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No PE – no problem?

A study on the Swedish preliminary income taxes for foreign companies without tax liability in Sweden

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Contents

Summary

New obligations for foreign companies operating in Sweden were introduced on 1 January 2021. Despite the absence of a Swedish PE or other tax liability, payments for work performed in Sweden by foreign companies is subject to a requirement of withholding preliminary income tax. A refund of the withheld amount can be granted, but only once a final tax assessment has been completed after the end of the fiscal year.

A fundamental principle of the Swedish system of preliminary income taxes is that preliminary taxes should be levied to an amount corresponding to an estimate of the final taxes. Yet, a foreign service provider without Swedish tax liability will have to abide with not getting paid in full, unless an administrative requirement involving registration or application for exemption is fulfilled prior to the payment. Additionally, new obligations have been introduced for these foreign companies opting for registration in Sweden.

The purpose of this thesis is to describe and to critically analyse these changes by comparing the motives for the original rules to the presented objectives for the new rules. Moreover, the thesis evaluates whether the new measures on the withholding of income taxes might cause an incompatible restriction with the fundamental freedoms of EU law.

The thesis presents the findings that the implemented changes are not compatible with EU law and that the new rules do not meet their purpose. The changes cause new difficult administrative and legal challenges and could have been designed differently for a more efficient and less restrictive outcome.

Sammanfattning

Nya skyldigheter för utländska företag verksamma i Sverige infördes den 1 januari 2021. Trots frånvaron av ett fast driftställe i Sverige eller annan skattskyldighet, ska skatteavdrag för preliminär inkomstskatt göras från betalningar för arbete som ett utländskt företag utför i Sverige. Den innehållna skatten kan återbetalas, men tidigast efter att ett beslut om slutlig skatt har fattats efter räkenskapsårets slut.

En grundläggande princip för det svenska preliminärskattesystemet är att preliminär skatt ska betalas till ett belopp som kan antas motsvara den slutliga skatten. Trots det behöver ett utländskt företag utan skattskyldighet i Sverige finna sig i att inte erhålla full betalning, såtillvida att man inte uppfyllt administrativa krav så som registrering eller ansökan om befrielse innan tidpunkten för betalningen. Dessutom har det tillkommit nya skyldigheter för utländska företag som valt att registrera sig i Sverige.

Syftet med denna uppsats är att beskriva och kritiskt granska dessa förändringar genom att jämföra motiven för de ursprungliga reglerna med syftet bakom de nya reglerna. Vidare undersöker uppsatsen om de nya reglerna om skatteavdrag för preliminär inkomstskatt kan medföra en otillåten restriktion av de grundläggande friheterna från EU-rätten.

Uppsatsen kommer till slutsatsen att lagändringarna varken är förenliga med EU-rätten eller uppfyller sina syften. Förändringarna orsakar nya svåra administrativa och juridiska utmaningar och kunde ha utformats annorlunda för ett mer effektivt och mindre restriktivt utfall.

Preface

This master thesis marks the long-awaited end of my academic journey at Lund University.

I would like to start off by thanking my supervisor Mariya Senyk for her support. I was determined to write my thesis in English, but without her insights and constructive feedback, I would probably have switched back to writing in Swedish halfway through the work. Many thanks also to Cécile Brokelind for introducing me to the immense field of European tax law during my participation in the European and International Tax Law master's programme.

Moreover, I would like to extend my gratitude to Mato Saric and Christian Schwartz at Deloitte for insightful discussions on the topic of this thesis.

I would like to also thank my friends and family for their encouragement during my studies. Above all, I am forever grateful to my dear Wilma, without you this would not have been possible.

Malmö, 5 January 2021
Ossian Mauritzson

Abbreviations

Art.	Article/articles
ATAD	Anti Tax Avoidance Directive
CCCTB	Common Consolidated Corporate Tax Base
CJEU	The Court of Justice of the European union
DAC	Directive on Administrative Cooperation in the Field of Direct Taxation
EC Treaty	The Treaty Establishing the European Economic Community
EU	European Union
OECD	Organisation for Economic Co-operation and development
PE	Permanent Establishment
PAYE	Pay As You Earn
prop.	Proposition
SAPA	Swedish Administrative Procedure Act (Förvaltningslag)
STPA	Swedish Tax Procedure Act (Skatteförfarandelag)
SITA	Swedish Income Tax Act (Inkomstskattelag)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VAT	Value Added Tax

1 Introduction

1.1 Background

The Swedish income tax system is generally based on a preliminary collection of taxes due. The preliminary taxes are calculated on an assessment of the final taxes and will consequently often be subject to adjustments. The Swedish Tax Procedure Act[1], hereinafter referred to as the STPA, states that preliminary taxes should be levied to an amount as close as possible to the deemed final tax.[2]

For work and services performed in Sweden, preliminary tax is levied either through the withholding of 30% of the payment (the responsibility of the payer) or through monthly instalments (the responsibility of the payee). For the enjoyment of the latter, there is a requirement of the payee to be approved for Swedish so-called *F-tax* or *F-skatt*.[3]

Up until recently, there was an exception for foreign companies without a permanent establishment (PE) in Sweden. Payments for work performed in Sweden to these entities were not subject to the 30% withholding tax, and consequently, there was no need for these entities to apply for F-tax approval.[4] However, on 1 January 2021, new legislation came into force specifically targeting situations of temporary work in Sweden, henceforth referred to as the TAIS[5] rules. It particularly introduced the economic employer concept into Swedish tax law. Furthermore, the changes brought in new administrative obligations for foreign companies.

[1] In Swedish: Skatteförfarandelag (2011:1244).
[2] See subchapter 2.3.1 Preliminary income taxes. See also Chapter 8, para. 1 STPA.
[3] See subchapter 2.3.1 Preliminary income taxes.
[4] See subchapter 2.3.1.1 Exceptions to preliminary withholding tax.
[5] Temporary work in Sweden rules (in Swedish: Tillfälligt Arbete i Sverige).

This topic piqued my interest after working at the Swedish Tax Agency the summers of 2020 and 2021. Having experienced the processing of applications for the approval for Swedish F-tax before and after the changes, I was intrigued to delve deeper and understand the full picture. In many cases, the increased number of F-tax applicants following the new legislation caused greatly extended processing times for the Swedish Tax Agency. From personal experience, the increased processing times could amount to several months. Although unable to provide a reliable and exact source, the extended processing times can be confirmed at the Swedish Tax Agency's website.[6]

Having to pay preliminary income taxes on the same income both in the source state and in the resident state is likely detrimental to some businesses. Even though the preliminary taxes withheld are not final and are often repaid, it is easy to make comparisons to traditional international double taxation.

Furthermore, the conditions for the approval for F-tax and the new situations when preliminary income tax needs to be withheld may not necessarily overlap. Saric and Schwartz have pointed out this potential issue in their article published in Svensk Skattetidning.[7] Consequently, the complicated nature of the new rules and their effects have resulted in uncertainty on whoever is in scope. Vague and complex rules may cause excessive and unreasonable administrative requirements, especially for foreign companies.

Finally, although the EU member states are generally competent to formulate their own tax laws, a national tax measure limiting the possibility for foreign companies to access the internal market of the EU may conflict with EU law.[8] The goal of the internal market is to achieve the most efficient allocation of resources across the Union. Consequently, restrictive national measures on cross border activities interfere with that goal by potentially limiting market

[6] The Swedish Tax Agency (2021a).
[7] Saric and Schwartz (2021), p. 395.
[8] Traversa and Pirlot (2014), e-book, subchapter 6.2. Exploring the meaning of the principle of tax sovereignty in EU law.

access for foreign companies.[9] In many cases, the Court of Justice of the European Union (CJEU) found that actions that discourage or dissuade economic actors from moving freely within the union are prohibited.[10]

The thesis is written with this background in mind. Given that the topic is of most relevance to foreign companies, the thesis is written in English.

1.2 Research questions and purpose

This thesis aims to examine, systematise, and analyse the Swedish rules on preliminary income taxes. The focus is how and to what extent the changes implemented with the TAIS rules affect foreign companies without a PE in Sweden. It is a complicated area, and therefore an overall objective is to provide some legal clarity. Finally, the aim is to also evaluate the current rules in view of their compatibility with the fundamental freedoms of EU law.

In fulfilling these objectives, the following research questions will be answered:

- What are the underlying reasons and purpose for preliminary income taxes and the changes implemented with the new TAIS rules regarding payments to foreign companies, and do they meet their purpose?

- How can a foreign company limit the effect of the new obligations following the TAIS rules?

- When can a foreign company be approved for F-tax, and is there a discrepancy between qualifying for F-tax and situations when preliminary income tax must be withheld from a payment?

[9] Lazarov (2020), p. 64.
[10] Schön (2015), p. 272.

- In the light of the EU fundamental freedoms, could the new Swedish rules on the withholding of preliminary income tax cause an incompatible restriction for foreign companies?

1.3 Method and material

To answer the research questions and achieve this paper's overall objective, the legal dogmatic method will be used. This entails finding the answers and the applicable law by examining the sources of law with their inherent legal status in mind. In other words, primarily reviewing the law as it stands and then looking into preparatory works, case law and the legal doctrine.[11] The overall purpose and the first research question involve a critical evaluation of the arguments and effects of the implemented changes of the TAIS rules. As opposed to strictly finding the applicable law, *de lege lata*, the method applied when answering these questions can be described as more of an analytical legal method with elements of *de lege ferenda* arguments.[12] Lambertz differentiates the two by describing the latter as leaning more towards a constructive legal dogmatic method, as opposed to a descriptive one.[13]

The thesis relies heavily on provided guidance in the available preparatory works. Furthermore, the legal doctrine is referred to, particularly the commentary to the STPA by Almgren and Leidhammar[14]. The preparatory works form an important means of interpretation in the field of Swedish tax law, to the benefit of legal certainty.[15] Often referred to by the Swedish Supreme Administrative Court in tax cases, the legal status of preparatory works is reinforced.[16] However, the degree of relevance the preparatory works will have for the interpretation of a tax measure depends on its characteristics and whether the wording of the provision is unclear.

[11] Kleineman (2018), pp. 21–22.
[12] Kleineman (2018), pp. 35–37; Sandgren (2018) pp. 50 ff.
[13] Lambertz (2002), pp. 264-266.
[14] Almgren and Leidhammar (2021a).
[15] Tjernberg (2018), p. 84.
[16] Tjernberg (2018), p. 84.

Statements in the preparatory works that are simply describing the applicable law have a legal status similar to that of the legal doctrine.[17]

Furthermore, opinions and publications by the Swedish Tax Agency have been used. Mainly regarding provisions where these opinions are specifically referred to in the preparatory works or when there is neither any relevant case law nor sufficient guidance in the preparatory works. As opposed to preparatory works, such material is rarely expressively referred to in judgments by the Swedish Supreme Administrative Court. Although not being a source of law in a strict legal dogmatic method, it serves as guidance and may also ultimately constitute an administrative practice that a taxpayer has legitimate expectations to rely on.[18]

The final research question of the thesis involves a compatibility analysis with EU law. When identifying a potential conflict, the specific characteristics of the EU legal order needs to be considered. Consequently, the traditional legal dogmatic method needs to be adjusted.[19] Much of the EU law has direct effect and thus can be directly relied upon in a national court, without the need for implementation.[20] Furthermore, the EU law takes precedence over any national provision in the event of a conflict, and a national court is required to apply EU law in its entirety.[21]

Particularly in tax law, the Court of Justice of the European Union (CJEU) plays a central role in interpreting and developing the EU law. Furthermore, there is a possibility for teleological interpretations, with the objectives of the EU such as a functional internal market in mind.[22] Teleological interpretations can be motivated by much of the EU law being vague and unspecific. However, it is of subsidiary character and may only be used when

[17] Tjernberg (2018), pp. 97–98.
[18] Tjernberg (2018), pp. 110–113.
[19] Hettne and Otken Eriksson (2011), pp. 34 and 40.
[20] Helminen (2018), p. 8.
[21] Adamczyk and Majdanska (2020), p. 3.
[22] Helminen (2018), p. 54–55.

the wording or context of a measure is unclear.[23] When finding relevant case law from the CJEU, the focus has been towards judgments on withholding taxes and the freedom to provide services.

Additionally, the legal doctrine plays a role in developing and interpreting EU law. Although the CJEU never refers to the legal doctrine on EU law in its judgments, arguments from the legal doctrine are often referred to by the parties involved and in the advisory opinions of the Advocate general. [24] The main material used in this regard are generally recognised publications on European tax law in Ståhl, et al., Lang, et al, Terra, and Helminen.[25]

1.4 Previous research

Research related to Swedish preliminary income taxes for companies is limited. Prior to the new TAIS rules, the field appears to have been regarded as relatively uncontroversial. Relevant Swedish case law is scarce, and the preparatory works seemingly provided sufficient guidance.

The implementation of the Swedish TAIS rules has been discussed since the Swedish Tax Agency first suggested them in 2017.[26] However, the focus of the discussion has mostly been on the economic employer concept and how it impacts individual taxation for temporary workers in Sweden.[27] How the changes implemented with the TAIS rules will affect foreign companies performing work in Sweden has been discussed in published articles by van der Capellen in 2020 and by Saric and Schwartz in August 2021. [28]

[23] Hettne and Otken Eriksson (2011), pp. 168–169.
[24] Hettne and Otken Eriksson (2011), pp. 120–122.
[25] Ståhl (2011); Lang, et al. (2020); Terra (2018); Helminen (2021).
[26] The Swedish Tax Agency (2017).
[27] See e.g. Saric and Schwartz (2018); Frödeberg and Rova (2021).
[28] van der Capellen (2020); Saric and Schwartz (2021).

On the other hand, research on how the EU law interacts with national measures in the field of direct taxes is extensive, as shown by the presented material used above. From a purely Swedish perspective, dissertations by Monsenego, Johansson, Fritz, and Croneberg have researched different areas of the topic. The dissertations by Monsenego and Johansson offer a more general approach to the compatibility of restrictive national tax provisions. In contrast, both Fritz's and Croneberg's research centres around EU principles on the abuse of law, with Croneberg specifically focusing on tax avoidance and the ATAD.[29]

The absence of any extensive research relating to the new withholding of preliminary income taxes improves the relevance of the thesis and supports the idea of spending time systemising the applicable law and how it affects foreign companies.

