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The Swedish Supreme Administrative Court Totally Disregards Tax Treaty - A Critical Analysis of a CFC Judgment

Maria Hilling, *Lund University*

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Citation for the published article:
Hilling, M., The Swedish Supreme Administrative Court Totally Disregards Tax Treaty: A Critical Analysis of a CFC Judgment

Intertax 2008, 36 (10) pp. 455-461

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Kluwer Law International (April 20, 2011)
www.kluwerlaw.com

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Subscription prices 2008 (12 issues, incl. binder):
EUR 850.00 USD 1123.00 GBP 625.00
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ISSN: 0165 2826

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Periodicals paid at Rahway, NJ, USPS nr. 013-166.
US Mailing Agent: Mercury Airfreight International Ltd., 365, Blair Road, Avenel, NJ 07001, USA.

Intertax is published monthly by Kluwer Law International,
P.O. Box 316,
2400 AH Alphen a/d Rijn,
The Netherlands

Distributed by
Extenza–Turpin
Stratton Business Park, Pegasus Drive
Biggleswade, Bedfordshire
SG18 8TQ
United Kingdom

Intertax is indexed/abstracted in IBZ–CD-ROM; IBZ-Online

The Swedish Supreme Administrative Court Totally Disregards Tax Treaty: A Critical Analysis of a CFC Judgment

Maria Hilling, Assistant Professor of Tax Law, Linköping University, Sweden*

There are disputes in many countries over the compatibility of Controlled Foreign Corporation (CFC) rules and tax treaties based on the Organization for Economic Cooperation and Development (OECD) Model Tax Convention.[1] In a recent decision, for instance, the Swedish Supreme Administrative Court (*Regeringsrätten*) has passed judgment on the compatibility of the Swedish CFC rules and the Swedish-Swiss Tax Treaty[2] and found that the Swedish CFC taxation was not limited by the tax treaty. It was the Court's reasoning, however, that deserves special attention, as the conclusion was reached without consideration for the provisions of the tax treaty. The Court completely disregarded the treaty, believing it to be a case of conflict between two equivalent legal norms – the domestic CFC rules and the Swedish-Swiss Tax Treaty – and the CFC rules were given precedence.

In this article, which is divided into five sections, I examine and critically analyze the Court's argumentation. Section 1 provides an overview of the Swedish CFC rules. In Sections 2 and 3, the facts of the case and the decision by the Council for Advanced Tax Rulings are presented. The focus in Section 4 is on the Court's reasoning. I begin this section by presenting the Court's argumentation and proceed with a critical analysis of the Court's adjudication. It is in this section that I establish that the Swedish-Swiss Tax Treaty certainly is applicable. In doing so, I discuss the Council for Advanced Tax Rulings' application of the Swedish-Swiss Tax Treaty. Concluding remarks are presented in Section 5.

1. The Swedish CFC rules

A. Attribution of income

Sweden first introduced CFC rules in 1990. New rules were enforced in 2004,[3] and in 2008 amendments were made to bring the rules into compliance with the European Court Justice's (ECJ's) decision in *Cadbury Schweppes*.[4,5]

Under certain circumstances, the Swedish CFC rules impose domestic taxation on resident shareholders on income earned by foreign separately taxable corporate entities. The rules attribute income, consisting of the profits of a foreign entity, to Swedish resident shareholders. This attribution of income results in taxation of profits in the hands of the shareholder before the profits have been distributed by the foreign entity, which represents a clear deviation from the concept on which attribution decisions are generally based. The basic conditions to be fulfilled in order for the Swedish CFC rules to apply primarily concern the legal characteristics of the foreign legal entity and the holding and the level of foreign taxation.

