international and European Tax Law”, p.10.

<sup>103</sup> Bammens, Neils, “the principle of non-discrimination in international and European Tax Law”, p.10.

<sup>104</sup> C-273/97, *Schumacker*, para.31.

<sup>105</sup> Bammens, Neils, “the principle of non-discrimination in international and European Tax Law”, p. 598-599.

<sup>106</sup> C-273/97, *Schumacker*,

employed in Germany and started to work there but continue to live in Belgium. Hence, Mr Schumacker was considered as a non-resident in Germany. According to the Belgium-German tax treaty was the income earned in Germany taxed there. German law did however not grant the same personal and family deduction to non-resident and resident taxpayers why Mr Schumacker brought a proceeding and claimed that the German legislation was contrary to EU law and the free movement of employees. The ECJ concluded that Mr Schumacker's situation is an exception of the general rule that non-resident and resident are not in a comparable situation since he obtains the major part of his income in the host state. In Mr Schumacker's case, the resident state was not in the position to grant the deductions since the taxable base was too small and in such situation the court ruled that there was no *objective difference* between resident and non-resident taxpayers. In a situation where a non-resident obtains almost all of his and his families income in the host state, discrimination arises due to the fact that his personal and family situation is taken into account in neither the home or the host state. Hence the German law was considered to violate the free movement of workers.<sup>107</sup>

The Schumacker doctrine has been repeated in subsequent case law such as *Asscher*,<sup>108</sup> *De Groot*,<sup>109</sup> *Wallentin*,<sup>110</sup> *D.*,<sup>111</sup> *Lakebrink*<sup>112</sup> and *Renneberg*<sup>113</sup>. All these cases are in the area of personal and family allowances, which comprises of contributions to pension reserves, deduction for maintenance payments, cost incurred in obtaining tax advice, splitting of family income, and tax- free allowances and losses.<sup>114</sup> The Schumacker doctrine only applies to cases concerning person-related tax benefits and the ECJ has stated that it is important to distinguish the court analysis regarding comparable situations in cases concerning personal-related benefits and income-related benefits.<sup>115</sup> This was for example expressed in the reasoning of the *Gielen*<sup>116</sup> case, which concerns a German resident who operated business in Germany and in the Netherlands. Under domestic law in the Netherlands, a tax deduction was granted to self-employed taxpayers, which lowered the taxpayers taxable business profit. However, in order for the taxpayer to benefit from the deduction the taxpayer had to work at least 1 225 hours for the undertaking from which the business profit were derived. A taxpayer resident in the Netherlands could take into account both hours worked in the Netherlands and abroad. By contrast, a non-resident taxpayer could only take into account hours worked in the Netherlands. Mr Gielen worked

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<sup>107</sup> C-273/97, *Schumacker*.

<sup>108</sup> C-107/94, *Asscher*.

<sup>109</sup> C-285/00, *De Groot*.

<sup>110</sup> C-169/03, *Wallentin*.

<sup>111</sup> C-376/04, *D.*

<sup>112</sup> C-182/06, *Lakebrink*.

<sup>113</sup> C-527/06, *Renneberg*.

<sup>114</sup> Lang, Pistone, Schuch and Staringer, "Introduction to European tax law", P.62-63.

<sup>115</sup> Lang, Pistone, Schuch and Staringer, "Introduction to European tax law", p.61.

<sup>116</sup> C-440/08, *Gielen*

more than 1 225 hours for his business in Germany, but less than 1 225 hours in the Netherlands, why he could not benefit from the deduction. The ECJ pointed out that the Schumacker incomparability does not apply when the deduction is directly linked to the activity that generated the taxable income;<sup>117</sup> “the self-employed person’s deduction is not related to the personal capacity of taxable persons but rather to the nature of their activity”.<sup>118</sup> Therefore, the ECJ held that with regards to the purpose of national measure at issue, to grant deduction to business operations whose main activity is to run a business, which is demonstrated by fulfilling the hours test, resident and non-resident taxpayers are in comparable situations. As a result, the difference in treatment of non-resident and resident taxpayers constituted a prohibited discrimination.

