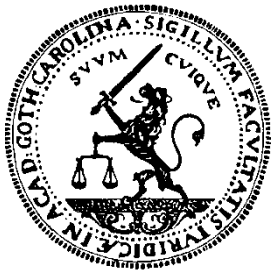

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Does the purpose validate the means?

A critical analysis of the 40th chapter 17 a § IL in Swedish tax law

LAGF03 Essay in Legal Science

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Contents

Summary

In the case HFD 2021 ref. 33 the issues regarding transactions of tax-deficient companies were a focal point. Also referred to as the Hoist-case, it dealt with the question of whether a transaction of a tax-deficient company was incompatible with the rules in the 40th chapter IL as well as the tax evasion act. HFD found that this was not the case and ruled in favour of Hoist, approving the transaction. The case resulted in several discussions and eventually lead to a *stoppskrivelse,* an intervening measure by the Swedish government in June of 2020. Therein, the government explained that new legislation was to be expected in the area, specifically to handle the gaps that were highlighted in the case.

The legislation was introduced in June of 2022 and meant, in short, that the purpose of the transaction shall be examined. In the case that the main purpose of the transaction is to acquire a tax-deficit, the right to deduct against that deficit shall cease to exist. The legislation has been the object of discussion both on the grounds that it was too hasted and incongruent with the principle of predictability.

This essay attempts to examine the legislations alignment with two of the founding principles of Swedish legislation, the principle of proportionality and the principle of legality. The principles are strongly connected to the legislative work in the taxational area, and to be deemed valid, the legislation should abide by them. The legislation falls short in several regards. Above all, the legislation is problematic regarding predictability and is a more intervening measure than what is required to regulate these situations. These factors, among others, have led to the deduction that the legislation is not consistent with the principles of proportionality and legality. The author thus believes that this should have been examined further prior to the legislation's implementation.

Sammanfattning

I fallet HFD 2021 ref. 33 var problematiken angående överlåtelser av underskottsföretag en central punkt. Fallet, även kallat Hoist-målet, hanterade frågan om huruvida en överlåtelse av ett underskottsföretag stred mot reglerna i 40 kap. IL alternativt skatteflyktslagen. HFD fann att så inte var fallet, och biföll Hoists överklagan av den tidigare fällande domen. Fallet resulterade i stora diskussioner och mynnade ut i en stoppskrivelse från regeringen i juni 2020. Däri förklarade regeringen att ny lagstiftning var att vänta på området, framför allt för att täcka upp de luckor som uppdagats i fallet.

Lagstiftningen introducerades i juni 2022 genom SFS 2022:267 och innebär i korthet att syftet med överlåtelsen skall undersökas. I de fall det huvudsakliga syftet var att förvärva ett skatteunderskott upphör rätten till att dra av underskott från tidigare beskattningsår. Bestämmelsen har varit föremål för diskussion både på grunderna av att den varit förhastad såväl som dess problematik med förutsägbarhet.

Uppsatsen gör ett försök att utreda bestämmelsens förenlighet med två av de grundläggande principerna i svensk rätt, proportionalitet- och legalitetsprincipen. De båda principerna är starkt anknutna till lagstiftningsarbetet på skatterättens område och för att anses korrekt bör lagstiftningen falla inom ramen för dessa. Slutsatsen som dras är att lagstiftningen brister i flera hänseenden. Framför allt problematiserar lagstiftning förutsägbarheten och är en mer ingripande åtgärd än vad som krävs. Den är dessutom resultatet av en alltför snäv situation för att tillåta sådan ingripande lagstiftning. Lagstiftningen är således inte är förenlig med proportionalitets- och legalitetsprinciperna. Författaren är av åsikten att denna problematik borde utretts ytterligare föregående implementerandet av lagstiftningen.

Abbreviations

IL	The Income Tax Act (1999:1229)
EU	European Union
RF	The Constitution of Sweden (1974:152)
HFD	High Administrative Court
Prop.	Governmental proposition
SKV	The Swedish Tax Agency
SOU	Swedish Government Official Reports
LAU	The law regarding deductions against tax deficits from economic activity (1993:1539)
Skr.	Governmental Writing
Dnr.	Reference number

1 Introduction

1.1 Background

In the summer of 2021, the Swedish Supreme Administrative court ruled in the case HFD 2021 ref. 33. Commonly known as "Hoist-finance", the case dealt with a transaction whereby a company with a deficit was transferred from one business group to another. This allowed the receiving group to unwind taxes against that deficit.[1] The Supreme Administrative Court ruled that the company in question had not committed a violation of taxation law and the deal was upheld. Following this, the Swedish Government issued a writing to the parliament.[2] They requested for the parliament to immediately examine the need for legislation regarding these types of transactions, and if issued, to apply such legislation retroactively.