B. Characteristics of the foreign legal entity

The basic condition under which the Swedish CFC rules apply is that the foreign legal entity fulfils certain requirements in order to obtain legal status under Swedish tax law.[6] The entity must be able to acquire rights and undertake obligations, for instance, and its owners must not have recourse to unlimited and unconditional access to its capital. A foreign legal entity which is tax transparent in its state of residence may never be deemed a CFC.[7]

C. Ownership requirements

The Swedish CFC rules may be applied only in situations in which a company or an individual holds

Notes

* This article is part of a research project dealing with tax treaties and worker mobility, and is financed by *Torsten and Ragnar Söderbergs Stiftelser*. Special thanks to Kristina Ståhl, Judge of the Swedish Supreme Administrative Court, who has made valuable comments on this article.

1 See, for instance, Aigner, Scheuerle & Stefaner, *General report*, in *CFC Legislation, Tax Treaties and EC Law*, eds Lang, Aigner, Scheuerle and Stefaner (The Hague, The Netherlands: Kluwer Law International, 2004), 28–38.

2 Case 2655-05 of 3 Apr. 2008.

3 SFS 2003:1086, Swedish Government Bill (*proposition*) 2003/04:10.

4 Case C-196/04 *Cadbury Schweppes plc* [2006] ECR I-7995.

5 SFS 2007:1254, Swedish Government Bill (*proposition*) 2007/08: 16.

6 Chapter 6, s. 8 of Income Tax Act (ITA).

7 Ch. 39a, s. 1 of ITA.

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or controls at least 25% of the capital or the voting rights of a CFC.[8] The participation may be direct or indirect. To prevent taxpayers from avoiding an application of the CFC rules by fragmenting the ownership of the shares among related persons, constructive ownership rules are inserted.[9]

The person holding all or part of a foreign legal entity must be subject to tax in Sweden on the income from the holding. Not only Swedish residents are subject to CFC taxation, therefore. A non-resident company which participates in a CFC and has a permanent establishment in Sweden may be subject to CFC taxation in Sweden in respect to its holding.[10]

D. The level of foreign taxation and low tax regimes

The scope of application of the Swedish CFC rules is determined by both a comparison of tax rates and a list of tax jurisdictions not deemed to be low tax regimes. The main rule gives that a foreign legal entity may be deemed a CFC if the foreign legal entity is low taxed or not taxed at all.[11] A tax rate below 55% of the ordinary Swedish tax rate of 28% is considered 'low taxed' (in other words below 15.4%). The legislation states that the tax rate is determined on the basis of the CFC's net income calculated according to Swedish tax rules. The nominal tax rate in the country of establishment of the CFC, therefore, may not necessarily be below 15.4%.[12]

According to the supplementary rule, it is automatic that foreign legal entities resident and subject to tax in certain jurisdictions or countries presented in the white list – which is attached as an appendix to the Income Tax Act and thereby part of the legislation – are not considered low taxed.[13] These entities may not be deemed CFCs, therefore, even though they may be taxed at an effective rate below 15.4%. As mentioned, the white list contains exceptions for certain activities, generally insurance, banking and financial activities. A foreign entity resident in a jurisdiction appearing on the white list may be automatically excluded from the risk of being deemed a CFC if its activities are not to be classified as an activity specifically mentioned on the list. If the foreign entity's activities are mentioned on the list, it must satisfy the conditions of the main rule in order to escape an application of the CFC rules. Furthermore, if there is a tax treaty in force between Sweden and the state of residence of the foreign entity, the supplementary rule is applicable only to the extent that the tax treaty covers the income.[14] The Swedish Tax Treaty with Luxembourg is an example of a tax treaty that excludes certain corporations from tax treaty benefits.[15] Although Luxembourg appears on the white list, such excluded companies must satisfy the requirements of the main rule in order not to be deemed CFCs.[16]