It should be highlighted that the ECJ reasoning with regards to comparable situation in cases concerning income-related benefits started in the *Biel I* and *II*<sup>119</sup> cases and has been repeated in subsequent case law such as the *Gerritse*,<sup>120</sup> *Conijn*,<sup>121</sup> *Bouanich*,<sup>122</sup> and *Gielen* etc. The general tenet in these income-related benefit cases is that resident and non-resident taxpayers are generally comparable. Consequently, different treatment as regards to income-related benefits will normally constitute discrimination.<sup>123</sup> Income-related benefits are benefits that are not connected to the person of the taxpayer, but to the income earned by the taxpayer such as refunds of overpaid wage, withholding tax and business expenses. Unlike the cases with personal deduction these cases do not relate to domestic measures that take account of a taxpayer’s ability to pay tax. Instead, the national measure at issue in these cases are linked to an activity exercised in the Member State in question or to a certain type of income earned. “Consequently, the relevant characteristic is not the taxpayers ability to pay but the fact that the taxpayer earns that type of income in the Member State concerned or carries out that activity there, which is reflected in the Member State in question exercising its taxing jurisdiction as regards the relevant income or activity”.<sup>124</sup> As a result, non-resident taxpayers are comparable to resident taxpayer with regards to the tax treatment of a specific type of activity or income if the source state exercises its taxing powers as regards both non-resident and resident taxpayers.<sup>125</sup> In order to verify whether a national measure at issue is related to personal and family circumstances, and thus the Schumacker doctrine would apply, the Advocate General in the

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<sup>117</sup> Bammens, Neils, “*the principle of non-discrimination in international and European Tax Law*”, p.678.

<sup>118</sup> C-440/08, *Gielen*, Para. 45.

<sup>119</sup> C-175/88, C-440/08, *Biel I* and *II*.

<sup>120</sup> C-324/01, *Gerritse*.

<sup>121</sup> C-346/04, *Conijn*.

<sup>122</sup> C-265/04, *Bouanich*.

<sup>123</sup> Bammens, Neils, “*the principle of non-discrimination in international and European Tax Law*”, p. 598-599.

<sup>124</sup> Bammens, Neils, “*the principle of non-discrimination in international and European Tax Law*”, p. 680.

<sup>125</sup> Bammens, Neils, “*the principle of non-discrimination in international and European Tax Law*”, p. 680.

Gielen case stated that consideration must be taken to the objective of the measure.<sup>126</sup>

#### 4.5 Disadvantage test

When two situations are considered as comparable, the principle of non-discrimination requires that the subject of comparison is not treated less favourably. Hence, for there to be a discrimination the first step is to determine whether the situations are comparable and then the second step is to determine whether the subject of comparison is treated differently than the object of comparison with the consequence that the subject of comparison is subject to a worse treatment. The decisive question when applying the discrimination test is whether the disadvantage due to difference in treatment is due to the national legislation at issue. When determine whether the individual is subject to a disadvantage it is essential to do an objective assessment and verify whether there is a causal link between the disadvantage and the national measure at issue.<sup>127</sup>

#### 4.6 Summary

When assessing whether discrimination occurs in cases concerning personal-related benefits, the ECJ starts from the assumption that non-resident and resident taxpayers are incomparable and then begins to find reasons why the situations might be comparable.<sup>128</sup> “Personal deductions that are not related to the acquiring of the income concerned do not normally need to be tax deductible for a non-resident in a state from which the taxpayer did not receive most of his/her income”.<sup>129</sup> By contrast, when assessing whether discrimination occurs in cases concerning income-related benefits, the ECJ starts from the assumption that non-resident and resident taxpayers are comparable. This means that expenses, which are directly linked to the income concerned, have to be deductible for non-resident in the same way as for resident taxpayers. Also, if a non-resident is taxed on a flat tax rate instead of a progressive tax rate that applies to the resident taxpayer, the tax burden for non-resident must not be higher than the tax burden on resident taxpayers in a comparable situation.<sup>130</sup> The ECJ ruling in the Schumacher case and the Gielen case demonstrate the importance of the nature of the tax benefit at issue.