1.5 Delimitations

As mentioned above, the TAIS rules implemented changes concerning the shift towards the economic employer concepts and its implications for individuals working temporarily in Sweden. As taxation of individuals is not within the scope of the thesis, it will only be discussed briefly to facilitate an understanding of the overall context. Furthermore, the taxation of individuals conducting business as sole traders has been excluded. As a result, the focus of the thesis is on the preliminary income taxes relating to independent associations categorised as legal persons, such as a limited liability company.

The concept of economic employer originally can be found in the commentary to the model treaty from the Organisation for Economic Co-operation and Development (OECD).[30] A comparative analysis with other countries that also have implemented similar rules could provide valuable

[29] Monsenego (2011); Johansson (2016); Fritz (2020); Croneberg (2021).
[30] OECD (2017), p. 317.

insights, perhaps specifically a comparison with countries bound by the same EU provisions and freedoms as Sweden. However, any comparative analysis has not been included in this thesis.

When discussing and providing examples of situations covered by the TAIS rules, many interesting issues also arise concerning indirect taxes, specifically VAT. Withholding or deducting taxes on payments for services also shares many similarities with how the system of VAT operates. Yet, issues related to the field of indirect taxes will be excluded from the scope of this thesis.

The analysis of the TAIS rules has been kept to a national and EU level. Given that the preliminary withholding taxes are not deemed final taxes, the relevance of double tax treaties is expected to be limited. However, the model tax treaty contains articles on non-discrimination, administrative cooperation, and the exchange of information. To the extent that the TAIS rules could be criticised using an applicable double tax treaty or using the model treaty commentaries by the OECD has not been included in this thesis.

On the topic of double tax treaties, the Swedish rules on preliminary income taxes include provisions specifically related to situations where preliminary income tax may or may not be levied across multiple states. The provisions apply when Sweden has a treaty specifically regarding the levying of preliminary taxes. Currently, such a treaty exists only regarding the Nordic countries.[31] Although relevant for the overall objective of the thesis, these provisions have been excluded.

The TAIS rules compatibility analysis with EU law will exclusively deal with the withholding of preliminary income taxes. The relevance of other new administrative obligations is regarded as subsidiary in this aspect.

[31] Almgren and Leidhammar (2021a), commentary to chapter 10 para. 10 STPA.

In addition, there are similarities between the withholding tax for work performed in Sweden and other types of source taxation. Taxes withheld from dividends and interest payments are perhaps the first thing that comes to mind when discussing the withholding of taxes. Moreover, such withholding taxes are often connected with similarly burdensome administrative requirements.[32] Yet, the comparisons with such taxes will not be analysed.

Finally, the ongoing progress on the OECD's Two-Pillar solution for the continuation of the BEPS project and its implementation into the EU will not be subject to review in this thesis.[33] On 22 December 2021, the Commission published a proposal for a new directive implementing a 15% minimum corporate income tax.[34] How these changes may affect the levying of Swedish preliminary withholding tax for foreign companies is out of scope for this thesis.

1.6 Terminology

Swedish terms are generally translated into English and abbreviated (such as F-tax and A-tax). This also includes Swedish legal instruments. When necessary, the Swedish translation is provided in the footnotes.

However, regarding the translation from Swedish, there is some inconsistency. The Swedish name proposition (prop.) is used in the footnotes when referring to Swedish preparatory works. Furthermore, the term paragraph (para./paras.) is used to refer to both paragraphs of a CJEU judgment and to specific provisions of Swedish legal acts. For the latter, the word article could have been used instead, but it might then have caused uncertainty for Swedish readers.

[32] OECD (2021).
[33] See e.g. Brokelind (2021).
[34] The European Commission (2021).

The central theme of this thesis is preliminary income taxes. The Swedish preliminary income tax paid by someone on account of an employee or a service provider, is generally referred to as deducting[35] taxes. However, since deductions have a broad meaning in tax law, the term *withholding tax* is used instead. Moreover, the term *TAIS rules* is used throughout the thesis to group up all the implemented changes for foreign companies conducting business in Sweden.

For consistency reasons, all references in the footnotes have been kept as short as possible, regardless of being digitally available or a published book. The complete and detailed reference is provided in the bibliography chapter. Regarding some digitally available e-books, referring to specific pages has not been possible. Instead, the reference has been made to the relevant subchapter.

When referring to judgments from the CJEU, sometimes simply "the Court" is used for variation. Moreover, for the purpose of this thesis, the term "foreign companies" or "foreign service provider" is to be generally understood as a foreign company without a Swedish PE. In other words, a company that is not liable for any corporate tax in Sweden. Finally, to emphasise certain concepts and to signal a reference to a judgment, italics are used throughout the text.

[35] In Swedish: Skatteavdrag.

1.7 Outline

The thesis is divided into six chapters. Following this introductory chapter, the second chapter provides the reader with an understanding of the Swedish tax procedure and the system of preliminary income taxes.

The third chapter lays down the specific conditions for the approval for Swedish F-tax. Moreover, chapters two and three contain a brief discussion and analysis that will be picked up in the final chapter.

The fourth chapter introduces the TAIS rules and describes how the changes will affect foreign companies. Chapters two, three and four will deal primarily with the first three research questions of the thesis.

In the fifth chapter, EU law and its relevance when applying and interpreting national tax provisions are discussed. Case law from the CJEU is presented and the Courts' usual approach when dealing with such issues.

Finally, in the last and sixth chapter, there is room for analysis and discussion. Here the findings and conclusions based on the research questions of the thesis are presented.

2 Paying taxes in Sweden

2.1 Introduction

The tax liability for legal persons operating in Sweden is either of a limited or unlimited character. With unlimited tax liability follows that all worldwide income is taxable in Sweden. On the other hand, limited tax liability can arise when a foreign company receives income somehow related to Sweden. [36] According to chapter 6 paras. 7 and 8 of the Swedish Income Tax Act[37](SITA), the tax liability of foreign legal persons is always limited. Moreover, these provisions provide that a foreign legal person in this context is interpreted as an independent company or association not incorporated in Sweden. Chapter 6 para. 11 SITA provides an exhaustive list of categories of income that are taxable in Sweden for companies with limited tax liability, with income originating from a Swedish PE being the most prominent one.[38]

Imposing taxes is tightly linked with the sovereignty of states and states generally look for a connection between their territory and the relevant tax subject or object.[39] Levying tax from a foreign company with a domestic presence is based on such an idea of territoriality and, more specifically, the source principle of taxation.[40] Monsenego presents the view that limiting source taxation to only situations of domestic presence, such as a PE, is not required by international law but rather a voluntary measure performed by states, motivated by practicality and international tax policy.[41] However, this view is opposed by the idea that some sort of link or connection with a state's jurisdiction is required by international law.[42]

[36] Påhlsson, Kleist, Rendahl and Svensson (2019), pp. 84–85.
[37] In Swedish: Inkomstskattelag (1999:1229).
[38] Andersson, Dahlberg, Saldén Enérus and Tivéus (2021), commentary to chapter 6, para. 11 SITA.
[39] Monsenego (2011), pp. 97-98.
[40] Påhlsson, Kleist, Rendahl and Svensson (2019), p. 346; Avi-Yonah (2015), p. 23.
[41] Monsenego (2011), p. 98.
[42] Gadžo (2018), e-book, subchapter 2.1.5. "Sufficient connection" requirement.

Nevertheless, falling back to the conditions laid down in chapter 6 para. 11 SITA. In the absence of other connecting factors, the presence of a PE is consequently the threshold for foreign companies' tax liability in Sweden – no PE, no Swedish tax.[43]

2.2 On the presence of a PE in Sweden

A PE is a term of international tax law, perhaps primarily associated with the double tax treaties between states. In line with the OECD model convention, the presence of a PE constitutes a nexus from which business profits are taxable.[44] However, a principle of Swedish tax law is that a double tax treaty can only limit the right to tax and never extend it.[45] Moreover, Sweden has a dualistic approach in terms of the effects an international treaty will have in the national legal order. In line with a dualistic view, a double tax treaty can only be relied upon by individuals when it's been incorporated into national law.[46] Consequently, to tax business profits from a PE in Sweden, a concept of PE needs to be part of the national income tax law. At a second stage, this tax can then be limited by applying an incorporated double tax treaty.

Following chapter 2 para. 29 SITA, conditions for a Swedish PE are a degree of permanency in a place from which business is being conducted. The provision includes examples that are generally considered to constitute a PE, such as a Swedish branch, an office or a construction site.[47] The condition on the degree of permanency is usually fulfilled when lasting longer than six months.[48] The Swedish provision is based on the definition of a PE in the OECD model convention, but it has not been amended to follow the development in the OECD.[49] Thus, conflicts may arise in situations where the applicable tax treaty allows for a more generous definition, e.g. 12 months.[50]

[43] Påhlsson, Kleist, Rendahl and Svensson (2019), p. 355.
[44] OECD (2017), pp. 31-34, Art. 5 and 7.
[45] Lodin, et al. (2021b), p. 519.
[46] Dahlberg (2020), p. 281.
[47] Dahlberg (2020), p. 71.
[48] The Swedish Tax Agency (2021f)
[49] Dahlberg (2020), p. 304.
[50] See e.g. HFD 2019 ref. 39, p. 6.

For the purpose of this thesis, a PE is generally to be understood as defined by the Swedish provision, disregarding any applicable double tax treaty.

2.3 The Swedish tax procedure

The Swedish tax procedure operates in the general field of Swedish administrative law and must consequently comply with the Swedish Administrative Procedure Act[51] (SAPA) provisions. However, the specific and tax-related measures of the STPA constitute *lex specialis,* and in the event of a conflict, the general rules of the SAPA will be derogated from.[52]

The STPA contains the provisions regarding the Swedish tax procedure and the process at the Swedish Tax Agency.[53] A crucial area of the tax procedure is the levying of preliminary income taxes. Through preliminary income taxes and the limiting of undue tax credits, both the risk of tax evasion and unfair liquidity advantages are dealt with.[54] The following subchapters will discuss aspects of Swedish preliminary income tax, relevant for foreign companies conducting business in Sweden.

2.3.1 Preliminary income taxes

Swedish preliminary income taxes are levied through two different methods. The first method is through set instalments paid by the taxable company or person in question, referred to as either *F-tax*[55] or *special A-tax*. The second method levies preliminary income taxes by an obligation to withhold taxes upon making a payment, referred to as *A-tax*. In other words, the difference between F-tax and A-tax is whether the responsibility of paying the preliminary taxes to the Swedish Tax Agency is on the one paying for work/a service or on the one receiving remuneration for performing such work or service.[56]

[51] In Swedish: Förvaltningslag (2017:900).
[52] Lodin, et al. (2021b), p. 629.
[53] Almgren and Leidhammar (2021b), p. 27.
[54] Prop 2014/15:100, p. 105.
[55] Regarding F-tax, please see chapter 3. Swedish F-tax.
[56] Lodin, et al. (2021b), pp. 689–690.

Someone who is obliged to withhold preliminary income tax or A-tax on someone else's account essentially functions as a tax collector for the state. In line with chapter 7 para. 1 STPA, such a person needs to be registered as an employer in Sweden and must submit monthly PAYE tax returns.[57] Furthermore, when the withholding of A-tax has been ignored or miscalculated, the cost may ultimately be borne by the deemed employer.[58]

The general idea is that employees should pay A-tax and that F-tax is specifically for businesses.[59] However, a person, legal or natural, that is not approved for F-tax will ultimately need to pay A-tax.[60] Consequently, the legal person, such as a foreign company, will be regarded as an employee in this context. According to chapter 11 para. 24 STPA, the preliminary income tax withheld upon payment to a legal person is 30% of the gross compensation.

A fundamental principle of the Swedish tax procedure is provided in chapter 8 para. 1 STPA, saying that preliminary income taxes should be paid at an amount corresponding to an initial assessment of the final taxes.[61] The rules on preliminary income taxes have been reworked several times during the last decades, with the introduction of the STPA in 2011.[62] Nevertheless, throughout the development of the rules on preliminary income taxes, this principle has remained present. In the preparatory works for the 1997 rules, it is stated that the proposal will lead to the preliminary income taxes coinciding with the final taxes to a greater extent.[63] Moreover, in the preparatory works for the STPA, it is stated that the principle should be the starting point for the

[57] Lodin, et al. (2021b), pp. 690–691.
[58] Almgren and Leidhammar (2021b), pp. 81–82; prop 2010/11:165, p. 485.
[59] Lodin, et al. (2021b), p. 689.
[60] Almgren and Leidhammar (2021b), pp. 65–66.
[61] Lodin, et al. (2021b), p. 689.
[62] Lodin, et al. (2021b), pp. 687–688.
[63] Prop. 1996/97:100 Del 1, p. 537.

calculation of all preliminary income taxes and be the foundation for levying such taxes also in the context of other provisions.[64]

2.3.1.1 Exceptions to preliminary withholding tax

According to chapter 10 paras. 2 and 3 STPA, the main rule is that whoever pays for work performed in Sweden needs to withhold preliminary income taxes. However, with the exception provided in chapter 10 paras. 10 and 11 STPA, no preliminary taxes should be withheld if the one performing the work and receiving the compensation is approved for F-tax.

Furthermore, with chapter 10 para. 9 STPA follows that a full exemption can be applied for regarding each specific transaction in scope of the rules on preliminary withholding tax. This alternative to the approval for F-tax provides that the Swedish Tax Agency may issue a specific decision notice stating that no taxes should be withheld from a particular payment made to someone who is found not to be liable for income tax in Sweden.[65]

Finally, until the introduction of the new TAIS rules in 2021, chapter 10 para. 6 STPA allowed for an exception of preliminary withholding tax regarding payments to foreign companies without a PE in Sweden.[66] The motives for the original introduction of the provision were of administrative character and to, in line with the principle of chapter 8 para. 1 STPA, avoid the levying of taxes from companies that were in fact not liable for tax in Sweden.[67] While this exception was still in force, it was consequently not necessary for a foreign company without a Swedish PE to consider neither approval for F-tax nor any other application for the exception of preliminary withholding tax.[68]

[64] Prop. 2010/11:165, p. 721.
[65] Almgren and Leidhammar (2021a), commentary to chapter 10 para. 9 STPA.
[66] Prop. 2019/20:190, p. 38.
[67] Saric and Schwartz (2021), s. 391.
[68] See subchapter 4.2 No exception for foreign companies.