A year later, this led to the adoption of the 40:17 a § IL[3] - a paragraph which states that the purpose of a transaction regarding a tax-deficient company shall be examined, and that if the main purpose of the transaction has been to acquire this deficit, the transaction is in violation of taxational[4] legislation.

Taxation in Sweden abides by the rule that all taxation must be upheld by law.[5] This requirement is an expression for the so-called requirement of legislation contained in the principle of legality.[6] Furthermore, this legislation must abide by the principle of proportionality. This means that the measures taken against an action must be in proportion to the goal and must also be the least intrusive measure.

The author poses the question of whether this introduced legislation is in alignment with how taxation law in Sweden is structured. At first glance, the legislation appears to be incongruent with the ruling principles of Swedish

[1] HFD 2021 ref. 33, p. 1–8
[2] Skr. 2020/21:212
[3] SFS 2022:267
[4] IL 40 Ch. 17 a §
[5] See 8 Ch. 2 § 1 n 2 p. and 8 Ch. 3 § 1 n 2 p. RF.
[6] This will from this point onwards be described only as the "principle of legality".

legislation. However, the legislation has de facto been approved and implemented. The author is of the opinion, regardless of implementation, that a further analysis of the legislation could prove useful for evaluating the legislation post-implementation.

1.2 Purpose & question framing

The purpose of this essay is to examine whether the 40th chapter 17 a § IL is consistent with the principles of proportionality and legality. To dismantle and analyse this legislation, the following questions aim to be answered:

- Is the introduced legislation consistent with the principle of legality in Swedish taxational legislation?
- Is the introduced legislation consistent with the principle of proportionality in Swedish taxational legislation?

Furthermore, it is necessary for the reader to understand how the paragraph has been shaped and what influenced the legislator. Therefore, the first, second and third sub question respectively are:

- How is the current regulation regarding the trade of tax-deficient companies shaped?
- Why was the 40:17 a § IL implemented?
- Why was the 40:17 a § IL designed the way it was?

1.3 Limitations

The essay examines the transactions of tax-deficient companies. To limit the subject, the questions have been formulated to deal specifically with the paragraph in question and situations relevant to this. A background will be presented for these types of transactions to give the reader an understanding of the subject, but it will be a general overview. This will be contextualized by an analysis of the case resulting in the legislation.

Despite taxation law being an area of law handled both on a national and EU-level, the essay will focus on Swedish national law. It will handle the principle of abuse regarding its relevance for national law but will not delve into EU-

related custom law. The essay will not examine transactions of tax-deficient companies across national borders, thus removing the need to examine foreign law.

1.4 Method

The essay has been written using a legal dogmatics method. The method of legal dogmatics aims to define current law regarding a specific legal question. This is done via the use of generally accepted sources of law,[7] and reconstructing a rule of law which is then applied to the question.[8] While the method of legal dogmatics has received critique regarding its lack of science, such as how it pertains to its shared use of working lawyers, it does hold demands for completeness, transparency and a critical way of thinking.[9] This results in a separation between the practical appliances of the method and the use of the method in scientific papers such as this.

It should also be held that the method does not limit the author to current law after it has been ascertained. The current law can be described as dissatisfactory, and therefore, allows a lex-lata and lex-ferenda analysis to be made.[10]

A remark should be made about why the author has chosen to write this essay in English rather than Swedish. It is the belief of the author that law is becoming more internationalized each year, and that the possibility of bridging language barriers is something which can benefit the legal field. It can provide aid for foreign lawyers attempting to understand the Swedish legal system and aid Swedish nationals in their foreign affairs. As English is the language with the most widespread official recognition, it has been deemed by the author to be the most fitting.[11]

[7] As defined in section 1.6
[8] Kleineman, p. 21
[9] Kleineman, p. 26
[10] Kleineman, p. 36–37
[11] Wikipedia, Official Language

A challenge with writing about Swedish taxation in English has been translating Swedish expressions and legal language. To correctly translate such expressions, the author has used working legal professionals and their accepted translations to the largest extent possible. When possible, the use of the Swedish National Courts Swedish/English Glossary has been used for cohesion.[12] Where such translations do not exist, the Swedish expression has been used along with a reference describing the expression in English, and how it will be used moving forward. While such a method is largely experimental, the author believes that it is one which accomplishes the goals of the essay fittingly.

1.5 Disposition

Chapter one has dealt with the formal section of the essay. It serves to set the framework for how this thesis is constructed and why it has been constructed in such a way. *Chapter two* will handle the principles and regulations that were in place prior to the new legislation. It will describe the relevant principles and what regulations were in place for transactions regarding tax-deficient companies prior to the case and following legislation. In *chapter three*, the main body of this essay is presented. It contains a presentation of the case and paragraph in question. This chapter will follow a chronological order from the case to the finished legislation. The author is of the view that this disposition is the one most easily understood by the reader and most prominently highlights why the legislation came to be. This section serves as the foundation my analysis will be based upon in *chapter four*. The analysis is presented together with my deductions and conclusions. This disposition is the one I have found most pedagogic and logical as this is an area of law which requires a certain amount of background knowledge to fully comprehend.