The ECJ’s positions on comparability is based on two premises, namely that direct tax law is typically designed to ensure that taxpayers contribute to public finance in accordance with their ability to pay and that non-discrimination seeks to ensure that all taxpayer with the same ability to pay bear the same tax burden. On this basis, the ECJ begins the comparability

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<sup>126</sup> Opinion of advocate-General Colomer in C-440/08, Gielen, p. 37-39.

<sup>127</sup> Bammens, Neils, “*the principle of non-discrimination in international and European Tax Law*”, P. 891-893.

<sup>128</sup> Bammens, Neils, “*the principle of non-discrimination in international and European Tax Law*”, p. 885.

<sup>129</sup> Helminen, Marjiaana, “*EU tax law-direct taxation-2015, online books*”, p.15.

<sup>130</sup> Helminen, Marjiaana, “*EU tax law-direct taxation-2015, online books*”, p.15.

analysis from the assumption that non-resident and resident taxpayers are incomparable since their ability to pay differs, namely because there is an assumption that residents usually earn the majority of their income in the state of residence and that only a small part is earned in the source state. However, it should be noted that a tax measure is not only intended to raise public revenue. In particular, some tax measures seek to influence the taxpayer's behaviour by encouraging or discouraging certain acts. From the perspective of such rules, the ability to pay is not a relevant characteristic. By contrast, the objectives of the measure at issue plays an important role when determine which characteristic determines comparability. For example, if a national measure seeks to mitigate double taxation on dividends in order to prevent such double taxation from hampering economic development. From the perspective of the objectives of such measure, the susceptibility to double taxation is the relevant characteristic. In a situation like this, there is no reason to distinguish between the inbound and outbound situation since the relevant characteristics in both categories of cases is the susceptibility to double taxation. In such areas, the taxpayers different ability to pay tax is not a relevant characteristic.”<sup>131</sup>

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<sup>131</sup> Bammens, Neils, *“the principle of non-discrimination in international and European Tax Law”*, P. 888-889

## 5 Analysis

### 5.1 Introduction

In this chapter, the Swedish Supreme Administrative court's reasoning concerning comparable situation will be critically analysed in relation to ECJ case law. In order to make this analyse, the three-step methodology developed by the ECJ when handling an alleged breach of the principle of non-discrimination will be applied in the situations at issue in the two cases from the Swedish Supreme Administrative court. Since the aim of this thesis is to critically inquiring whether the Swedish Supreme Administrative Court's reasoning about comparable situations in the two rulings concerning taxation of stock options is supported by ECJ case law, the analysis is focusing on the comparability and disadvantage test.

When a question is raised in a national court concerning interpretation or application of EU law the national court may ask for a preliminary ruling if the court believes that such ruling is necessary to deliver a decision which is in line with uniform application of EU Law. A national court has an obligation to ask for a preliminary ruling when the EU provision at issue has not "been interpreted by the ECJ before" (*acte éclairé*) or if the correct application of the EU law is not "obvious as to leave no scope of reasonable doubts" (*acte clair*).<sup>132</sup> Therefore, this chapter also includes an analysis whether the Swedish Supreme Administrative court interpretation of EU law is covered by the *acte éclairé* and *acte clair* doctrine, why the court have no obligation to ask for a preliminary ruling.

### 5.2 Comparability and disadvantage test

When assessing whether a national measure of a Member State constitutes an alleged breach of the principle of non-discrimination, the court first verifies whether the fundamental freedoms guaranteed under TFEU are applicable. In order for the freedoms to be applicable, it is necessary that the situation involve a cross-border element. The next step is to determine whether the situations are comparable and then, whether the subject of comparison is treated differently than the object of comparison with the consequence that the subject of comparison is subject to a worse treatment. Consequently, discrimination occurs if the rules of a Member States place a taxpayer in a cross boarder situation in a disadvantage compared to taxpayers in a different, but comparable, situation.