After the judgment in *Cadbury Schweppes*, it was clear that changes had to be made in order to bring the Swedish CFC rules in compliance with European Community (EC) law. On 1 January 2008, a new provision was added to the existing legislation.[17] The new provision applies only to foreign legal entities resident within the European Union/European Economic Area (EU/EEA). The provision provides that income considered to be low taxed according to the main rule, and not excluded from the application of the CFC rules by way of the supplementary rule, are not to be considered low taxed if the foreign legal person is established in the foreign state for business reasons – that the person conducts genuine economic activities there. In determining if the entity qualifies under this rule, three main criteria are to be considered:

(1) Does the foreign entity have an office and equipment in its state of residence to the extent necessary to conduct its business activities?
(2) Does the foreign entity have its own employees with the required competence to be able to run the business independently?
(3) Are such employees authorized to make decisions in the daily business?

E. Avoidance of double taxation

A shareholder subject to the Swedish CFC rules is granted a tax credit corresponding to the tax paid by the foreign legal entity on the relevant income multiplied by the Swedish shareholder's part of the capital of the foreign entity.[18] However, the ordinary credit

Notes

8 Ch. 39a, s. 2 of ITA.

9 Ch. 39a, s. 3 of ITA.

10 Ch. 39a, s. 2 of ITA.

11 Ch. 39a, s. 5 of ITA.

12 Köhlmark & Källqvist, 'New CFC Legislation in Sweden', *Bulletin for International Fiscal Documentation* 2004, 227.

13 Ch. 39a, s. 7 of ITA.

14 This does not apply to tax treaties with limited scope, i.e. treaties only covering international shipping or air transport.

15 Arts 1 and 2 of the protocol signed 14 Oct. 1996.

16 Köhlmark & Källqvist, 'New CFC Legislation in Sweden', *Bulletin for International Fiscal Documentation*, 228.

17 Ch. 39a, s. 7a of ITA.

18 Sections 18–22 of the Foreign Tax Credit Act.

limitation applies. The result is that if the Swedish tax on the foreign income is lower than the foreign tax, which would rarely be the case, the credit is limited to the amount of that Swedish tax.

F. The compatibility of CFC rules and Sweden's tax treaties: the Government's position

As in other countries, it has been discussed in Sweden whether or not the CFC rules are compatible with Sweden's tax treaties.[19] In 1990, when CFC rules were first introduced in Sweden, it appears to have been the general understanding that the rules were likely to be incompatible with Sweden's tax treaties.[20] The legislation was therefore drafted in a way that resulted in an application of the rules to non-treaty states only. Following amendments in the Commentary to the OECD Model, as well as trends within the OECD and EU, this view has now changed. In the preparatory works to the 2004 legislative changes of the CFC rules, the Swedish Government contended that the new CFC rules are compatible with Sweden's tax treaties in general, and those based on the OECD Model in particular.[21] The Government's argumentation is founded on the general structure of tax treaties and statements made in the Commentary to Article 1 of the OECD Model.[22] According to the Government, the fact that many Swedish treaties were concluded before this statement was inserted in the Commentary does not change this conclusion. The reason for this point of view, the Governments argues, is that changes in the Commentary are inserted simply to clarify its content, not to change it.[23]

2. Presentation of the case

A Swedish company was the sole owner of a Swiss insurance company. Switzerland is on the white list of the Swedish CFC rules, but insurance activities are excluded. The Swiss company was established for the sole purpose of insuring the Swedish group, and was deemed a CFC. The question was whether or not the Swedish treaty with Switzerland excluded an application of the Swedish CFC rules to the Swedish owner.

3. The Council for Advanced Tax Rulings

The Council for Advanced Tax Rulings[24] (*Skatterättsnämnden*) was asked if the Swedish CFC rules were restricted by Sweden's treaty with Switzerland. The ruling, which was delivered on 4 April 2005, was appealed to the Supreme Administrative Court.[25]

The Council first clarified that to establish what is considered income and the attribution of income, the domestic law is decisive, and a tax treaty does not have any impact on such decisions. In other words, it is up to the domestic legislation to decide what is to be regarded as income. Following this line of reasoning, the Council concluded that the Swedish CFC rules impose taxation on the Swedish company for profits earned by the Swiss company.