[12] Dnr. 938-2010

1.6 Material

In accordance with the method of legal dogmatics, the material used in this essay is primarily constituted by legislation, legal review, legislative review, and legal doctrine.[13] Where multiple types of material cover the same issue, the hierarchy of the legal source doctrine will be applied.[14] However, when applying any kind of legal source, the doctrine may be of use to guide and assist the reader. This will be significant in the descriptive part of this essay, and the author aims to clarify when supplemental use of doctrine is applied.[15]

As stated previously, the essay will account for a legal case in section three. The legal case in question is the very foundation for the legislation this essay aims to examine and is hence of vital importance. The legal case will be presented in its entirety, including the background and the courts perception. In the scope of the essay, a more extensive legal review has not been possible with regards to time and disposition.

1.7 Current research

There is a lack of current research standing regarding the implemented legislation. As it was implemented last year, judicial review or other doctrinal contributions have had little time to take place. The case itself has been commented upon by multiple researchers and professionals, and some of these views will be accounted for later in the paper. There exists extensive research regarding the trade of tax-deficient companies per say, but not in cases such as the one relevant to this essay. The research will, however, be used to map the system. Furthermore, extensive research exists regarding the principles in the essay. Both the principle of legality and proportionality are cemented in the Swedish legal system and as such extensive doctrine exists in the field.

[13] Kleineman, p. 21
[14] Kleineman, p. 22
[15] See Chapter 2 & 3

2 Swedish taxation law

To contextualize the later content of this essay, the following section is devoted to creating an understanding for the taxational system regarding the trade of tax-deficient companies. Firstly, the principles which this essay will use to analyse the proposed legislation are described shortly. Secondly, the legislation regarding trade of tax-deficient companies is described.

2.1 The principle of proportionality

In short, the principle of proportionality means that the character and nature of any legal measure should be proportionate to that which could be gained using the measure.[16] Uniquely, the principle also has a close connection to the EU law and is impactful in both the legislative and judicial realms.[17] The compulsory nature of taxation means that taxational legislation *de facto* falls within this category of measures.[18] However, more room is given to the legislator regarding taxation than those rights related to an individual's integrity.[19]

In practice, the principle of proportionality is applied as follows: Firstly, the purpose of the measure is established. The more intervening the measure is, the higher the requirement for establishing a precise purpose. Otherwise, the measure might be more extensive than what is required.[20] Secondly, both the suitability as well as the necessity of the measure in proportion to the purpose shall be examined. After having done this, the final consideration regarding proportionality is made.[21]

The principle of proportionality in Sweden also exists in close relation to the EU.[22] Whilst the principle is codified in Article 5 of the Treaty on European Union, it is primarily the meaning which has been given by the EU-court that

[16] Prop. 1987/88:65 p. 71
[17] Tikka, 2004, p. 661
[18] Moëll, 2003, p. 287
[19] Moëll, 2003, p. 287
[20] SOU 1993:62 p. 161
[21] Moëll, 2003, p. 193
[22] Moëll, 2003, p. 185

matters for the member states.[23] As EU law is a part of Swedish national law, the interpretation made by the Court of Justice of the European Union shall constitute the meaning.[24] Hence, the principle of proportionality's meaning in Sweden cannot be fully separated from its utilization in EU law.

2.2 The principle of legality

The principle of legality aims to insure both the individual's right to predictable legislation as well as the rule of law. In taxation law, this can be closer specified as taxation being predictable for both the individual and the element of restriction on the legislator regarding their ability to legislate freely.[25] Moreover, it aims to set certain demands regarding requirements of precision and delegation of taxational legislation.[26]

The principle of legality is generally referred to as the primary obstacle for retroactive legislation in a state governed by the rule of law.[27] In Sweden, this principle is expressed in 1 chap.1 § 3 n. RF and states that the public authority shall be governed by law. This has been specified in the proposition as a guarantee for citizens to not have their property infringed upon without legislation.[28] In regard to taxation, the principle of legality often encompasses the ability for citizens to prematurely judge the legal consequences of a certain action.[29] This has been motivated by the importance of legal certainty and to avoid legislation which detrimentally affects citizens retroactively.[30]

Nullum tributum sine lege, no taxation without law, expresses what the requirement for legislation means.[31] It is codified through the 8 chapter 2 § 1 p RF and can be read as any measure regarding the relationship between individuals and the state, assuming the measure results in a duty for individuals or other encroachments upon their personal or economic situation, shall be