2.3.1.2 Limiting the preliminary withholding tax

In addition to a full exception from preliminary withholding tax, there is also a procedure through which the withheld tax instead can be limited. In line with chapter 55 para. 9 STPA, it is possible to apply for a decision on an adjustment of the above-mentioned 30% preliminary withholding tax. If approved, the tax withheld will instead be an amount according to a special calculation basis. The two conditions to be eligible for such a decision on a special calculation basis are that it will lead to the withheld preliminary taxes being closer to the estimated final taxes and that the difference in levied tax is not insignificant.[69] Moreover, nothing prevents such a calculation basis from finding that no tax should be withheld at all.[70]

A preliminary withholding tax can also be deferred following the provisions of chapter 63 STPA. The granting of a deferral needs to be preceded by an application from the taxpayer. In addition, conditions to be fulfilled for a deferral are, for example, when the taxes due are uncertain or specific circumstances when the payment will lead to considerable damages.[71]

2.3.2 Final tax assessment and requesting a refund

For a foreign company without a Swedish PE, there is generally no obligation to file a yearly tax return. This is a result of the wording of chapter 30 para. 4(3) STPA, indicating that the taxable income must exceed 200 SEK. However, according to chapter 56 para. 2 STPA, the Swedish Tax Agency will conduct a yearly final tax assessment based on the information made available.[72] In line with chapter 56 para. 10 STPA, the final tax assessment must be completed by the 15th on the twelfth month after the end of the fiscal year, typically by the 15th of December. The assessment is followed by a tax

[69] Almgren and Leidhammar (2021a), commentary to chapter 55 para. 9 STPA.
[70] The Swedish Tax Agency (2017), p. 89.
[71] Alggren and Leidhammar (2021b), pp. 75–78.
[72] For more information on the filing of tax returns and discretionary tax assessments, see chapter 57 of the STPA.

calculation, comparing the final tax to the withheld preliminary tax. To the extent the withheld preliminary tax exceeds the final tax, it is to be refunded.[73]

Furthermore, following chapter 64 para. 5 STPA, upon request, a refund of preliminary withholding tax may be granted in advance. The two provided conditions are that it can be assumed that the amount would otherwise be refunded after the final tax assessment and that waiting for the final tax assessment would be unreasonable. An application for a refund needs to be processed manually, and according to the preparatory works, the provision is to be applied restrictively.[74] In most situations, the interest of ensuring an effective tax procedure is given priority, to the detriment of the interest of an individual to receive its refund in advance.[75] One aspect of relevance for the interpretation of the provision is how close in time the final tax assessment is.[76] Another relevant aspect is the link between the deemed unreasonableness and the degree of certainty in the assumption for a future refund. In other words, the more evident it is that a refund will be granted after the final tax assessment, the more unreasonable it is to deny a refund in advance. A taxable person moving abroad is provided as such an example.[77] However, in the most recent preparatory works, it is yet again stressed that an advance refund should be granted restrictively and only under special circumstances. In normal situations, a foreign company should not be able to receive an advance refund simply because they have had tax withheld.[78]

Nevertheless, to receive either an advance refund or a refund after the final tax assessment, a bank account must be provided to the Swedish Tax Agency. For payments to foreign bank accounts, a written request needs to be sent by post to the Swedish Tax Agency. The request should be signed by the authorised signatories, such as the CEO or the board of directors. Attached needs to be a stamped and signed official registration certificate issued no

[73] Lodin, et al. (2021b), pp. 695–696.
[74] Prop. 2010/11:165, p. 1048.
[75] Almgren and Leidhammar (2021a), commentary to chapter 64 para. 5 STPA.
[76] Prop. 2010/11:165, p. 1049.
[77] Prop. 2010/11:165, p. 1049.
[78] Prop. 2019/29:190, pp. 96–97.

later than one month prior to the refund request. Additionally, a statement from the bank needs to be included, signed by the banker, and confirming the bank account holder.[79]

2.3.3 Concluding remarks

The fundamental principle of the Swedish preliminary income taxes is to levy an amount as close as possible to the deemed final taxes, and it appears to be the guiding principle throughout this area of the Swedish tax procedure. It is present regarding exceptions, exemptions, limitations and in situations of refunds of preliminary withheld taxes.

As a result, foreign companies that are not liable for tax in Sweden should not pay any preliminary income tax in Sweden. Yet, when preliminary income tax has been withheld, such foreign companies will often have to wait a long time to receive a refund. Furthermore, it will always require some sort of administrative burden, ultimately when fulfilling the requirements of requesting the refund.

Applying for an exemption from withholding tax needs to be done in advance by someone paying for services involving work performed in Sweden. Such an exemption needs to be applied for in advance regarding each specific payment. In contrast, the same result can be achieved through a decision to have the withheld preliminary tax limited. However, the latter is instead applied for by the foreign company providing the said service. In both cases, there is no retroactive effect to preliminary tax already withheld.

Allowing the preliminary income tax to be withheld and then requesting an advance refund appears to be an efficient way for a foreign company to remedy the effects of the preliminary withholding tax. Although, the reluctance in the preparatory works to grant such refunds causes a great deal of uncertainty regarding its credibility in practice.

[79] The Swedish Tax Agency (2021b).

3 Applying for Swedish F-tax

3.1 Introduction

The system of F-tax was introduced in 1993 to make it less complicated to acquire services. Previously, it had been the responsibility of the customer to evaluate if a service was purchased from a business or not. In many cases, customers who had made an incorrect assessment were charged with the preliminary income taxes they should have withheld. This uncertainty was undesirable and called for a change.[80]

Through an application process, businesses can now enjoy the benefits involved with the tax status of being approved for F-tax. If a service provider can confirm the approval for F-tax, its customers can safely pay for the performed service without the concern of withholding any preliminary income tax.[81] However, businesses have no obligation to neither apply nor be approved for F-tax.[82]

Conversely, being liable for tax in Sweden is not one of the requirements for the approval of Swedish F-tax.[83] Nevertheless, following chapter 28 para. 2 STPA, whoever applies for the approval for F-tax shall submit a preliminary tax return. Such preliminary tax return will serve as the basis for the decision of the preliminary income tax that is to be paid through monthly instalments, in line with chapter 55 para. 2 STPA.[84]

[80] Almgren and Leidhammar (2021a), introductory commentary to chapter 9 STPA.
[81] Prop. 2010/11:165, p. 327.
[82] Lodin, et al. (2021b), pp. 692–693.
[83] Almgren and Leidhammar (2021a), commentary to chapter 9, para. 1 STPA.
[84] Prop. 2010/11:165, p. 812.

3.2 Conditions for approval

According to chapter 9 para. 1 STPA, an applicant claiming to conduct *business in Sweden*, is to be approved for F-tax. Furthermore, approval for F-tax should also be granted even if there is no business performed in Sweden at the point of application, but instead, there is an intention to pursue business activities in Sweden in the future. The provision then presents conditions for the refusal of an application for F-tax. Such conditions are, for example, when there is a reasonable cause to assume that no business in Sweden neither is nor will be conducted. Another condition is when the soundness or legitimacy of the company can be questioned.[85]

The most relevant conditions for a foreign company applying for F-tax will be examined in detail in the following two subchapters.

3.2.1 Business in Sweden

A foreign company applying for the approval for F-tax needs to meet the requirement of performing business activities in Sweden. In line with chapter 3 para. 14 STPA, business in this context is defined as activities meeting the criteria for business taxation according to the SITA.[86] Following chapter 13 para. 1 SITA, business taxation entails independence, a degree of professionalism and permanency, and a profit-making purpose.[87] However, the Swedish Tax Agency suggests that legal persons are always taxed as a business, and under normal circumstances, it should not be reviewed whether the business criterion is met.[88]

Somewhat contrarily, the Swedish Tax Agency further states that it is not sufficient that the business criterion is met in the country of residence. It must also be met specifically regarding the activities performed in Sweden. A

[85] Almgren and Leidhammar (2021a), commentary to chapter 9, para. 1 STPA.
[86] Lodin, et al. (2021b), p. 692.
[87] Lodin, et al. (2021a), pp. 245–247.
[88] The Swedish Tax Agency (2021c).

business that is only carried out abroad does not qualify for Swedish F-tax.[89] Nevertheless, the definition of business activities in Sweden is not limited to work performed by representatives of the company or other employed personnel but includes hired independent subcontractors as well.[90]

Finally, F-tax is to be approved if there is an intention to perform business activities in Sweden. The provision helps new companies that find it challenging to start their business activity before being approved for F-tax.[91] The opinion of the Swedish Tax Agency is that a reasonable intention to perform business activities is when the business activities are commenced within three months upon the time of application.[92]

3.2.2 Other conditions

Following chapter 9 para. 1(3) STPA, approval for F-tax should not be granted if the applicant previously has abused an approval for F-tax or have unpaid taxes. Furthermore, the provision provides that an applicant for F-tax should not be in bankruptcy or banned from running a business.

In line with chapter 56 para. 2 SITA, a company with fewer than five owners making up for more than 50% of the voting rights is defined and treated differently in Swedish income tax law. According to chapter 9 para. 2 STPA, such companies need to meet the above-mentioned conditions both for the applying company and for the managers and executives of the company. This is motivated by the need to limit the possibility of simply assuming a prohibited business in a new legal form.[93]

Regarding the requirement on the absence of unpaid taxes, it covers due taxes and other fees, both in Sweden and abroad.[94] The Swedish Tax Agency claims that the relevant minimum threshold should be unpaid taxes or fees above

[89] Almgren and Leidhammar (2021a), commentary to chapter 9, para. 1 STPA.
[90] The Swedish Tax Agency (2021d).
[91] Lodin, et al. (2021b), p. 692.
[92] The Swedish Tax Agency (2012), p. 1.
[93] Almgren and Leidhammar (2021a), commentary to chapter 9, para. 2 STPA.
[94] Almgren and Leidhammar (2021a), commentary to chapter 9, para. 1 STPA.

20 000 SEK.[95] Foreign companies and individuals that are not residents of Sweden will need to prove that they have no liabilities of taxes in their country of residence. This is achieved through a tax arrears certificate issued from the tax authority of the resident state, included as an attachment to the application for Swedish F-tax.[96]

3.3 Concluding remarks

Being approved for F-tax evidently makes it easier to conduct business in Sweden. By choosing a service provider approved for F-tax, someone purchasing services involving work performed in Sweden can make sure never to be responsible for withholding preliminary income tax.[97]

With the approval for F-tax, the responsibility to pay preliminary income tax is shifted to the service provider. Furthermore, there are multiple criteria involved with a foreign company applying for the approval for F-tax. For example, the presence of tax liabilities for domestic companies and individuals is readily available information for the Swedish Tax Agency. In contrast, for foreign companies, this needs to be proven explicitly with attached documents.

Seemingly, two requirements to be approved for F-tax are that the work is being performed in Sweden and that this work is covered within the definition of business activities in Sweden. The Swedish Tax Agency claims that concerning legal persons, the classification of the work performed should not be an issue, while at the same time indicating that only being within the scope of business abroad is not sufficient to be approved for F-tax in Sweden.[98]

At the point of applying for F-tax, the criteria of either performing work in Sweden or having the intention to perform work in Sweden needs to be fulfilled. Following the opinion of the Swedish Tax Agency that the intent

[95] The Swedish Tax Agency (2012), p. 2.
[96] The Swedish Tax Agency (2021e).
[97] See subchapter 2.3.1 Preliminary income taxes.
[98] Elaborated further in subchapter 4.2.2 Work performed in Sweden.

should be realised within three months, a foreign company should consequently not apply for F-tax earlier than three months before the business in Sweden is planned to start. Furthermore, the criteria indicate *e contrario* that the approval for F-tax cannot be granted retroactively. If there is neither any ongoing business activity nor any future intentions of performing such work in Sweden, the approval for F-tax should be refused.

Based on the above, this creates a window of eligibility that is furthermore highly dependent on the processing times of the Swedish Tax Agency.[99] To illustrate this with an example, if a company wishes to be sure to avoid the withholding of preliminary income tax on its compensation concerning a temporary one-week project in Sweden, they can apply for F-tax. Provided that the project is planned ahead of time, the earliest the company can apply for F-tax is three months before the project starts. Given that the processing times of the Swedish Tax Agency is three months or more and that the planned project will not be continued longer than one week, the company would seemingly not meet the main criteria of performing work in Sweden.

Moreover, it is not unlikely that questions of preliminary income tax and F-tax, in practice might not arise until the point of requesting payment or sending an invoice. To conclude, F-tax as a way for foreign companies to avoid the withholding of preliminary income taxes is not without its complications and drawbacks. The approval for F-tax does not seem well suited for foreign companies with short and temporary projects in Sweden.

[99] On the extended processing times, please see subchapter 1.1 Background.