The next step of the Council's assessment was to turn to the Swedish-Swiss Tax Treaty.[26] The starting point was that Sweden is the state of residence. In terms of distributive rules, the Council discussed Article 7 on business income, Article 10 on dividends and Article 23 on other income. The Council found that the income subject to the CFC rules was not covered by the definition of dividends given in Article 10(3). An application of Article 10 was therefore excluded. Regarding Articles 7 and 23, the Council concluded that neither of these distributive rules limited Sweden's right to impose CFC taxation, because Sweden applies the credit method to avoid double taxation. Consequently, the Council found that the Swedish-Swiss Tax Treaty did not hinder an application of the Swedish CFC rules.

4. The Swedish Supreme Administrative Court

The judgment from the Swedish Supreme Administrative Court was delivered on 3 April 2008.[27] The Court answered the question of whether or not the Swedish CFC taxation is limited by tax treaties in the negative. In the following sections, my focus is on the Court's argumentation. The arguments presented by the Court for not considering the tax treaty are of pertinent interest.

Notes

[19] See, for instance, Roupe, 'CFC-reglerna, skatteavtalen och EG-rätten – några förhandsavgöranden', *Svensk skattetidning* 2005, 262–269 and Burmeister, Tivéus & Uggla, 'De svenska CFC-reglernas förenlighet med ingångna skatteavtal och EG-rätten m.m.', *Skattenytt* 2005, 448–461.

[20] See Dahlberg, 'National Report Sweden', in *CFC Legislation, Tax Treaties and EC Law*, eds Lang, Aigner, Scheuerle & Stefaner (The Hague, The Netherlands: Kluwer Law International, 2004), 598.

[21] Swedish Government Bill (*proposition*) 2003/2004: 10 97 and 101.

[22] Ibid., 100–101.

[23] Ibid., 99.

[24] The function of the Council of Advanced Tax Rulings in a ruling procedure is to indicate the tax consequences of proposed transactions. A ruling is normally binding on the tax administration but not on the taxpayer and can be appealed directly to the Supreme Administrative Court.

[25] Dnr 139-04/D.

[26] *Lag (1987:1182) om dubbelbeskattning mellan Sverige och Schweiz.*

[27] Case 2655-05.

A. The Court's reasoning

The Supreme Administrative Court shared the Council's conclusion that the tax treaty between Sweden and Switzerland did not hinder an application of the CFC rules. It reached this conclusion, however, in an entirely different way. *The Court did not find it necessary to interpret the tax treaty in order to deal with the question of whether or not it hinders CFC taxation*. Instead, the Court focused on the following issues. First, it emphasized that Sweden is bound by its tax treaties according to public international law. Tax treaties become part of Swedish national law only after they have been incorporated, however. The Court ascertained that the Swedish-Swiss Tax Treaty had been incorporated in accordance with procedural requirements. Second, the Court argued that no higher rank is accorded to acts of incorporation of tax treaties in comparison to other legislative acts. The Court pointed out that in the Act of incorporation of the Swedish-Swiss Treaty, it is stated that the provisions of the treaty may be applied only in order to limit the Swedish taxes otherwise imposed.[28] The treaty, therefore, is exclusively relieving in nature and may never extend Sweden's right to tax. In this context, the Court explained that Sweden has the possibility, by later legislative amendments, to extend its taxing rights according to internal law. Third, the Court discussed that in case of conflict between two equivalent legal norms – norms at the same level in the legal hierarchy – certain principles are available to give priority to one of the two norms. The Court pointed out that not only are the Swedish CFC rules of a later date than is the legislation incorporating the tax treaty, but the CFC rules aim specifically at imposing taxation on income from the activities conducted by the Swiss entity: captive insurance activities. It is clear under these conditions, the Court concluded, that the Swedish CFC rules take precedence over the tax treaty and shall be applied regardless of the result of an application of the treaty provisions. According to the Court, therefore, an analysis of the tax treaty is unnecessary.