[23] Moëll, 2003, p. 175
[24] Moëll, 2003, p. 175
[25] Tikka, 2004, p. 658
[26] Tikka, 2004, p. 657
[27] Påhlsson, 2019, p. 36.
[28] Prop. 1973:90 p. 138
[29] Prop. 1978/79:195 p. 55
[30] Prop. 1978/79:195 p. 55
[31] Lodin et al., 2019, p. 641

communicated through legislation. This also includes a requirement for any legal interpretation to have objective founding in the wording of the legislation.[32] Whilst the individual is protected against the state through the principle, the state is also obligated to tax according to the law and may not omit taxation unless the law specifically allows it. [33]

2.3 The trade of tax-deficient companies

The definition of a tax-deficient company in Swedish legislation is that the company has had a tax deficit during the past taxational year which has carried over to the following year.[34] The relevant legal statutes can be found in the 40th chapter IL, hence the name of the chapter – Previous year's deficit.[35] The rule of thumb is that deficits that remain from previous years shall be deducted against.[36] However, this right is infringed upon by other paragraphs in the 40th chapter. It is of importance to note that the relevant paragraphs of the 40th chapter does not concern deficits for the current year, only deficits which have been carried over from previous years.[37]

The regulations regarding tax deficient companies are remnants of an older law, LAU.[38] However, during the extensive reform of 2000 the rules were transferred over to IL with technical and linguistic alterations.[39] The current regulations primarily target four different situations. The primary focus of this section will be the situation where companies acquire the majority of shares in a tax-deficient company.

[32] Påhlsson, 2018, p. 32
[33] Påhlsson, 2018, p. 32
[34] IL 40:4
[35] 40th chap. IL
[36] 40:2 IL
[37] Prop. 1999/2000:2, part 2, p. 462
[38] "Lagen (1993:1359) om avdrag för underskott av näringsverksamhet", roughly translated: The tax deduction act regarding tax-deficits
[39] Prop. 1999/2000:2, part 2, p. 461-463

2.3.1 40 chap. 10 § IL

Referred to as a *Spärrsituation*[40], the 40th chapter 10 § IL handles the situation of a company acquiring the majority of shares in a tax-deficient company.[41] When such a situation occurs, both an amount limit blocking measure, and a blocking measure concerning group contributions are introduced. The second part of the paragraph specifies that the amount limit blocking measure does not enter into force if the company acquiring the majority shares was part of the same group as the tax-deficient company prior to the transaction. Further, according to the 3rd part of the paragraph, the same is true regarding the group contribution blocking measure. These blocking measures have a collaborative effect where the amount limit blocking measure takes priority in application over the group contribution blocking measure.[42]

2.3.2 The amount limit blocking measure

The amount limit blocking measure restricts the tax-deficient companies' ability to deduct against previous year's deficit, preceding the year the block enters effect, for the part of the deficit exceeding 200 percent of the acquisition cost of the tax-deficient company.[43] In practice, this limits the acquiring companies' ability to deduct against the deficit if the amount does not exceed double the amount of the transactional fee. For example, if company A acquires company B for 100, at most they can deduct against a deficit of 200. Any tax-deficits exceeding 200 would be remove d.[44]

The reason for this design is the existing connection between the taxational value of a deficit and the transactional value of shares.[45] Assuming the transactional fee exceeds the deficits, there are no reasons to doubt the acquiring companies' will to acquire the company for other reasons than deductions.

[40] A situation whereupon a blocking measure regulates the possibility of taking an action in Swedish tax legislation, hereby referred to as "Blocking measures".
[41] Prop. 1993/94:50 p. 262
[42] 40 chap. 18 § 2 n. IL
[43] 40 chap. 15 § IL
[44] Prop. 1993/94:50 p. 266
[45] Prop. 1993/94:50 p. 266

However, if the opposite is true, there can be suspicions of the acquiring company purchasing the tax-deficient company to deduct against their deficits. As such, the amount limit blocking measure is widely recognized to be able to prohibit the trade of shell companies.[46]

2.3.3 The acquisition fee

It has already been noted that the main object of importance to ascertain the amount limit blocking measure is the transactional fee paid to acquire the tax-deficient company in question. However, 40:15 IL does not define this term. Hence, the terms definition is primarily constituted by judicial review. Obviously, monetary payments are deemed to be such a fee, but it's not limited to rudimentary methods of payment. Stocks and property are both examples of unorthodox payment methods which have, in cases past, been deemed as a transactional fee.[47]

The problems that arise from determining the acquisition fee are primarily regarding whether payments not made in cash should be included in the fee. Apart from non-monetary payments being included, there exists no further elaboration on this question. As mentioned above, this question has also been handled in judicial review on several occasions.[48] The consensus is that non-monetary payments could be included when determining the fee, but issues remain with predicting what the outcome will be dependent on the determination of each case.