4 The TAIS rules

4.1 Background

The central argument for the changes implemented with the TAIS rules was an expressed need for neutrality. The competitive advantage of tax benefits available exclusively to foreign companies was not promoting ambitions towards other more productive competitive advantages.[100] Additional motives were to combat tax evasion and avoidance and allow for more certainty and foreseeability.[101]

The TAIS rules can be divided into three main components, whereas the last two are the focus of this thesis and will be elaborated on further in the following subchapters. The first component involves the shift to an economic employer concept and its effects on individual taxation. The second component brought changes to the exception on the withholding of preliminary income tax for payments to and from foreign companies. The third component enforces new obligations on foreign companies to provide information to the Swedish Tax Agency.[102]

Regarding the first component, the provisions enabling the taxation of individuals with limited tax liability are found in the Swedish Special Income Tax for Non-Residents Act[103]. The act allows for source taxation of non-residents that are working temporarily in Sweden.[104] Previously, there was an exception regarding foreign employers without a Swedish PE. The effect of this exception was that if a non-resident would travel to Sweden for temporary work, being employed by a domestic company would imply Swedish tax liability while being employed by a foreign staffing company would typically not. With the changes implemented through the TAIS rules, the shift to an

[100] Prop 2019/20:190, pp. 143–144.
[101] Prop 2019/20:190, p. 111.
[102] van der Capellen (2020), p. 456.
[103] Lag (1991:586) om särskild inkomstskatt för utomlands bosatta.
[104] Lodin, et al. (2021a), p. 55.

economic employer concept causes more non-residents with temporary work in Sweden to be liable for income tax in Sweden.[105] However, work limited to 15 subsequent days and 45 days per year has remained out of scope even for staffing companies.[106] The purpose of this minimum threshold was to exclude certain short and temporary situations such as meetings.[107]

In the preparatory works, it is stated that the effects of the TAIS rules will ease the administrative burden for those with an unlimited tax liability in Sweden while making it more complicated for those with a limited tax liability.[108] Furthermore, there was an awareness of increased administrative and compliance costs for both foreign companies providing services in Sweden and for Swedish companies purchasing such services. Moreover, the overall presence of foreign companies operating in Sweden was expected to decline, partly to be replaced by domestic companies. However, these costs were considered secondary when compared to the benefits of increased tax revenue, estimated to be at least 700 million SEK.[109]

4.2 No exception for foreign companies

With the TAIS rules, the exception provided in chapter 10 para. 6 STPA has been significantly changed.[110] Following the new provision, preliminary income tax must be withheld from payments to the extent these payments derive from work performed in Sweden. Tax liability or the presence of a Swedish PE is no longer a relevant condition.[111] Consequently, the provision targets two situations involving foreign companies without a Swedish PE that previously were not subject to any requirement to withhold Swedish preliminary income tax. The first situation is when a foreign company pays for work performed in Sweden. The second situation is when a Swedish

[105] van der Capellen (2020), pp. 457–462.
[106] Para. 6 b of the Swedish Special Income Tax Act for Non-Residents Act.
[107] Prop 2019/20:190, p. 62.
[108] Prop 2019/20:190, p. 129.
[109] Prop 2019/20:190, pp. 143.
[110] See subchapter 2.3.1.1 Exceptions to preliminary withholding tax.
[111] Almgren and Leidhammar (2021a), commentary to chapter 10 para. 6 STPA.

company pays a foreign company for work performed in Sweden.[112]

Apart from achieving neutrality, the change was further motivated by a need to make the Swedish rules on the withholding of preliminary income taxes more foreseeable and easier to comply with. By removing the exception mentioned above, Swedish companies were no longer required to make an assessment on the presence of a Swedish PE regarding the foreign company they were potentially purchasing a service from.[113] The preparatory works further pointed out that a failure to make such assessment correctly would lead to the undesirable result of the Swedish company being ultimately liable for the preliminary income tax. This result was not in line with having foreseeable rules and moreover didn't stress the benefits of being approved for F-tax.[114]

The suggested changes were also criticised. Svensk Näringsliv and Almega believed that the more complicated rules would make hiring foreign companies harder and more expensive without any significant benefit.[115] Furthermore, they were not convinced of the rules perceived compatibility with EU law.[116] On the other hand, the Swedish Government argued that the withholding of preliminary income tax for payments to foreign companies was not discriminatory and could otherwise be justified by the need to ensure an effective fiscal supervision and by a need to combat disloyal competition. However, the presented arguments by the Swedish Government were not discussed in detail and was without any reference to the CJEU case law on withholding taxes for services.[117]

[112] Saric and Schwartz (2021), pp. 391 and 395.
[113] Prop 2019/20:190, p. 91.
[114] Prop. 2019/20:190, p. 91–92.
[115] Prop. 2019/20:190, pp. 131–132.
[116] Prop. 2019/20:190, p. 112.
[117] Prop. 2019/20:190, pp. 113–115. See also subchapter 5.5.3 Justification and the Rule of Reason.

4.2.1 Partial withholding and the absence of a threshold

The wording of chapter 10 para. 6 STPA indicates that it's only to the extent a payment derives from work performed in Sweden that preliminary income tax is to be withheld. As pointed out by Saric and Schwartz, an assessment of the partial withholding of preliminary income tax is no easy task. If a Swedish company hires a foreign company for a project that involves both work performed in Sweden and abroad, only a part of the payment is to be subject to the preliminary income tax. When calculating this partial withholding, a Swedish company is likely to withhold too much or too little, especially given the absence of guidance in the preparatory works.[118] Furthermore, there is no minimum threshold to the requirement on withholding preliminary income tax. Work performed in Sweden could, for example, be a two-hour meeting.[119]

The difficulty in calculating a partial withholding of preliminary income tax was addressed by the Swedish Tax Agency on the 22 of March 2021. In a statement, the Swedish Tax Agency claimed that, regarding international transports, there would no longer be a need to withhold preliminary income tax for work performed in Sweden. The Swedish Tax Agency observed that foreign companies involved with international transports in Sweden are unlikely to have a Swedish PE or be liable for tax in Sweden. Furthermore, when a Swedish company pays for international transportation, determining the value of the work performed in Sweden would require conditions and circumstances which are typically not included on an invoice. As a result, the Swedish Tax Agency found that this considerable inconvenience allowed for an exception. However, this exception provided by the Swedish Tax Agency is only available specifically for international transports.[120]

[118] Saric and Schwartz, pp. 396–937.
[119] Saric and Schwartz, p. 395.
[120] The Swedish Tax Agency (2021g).

The Swedish Tax Agency has not published any additional statements regarding other industries that are likely to face the same problems and inconveniences. Saric and Schwartz suggest the publishing of a more general statement is in order.[121]

4.2.2 Work performed in Sweden

In line with chapter 10 para. 6 STPA, the obligation to withhold preliminary income tax is related to work performed in Sweden. In contrast and following chapter 9 para. 1 STPA, the approval for F-tax is instead related to the requirement of performing business activities in Sweden. As observed by Saric and Schwartz, this discrepancy is not ideal and may lead to situations where the withholding of preliminary income tax is required, but the condition for F-tax is not fulfilled. Provided that the approval for F-tax is one of the main ways of avoiding the preliminary withholding tax, it should be granted on the same terms as the obligation to withhold preliminary income taxes.[122]

Furthermore, there is uncertainty on what constitutes work performed in Sweden and when there is a business activity in Sweden. As previously mentioned, the Swedish Tax Agency is of the opinion that the hiring of subcontractors for the work performed in Sweden is within the scope of business activity for the foreign company.[123] This widened scope appears not to be the case for the definition of work performed in Sweden and the obligation to withhold preliminary income tax. If the foreign company and service provider hires a subcontractor to perform the work in Sweden, the Swedish company does not have to withhold preliminary income tax.[124]

In line with the wording of chapter 10 para. 6 STPA, if a subcontractor has not been approved for F-tax, the foreign company and service provider must

[121] Saric and Schwartz (2021), pp. 396–397.
[122] Saric and Schwartz (2021), pp. 395–396.
[123] See 3.2.1 Business in Sweden; The Swedish Tax Agency (2021d).
[124] Saric and Schwartz (2021), p. 398.

withhold preliminary income tax on behalf of its subcontractor. By using a subcontractor for the work performed in Sweden, the responsibility is shifted. As a result, the obligation to withhold preliminary income taxes may cover a transaction between two foreign companies where neither are liable for tax in Sweden.[125]

The preparatory works identified situations where a foreign company may be obliged to withhold preliminary income tax on account of a subcontractor while simultaneously having preliminary income tax withheld from a received payment. The presented solution for this problem is that the service provider can apply for a deferral of payment.[126]

4.3 New obligation to provide information

The third and last area of changes for foreign companies following the TAIS rules is a new obligation to provide information to the Swedish Tax Agency. Following chapter 33 para. 2(2) STPA, foreign companies without a Swedish PE must provide information on their tax liability in Sweden. In the preparatory works, it is stated that a foreign company is unlikely to file a tax return in Sweden after making the assessment that it does not have a Swedish PE. As a result, the Swedish Tax Agency will not have the information available to validate this assessment.[127]

Chapter 33 para. 6a STPA provides that the obligation to provide information includes foreign companies approved for F-tax and foreign companies that are required to withhold preliminary income tax on account of someone else. Furthermore, the requested information should include a description of the activities in Sweden, the duration, and other relevant details for income tax purposes.[128]

[125] Saric and Schwartz (2021), p. 398.
[126] Prop 2019/20:120, pp. 94–95.
[127] Prop 2019/20:120, pp. 99–100.
[128] Almgren and Leidhammar (2021a), commentary to chapter 33 para. 6a STPA.

In line with chapter 33 para 6b STPA, the Swedish Tax Agency can grant a limited exception from this new obligation to provide information. According to the preparatory works, such an exception can be granted when additional information is not required to determine the tax liability. Moreover, an exception should not last longer than five years. Finally, the exception may be recalled at any time when circumstances are changed.[129]

[129] Prop 2019/20:120, p. 152.

5 EU law and national tax provisions

5.1 Introduction

The EU law consists of legally binding primary law, secondary law, and case law from the CJEU. Furthermore, there are multiple sources of non-binding EU law, often referred to as soft law.[130] The two founding treaties, the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), are the two main sources of primary law. The latter TFEU originates from the Treaty establishing the European Economic Community (EC Treaty) and is the most relevant in tax law.[131]

With the early cases of *Costa v E.N.E.L* and *van Gend & Loos,* the CJEU has established the supremacy and direct effect of EU law in the event of conflicts with domestic legal provisions.[132] The *fundamental freedoms*[133] in the articles of the TFEU and their interpretation and development by the CJEU form part of the negative integration of the EU law into the legal orders of the member states, limiting discriminative and restrictive national measures.[134] On the other hand, positive integration is harmonisation achieved through secondary law and the adoption of more detailed provisions across the union.[135]

As an example of positive integration in the field of indirect taxes, Art. 113 TFEU provides that indirect taxes are harmonised within the EU. It is within the competence of the Council to unanimously adopt new provisions. For the field of direct taxes, however, the scope of EU law is limited, and it has remained a competence of the member states.[136] Consequently, regarding

[130] Hettne and Otken Eriksson (2011), pp. 40-46.
[131] Helminen (2018), pp. 1 and 9.
[132] See cases C-26/62, *van Gend & Loos* and C-6/64, *Costa v E.N.E.L.*
[133] See subchapter 5.2 The fundamental freedoms.
[134] Helminen (2018), p. 10; Adamczyk and Majdanska (2020), p. 9.
[135] Helminen (2018, p. 11; Croneberg (2021) p. 298.
[136] Adamczyk and Majdanska (2020), pp. 9–11; Påhlsson (2018), p. 55.

direct taxes, more emphasis is put on the above-mentioned negative integration of EU law.[137]

Art. 115 TFEU provides a legal basis for harmonisation and positive integration also for direct taxes, by the adoption of directives. Because of variations in tax policies between the different member states, there are often difficulties in finding common ground.[138] This is evident in the halted process towards a common consolidated tax base (CCCTB) which is a directive in progress, initially proposed by the Commission in 2011 and then re-launched in 2016.[139] Nevertheless, many successful examples exist as well, such as the recent Anti Tax Avoidance Directive[140] (ATAD) from 2016 and the multiple iterations of the Directive on Administrative Cooperation in the Field of Direct Taxation[141] (DAC) from 2011 and onward.[142]

Regarding the direct effect of directives, they generally need to be implemented into domestic law first. However, if the directive has not been implemented in time or implemented incorrectly, it may be relied upon by individuals.[143] Moreover, for direct effect of a directive provision, it needs to be unconditional and sufficiently precise.[144]

5.2 The Fundamental Freedoms

In line with Art. 20 TFEU, a citizenship of the EU allows for the free movement and equal treatment across the Union. Equal treatment for companies on the same grounds as for natural persons is provided by Art. 54 TFEU. Companies with their registered office, central administration, or their

[137] Wattel (2018a), p. 24.
[138] Adamczyk and Majdanska (2020), p. 11.
[139] The European Commission (2016). See also Adamczyk and Majdanska (2020), pp. 22–23
[140] Council Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.
[141] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.
[142] Adamczyk and Majdanska (2020), pp. 19–21.
[143] Adamczyk and Majdanska (2020), pp. 4–6.
[144] See e.g. case C-8/81, *Becker*, para. 25.

principal place of business in the EU are ensured the same protection as natural persons being citizens of a member state.[145] Furthermore, discrimination based on nationality is prohibited in Art. 18 TFEU. The article only applies when there is a cross-border element present and not to purely domestic discrimination.[146]

Following Art. 26(2) TFEU, the internal market is defined as an area of free movement for goods, persons, services, and capital. The free movement of persons implies both the free movement of workers and the freedom of establishment. Consequently, there are then in total five fundamental freedoms.[147] In line with Art. 6(3) TEU, these fundamental freedoms constitute general principles of EU law.

Regarding the free movement of goods, it is of limited relevance in the field of direct taxes.[148] Furthermore, because individual taxation is outside the scope of this thesis, the free movement of workers will not be discussed further. The following subchapters will explore the remaining three fundamental freedoms.[149]

5.2.1 Freedom of establishment

Pursuant to Art. 49 TFEU, the freedom of establishment entails a right for EU nationals to conduct business in other member states by setting up agencies, subsidiaries, or branches. The case of *Avoir Fiscale*[150] from 1986 was the first time the CJEU found a national tax measure to be incompatible with the TFEU, and more specifically, the freedom of establishment.[151] In this case, French domestic companies were given a more favourable treatment

[145] Helminen (2018), p. 59.
[146] Lazarov (2020), p. 64.
[147] Wattel (2018a), p. 23.
[148] Lazarov (2020), p. 64.
[149] Many of the presented cases here will be elaborated further in subchapter 5.5 Reviewing the compatibility of a national provision.
[150] Case C-270/83 *Avoir Fiscale*.
[151] Ståhl, et al. (2011), p. 70.

compared to French branches of foreign companies regarding dividend taxation.[152]

The essence of the freedom of establishment is a right to move a business with a degree of permanency involved.[153] Furthermore, the freedom is not limited by just allowing the setting up of a new main office or subsidiary abroad, but also includes a right of departure from the member state of origin.[154] In the *Daily mail* case from 1988, the freedom of establishment did not prohibit a national limitation for companies incorporated in the United Kingdom to move their effective place of management and establish themselves in the Netherlands.[155] However, in the case of *National Grid Indus,* an exit tax levied immediately upon departure was found not to be in line with the freedom of establishment.[156]

5.2.2 Freedom to provide services

The free movement of services is addressed in Art. 56-62 TFEU. What constitutes a service is given a broad definition and includes most activities that are performed in exchange for compensation.[157] The freedom enables a service provider to enter the market of another member state and be treated equally without the need to be established there.[158] Furthermore, the free movement of services also allows consumers to acquire services abroad where the service provider is located.[159] To keep in mind regarding the free movement of services is that it is generally subordinated to the other fundamental freedoms. As a result, the number of judgments by the CJEU on this freedom is limited.[160]

[152] Case C-270/83 *Avoir Fiscale*, para. 28.
[153] Lazarov (2020), p. 68.
[154] Wattel (2018a), p. 45.
[155] Case C-81/87, *Daily Mail*.
[156] Case C-371/10, *National Grid Indus*.
[157] Lazarov (2020), p. 69.
[158] Wattel (2018a), p. 43.
[159] Lazarov (2020), p. 69.
[160] Helminen (2021), e-book, subchapter 2.2.7.2 Cases on direct taxes.