B. Critical examination of the Court's reasoning

1. Conflict between norms instead of interpreting the Swedish-Swiss Tax Treaty

In Sweden the dualistic view is predominant, and the Court's statement that a tax treaty is part of the domestic legal system only after incorporation is easy to agree with. The same applies when it comes to the fact that tax treaties are exclusively relieving in nature. It is undisputed that in Sweden, as in most other states, tax treaties may only limit taxes that are otherwise imposed. It is also correct that it is possible for a country to extend its taxing rights under internal law. The extended tax claims are effective, however, only to the extent that the tax treaty does not limit the state's taxing rights in this respect. In my opinion, this principle applies to CFC rules as well. When considering the extent to which CFC taxation is possible in the presence of a tax treaty, an interpretation of the tax treaty is certainly necessary.

Instead of consulting the Swedish-Swiss Tax Treaty, the Court considered it to be a case of conflict between two equivalent legal norms. To solve this conflict, the Court argued in terms of *lex posterior* and *lex specialis* – principles which are classical solutions of conflicts between norms. Because the Swedish CFC rules are of a later date than is the Act of incorporation of the Swedish-Swiss Tax Treaty, and because the CFC rules aim specifically to impose taxation on income from captive insurance activities in Switzerland, precedence was given to the CFC rules. In my opinion, this part of the Court's argumentation must be questioned. Unlike the Court, I believe that an interpretation of the tax treaty is absolutely crucial to establishing whether or not it limits Sweden's right to impose CFC taxation. After all, CFC rules are domestic tax regimes on which tax treaties may have a limiting effect.[29]

According to the Court's reasoning, it is clear that it did not find it necessary to establish whether or not the Swedish-Swiss Tax Treaty was applicable. In this context it is worth noting that by 1974 Sweden had ratified the Vienna Convention on the Law of Treaties.[30] Besides the well-known content of Article 26 of this Convention – that every treaty in force is binding upon the parties to it and must be performed by them in good faith – Article 27 stipulates that a state may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Consequently, to not consider the Swedish-Swiss Tax Treaty is to act in breach of Sweden's international obligations.

2. The applicability of the tax treaty

Certain steps must be taken to determine if the Swedish-Swiss Tax Treaty is applicable. First, recourse must be had to Article 1 on the treaty entitlement of the taxpayer. Article 1 of the Swedish-Swiss Treaty stipulates that it applies to all persons who are residents of one or both of the Contracting States. The Swedish company is resident in Sweden and, according to the Swedish CFC legislation, is taxed on profits generated in Switzerland. The fact that this attribution of income is a deviation from ordinary

Notes

[28] *Section 2 of Lag (1987:1182) om dubbelbeskattning mellan Sverige och Schweiz.*

[29] See Lang, 'CFC Regulations and Double Taxation Treaties', *Bulletin for International Fiscal Documentation* 2003, 52.

[30] SÖ 1975:1.

principles on which attribution decisions are otherwise based is of no significance.[31] Therefore, the Swedish-Swiss Tax Treaty is applicable.

It is worthy of mention in this context that since 2003 the Commentaries to Article 1 of the OECD Model explicitly state that '[i]t is recognised that controlled foreign companies legislation structured in this way is not contrary to the provisions of the Convention'.[32] One must be cautious, however, about applying this statement to the Swedish-Swiss Tax Treaty, which was concluded in 1965; to deny tax treaty benefits on the basis of this statement would be problematic because the statement's legal relevance must be questioned.[33] Even though the Swedish case law on tax treaty interpretation does not exclude the possibility of an ambulatory approach to changes in the Commentaries, it is my opinion that it would be a too far reaching a conclusion to exclude certain taxpayers from the scope of the treaty based on this statement.[34] Not only was the statement inserted long after the tax treaty was concluded, but its wording gives rise to different interpretations. Is the statement to be understood to mean that tax treaties are never to be applied in cases of CFC taxation, for instance, or that an application of the distributive rules of tax treaties give that CFC legislation is not contrary to the tax treaty?