The situation in the two cases from the Swedish Supreme Administrative court could be described as follows: The cross-border element and the utilization of the free movement takes place when the French citizens become employees and move to Sweden. The adverse treatment consists of

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<sup>132</sup> C-283/81 CILFIT. Para.21.

the difference in treatment when the French nationals foreign earned equity based compensation is taxed in Sweden whereas Swedish nationals foreign earned equity based compensation is tax exempt under the six-month rule or the one-year rule. Different tax treatment of residents and non-residents is not acceptable in regard to such matters in relation to which a resident and a non-resident are from an objective perspective in a comparable situation. In the two rulings from the Supreme Administrative Court, the court ruled that non-residents and residents who receive foreign earned income from employee stock option and/or share programs are in comparable situations. In the rulings the court made a comparison with the situation of the French nationals (the subject of comparison) and a person who is resident in Sweden and takes employment abroad for a period of time and then comes back to Sweden (the object of comparison). As appeared in this thesis, the nature of the benefits at issue is important for the purpose of the comparability test. The *Schumacker* doctrine and its subsequent case law provide some guidance regarding personal-related benefits. It could be argued that the six-months rule and the one-year rule are more alike a person-related benefit than an income-related benefit since the exemption rule only applies to individuals subject to unlimited tax liability. Hence, the income at issue has no matter when determine whether the six-month rule and the one-year rule is applicable. Also, the six month rule and the one year rule is difficult to equate with costs that are directly linked to the activity which gives rise to the income received, since no expenses are directly linked to income at issue. Although, the difficulty of classifying the six-month rule and the one-year rule as a personal-related benefit or an income related benefit is limiting the conclusions that could be drawn to the doctrine established in both areas.

When assessing whether discrimination occurs in cases concerning personal-related benefits, the ECJ starts from the assumption that non-resident and resident taxpayers are incomparable and then begins to find reasons why the situations might be comparable.<sup>133</sup> If the Swedish Supreme Administrative judgements are interpreted in line with the doctrine of personal-related benefits, the court starts the comparability by the assumption that non-resident and resident taxpayers are not comparable. When the Swedish Supreme Administrative court compares two resident taxpayers, the court simply conclude that the nationals are comparable since they have the same ability to pay taxes in Sweden. Since the object and subject of comparison always should be each other's mirrors, it could be argued that the Swedish tax Agency comparison is more relevant, compared to the comparison that the Swedish Supreme Administrative court made. The Tax Agency claimed that the comparison should be made between the French nationals (subject of comparison) and a Swedish national who

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<sup>133</sup> Bammens, Neils, "the principle of non-discrimination in international and European Tax Law" p. 885.

moves abroad to work and thus become subject to limited tax liability in Sweden (object of comparison). Hence, the Tax Agency compares a non-resident and a resident taxpayer. Non-resident and resident taxpayers are as a rule not comparable in personal-related benefit cases. However, it should be noted that the subject and object of comparison comparative attributes do not only control the comparison of two situations. Other characteristics are also normally included in the comparison, which render the subject and object of comparison either comparable or incomparable. A Swedish national who takes up employment abroad will often remain a Swedish tax resident and subject to unlimited tax liability while they perform work abroad, and so be able to benefit from the tax exemption rules. With regards to this, it could be argued that the subject and object of comparison thus becomes comparable. Consequently, the situations are considered comparable regardless of the comparison made by the court or the tax agency.

It should be noted that neither the Swedish court nor the Swedish tax agency referred to any ECJ case law, which concerned a similar issue regarding comparable situations in relation to taxation of employee stock options rule or national tax exemption rules. It could therefore be questionable whether there has been no similar ruling in the ECJ? A case that has similarities with the cases from the Swedish Supreme Administrative court is *Commission v Greece*<sup>134</sup>, which concerned the Greek exemption rules. However, it should be emphasized that the case concerned both overt and covert discrimination and tax exemption when transferring real estates, why the cases differs in some aspects from the Swedish cases. The cases from the Swedish Supreme Administrative court concerned tax exemption of foreign earned equity based compensation and the measure constituted overt discrimination. However, with regards to the similarities in the cases it could be argued that a reasonable conclusion is that tax rules which allows tax exemption to its own citizens but not to other EU citizens is contrary to the treaty freedoms. Rules regarding equal treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.<sup>135</sup> Although the Swedish rules did not state that tax exemption was exclusively granted to its own nationals, the requirement of unlimited tax liability, leads in fact to the same result. Hence, the Swedish measure disfavours individuals who are subject to limited tax liability, which are in most cases nationals of other Member States.