The CJEU has held that a general rule of taxing foreign service providers on gross income and not allowing deduction of business expenses is not in line with the freedom to provide services.[161] Moreover, a national measure on the definitive withholding of income tax for cross border interest payments has been found prohibited by the freedom to provide services when it didn't allow for a deduction of related business expenses.[162]

In the joined cases of *Strojírny Prostejov and ACO Industries* from 2014, a requirement to withhold preliminary income tax only related to foreign staffing companies was not compatible with the freedom to provide services.[163] The CJEU came to the same conclusion in *X NV*, also regarding the withholding of source taxation on services.[164]

5.2.3 Freedom of capital

Following Art. 63-66 TFEU, restrictions on the free movement of capital and payments are generally prohibited. The treaty provides exceptions when the freedom may be limited in Art. 65 TFEU.[165] As opposed to the other freedoms, the freedom of capital is applicable in relation to third states and citizens outside the EU.[166] The free movement of capital and payments is a necessity to have a meaningful free movement of workers and freedom of establishments. Furthermore, Wattel considers the exceptions provided in Art. 65 TFEU to be unnecessary as they are simply a codification of the *rule of reason*[167] test of the CJEU.[168]

5.3 Double taxation in the EU

The instances of international double taxation that is likely to occur with overlapping tax claims of sovereign states are remedied through bilateral tax

[161] Case C-234/01, *Gerritse*, paras. 52–53.
[162] Case C-18/15, *Brisal and KBC Finance Ireland*, para. 47.
[163] Joined cases C-53/13 and C-80/13, *Strojírny Prostejov and ACO Industries*.
[164] Case C-498/10, *X NV*.
[165] Dahlberg (2020), pp. 432–433.
[166] Lazarov (2020), p. 70.
[167] See subchapter 5.5.3 Justification and the Rule of Reason.
[168] Wattel (2018a), pp. 48–49.

treaties and the ongoing development in the OECD and the model tax convention.[169] An in-depth analysis of the bilateral tax treaties is outside the scope of this thesis, yet the combatting of international double taxation is an objective of the EU as well. According to Art. 293 of the original EC treaty, member states should eliminate double taxation. However, such a provision is no longer part of either the TFEU or the TEU.[170] With the introduction of the ATAD, there has instead been a shift in focus towards double non-taxation and situations with a risk of double deduction of losses.[171]

The fact that there is no new article corresponding to Art. 293 of the EC treaty should not be interpreted as if dealing with situations of double taxation is no longer an important issue for the EU.[172] To an extent, international double taxation does interfere with the internal market and rights ensured by Art. 6 TEU.[173] Johansson describes the problem as that of cumulative burdens, where a cross-border activity may be subject to tax in multiple member states.[174] However, the CJEU has in multiple cases held that in the current stage of harmonisation in the field of direct taxation, there is no obligation for a member state to eliminate juridical double taxation caused by overlapping tax claims.[175] Furthermore, a member state is not obliged to consider the impact of tax provisions of other member states and ensure that cross-border activities are tax neutral.[176] The fundamental freedoms do not preclude that crossing a border may be disadvantageous, as long as there is no different treatment for comparable domestic situations.[177]

[169] OECD (2017), p. 9.
[170] Helminen (2018), p. 45.
[171] Johansson (2021), p. 948.
[172] Adamczyk and Majdanska (2020), p. 11.
[173] Monsenego (2011), p. 387.
[174] Johansson (2016), p. 137.
[175] Lazarov (2020), p. 86.
[176] Case C-371/10, *National Grid Indus*, para. 62.
[177] Case C-128/08, *Damseaux*, para. 27. See also Wattel (2018b), p. 382; Monsenego (2011), p. 383.

5.4 Directives on administrative cooperation and assistance

The DAC, adopted in 2011, was preceded multiple previous directives on the administrative cooperation and exchange of information. Furthermore, new DAC directives have been followed since 2011, with a proposal for a DAC 7 initiated in 2020.[178]

The fact that member states may use the DAC to acquire information has influenced how the CJEU interprets the compatibility of national tax provisions and the fundamental freedoms.[179] The DAC has made it harder to justify a discriminatory tax provision by a need to ensure an effective fiscal supervision.[180] However, the existence of the DAC does not mean that any national tax measure enforcing an obligation upon taxpayers to provide requested information is an excessive administrative burden.[181] Schilcher, Spies and Zirngast argue that some degree of increased administrative requirements must be accepted in a cross-border situation.[182]

Another relevant directive is the Tax collection Directive[183] which came into force in 2012. As with the DAC, this directive has had a similar effect on the CJEU's interpretation of national discriminatory or restrictive measures.[184] Nevertheless, regarding the withholding of source tax, the CJEU has held that although the Tax collection Directive is a step towards harmonisation, the purpose was not to replace source taxation as a way of levying taxes.[185]

[178] Schilcher, Spies and Zirngast (2020), pp. 251–254. See also The European Commission (2020).
[179] Schilcher, Spies and Zirngast (2020), p. 283.
[180] Schilcher, Spies and Zirrngast (2020), p. 283. See also 5.5.3 Justification and Rule of Reason.
[181] Joined cases C-436/08 and C-437/08, *Haribo and Österreichische Salinen*, paras. 102–103.
[182] Schilcher, Spies and Zirngast (2020), p. 284.
[183] Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.
[184] Schilcher, Spies and Zirngast (2020), p. 293.
[185] Case C-498/10, *X NV*, para. 47.

Furthermore, Hemels observes that neither of these two directives aims to harmonise national tax law or national tax procedure.[186]

5.5 Reviewing the compatibility of a national provision

When the CJEU examines a national provision in light of its compatibility with the fundamental freedoms, the procedure can be divided into four steps. First, it needs to be determined which fundamental freedoms are applicable for the case at hand. Secondly, the CJEU must review whether the selected freedom is sufficiently restricted. The final two steps involve evaluating possible justification grounds and then ultimately assessing the proportionality of the national measure.[187] However, this strict procedure is not followed in every judgment by the CJEU, and Johansson describes the process in three steps, merging the final two.[188]

In line with this structure, the following subchapters will discuss the approach of the CJEU when evaluating a national tax measure. The focus will be on cases dealing with the withholding of income tax for foreign service providers, similar to the changes implemented with the Swedish TAIS rules.

5.5.1 Applicable freedom

Although the fundamental freedoms[189] each have their own scope of applicability, there are situations of cross border activities where multiple freedoms may be invoked.[190] Lazarov presents the idea that in recent case law, the CJEU appears to look for the predominant freedom and disregard the others. However, although the CJEU's compatibility analysis is the same, it remains important to delineate the freedoms from each other, especially in situations involving third states.[191]

[186] Hemels (2018), pp. 280–281.
[187] Lazarov (2020), p. 65.
[188] Johansson (2016), pp. 44–45.
[189] See subchapter 5.2. The Fundamental Freedoms.
[190] Lazarov (2020), pp. 70–71.
[191] Lazarov (2020), p. 71.

When differentiating the freedom to provide services to other freedoms, the effect of the national measure and its purpose needs to be reviewed on a case-to-case basis.[192] An illustrating example is the *Fidium Finanz* case, where a German measure targeted providers of financial services established in third states, outside the Union. The national measure related to both the freedom to provide services and the freedom of capital and payments.[193] However, the freedom to provide services was found to be the more prominent and prevailing freedom. Thus, the measure was found not to conflict with EU law, as companies of third states could not rely on the freedom to provide services.[194]

5.5.2 Finding a restriction or discrimination in comparable situations

When analysing a national measure, the CJEU will typically make an assessment regarding either potential discrimination or the presence of a restriction.[195] In light of what's been previously discussed on the topic of double taxation, there are different opinions in the doctrine on whether pure restrictions can cause an infringement with the fundamental freedoms in tax cases.[196] Lazarov describes the restriction analysis in tax law cases as discrimination based.[197] On the other hand, Johansson separates the terminology and considers a restriction not to include any discriminatory elements.[198] Either way, as expressed by Advocat General Pitruzzella, direct taxes are likely to restrict activity on the internal market. Still, such a restriction is not infringing the fundamental freedoms unless there is also discrimination.[199]

[192] See cases C-53/13 and C-80/13, *Strojírny Prostejov and ACO Industries*, See also Johansson (2016), p. 41.
[193] Case C-452/04, *Fidium Finanz*, para. 34.
[194] Case C-452/04, *Fidium Finanz*, paras. 49–50.
[195] Johansson (2016), p. 265.
[196] See Lazarov (2020), pp. 74–75; Johansson (2016), p. 265; Monsenego pp. 238–240.
[197] Lazarov (2020), pp. 77–78.
[198] Johansson (2016), p. 265.
[199] Opinion of AG Pitruzzella in case C-156/17, *Köln-Aktienfonds Deka*, paras. 56–57.

Furthermore, incompatible discrimination can also be found in national tax measures that are not explicitly discriminatory. A tax measure that differentiates between companies of domestic and foreign origin is an example of such indirect discrimination.[200] However, other differentiating criteria for indirect discrimination is less decisive and allow member states to enforce protectionist tax policies.[201] In two recent cases on the Hungarian turnover tax, essentially only in scope for foreign companies, no indirect discrimination or restriction was found.[202] The CJEU stated in *Tesco-Global* that, in the absence of harmonisation, member states are free to establish a system of taxation that they see fit.[203] Moreover, in *Vodafone*, the Court indicated that progressive turnover taxes are not an indirect discrimination, despite the fact that they may to a greater extent affect foreign companies.[204]

Prohibited discrimination occurs when comparable situations are treated differently or when the same treatment is given to situations that are not comparable.[205] Furthermore, when determining if two situations are comparable or not, it should be assessed with the purpose and objective of the reviewed tax provision in mind.[206] In general, a domestic PE of a foreign company is considered to be a comparable situation to a domestic company.[207] However, in the *Futura Participations* case, a tax benefit reliant on the same administrative requirement for both domestic companies and the domestic PE of foreign companies was still considered to be indirect discrimination.[208] Johansson describes the Court's restriction analysis in the *Futura Participations* case as unclear, but indicates that it may be based on

[200] Helminen (2021), e-book, subchapter 2.1.2. Concept of discrimination.
[201] Lazarov (2020), p. 76.
[202] See cases C-75/18, *Vodafone*, para. 54; C-323/18, *Tesco-Global*, para. 74.
[203] Case C-323/18, *Tesco-Global*, para. 69.
[204] Case C-75/18, *Vodafone*, paras. 52–54.
[205] Case C-513/04, *Kerckhaert and Morres*, para. 19.
[206] Case C-252/14, Pensioenfonds Metaal en Techniek, paras. 48–51. See also Helminen (2021), e-book, subchapter 2.1.3.1 Comparability analysis.
[207] Lazarov (2020), pp. 81–82.
[208] Case C-250/95, *Futura Participations*, para. 43.

the indirect discrimination following the same treatment to situations which are not comparable

In contrast, in the *Commission v Belgium* case the there was no discussion of indirect discrimination or a comparability analysis when the withholding of tax and requirement to be registered in Belgium was evaluated. The CJEU was satisfied by confirming that the rules restrict the freedom to provide services by impeding or making it less advantageous to acquire services from a service provider of another member state.[209] To deprive an unregistered service provider of 15% of the price charged, which can only be recovered after an administrative procedure, constituted a restriction.[210] Regarding withholding taxes and the freedom to provide services, the CJEU has reached the same conclusion in multiple cases without discussing discrimination and comparability.[211]

5.5.3 Justification and the Rule of Reason

An established restriction of a fundamental freedom may be justified if the aim and purpose of the restriction are legitimate.[212] Some grounds for justification are provided directly in the TFEU.[213] However, these require direct and explicit discrimination and are rarely used successfully in direct tax cases.[214] Instead, the CJEU has through its case law accepted other justification grounds where there is an overriding reason of public interest.[215] These additional justification grounds from the case law is a result of the *rule of reason* principle, established in 1979 with the *Cassis de Dijon*[216] case.[217] Following this principle, a restrictive national measure with the purpose of achieving an overriding reason of public interest needs to be both appropriate

[209] Case C-433/04, *Commission v Belgium*, para. 32.
[210] Case C-433/04, *Commission v Belgium*, paras. 28–31.
[211] See e.g. cases C-498/10, *X NV*, para. 34; C-290/04, *Scorpio*, para. 34.
[212] Wattel (2018a), p. 39.
[213] See Art. 36, 45, 52, 65, and 202 TFEU.
[214] Lazarov (2020), p. 89.
[215] Wattel (2018a), p. 39.
[216] Case C-120/78*, Cassis de Dijon*.
[217] Lazarov (2020), p. 89.

and not go beyond what's necessary.[218] Ultimately it is the member states that must present their possible grounds for justification to the CJEU, i.e. justification grounds will not be assessed *ex oficio* by the Court.[219]

Regarding direct taxation, there are a few public interests that have been accepted as justification grounds. Lazarov categorises them as three, the need to safeguard the balanced allocation of taxing rights, the prevention of abuse and tax avoidance, and finally, to ensure the effectiveness of fiscal supervision and collection of taxes.[220] Wattel on the other hand, refers to five justification grounds, but ultimately boils them down to one – the need to safeguard tax base integrity.[221]

In the *Scorpio*[222] case, the withholding of income tax at source regarding payments to foreign service providers was justified by the need to ensure an effective collection of income tax. The Court further argues that it is an appropriate measure in ensuring that income does not escape taxation, considering that at the time of the events, there were no applicable mutual assistance directives.[223] Moreover, a foreign company could be granted an exemption by providing a residency certificate to the tax authority. Such administrative requirements to escape the withholding tax were considered justified.[224]