The second step is to establish whether or not the treaty applies to the tax in question. Article 2(2) of the Swedish-Swiss Tax Treaty states that the Convention applies to taxes on income which includes all ordinary and extraordinary taxes imposed on total income or on elements of income. Furthermore, the national income tax is expressly mentioned in Article 2(3)(a)(1). In reading this Article and recognizing that the Swedish-Swiss Tax Treaty does not include special provisions for CFC, I see no convincing reason to exclude from the tax treaty's scope of application the Swedish CFC taxation on profits from the Swiss captive insurance company. I conclude, therefore, that the Swedish taxation of the resident shareholder on income earned by the Swiss captive insurance company is within the scope of the tax treaty.

The third step in the process of tax treaty application is to consider the distributive rules. This is done to determine if Sweden's right to tax is limited by the treaty. Just as the Council for Advanced Tax Rulings concluded, three main alternatives exist: Article 7 on business income, Article 10 on dividends and Article 23 on other income. The Swedish CFC rules are not completely clear on the type of income constituted by CFC income. The legislation merely stipulates that the income is attributed to the shareholders. The Council's reasoning indicates that the income was not a deemed distribution of dividends, as Article 10 was found not to apply. Rather, the Council turned to Articles 7 and 23. However, it did not decide which of the two distributive rules actually applied; it simply concluded that neither of the two Articles, in the context where Sweden applies the credit method, excluded Sweden's right to tax the income. When deciding which distributive rule applies, it is clear that Article 10 on dividends takes precedence over Article 7 on business income, and that Article 23 on other income is applicable only to the extent the income is not dealt with in any of the other distributive rules.[35] The scope of the individual distributive rules is disputed.[36] In my view, the Council excluded an application of Article 10 too easily. The decision about which rule applies is especially significant in case an exemption is agreed for the relevant distributive rule. The case may then be that the CFC taxation is restricted due to the tax treaty.

3. *Questionable reasoning by the Supreme Administrative Court*

To conclude, I question the Court's reasoning primarily in two respects:

(1) It is not relevant to argue in terms of conflicts of norms when a tax treaty is founded on the presumption that it limits national tax claims extending beyond what is stated in the tax treaty.
(2) The situation is clearly within the tax treaty's scope of application.

Therefore, the rules of the tax treaty are to be applied. It is true that there is no consensus, either nationally or internationally, on whether or not CFC taxation is limited by the distributive rules. For instance, the Supreme Administrative Courts of France[37] and Finland[38] arrived at different conclusions.

Notes

[31] See Lang, 'CFC Regulations and Double Taxation Treaties', *Bulletin for International Fiscal Documentation* 2003, 54.

[32] Para. 23 of the Commentary on Art. 1 of the OECD Model. For countries dissenting with this view, see paras 27.4–27.9 of the Commentary on Art. 1. Switzerland is one of these countries, declaring in para. 27.9 that CFC legislation 'may, depending on the relevant concept, be contrary to the spirit of Art. 7'.

[33] See, for instance, Lang, 'CFC Regulations and Double Taxation Treaties', *Bulletin for International Fiscal Documentation* 2003, 52; Avery Jones, 'The Effect of Changes in the OECD Commentaries after a Treaty Is Concluded', *Bulletin for International Fiscal Documentation* 2002, 102 and Wattel & Marres, 'The Legal Status of the OECD Commentary and Static or Ambulatory Interpretation of Tax Treaties', *European Taxation* 2003, 223–235.

[34] See, for instance, RÅ 1996 Ref. 84.