An interesting example of this is contrasting the case HFD 2014 ref. 67 with the case in focus, HFD 2021 ref. 33. In the former, the court found that the payment made by company A to acquire company B would be determined while excluding payments made for demand notes.[49] In the latter case, however, the court found that taking over the responsibility of a promissory note would be included in determining the acquisition fee. This will be expanded

[46] Prop. 1993/94:50 p. 259
[47] Prop. 1999/2000:2, part 2, p. 474
[48] For example, see HFD 2020 ref. 10
[49] HFD 2014 ref. 67

upon in the following section.[50] While these cases are separated by some time, it highlights the difficulties in determining what the actual acquisition fee can and cannot be attributed to.

[50] See section 3.4.x

3 The new legislation

A focal point of this essay, HFD 2021 ref. 33 handled the case between Hoist Finance Services AB and the Swedish Tax Agency. The following section aims to describe the case in detail, as well as the consequences and subsequent legislation. This should provide the reader with a comprehensive understanding of why the legislation in question was proposed, swiftly implemented, and what it prohibits.

3.1 HFD 2021 ref. 33

At the beginning of the taxation year 2012, Hoist Finance Services AB (Finance) had a tax deficit of 135 million Swedish kronor (SEK). In May 2012, they transferred the entirety of their operations to a subsidiary fully owned by Hoist for an amount of six million SEK. No taxation was incurred because of this transaction, as it was a tax-free transfer at below cost price.[51] Later in 2012, Hoist sold all their shares in the subsidiary to their parent company for the current market price of 150 million SEK. In exchange, Hoist received an interest-bearing promissory note which amounted to the entirety of Hoist's assets after the exchange. Because these shares were trade investments, the transaction was not subject to any taxation, and the previously mentioned tax deficit was not affected by this transaction either.

At the end of 2012, all shares of Finance were sold to an external company - Hoist Kredit AB. Through the acquisition, Hoist Kredit received a shareholder's majority in Finance in exchange for 160 million SEK. The payment consisted of eight million SEK as well as Hoist Kredit's takeover of the seller's debt to Finance, including compounded interest of about 152 million SEK. The expense paid by Hoist Kredit to acquire the majority of shares in Finance, minus the capital contribution which had been left to Finance prior to the transaction, amounted to around 74 million SEK. Hence, the tax deficit

[51] 23 chap. 3 § IL and 23 chap. 14-29 §§ IL

of Finance of 135 million SEK fell short of 200 percent of the expenditure for the transaction.[52]

Following this transaction, SKV decided that, for the taxation years 2012-2014, Finance would not be allowed to deduct from their previous tax deficit with the motivation that the real meaning of the transaction was that the expenditure to acquire the company only amounted to the cash paid.[53] This expenditure was set to be 0 SEK after deductions for capital contributions. Finance appealed to the Administrative Court of Stockholm which later, using the tax evasion act, upheld the appealed decision.[54] The court of appeals in Stockholm, however, found that the company should be taxed in accordance with their given declaration. They found that the real implication of the transaction was that the shares in Finance had been sold for the agreed upon amount, including the takeover of the debt. When the court applied the tax evasion act, they found that there was no tax benefit in the meaning of the law, and it would not conflict with the purpose of the law to tax the company accordingly on basis of the transaction.[55]

3.1.1 The Supreme Administrative Court

HFD initially established that the transaction between Finance and the parent company resulted in the exchange of stocks for an interest-bearing promissory note. They went on to establish that it was not questioned however this trade adhered to market-conforming demands or however the value of Finance's promissory note corresponded to the nominal value of the note. HFD therefore found a lack of support for the conclusion that the true purpose of the transaction was anything other than the one the acts express. This was accredited to the circumstances that the transactions had been adherent to market-

[52] HFD 2021 ref. 33 n. 4-5
[53] In accordance with the principle of legal acts true purpose, taxation shall originate from the real meaning of a legal act, regardless of the denomination of the act, see RÅ 2004 ref. 27
[54] HFD 2021 ref. 33 n. 7
[55] HFD 2021 ref. 33 n. 8

conforming demands, and the fact that every transactional step had triggered the relevant legal consequences.[56]

Following this, HFD examined the application of the Tax Evasion act on the case. They start by establishing that for the Tax Evasion act to be applicable, there must be a need for the creation of a tax benefit not foreseen by the legislator. The existence of a tax benefit is, in and of itself, not sufficient for the law to be applied.[57] HFD accounts for the legal position prior to 1993's legislation and states that, generally, close companies lost the possibility for deductions against tax deficits. For other companies, the opposite was true. The right to deductions against tax deficits was not affected by a change of ownership, and only shell companies lost this right.[58] The rule of shell companies, however, was only applicable if the asset mass consisted of financial assets.[59] In accordance with these earlier rules, Finance would have lost the right to deduct against their tax deficit following the change of ownership.[60]

However, the previous system was viewed as lacking in neutrality concerning owner- and business changes and was replaced in 1993 by blocking rules. Through this legislation, the specific legislation concerning shell companies was removed. HFD states that it must have been foreseen by the legislator that shell companies would no longer lose the right to deduct against tax deficits following a change of ownership.[61] Hence, the only limiting factor against these types of deals in the current legal state is the threshold rule.[62]