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<sup>134</sup> C-155/09.

<sup>135</sup> Case C-279/93 *Schumacker* para. 26.

### 5.3 Neutralization

The six-month rule and one-year rule were introduced in the Swedish ITA to mainly avoid international double taxation. However, as the number of tax treaties and the use of foreign credit rules have increased significantly over the years, the aim and purpose of the exemption rules has change. Today, the tax exemption rules are essential to strengthen the Swedish companies international competitiveness. The exemption rules constitute not only a benefit for the employee, but also means a reduction in salary costs for Swedish companies operating abroad.<sup>136</sup> With regards to the aim and the purpose of the Swedish tax exemption rules it is however difficult to neutralize the difference in treatment of resident and non-resident taxpayer. The use of internal legislation to eliminate double taxation, i.e. the six-month rule and the one-year rule, makes it also easier for the tax authorities and the taxpayer with regards to both workload and predictability.

It could also be questionable whether the difference in treatment could be neutralized by granting a credit for foreign taxes levied abroad. Direct taxation is not harmonized why Member States have sovereignty and exclusively competence for direct taxation. When double taxation occurs, EU Member States retain the power to define by double taxation treaty, or unilaterally, the criteria for allocating their power of taxation between them in order to relive double taxation.<sup>137</sup> Hence, the fact that the non-resident taxpayers bear an overall higher tax burden than resident taxpayers, due to the effects of the credit method when using bilateral tax treaties to mitigate double taxation, is a consequence of the taxing rights in each Member States. In order to neutralize the difference in treatment the ECJ has held that the tax credit must be equal to amount of domestic tax levied on the same income (full credit), i.e. that the difference in treatment is fully compensated.<sup>138</sup> Since Sweden only granted an ordinary credit for the tax levied in French and Japan the double taxation was not entirely eliminated, why the difference in treatment cannot be neutralized.<sup>139</sup>

### 5.4 Preliminary ruling

Taxation of employee stock option is as special area within tax law since stock options often are taxed at a time that is very different from the time when the employment services are rendered. Accordingly, where different countries tax the benefits at different times, this may result in the usual problem of relieving double taxation. Since the use of incentive programmes has grown steadily in Sweden and aboard over the recent years, a uniform way of handling taxation of employee stock option would be preferable.

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<sup>136</sup> Prop. 1984/85:175, s. 15 and prop. 1989/90:110 del 1 s. 385.

<sup>137</sup> See for example cases; judgments in Gilly, C-336/96 and Gschwind, C-391/97.

<sup>138</sup> Miljoen C-10/14, C-14/14, C-17/14, para. 86, 88.

<sup>139</sup> Cejje, Katia and Hilling, Maria, "Aktuellt om EU-domstolens praxis-direct beskattning, Internationellt, 2015, P. 861-862