Furthermore, in the *X NV* case, the CJEU justified the withholding of income tax as a suitable means for ensuring an effective collection of income tax.[225] Like in *Scorpio*, the Dutch rules in X NV enforced the withholding of income tax specifically relating to foreign service providers. Previously there had been a system of applying for a tax decision in advance, but it was seen as too ineffective and challenging, both for the Dutch tax authority and for the

[218] Helminen (2021), e-book, subchapter 2.3.1. Rule of reason.
[219] Case C-35/19, *BU v État belge*, paras. 37–38.
[220] Lazarov (2020), pp. 89–97.
[221] Wattel (2018a), pp. 39–40.
[222] Case C-290/94, *Scorpio*.
[223] Case C-290/04, *Scorpio*, paras. 35–36.
[224] Case C-290/04, Scorpio, paras. 57–59.
[225] Case C-498/10, *X NV*, para. 42.

foreign companies.[226] In both *X NV* and *Scorpio,* the income taxes withheld at source were final taxes, and in *X NV,* there was also a possibility for deduction of related costs.[227] The need to allow foreign service providers such deductions were also confirmed in *Brisal and KBC Finance Ireland*.[228]

However, in *Commission v Belgium*, the CJEU came to an opposite conclusion. The case revolved around similar national provisions, although the ultimate responsibility for incorrectly withheld taxes was jointly held and could include work the service provider performed for others as well.[229] The requirement of withholding income tax related to all service providers that were not registered in Belgium, i.e. not exclusively targeting foreign companies.[230] The Belgian government argued that the rules had the purpose of encouraging registration in Belgium and that they could be justified by the need to combat tax avoidance, a need for an effective fiscal supervision, as well as the need to recover tax debts from unregistered service providers.[231] Nevertheless, CJEU found that the measures could not be justified as they were too unconditional and, on a precautionary basis, targeted all unregistered service providers regardless of their tax liability in Belgium.[232]

National provisions on the withholding of income taxes were also the question at hand in the joined cases of *Storjírny Prostejov and ACO Industries*.[233] When purchasing a service from a foreign staffing company, income tax had to be withheld regarding the income tax for the salaries of the posted workers. The national measure was motivated both by a need to ensure an effective collection of income tax and to prevent tax avoidance. [234] However, the CJEU ruled that the measure was not an appropriate means of ensuring the effective collection of income tax and argued that a more

[226] Case C-498/10, *X NV*, para 41.
[227] Cases C-498/10, *X NV*, para 41 and C-290/94, Scorpio, para. 49. (In *Scorpio* not allowing deductions was incompatible with the freedom of services).
[228] Case C-18/15, *Brisal and KBC Finance Ireland*, para. 55.
[229] Case C-433/04, *Commission v Belgium*, para. 20.
[230] Case C-433/04, *Commission v Belgium*, para. 22.
[231] Case C-433/04, *Commission v Belgium*, para. 23.
[232] Case C-433/04, *Commission v Belgium*, paras. 36–38.
[233] Joined cases C-53/13 and C-80/13, *Strojírny Prostejov and ACO Industries*.
[234] Joined cases C-53/13 and C-80/13, *Strojírny Prostejov and ACO Industries*, para. 52.

efficient system would allow the staffing company itself to withhold income taxes on behalf of its employees.[235] The Court then assumed a similar position like in the *Commission v Belgium* case and stated that general presumption of tax avoidance could not justify a restrictive measure.[236] This is in line with the *Cadbury Schweppes* case, where the CJEU confirmed that only restrictions to wholly artificial arrangements could be justified by the need to combat tax avoidance.[237]

To conclude, some examples of justification grounds that have not been accepted are, for example, the loss of tax revenue or the offsetting of low taxation abroad.[238] For instance, following the *Euro Wings case*, the fact that a service provider pays lower taxes in its country of residence cannot in any way justify a restrictive measure attempting to level out the competition.[239] In *Commission v Spain*, the Spanish government tried to justify a restrictive measure by stressing the administrative difficulties involved for the Spanish tax authority in obtaining required information from non-residents. This justification was not accepted.[240]

5.5.4 Proportionality

From the rule of reason, the principle follows that a justified tax measure may not go beyond what's necessary to achieve its purpose.[241] A measure targeting tax avoidance must target only abusive practices and not genuine businesses.[242] The withholding of income tax from payments to foreign service providers may under some circumstances be both justified and a

[235] Joined cases C-53/13 and C-80/13, *Strojírny Prostejov and ACO Industries*, paras. 52–53.
[236] Joined cases C-53/13 and C-80/13, *Strojírny Prostejov and ACO Industries*, paras. 54–59.
[237] Case C-196/04, *Cadbury Schweppes*, paras. 55 and 75.
[238] Helminen (2021), e-book, subchapter 2.3.1. Rule of reason.
[239] Case C-294/96, *Eurowings*, paras. 44–45.
[240] Case C-678/11, *Commission v Spain*, para. 61.
[241] See subchapter 5.5.3 Justification and the Rule of Reason. See also Case C-55/94, *Gebhard*, para. 37.
[242] Lazarov (2020), p. 101.

proportionate means of securing an effective collection of tax.[243] In *Commission v Belgium* the withholding of income tax with the purpose of ensuring an effective fiscal supervision was not proportionate, and a less restrictive rule would instead allow for some kind of exchange of information between the contracting partners and the tax authority.[244] Following *National Grid Indus*, an exit tax on unrealised gains levied directly upon leaving a member state was deemed disproportionate, and a less restrictive measure would allow for a deferral of the payment.[245]

Wattel presents the idea that the justification ground of ensuring a fiscal supervision and the effective collection of taxes may have lost some relevance after the introduction of the DAC and the tax collection directive but remains aware that there is some contradicting case law.[246] Furthermore, Helminen argues that due to these two directives, there are often less restrictive measures available for the states that still ensure the effective collection of taxes and a fiscal supervision.[247]

[243] See cases C-290/94, *Scorpi*o, para. 37; Joined cases C-53/13 and C-80/13, *Strojírny Prostejov and ACO Industries*, para. 48.
[244] Case C-433/04, *Commission v Belgium*, para. 39.
[245] Case C-371/10, *National Grid Indus*, para. 85.
[246] Wattel (2018a), pp. 39–40. See also subchapter 5.4 Directives on administrative cooperation and assistance.
[247] Helminen (2021), e-book, 2.3.2. Effectiveness of fiscal supervision and the recovery of tax debt.

6 Final analysis and conclusions

6.1 The changes following the TAIS rules

- *What are the underlying reasons and purpose for preliminary income taxes and the changes implemented with the new TAIS rules regarding payments to foreign companies, and do they meet their purpose?*

The fundamental principle of the Swedish system of preliminary income taxes, is that preliminary taxes paid in advance should correlate with the deemed final taxes. Furthermore, the levying of preliminary income taxes is motivated by a desire not to grant undue liquidity advantages and to prevent tax evasion.[248] The previous exception from the need to withhold preliminary income taxes relating to payments to foreign companies without a PE and Swedish tax liability was motivated by this fundamental principle.[249]

The main purpose presented by the Swedish government for the changes implemented with the TAIS rules is a need to level out the competition and to have all economic actors, foreign or domestic, compete on the same terms. Moreover, the changes had the purpose of combating tax evasion and avoidance, and to enable more certainty and foreseeability in the tax procedure.[250]

In the preparatory works, there is an awareness of the fact that the changes will benefit domestic businesses.[251] Regarding the competition purpose, it can be argued that the real purpose is slightly leaning towards protectionism and promoting domestic businesses. Assuming that a foreign company will pay preliminary taxes both in Sweden and in its country of residence, what's being

[248] See subchapters 2.3.1 Preliminary income taxes; 2.3 The Swedish tax procedure.
[249] See subchapter 2.3.1.1 Limiting the preliminary withholding tax.
[250] See subchapter 4.1 Background.
[251] See subchapter 4.1 Background.

achieved is likely not equal competition between foreign and domestic companies on the same terms.

By withholding preliminary income taxes, the risk of tax evasion is, of course, limited. However, that is providing there are indeed final taxes due. By specifically removing the exception for the need to withhold preliminary income taxes regarding payments to foreign companies without a Swedish PE, the rules can hardly be interpreted as meeting any purpose relating to the combatting of tax evasion and avoidance.

In addition, by removing the above-mentioned exception, the administrative burden on those acquiring services from foreign companies was intended to be reduced. When hiring a foreign service provider, there is no longer an associated risk with making an incorrect assessment on whether the service provider has a Swedish PE or not.[252] Consequently, the rules relieve the administrative burden for these actors to the detriment of increasing the administrative burden for foreign service providers. Moreover, the changes promote and provide further incentives for foreign service providers to be approved for F-tax. However, because of the new uncertainties for actors acquiring services, e.g., problems with partial withholding, it can be argued that the administrative burden has not changed significantly. Conceivably, the rules on preliminary income tax have not become more foreseeable and certain when considering the effects both for foreign service providers and for domestic actors acquiring services.

To conclude, it is hard to say if any of the general motives for both the system of preliminary income taxes and the changes with the TAIS rules are fulfilled. What's certainly been achieved are incentives for foreign companies to apply for the approval for F-tax, and some competitive advantages for domestic businesses. Making foreign companies register at the Swedish Tax Agency may to some extent facilitate the combatting of tax avoidance. However,

[252] See subchapter 4.1 Background.

provided that the previous exception was specifically towards foreign companies without tax liability in Sweden, there should be no risk of tax avoidance. The changes do not meet the purpose inherent in the overall objective of the Swedish preliminary income taxes, that preliminary income taxes should be levied at an amount close to the final taxes. Therefore, it is questionable if the withholding of preliminary income taxes is the right tool achieve the desired purpose.

- *How can a foreign company limit the effect of the new obligations following the TAIS rules?*

There are multiple ways the effects of the new obligation to withhold preliminary income tax can be limited, approval for F-tax perhaps being the most prominent one. Moreover, the TAIS rules have introduced an obligation for all foreign companies approved for F-tax to provide yearly information to the Swedish Tax Agency on their tax liability in Sweden. However, this obligation can be limited by applying for an exception for up to five years.[253] Consequently, a foreign company without a PE that wishes to apply for F-tax to avoid the withholding of preliminary income tax should make sure to attach an application for said exception together with its application for F-tax.

In addition, a company acquiring services involving work performed in Sweden may apply for an exemption from withholding preliminary income tax from a specific payment if the service provider is not approved for F-tax. Alternatively, the foreign company and service provider may apply for a decision to have the preliminary income tax calculated in accordance with a special calculation basis and consequently adjusted to zero. Finally, suppose the service provider has had tax withheld and is about to withhold preliminary income tax on account of a subcontractor or its employees. In that case, it may apply for a deferral of payment.[254]

[253] See subchapter 4.3 New obligation to provide information.
[254] See subchapters 2.3.1.2 Limiting the preliminary withholding tax; 2.3.3 Concluding remarks.

To ultimately receive the withheld tax, a foreign company will need to wait up to two years for the final tax assessment to be completed and the amount to be refundable through an administrative procedure. There is an option to receive an advance refund, but it is limited to special circumstances and will likely not be a successful procedure for foreign companies according to the recent preparatory works.[255]

Consequently, the most efficient way of limiting the effect of the new obligations for foreign companies appears to be through the application for the approval for F-tax and by making sure to include an application for exception from the yearly information obligation. The alternative ways involve a more demanding administrative burden by requiring a new application for each payment or ultimately when requesting a refund.

- *When can a foreign company be approved for F-tax, and is there a discrepancy between qualifying for F-tax and situations when preliminary income tax must be withheld from a payment?*

The approval for F-tax entails several formal requirements, such as a certificate on the absence of tax arrears, in some cases needed both for the foreign company and for its managers.[256] Another requirement is that work needs to be performed in Sweden and that this work is defined as a business activity.[257] Paying a service provider that is approved for F-tax for work performed in Sweden implies no obligation to withhold preliminary income tax. However, as pointed out by Saric and Schwartz, there may be a discrepancy between when one is eligible for the approval for F-tax and when preliminary income tax needs to be withheld.[258] Such discrepancy would arise when there is work performed in Sweden but said work would not be defined as a business activity. Moreover, the performed business activity in Sweden

[255] See subchapters 2.3.2 Final tax assessment and requesting a refund; 2.3.3 Concluding remarks.
[256] See subchapter 3.2.2 Other conditions.
[257] See subchapter 3.2.1 Business in Sweden.
[258] See subchapter 4.2.2 Work perfomed in Sweden.

needs to be within three months upon the time of applying for F-tax. The approval cannot be granted retroactively, and in situations where the processing times of the F-tax application is extended, it may not be an efficient method of escaping the withholding of preliminary income tax.[259]

The Swedish Tax Agency has indicated that foreign companies are generally deemed to engage in business activity, seemingly limiting the potential discrepancy. Moreover, the Swedish Tax Agency has stated that in scope for the definition of business activity in Sweden would also be the hiring of independent subcontractors.[260] Consequently, the discrepancy is undeniably present for sole traders or self-employed individuals providing temporary services in Sweden.

The discrepancy for foreign companies is different. Instead of there being an area where the scope of approval for F-tax is not overlapping with the need to withhold preliminary taxes, the scope for the approval for F-tax is much wider. This discrepancy is not without its own problems and uncertainty. For example, a Swedish company may not necessarily know whether the hired service provider intends on sending its own workers or will employ independent subcontractors. Only in the first case, there is a need to withhold preliminary income tax. If the service provider is only hiring subcontractors for the work performed in Sweden, an application for the exemption from the withholding of preliminary income tax would likely be declined on the grounds of there simply being no obligation to withhold preliminary income tax. In contrast, an application for F-tax would be approved regardless.

Consequently, the extended processing times may cause somewhat of a discrepancy in the sense of the approval for F-tax being realistically available for foreign companies in time. Otherwise, there should be no discrepancy where a foreign company is not eligible for F-tax and situations when there is

[259] See subchapters 3.2.1 Business in Sweden; 3.3 Concluding remarks.
[260] See subchapter 3.2.1 Business in Sweden.

an obligation to withhold preliminary income tax. Contrarily, the approval for F-tax is granted to a greater extent and cause an opposite discrepancy.