HFD goes on to confirm that Hoist Kredit had paid for the shares in Finance through the overtaking of the seller's debt to Finance of 152 million SEK. This amount is, therefore, included in the amount paid to acquire the majority shares in the company. They held forth that this was not to be accounted as a situation where the acquisition cost should be lessened by this amount, as put

[56] HFD 2021 ref. 33 n. 21-23
[57] Prop. 1980/81:17 p. 108 f., prop. 1982/83:84 p. 13 and prop. 1996/97:170 p. 40
[58] HFD 2021 ref. 33 n. 24-26
[59] Prop. 1993/94:50 p. 257
[60] HFD 2021 ref. 33 n. 27
[61] HFD 2021 ref. 33 n. 26-29
[62] The amount limit blocking measure, see section 3.3.2

forth by SKV. They referenced the proposition and the terms “real and particular value” and pointed out that these types of transactions were not uncommon. A company acquiring shares through the overtaking of debt is a common occurrence and could not have been unforeseen by the legislator. Therefore, it could not have been the legislator’s intent to limit shell companies right to deduct against tax deficits in situations like this.[63]

Two justices were of dissenting opinion. They, instead, found that the tax evasion act was applicable to the case and that the preparatory works establish that the primary purpose of the 40th chapter IL is to prevent the trade of tax deficient companies, shell companies or not. It was put forth that, even though the older legislation had been replaced, it could not be argued that this purpose had been abandoned.[64]

3.1.2 Consequences of the case

The case not only handled the question of acquisition costs but proved to be explanatory regarding the application of the Tax Evasion act. The dissenting opinion highlights the difficulties of applying the tax evasion law to practical cases. Not only does the court have to examine the intention and will of the legislator, but also analyse what the legislator could have foreseen. While the author agrees with the opinion of the majority, the argumentation held in the dissenting opinion can prove valuable in evaluating the tax evasion act in practice.

However, several discussions arose as a result from the decision. As Croneberg writes, the importance of adjusting the Swedish legislation to EU-legislation through conform interpretation is of significance to understand national legislation considering EU-legislation.[65] He argues that it is complex for courts to create a separate of understanding for strictly national situations that differs from how the same situations should be tried when transnational elements are included. Moreover, he advocates for the use of the principle of

[63] HFD 2021 ref. 33 n. 30-34
[64] Dissenting opinion HFD 2021 ref. 33
[65] Croneberg, Richard, SN 2021, p. 792

abuse as presented in the Tax Evasion Directive.[66] He continues and states that HFD already makes an analysis similar to that of the EU-court when the latter tries the principle of abuse, but that the dissenting opinion of HFD is even more in line with the EU-courts view.[67]

A different question raised is the one brought to attention by the representatives of the case, Anders Lilja and Fredrik Berndt.[68] Their interpretation of the court's opinion is that HFD did not further analyse the application of the tax evasion act after having established that the requirement for a tax benefit was not fulfilled. They understand it as HFD being of the opinion that a tax benefit de facto had been created, but that this had not been intended by the legislator. They advance this by stating that the argumentation HFD held targeted however the actualised tax benefit had been intended by the legislator, not however the taxation would be contradictory to the purpose of the legislation itself.[69] In contrast with this, the ministry of finance is of the opinion that the latter interpretation would be more correct.[70]

Differing from the reasoning of HFD, the authors of the article go on to state that the taxation incurred in the case was adherent to taxational legislation, and therefore, no tax benefit was created at all.[71] In the same line of reasoning as the Court of Appeal, they argue that a tax benefit defined as the "avoidance of the taxation which would have been inflicted had the tax evasion not been successful in the preparatory work" means that no tax benefit was created in the case. Since Finance's tax position remained unchanged, as the ability to deduct against their tax deficit was neither improved nor worsened, there could be no tax benefit.[72] The article also finishes by briefly touching on the consequences of implementing legislation following a case such as this. The authors of the article are of the opinion that it is an extraordinary measure to

[66] The Directive of rules against tax avoidance practices, Art. 6
[67] Croneberg, Richard, SN 2021, p. 792
[68] Lilja & Berndt, SN 2021, p. 612
[69] Lilja & Berndt, SN 2021, p. 619
[70] Fi2021/02354, p. 7
[71] Lilja & Berndt, SN 2021, p. 620–621
[72] Lilja & Berndt, SN 2021, p. 621–622

implement such legislation based on SKV losing a case regarding the application of the tax evasion act. They add that the reason for SKV losing the case is that HFD deemed the taxational consequences of the action to be foreseen by the legislator following the legislation of 1993. Changes that could affect this norm of neutrality, which were the reaction of the unsuitability of previous legislation, should therefore not be implemented without careful consideration.[73]

3.2 SFS 2022:267

On the 7th of April 2022 the law SFS 2022:267 was announced by the government.[74] This law introduced the 40 chap. 17 a § IL and was the consequence of a multitude of events. The following section will describe the practical events that led up to the legislation, specifically the administrative work, as in contrast with the previous section regarding the actions taken by the courts. Firstly, the institute of "*Stoppskrivelse*"[75] will be described. Secondly, the proposition and its investigation will be accounted for, and lastly, the practical results of this work will be discussed.