After the Swedish Supreme administrative court's ruling, it is now established that taxation in Sweden of foreign earned compensation is discriminatory and contrary to EU law and the free movement of workers. Hence, in some situations EU nationals who are subject to limited tax liability may benefit from tax exemptions under the six-month rule and the one-year rule. However, it is still unclear whether Swedish nationals who move abroad and become subject to limited tax liability can benefit from the exemption rules. Also, whether Swedish national who moves to third countries can benefit from the exemption rule. Whether the questions remain unanswered or if any change in the law or practice clarifies the tax rules in cross-border situations is something that the future will tell. Clearly, there is great uncertainty about how the tax treatment of employee stock options should be handled in situations where individuals moving within the EU/EEA area. This uncertainty also affects the employer's ability to accurately report the benefits, withholding tax and to establish a basis for employer contributions.<sup>140</sup> The fact that the Swedish stock option rules has been regarded incompatible with EU law and thus been changed several times over the years is a proof of the uncertainty. With regards to the complexity of taxing employees stock options and the usual problem of relieving double taxation in situations involving taxation of employee stock options one may argue that a request for a preliminary ruling might have been a step in the right direction to ensure uniform taxation of employee stock options in cross-border situations. The Swedish court has during the period of 2010-2015 asked for a preliminary ruling in 35 cases. This is a minor increase compared to the period of 1995-2015. The statistics provide a basis for concluding that Sweden has not asked for a preliminary ruling in remarkably few cases compared to other countries. However, there is still a scope for a significant increase in the number of Swedish cases that could be referred to the ECJ without the possibility that the Swedish court would be criticized for overburden the ECJ. The Swedish position to seek a preliminary ruling is also important for the opportunities to gain knowledge and understanding in the EU and for the Swedish legal culture and subsequently built legal beliefs and values. The Union law is constantly evolving under the influence of a dialogue between the ECJ and the national courts, why it is important that the Swedish courts plays a role in the development of the Union law.<sup>141</sup>

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<sup>140</sup> Skattenytt 2016 p.698.

<sup>141</sup> Bernitz, Ulf, Förhandsavgöranden av EU-domstolen – Utvecklingen av Svenska domstolens hållning och praxis 2010-2015, sammanfattning av rapporten.

## 6 Conclusion

The aim of this thesis was to present issues related to cross-border taxation of employee stock options and critically inquiring whether the Swedish Supreme Administrative Court's reasoning about comparable situations in the two rulings concerning taxation of stock options is supported by ECJ case law. The thesis has shown that Member States different country rules for taxing employee stock options creates problems with regards to relieving double taxation when the resident state and the source state does not tax the benefits from employee stock options at the same time. "The problem of relieving double taxation is partly addressed by the fact that the application of the relief of double taxation provisions of the OECD Model Convention is not restricted in time, i.e. relief must be given even if the State of residence taxes at a different time than the State of source."<sup>142</sup> Since employee stock options are often taxed at a time that is very different from the time when the employment services are rendered the problem of relieving double taxation occurs often. In a situation when an employee is taxed in year one in a Member State (for example when the option is granted) and in year three in another Member State (for example when the options is exercised) it is questionable how the relief from double taxation should be granted since the income is taxed in different years. In a situation like this it could also be argue that relief should be denied since the income is tax at a different event. And if relief is granted, the resident state must grant a relief that is equal to the amount of domestic tax levied in the other country in order to neutralize the difference in treatment. However, since most tax treaties include the ordinary credit method to relive double taxation the difference in treatment cannot be neutralized in most situations. Consequently, the national courts in the Member States may therefore come to the conclusion that the national measure for taxation of employee stock options benefits constitute a discriminatory measure since non-resident taxpayer is subject to a less favourable treatment compared to its own nationals. This is due to the fact that cross-border taxation of employee stock options usually will result in an overall higher tax burden than if the benefit from employee stock option only is taxed in one Member State.

The thesis shows that the Swedish Administrative courts ruling concerning taxation of employee stock options solved one problem, i.e. that EU nationals may in some situations benefit from the Swedish tax exemption rules, why the taxpayer will no longer be subject to a worse treatment than Swedish national. However, this thesis has also shown that the courts rulings also created new legal issues with regards to equal taxation of non-resident and resident taxpayers. The thesis has also highlighted the question whether the difference in treatment of non-resident and resident taxpayers

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<sup>142</sup> OECD "Cross-boarder income tax issues arising from employee stock-options plan", p.7.

who receives foreign earned employment income through stock options is due to the application of the six month rule and the one year rule or if it is actually due to the framing of the Swedish employee stock options, since the application of the Swedish employee stock options rules as a fact led to the same consequence as the application of the exemption rules.

With regards to the complexity of taxing employee stock options and the usual problem of relieving double taxation in situations involving taxation of employee stock options the author of this thesis has argued that a request for a preliminary ruling would have been a step in the right direction to ensure uniform taxation of employee stock options in cross-border situations.

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