6.2 Compatibility with EU law

- *In the light of the EU fundamental freedoms, could the new Swedish rules on the withholding of preliminary income tax cause an incompatible restriction for foreign companies?*

A compatibility analysis of the new Swedish rules on the withholding of preliminary income tax for payments to foreign companies, not liable for tax in Sweden, would first determine the applicable fundamental freedom. This is achieved by reviewing the objective and purpose of the national measure. The *Fidium Finanz* case involved both the freedom to provide services and the freedom of capital and payments. However, the freedom of capital and payments were found to be secondary to the more prominent freedom to provide services.[261]

The new Swedish rules on the withholding of preliminary withholding tax could potentially be a restriction on the freedom of capital and payments. However, given the objective and purpose of the rules, the freedom to provide services is evidently more prominent.

In multiple cases, the CJEU has held that in the current state of harmonisation in the field of direct taxes, overlapping tax claims and disadvantageous cumulative burdens for cross-border activities constitute no restriction to the fundamental freedoms.[262] This was also confirmed in the *Tesco-Global* and *Vodafone* cases where progressive turnover taxes targeted mainly foreign companies.[263] However, In line with the presented case law on withholding of income taxes, the CJEU tends to not hesitate in constituting the presence

[261] See subchapter 5.5.1 Applicable freedom.
[262] See subchapter 5.3 Double taxation in the EU.
[263] See subchapter 5.5.2 Finding a restriction or discrimination in comparable situations.

of a restriction to the freedom to provide services. The withholding of income taxes for payments to foreign companies appears to be a restriction to the freedom to provide services regardless of whether the rules apply in general or specifically to foreign companies. Moreover, the Swedish provisions are likely to also imply indirect discrimination by enforcing the same rules on situations that are not objectively comparable. In other words, a foreign company without a PE or tax liability in Sweden, would not be in a comparable situation to a domestic company. [264]

With the conclusion that the Swedish rules on the withholding of preliminary income taxes cause a restriction, what's left is to assess whether they can be justified and are proportional. The Swedish government argues that rules can be justified by the need to ensure an effective fiscal supervision and to prevent disloyal competition.

The prevention of disloyal competition is not an acceptable justification ground by the CJEU. This justification ground is very similar to the one presented in the *Eurowings* case, with the purpose of levelling out an unfair tax advantage.[265] To the extent that it instead refers to the prevention of abuse and tax avoidance, it is settled that this justification requires wholly artificial arrangements and may not also target genuine businesses.[266]

Furthermore, the justification ground of securing an effective fiscal supervision or the effective collection of taxes was evaluated in several cases presented above. A case with a striking resemblance to the Swedish provisions was the *Commission v Belgium* case. In this case, the tax withheld from payments to unregistered service providers, only refundable after an administrative procedure, was a too broad and blunt measure to be justified. There were no tax liability or intention to tax, instead the purpose was to receive information on the foreign service providers and to make them

[264] See subchapter 5.5.2 Finding a restriction or discrimination in comparable situations.
[265] See subchapter 5.5.3 Justification and the Rule of Reason.
[266] See subchapters 5.5.3 Justification and the Rule of Reason; 5.5.4 Proportionality.

register in Belgium.[267] The Swedish rules on preliminary income tax similarly apply to all service providers unless registered for F-tax, with an expressed purpose of encouraging foreign service providers to apply for registration in Sweden.

In, for example, the *X NV* and *Scorpio* cases, the withholding tax measures could be justified by the need for an effective collection of taxes. However, these taxes were final and subject to possible deductions of related costs.[268] The minimum threshold for taxation of foreign companies in Sweden is the presence of a PE; there are no other means of definitive source taxation for work performed in Sweden by foreign companies.[269] Bearing in mind the overall objective of the Swedish preliminary income tax system, that taxes should be levied to an amount corresponding to the deemed final taxes, and provided that a foreign company has no tax liability in Sweden, the rules cannot possibly be justified by the need to ensure an effective collection of taxes. Consequently, the relevance of these two cases is deemed to be limited when interpreting the Swedish rules.

In the event that the need for an effective fiscal supervision could justify the Swedish rules, the restriction ultimately needs to fulfil the proportionality requirement. As presented above, in the *Commission v Belgium* case, the withholding of income taxes as a means for ensuring an effective fiscal supervision was not found to be proportional.[270] In light of this judgment, the Swedish rules on the withholding of preliminary income tax would nevertheless be incompatible with the freedom to provide services on the grounds of going beyond what's necessary to achieve an effective fiscal supervision. A less restrictive measure would involve the Swedish Tax Agency requesting the needed information without a need of withholding preliminary income taxes on account of foreign companies not liable for taxes in Sweden.

[267] See subchapter 5.5.3 Justification and the Rule of Reason.
[268] See subchapter 5.5.3 Justification and the Rule of Reason.
[269] See subchapters 2.1 Introduction; 2.2 On the presence of a PE in Sweden.
[270] See subchapter 5.5.4 Proportionality.

Notably, difficulty in acquiring information cannot justify a restrictive measure. Particularly provided the alternative possibility of both obtaining information and collecting taxes through the DAC and the Tax collection Directive.[271] Although the relevance of these two directives is yet somewhat limited and that they do not prohibit national measures incurring burdensome administrative requirements upon foreign companies, they are likely to still have an effect when assessing whether the national measure is proportionate.

Consequently, the new Swedish obligation to withhold preliminary income taxes on behalf of foreign companies without a PE or tax liability in Sweden is an incompatible restriction to the freedom to provide services and EU law.

6.3 Final remarks

To conclude, it appears that the withholding of preliminary income taxes in breach of Swedish tax liability would not be in line with neither EU law nor would it efficiently achieve the overall purpose from a Swedish perspective.

From the recent Hungarian turnover tax cases of *Vodafone* and *Tesco-Global*, it is clear that the member states are generally free to create new means of taxing foreign companies that is not dependent on the presence of a PE. Moreover, following *X NV* and *Scorpio*, the withholding of preliminary income taxes is compatible with EU law when there is tax liability relating to the withheld tax. However, with the Swedish rules, there is no tax liability backing them up, similar to the circumstances of the *Commission v Belgium* case.

[271] See subchapters 5.4 Directives on administrative cooperation and assistance; 5.5.3 Justification and the Rule of Reason; 5.5.4 Proportionality.

Notably, the brief compatibility assessment made by the Swedish Government did not refer to any of the CJEU case law on the withholding of taxes related to performed services.[272] Moreover, the previously available exception for foreign companies without a Swedish PE, prior the TAIS rules changes, was motivated by primarily administrative reasons. Compliance with EU law was not mentioned.[273] However, just because an exception was introduced without EU law compatibility in mind, the effect of removing such an exception should not be overlooked.

The new Swedish rules could have been designed differently to still achieve their overall purpose and to be more likely of fulfilling the proportionality requirement of EU law. As previously mentioned, the obligation to withhold preliminary income tax is only related to work that the service provider performs in Sweden. This puts emphasis on two interconnected issues. For situations where the payment refers to more than just work performed in Sweden, there is a necessity to calculate a partial withholding. In addition, the absence of a minimum threshold potentially incurs an obligation to withhold income tax from a simple meeting. In line with the argumentation by Saric and Schwartz, the rules need more straightforward methods for addressing these issues. Furthermore, the necessity of some change is evident from the legal statement by the Swedish Tax Agency on the exception for international transports.[274] Allowing for more general exceptions would relieve some of the administrative burden. Regarding the TAIS changes implemented in the Swedish Special Income Tax for Non-Residents Act, an exception was allowed provided that the threshold of work performed did not surpass 15 consecutive days and 45 days per year. The exception was motivated by the desire not to target specifically meetings.[275] Perhaps a similar exception would be appropriate regarding payments to foreign companies as well.

[272] See subchapter 4.1 Background.
[273] See subchapter 2.3.1.1 Exceptions to preliminary withholding tax.
[274] See subchapter 4.2.1 Partial withholding and the absence of a threshold.
[275] See subchapter 4.1 Background.

Furthermore, the changes of the TAIS rules could have allowed foreign companies without a PE specific access to the advance refund procedure. Instead of explicitly excluding foreign companies, as expressed in the recent preparatory works, it would be an efficient way of refunding withheld taxes relating to temporary work in Sweden.[276] Additionally, this would limit the administrative burdens both for the Swedish Tax Agency and for the foreign service providers. Moreover, such an approach would better align with the overall principle that preliminary income taxes should be levied to an amount close to the final taxes.

It remains to be seen what will happen next. One question is whether the Swedish Tax Agency will issue more branch related exceptions or whether the current situation of pushing foreign companies to register for F-tax will be maintained. Moreover, given that the conditions of the Swedish preliminary withholding taxes are equivalent to those of the Belgian rules in the *Commission v Belgium* case, it is not impossible that the Commission will act against Sweden as it did against Belgium. Perhaps such action could be instigated by the implementation of the new means of source taxation following Pillar one and two. Although being out of scope for this thesis, its implementation opens for new research in the light of the compatibility of withholding taxes and source taxation across the EU.

[276] See subchapters 2.3.2 Final tax assessment and requesting a refund; 2.3.3. Concluding remarks.

Bibliography

EU legal sources

Treaties:

Consolidated version of the Treaty establishing the European Economic Community (EC treaty), C 325/45, Official Journal of the European Communities, 24 December 2002.

Consolidated version of the Treaty on European Union (TEU), C 326/01, Official Journal of the European Union, 26 October 2012.

Consolidated version of the Treaty on the Functioning of the European Union (TFEU), C 326/01, Official Journal of the European Union, 26 October 2012.

Council Directives:

Council Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (ATAD), L 193/53, Official Journal of the European Union, 19 July 2016.

Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (DAC), L 64/54, Official of the European Union, 11 March 2011.

Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (the Tax collection Directive), L 84/53, Official Journal of the European Union, 31 March 2010.

Swedish legal acts

Swedish Administrative Procedure Act (SAPA),
Förvaltningslag (2017:900).

Swedish Income Tax Act (SITA),
Inkomstskattelag (1999:1229).

Swedish Special Income Tax Act for Non-Residents Act,
Lag (1991:586) om särskild inkomstskatt för utomlands bosatta.

Swedish Tax Procedure Act (STPA),
Skatteförfarandelag (2011:1244).

Swedish Preparatory works

Prop. 1996/97:100 Del 1, *Ett nytt system för skattebetalningar, m.m. kap. 1-11.*
[Cit. Prop. 1996/97:100 Del 1]

Prop. 2010/11:165, *Skatteförfarandet.*
[Cit. Prop. 2010/11:165]

Prop. 2014/15:100, *2015 års ekonomiska vårproposition.*
[Cit. 2014/15:100]

Prop. 2019/20:190, *Ekonomiskt arbetsgivarbegrepp – förändrade skatteregler vid tillfälligt arbete i Sverige.*
[Cit. Prop. 2019/20:190]

Other sources

The European Commission:

The European Commission, Press release, *Commission proposes major corporate tax reform for the EU*, 25 October 2016, available online: https://ec.europa.eu/commission/presscorner/detail/en/IP_16_3471 accessed 2021-10-01.
[Cit. The European Commission (2016)]

The European Commission, Press release, *Fair Taxation: Member States agree on new tax transparency rules on digital platforms,* 1 December 2020, available online: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2253 accessed 2021-12-10.
[Cit. The European Commission (2020)]

The European Commission, Press release, *Fair Taxation: Commission proposes swift transposition of the international agreement on minimum taxation of multinationals*, 22 December 2021, available online: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_7028 accessed 2021-12-23.
[Cit. The European Commission (2021)]

The OECD:

OECD, *Model Tax Convention on Income and on Capital: Condensed Version*, OECD Publishing, 2017, available online: https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017_mtc_cond-2017-en accessed 2021-09-22.
[Cit. OECD (2017)]

OECD, *Tax Administration Responses to Covid-19: Administrative Measures to facilitate withholding Tax Relief Claims*, 6 September 2021, available online: https://read.oecd-ilibrary.org/view/?ref=1106_1106605-twb5vxr6i9&title=Tax-Administration-Responses-to-COVID-19-Administrative-Measures-to-facilitate-withholding-Tax-Relief-Claims accessed 2021-11-22.
[Cit. OECD (2021)]

The Swedish Tax Agency:

The Swedish Tax Agency, general advice, *Skatteverkets allmänna råd om godkännande för F-skatt*, SKV A 2012:6, 20 April 2021, available online: https://www4.skatteverket.se/download/18.22f626eb14fb326a4b6630/1441822874961/SKVA%202012_06.pdf accessed 2021-11-03.
[Cit. The Swedish Tax Agency (2012)]

The Swedish Tax Agency, notice, *Beskattning och betalning av skatt vid tillfälligt arbete i Sverige*, Dnr 2 02 253985-17/113, 19 June 2017, available online: https://www.skatteverket.se/download/18.515a6be615c637b9aa46954/1498048417908/170619%20-%20Promemoria_Beskattning%20och%20betalning%20av%20skatt%20vid%20tillf%C3%A4lligt%20arbete%20i%20Sverige.pdf accessed 2021-11-12.
[Cit. The Swedish Tax Agency (2017)]

The Swedish Tax Agency, *Registration for foreign companies in Sweden*, available online: https://www.skatteverket.se/servicelankar/otherlanguages/inenglish/businessesandemployers/startingandrunningaswedishbusiness/registeringabusiness/registrationofforeigncompaniesinsweden.4.109dcbe71721adafd25501e.html accessed 2021-11-10.
[Cit. The Swedish Tax Agency (2021a)]

The Swedish Tax Agency, *Refund from tax account*, available online: https://skatteverket.se/servicelankar/otherlanguages/inenglish/businessesandemployers/startingandrunningaswedishbusiness/refundfromtaxaccount.4.8bcb26d16a5646a1487886.html accessed 2021-11-30.
[Cit. The Swedish Tax Agency (2021b)]

The Swedish Tax Agency, legal guidance, *Vem kan bli godkänd för F-skatt eller FA-skatt? – Juridiska personer personer bedriver alltid näringsverksamhet (med undantag för lagerbolag),* 2021, available online: https://www4.skatteverket.se/rattsligvagledning/edition/2021.17/1292.html#h-Juridiska-personer-bedriver-alltid-naringsverksamhet-undantag-for-lagerbolag accessed 2021-12-06.
[Cit. The Swedish Tax Agency (2021c)]