3.2.1 Stoppskrivelse

As explained previously, there exists a ban on retroactive legislation in taxational legislation in Sweden. This is expressed through the 2 chap. 10 § 2 n RF which explicitly prohibits formal retroactivity. More precisely, this prohibits legislation that targets actions taken before the law's entry into force.[76] In order to determine whether or not a law abides by this demand, the timeframe of an action that has triggered a taxable event is examined.[77] It is vital to keep in mind that formal retroactivity is not identical to material ret-

[73] Lilja & Berndt, SN 2021, p. 624
[74] SFS 2022:267 p. 1
[75] A writing from the Swedish Government to the Parliament describing imminent legislation and the retroactive effect of such legislation, further referred to as "Stoppskrivelse".
[76] Fast, Katarina, *Om skyddet mot retroaktiv beskattning*, SN akademisk årsskrift 2011, p. 118
[77] SOU 1978:34 p. 159

roactivity. Formal meaning legislation which targets previously taxable actions, and the latter legislation which, in and of itself, is retroactive.[78] The practical consequences are that previously taken actions can be affected by new legislation.[79]

While the principle of legality bars an obstacle towards retroactive legislation, it is not an absolute hindrance. The paragraph contains two decisive exceptions. The first, and most relevant exception, results in the possibility to implement legislation with an onerous character.[80] This is done through a specific procedure in which the government informs the parliament that a certain legislation is to be expected, a so-called *stoppskrivelse*.[81] For this procedure to be deemed valid, however, extraordinary circumstances must be at hand. To avoid a concentration of power, it is up to the parliament to decide upon this *ex post facto*. If parliament decides that such circumstances are present in the situation, the legislation is valid from the day the writing is published.[82] It is put forth in the proposition that such circumstances include situations of tax fraud and tax evasion.[83] These are primarily motivated by the need for fair and equal taxation.[84] While this infringement upon legal certainty is undesirable, it is motivated by the need for the highest governing bodies to counteract unforeseen measures. [85] It is still, however, criticized for the lack of foreseeability and the conflict of interests arising from such measures.[86]

In the situation at hand, the writing 2020/21:212 was issued by the government and handed over to the parliament on the 10th of June 2021. Therein a notification of coming legislation regarding limitations on the right to deduct against previous years deficits was contained. The writing contained much of what was later presented in the proposition that followed and will be accounted for in the next section.

[78] Fast, p. 118
[79] Fast, p. 118
[80] RF 1:1 3 n
[81] RF 2:20 contradictory
[82] Påhlsson, p. 39
[83] Prop. 1978/79:195 p. 55
[84] Prop. 1978/79:195 p. 55
[85] Prop. 1978/79:195 p. 55
[86] Fast, p. 138

3.2.2 The proposition

In the wake of HFD 2021 ref. 33, the government deemed it necessary for a blocking measure to be introduced to counteract the trade of tax-deficient companies.[87] They held forth that the trade of companies whose sole assets are a tax-deficiency are what the rules in the 40th chapter IL seek to counteract. These situations have previously been handled using the tax evasion act and targeted as situations creating an unforeseen tax benefit. However, HFD 2021 ref. 33 highlights that such situations are sometimes impervious to the legislation. Hence, new legislation is necessary to handle situations such as the Hoist-case. The government expected an increase in such trades which could lead to significant tax losses.[88] Thus, it proposed a legislation where the purpose of the transaction is the focus for investigation.

The proposition's main idea is that if the main purpose of the transaction is to acquire the tax-deficit of a company, the acquiring company may not deduct against that deficit.[89] In order to ascertain what the goal of any given transaction is, the government also put forth several circumstances which shall be taken into consideration by the courts. For example, it must be considered whether the tax-deficient company holds any assets other than cash and claims on other companies who were part of the same group as the tax-deficient company prior to the change in ownership.[90] Issues regarding foreseeability were also commented upon, and the government stated that it would be suitable to include guiding criteria for different circumstances which should be taken into consideration to prevent these issues.[91]

The governmental writing eventually lead to a proposition.[92] Most of what has been said previously is reiterated, but there is reason to examine what the consulting bodies commented upon.[93] The Swedish National Courts made note that the proposal included a complex legislature with notes reminiscent