The Swedish Tax Agency, legal guidance, *Vem kan bli godkänd för F-skatt eller FA-skatt? – näringsverksamhet i Sverige*, 2021, available online: https://www4.skatteverket.se/rattsligvagledning/edition/2021.17/1292.html#update_20211201102752 accessed 2021-12-06.
[Cit. The Swedish Tax Agency (2021d)]

The Swedish Tax Agency, legal guidance, *Vem kan bli godkänd för F-skatt eller FA-skatt? – intyg om att skate- och avgiftsskulder saknas i utlandet*, 2021, available online: https://www4.skatteverket.se/rattsligvagledning/edition/2021.17/1292.html#h-Brister-i-redovisning-eller-betalning-av-skatter-eller-avgifter accessed 2021-12-06.
[Cit. The Swedish Tax Agency (2021e)]

The Swedish Tax Agency, legal guidance, *Fast driftställe, Huvudregel, Stadigvarande,* 2021, available online: https://www4.skatteverket.se/rattsligvagledning/edition/2021.17/2690.html#h-Stadigvarande accessed 2021-12-06.
[Cit. The Swedish Tax Agency (2021f)]

The Swedish Tax Agency, legal statement, *Internationella vägtransporter – fråga om skatteavdrag på ersättning för arbete i Sverige till utländsk juridisk person*, 8-866441, 22 March 2021, available online: https://www4.skatteverket.se/rattsligvagledning/390683.html?date=2021-03-22 accessed 2021-12-07.
[Cit. The Swedish Tax Agency (2021g)]

Literature:

Adamczyk, Lukasz and Majdanska, Alicja, 'Chapter 1: The Sources of EU Law Relevant for Direct Taxation' in: Lang, Michael, Pistone, Pasquale, Schuch, Josef, Staringer, Claus, Rust, Alexander, Kofler, Georg & Spies, Karoline (Ed.), *Introduction to European tax law on direct taxation*, 6th edition, Linde, Wien ; London, 2020.
[Cit. Adamczyk and Majdanska (2020)]

Almgren, Karin and Leidhammar, Börje, *Skatteförfarandelagen m.m., En kommentar* [Electronically available through Juno], Norstedts Juridik, 2021.
[Cit. Almgren and Leidhammar (2021a)]

Almgren, Karin and Leidhammar, Börje, *Skatteprocessen*, 4th edition, Norstedts juridik, Stockholm, 2021.
[Cit. Almgren and Leidhammar (2021b)]

Andersson, Mari, Dahlberg, Mattias, Saldén Enérus, Anita and Tivéus, Ulf, *Inkomstskattelagen, en kommentar. Del I och del II* [Electronically available through Juno], Norstedts Juridik, 2021.
[Cit. Andersson, Dahlberg, Saldén Enérus and Tivéus (2021)]

Avi-Yonah, Reuven S., *Advanced introduction to international tax law*, Elgar, Cheltenham, 2015.
[Cit. Avi-Yonah (2015)]

Brokelind, Cécile, *An Overview of Legal Issues Arising from the Implementation in the European Union of the OECD's Pillar One and Pillar Two Blueprint* [Electronically available through IBFD], Bulletin for International Taxation, Volume 75, No. 5, 2021.
[Cit. Brokelind (2021)]

Croneberg, Richard, *Att motverka skatteflykt: en komparativ studie av generella åtgärder mot skatteflykt i Sverige och Danmark i ljuset av skatteflyktsdirektivets allmänna regel mot missbruk*, Lund University, Faculty of Law, Diss. Lund: Lunds universitet, Lund, 2021.
[Cit. Croneberg (2021)]

Dahlberg, Mattias, *Internationell beskattning*, 5th edition, Studentlitteratur, Lund, 2020.
[Cit. Dahlberg (2020)]

Fritz, Maria, *Förbudet mot rättsmissbruk i EU-rätten: en förändrad avvägning mellan rättssäkerhet och rättvisa i den svenska skatterätten?*, Department of Business Law, School of Economics and Management, Lund University, Diss. Lund : Lunds universitet,Lund, 2020.
[Cit. Fritz 2020)]

Frödeberg, Petter and Rova, Johan, *Ekonomisk arbetsgivare - nytt regelverk för beskattning av personal som arbetar tillfälligt i Sverige*, Skattenytt, 2021, pp. 253–264.
[Cit. Frödeberg and Rova (2021)]

Gadžo, Stjepan, *Nexus Requirements for Taxation of Non-residents' Business Income: A Normative Evaluation in the Context of the Global Economy* [Electronically available through IBFD], IBFD, 2018
[Cit. Gadžo (2018)]

Helminen, Marjaana, *EU tax law: direct taxation*, 2018 edition, IBFD, Amsterdam, 2018.
[Cit. Helminen (2018)]

Helminen, Marjaana, *EU tax law: direct taxation*, 2021 edition, [Electronically available through IBFD], IBFD, 2021.
[Cit. Helminen (2021)]

Hemels, Sigrid, ’Chapter 13: Administrative Cooperation in the Assessment and Recovery of Direct Tax Claims’ in: Terra, B. J. M., *European tax law Volume I General topics and direct taxation*, edited by Peter J. Wattel, Otto Marres and Hein Vermeulen, 7th abridged student edition, Wolters Kluwer, Deventer, 2018.
[Cit. Hemels (2018)]

Hettne, Jörgen and Otken Eriksson, Ida (Ed.), *EU-rättslig metod*, 2nd edition, Nordstedts Juridik, Stockholm, 2011.
[Cit. Hettne and Otken Eriksson (2011)]

Johansson, Jesper, *EU-domstolens restriktionsprövning i mål om de grundläggande friheterna och direkta skatter*, Jure, Diss. Stockholm : Stockholms universitet, Stockholm, 2016.
[Cit. Johansson (2016)]

Johansson, Jesper, *Is NN A/S (C-28/17) a Potential Trendsetter*?, Intertax, Volume 49/11, Kluwer Law International, 2021, pp. 948-955.
[Cit. Johansson (2021)]

Kleineman, Jan, ’Rättsdogmatisk metod’ in: Nääv, Maria and Zamboni, Mauro (Ed.), *Juridisk metodlära*, 2nd edition, Studentlitteratur, Lund, 2018.
[Cit. Kleineman (2018)]

Lambertz, Göran, *Nyttig och onyttig rättsvetenskap*, Svensk Juristtidning, 2002, pp. 261–278.
[Cit. Lambertz (2002)]

Lang, Michael, Pistone, Pasquale, Schuch, Josef, Staringer, Claus, Rust, Alexander, Kofler, Georg & Spies, Karoline (Ed.), *Introduction to European tax law on direct taxation*, 6th edition, Linde, Wien ; London, 2020.
[Cit. Lang, et al. (2020]

Lazarov, Ivan, 'Chapter 2: The Relevance of the Fundamental Freedoms for Direct Taxation' in: Lang, Michael, Pistone, Pasquale, Schuch, Josef, Staringer, Claus, Rust, Alexander, Kofler, Georg & Spies, Karoline (Ed.), *Introduction to European tax law on direct taxation*, 6th edition, Linde, Wien ; London, 2020.
[Cit. Lazarov (2020)]

Lodin, Sven-Olof, Lindencrona, Gustaf, Melz, Peter, Silfverberg, Christer, Simon-Almendal, Teresa and Persson Österman, Roger, *Inkomstskatt: en lärobok i skatterätt Del 1*, 18th edition, Studentlitteratur, Lund, 2021.
[Cit. Lodin, et al. (2021a)]

Lodin, Sven-Olof, Lindencrona, Gustaf, Melz, Peter, Silfverberg, Christer, Simon-Almendal, Teresa and Persson Österman, Roger, *Inkomstskatt: en lärobok i skatterätt Del 2*, 18th edition, Studentlitteratur, Lund, 2021.
[Cit. Lodin, et al. (2021b)]

Monsenego, Jérôme, *Taxation of foreign business income within the European internal market: an analysis of the conflict between the objective of achievement of the European internal market and the principles of territoriality and worldwide taxation*, Stockholm School of Economics, Diss. Stockholm : Handelshögskolan i Stockholm, Stockholm, 2011
[Cit. Monsenego (2011)]

Påhlsson, Robert, *Konstitutionell skatterätt*, 4th edition, Iustus förlag, Uppsala, 2018.
[Cit. Påhlsson (2018)]

Påhlsson, Robert, Kleist, David, Rendahl, Pernilla and Svensson, Bo, *Grundläggande inkomstskatterätt*, 1st edition, Iustus, Uppsala, 2019
[Cit. Påhlsson, Kleist, Rendahl and Svensson (2019)]

Sandgren, Claes, *Rättsvetenskap för uppsatsförfattare: ämne, material, metod och argumentation*, 4th edition, Norstedts Juridik, Stockholm, 2018.
[Cit. Sandgren (2018)]

Saric, Mato and Schwartz, Christian, *Förslaget om övergång till ekonomisk arbetsgivare vid tillfälligt arbete i Sverige,* Svensk Skattetidning, 2021, pp. 329–341.
[Cit. Saric and Schwartz (2018)]

Saric, Mato and Schwartz, Christian, *Skatteavdrag på skattefri inkomst – förändrade skatteregler vid tillfälligt (och "otillfälligt") arbete i Sverige,* Svensk Skattetidning, 2021, pp. 389–400.
[Cit. Saric and Schwartz (2021)]

Schilcher, Michael, Spies, Karoline and Zirngast, Sabine, 'Chapter 9: Mutual ssistance in Direct Tax Matters' in: Lang, Michael, Pistone, Pasquale, Schuch, Josef, Staringer, Claus, Rust, Alexander, Kofler, Georg & Spies, Karoline (Ed.), *Introduction to European tax law on direct taxation*, 6th edition, Linde, Wien ; London, 2020.
[Cit. Schilcher, Spies and Zirngast (2020)]

Schön, Wolfgang, *Neutrality and Territoriality – Competing or Converging Concepts in European Tax Law?,* Bulletin for International Taxation, April/May, 2015, pp. 271–293.
[Cit. Schön (2015)]

Ståhl, Kristina, Persson Österman, Roger, Hilling, Maria and Öberg, Jesper, *EU-skatterätt*, 3rd edition, Iustus, Uppsala, 2011.
[Cit. Ståhl, et al. (2011)]

Terra, B. J. M., *European tax law Volume I General topics and direct taxation*, edited by Peter J. Wattel, Otto Marres and Hein Vermeulen, 7th abridged student edition, Wolters Kluwer, Deventer, 2018.
[Cit. Terra (2018)]

Tjernberg, Mats, *Skatterättslig tolkning*, 1st edition, Iustus, Uppsala, 2018.
[Cit. Tjernberg (2018)]

Traversa, Edoardo and Pirlot, Alice 'Chapter 6: Tax Sovereignty and Territoriality under Siege: How far Should the EU Freedoms of Movement Impact on the Territorial Allocation of Taxing Powers between Member States?' in Brokelind, Cécile (Ed.), *Principles of law: function, status and impact in EU Tax Law* [Electronically available through IBFD], IBFD, Amsterdam, 2014.
[Cit. Traversa and Pirlot (2014)]

van der Capellen, Pernilla, *Regelverket om det ekonomiska arbetsgivarbegreppet – så blev det, Svensk Skattetidning*, 2020, pp. 455–471.
[Cit. van der Capellen (2020)]

Wattel, Peter J., 'Chapter 3: General EU Law Concepts and Tax Law' in: Terra, B. J. M., *European tax law Volume I General topics and direct taxation*, edited by Peter J. Wattel, Otto Marres and Hein Vermeulen, 7th abridged student edition, Wolters Kluwer, Deventer, 2018.
[Cit. Wattel (2018a)]

Wattel, Peter J., 'Chapter 14: Conceptual Background of the CJEU Case Law in Direct Tax Matters' in: Terra, B. J. M., *European tax law Volume I General topics and direct taxation*, edited by Peter J. Wattel, Otto Marres and Hein Vermeulen, 7th abridged student edition, Wolters Kluwer, Deventer, 2018.
[Cit. Wattel (2018b)]

Table of Cases

Judgment from the Swedish Supreme Administrative Court

HFD 2019 ref. 36

Judgments from the Court of Justice of the European Union

Case C-26/62, *van Gend & Loos*, EU:C:1963:1

Case C-6/64, *Costa v E.N.E.L*, EU:C:1964:66.

Case C-120/78, *Cassis de Dijon*, EU:C:1979:42.

Case C-8/81, *Becker*, EU:C:1982:7.

Case C-270/83 *Avoir Fiscale*, EU:C:1986:37.

Case C-81/87, *Daily Mail*, EU:C:1988:456.

Case C-55/94, *Gebhard*, EU:C:1995:411.

Case C-250/95, *Future Participations*, EU:C:1997:239.

Case C-294/96, *Eurowings*, EU:C:1999:524.

Case C-234/01, *Gerritse*, EU:C:2003:340.

Case C-290/94, *Scorpio*, EU:C:2006:630.

Case C-452/04, *Fidium Finanz*, EU:C:2006:631.

Case C-433/04, *Commission v Belgium.* EU:C:2006:702.

Case C-513/04, *Kerckhaert and Morres*, EU:C:2006:713.

Case C-128/08, *Damseaux*, EU:C:2009:471.

Joined cases C-436/08 and C-437/08, *Haribo and Österreichische Salinen*, EU:C:2011:61.

Case C-371/10, *National Grid Indus*, EU:C:2011:785.

Case C-498/10, *X NV*, EU:C:2012:635.

Joined cases C-53/13 and C-80/13, *Strojírny Prostejov and ACO Industries*, EU:C:2014:2011.

Case C-678/11, *Commission v Spain*, EU:C:2014:2434,

Case C-252/14, *Pensioenfonds Metaal en Techniek*, EU:C:2016:402.

Case C-18/15, *Brisal and KBC Finance Ireland*, EU:C:2016:549.

Case C-35/19, *BU v État belge*, EU:C:2019:894.

Case C-75/18, *Vodafone*, EU:C:2020:139.

Case C-323/18, *Tesco-Global*, EU:C:2020:140.

Opinion of Advocat General

Opinion of AG Pitruzzella in case C-156/17, *Köln-Aktienfonds Deka*, EU:C:2019:677.