[87] Skr. 2021/22:SkU21
[88] Skr. 2021/22:SkU21 p. 8–9
[89] Skr. 2021/22:SkU21 p. 9
[90] Skr. 2021/22:SkU21 p. 9
[91] Skr. 2021/22:SkU21 p. 10
[92] Prop. 2021/22:93 p. 5
[93] Prop. 2021/22:93 p. 39

of the tax evasion act.[94] This can lead to difficulties in interpreting and applying the legislation, and the need for judicial review is evident.[95] SKV wrote in their consultation note that as the criteria for the paragraph are derived from the tax evasion act. SKV wrote in their consultation note that the criteria for the paragraph are derived from the tax evasion act. Hence, judicial review regarding that law may offer guidance for the courts in practice.[96] They also noted, however, that difficulties may arise in situations when assets remain in the tax-deficient company, which typically speak to the transaction taking part for other reasons than the acquiring the deficits.[97]

[94] DOV 2021/850
[95] DOV 2021/850
[96] Fi 2021/02354
[97] Fi 2021/02354

4 Analysis & Deduction

The legislation introduces an unusual type of legislation to the income tax act. To include purpose driven legislature in a system which heavily prioritizes foreseeability and proportionality may give way for the legislator to further deviate from the established path.

In terms of legality, the implemented legislation is a clear deviation from previously established legal position on taxational legislation in Sweden. The income tax act should result in individuals and companies being able to foresee, at any given point, what their total taxation will be by the end of the year. As this legislation introduces a discretionary assessment by the courts, it lessens that possibility. As the Swedish National Courts noted in their consultation, it will take judicial review to establish what this legislation means in practice. Thus, prior to this review, it is impossible for companies to foresee what certain transactions will mean in a taxational regard. This clashes with the principle of legality.

It could be argued, as SKV does, that prior judicial review can provide guidance for individuals - more specifically, judicial review regarding the Tax Evasion Act from which the paragraph has gained its terminology. However, this still proves to be problematic as it does not fully guarantee individuals and companies a foreseeability. At most, it would lend itself to an educated guess. I can't help but worry how significantly this will impact the trading of tax-deficient companies. As Moëll presents, the aspect of foreseeability is especially problematic in the native stages of legislation.[98] When the legislation requires an individual consideration, there exists a requirement for the Tax Agency and the Courts to account for the considerations which shall be made in each case. Without such review, companies may think twice before acquiring a tax-deficient company, regardless of the purpose of the acquisition. This could hinder the possibility for smaller companies, which are more typically tax deficient, to be acquired by larger groups. As Croneberg presented, an-

[98] Moëll, 2003, p. 298

other option would be to apply the principle of abuse as presented in his article.[99] This principle has been utilized by the EU-court in several instances and judicial review is therefore available. This could, in theory, improve foreseeability without needing to wait for judicial review to occur.

Regarding proportionality, the legislation does not appear to be the least intrusive measure to achieve the goal set out by the state. Applying the test of proportionality, the measure seems more intrusive than what is necessary to achieve the goal. An interpretation of the tax evasion act and a more widespread use of the abuse principle should lead the courts to the same conclusions as the legislation does. It would result in actions violating the intended goal of the legislator to be prohibited, much like the legislation. This would more fittingly serve the purposes of the principle of proportionality, as using an already existing and established measure would be more proportional than creating new legislation in this case. The principle of abuse specifically deals with situations where an individual or a company have received a tax benefit not foreseen by the legislator and which is seen as abusive towards the system. Because of the principles direct vertical effect, it would not require any additional efforts outside of the court applying the principle in practice, rendering the need for legislation obsolete. Nevertheless, as the principle of proportionality is the object of debate regarding its impact on taxational legislation an argument could be raised regarding whether it is a principle of importance in these questions or not.

In chapter 3.1.3, the opinion and comments left by working professionals and researchers were highlighted. According to their statements, the proposed legislation could arguably not be the most proportional solution. Croneberg advocates for a more homogenous interpretation of the principle of abuse and its application in Swedish national law.[100] Lilja & Berndt also present that HFD's reasoning appears to hold fast that the tax benefit created was not contradictory to the purpose of the legislation.[101] What both commentators have in common is that there would have been alternative ways for this issue to be

[99] Croneberg, p. 792
[100] Croneberg, p. 792-793
[101] Lilja & Berndt, p. 617-618

handled without implementing further taxational legislation. The authors also make a case for how this type of legislation should be carefully introduced as to not counteract the reasoning that was used in the legislation of 1993.[102] To introduce new legislation with a sample size of only a case, especially when the deciding factors of the case are highly debated, may be something to re-consider

The author of this essay is of the opinion that the introduced legislation is superfluous and in breach of the framework safeguarding taxational legislation. Specifically, it does not align with the principle of legality. It does not formally violate the principle of proportionality, but that does not mean that there is not room to discuss its redundancy. The legislation is, in my opinion, an unnecessarily unpredictable and intervening measure taken on a basis which is far too small to introduce such drastic measures. The purpose does not always justify the means, and this legislation is a prime example of that notion.

[102] Lilja & Berndt, p. 624

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