[35] Art. 7(8) of the Swedish-Swiss Tax Treaty & Vogel, *On Double Taxation Conventions*, 3rd edn (Deventer, The Netherlands: Kluwer Law International, 1997), Introduction, m. no. 54.

[36] See Aigner, Scheuerle & Stefaner, 'General report', in *CFC Legislation, Tax Treaties and EC Law*, eds Lang, Aigner, Scheuerle & Stefaner (The Hague, The Netherlands: Kluwer Law International, 2004), 38.

[37] *Société Schneider Electric Conseil d'Etat No. 232,276,4* of the Supreme Administrative Court of France (28 Jun. 2002).

[38] KHO 596/2002 (yearbook no. 26) of the Supreme Administrative Court of Finland (20 Mar. 2002). See Helminen, 'National Report Finland', in *CFC Legislation, Tax Treaties and EC Law*, eds Lang, Aigner, Scheuerle & Stefaner (The Hague, The Netherlands: Kluwer Law International, 2004), 204–212.

However, unlike the Swedish Supreme Administrative Court, the Courts of France and Finland found it necessary to interpret the tax treaties in question in order to reach a conclusion.

5. Concluding remarks

The Swedish Supreme Administrative Court has judged on the issue of the possibility of CFC taxation under the Sweden-Swiss Tax Treaty. The Court found that the Swedish CFC taxation was not restricted by the tax treaty. I do not object to this outcome, but I question the Court's reasoning. I find it highly questionable that the Supreme Administrative Court reaches a conclusion on this issue without interpreting the treaty. My starting point is that unless a tax treaty explicitly provides otherwise, the provisions of the treaty need to be consulted in order to determine if the CFC taxation is limited by the tax treaty.

The compatibility of CFC rules with tax treaties based on the OECD Model Tax Convention is debated in many countries, and it is clear that national courts, legislators and scholars hold different opinions.[39] The fact that the reasoning presented by Council for Advanced Tax Rulings and the Swedish Supreme Administrative Court differ can therefore be considered understandable. I find the Council's approach to be perfectly reasonable in terms of the methodology used when applying the tax treaty. The Council found that the Swedish-Swiss Tax Treaty did not restrict Sweden's CFC taxation. The Supreme Administrative Court reached the same conclusion, but its reasoning is highly questionable, as there is no recourse to the tax treaty itself. Rather, the Court argued in terms of conflict between the domestic CFC legislation and the tax treaty, and solved this 'conflict' by giving precedence to the domestic legislation without interpreting the tax treaty.

Does the Supreme Administrative Court's reasoning indicate a new position in terms of Swedish tax treaty application? It is possible to interpret the judgment as introducing a new approach to the relationship between Swedish domestic law and Swedish tax treaties. For pedagogical reasons, let us assume that in the future Sweden extends its source taxation, implying that outgoing interest is taxable with 20% on the amount of the interest. In general, tax treaties limit the tax to a maximum of 10%. A proper tax treaty interpretation would then result in limiting Sweden's taxing right to 10%. The judgment indicates, however, that the Supreme Administrative Court may consider this to be a case of 'conflict' between the domestic law imposing 20% tax and the tax treaty limiting the tax to 10%. If the latest legislation is given priority, the domestic law will be given precedence. Such consequences would be devastating for the Swedish tax treaty network, for Sweden would likely be considered an extremely unreliable tax treaty partner. Tax treaties would be unable to fulfil the aim of avoiding double taxation if they are not given a limiting effect on national taxing regimes. This scenario is unlikely in my view, because it contradicts all the logic of tax treaty application.

A more realistic interpretation of the Court's reasoning is that in case of normal taxable events the Court will adhere to accepted principles of tax treaty application, but in special situations – situations in which rules to protect the Swedish tax base are involved, for instance – the Court may argue in line with its reasoning in this case. If this is the Court's position, it is a clear deviation from its established case law on tax treaty interpretation. This case law shows that it is the construction of individual treaty provisions that is crucial for the fulfilment of the aims that are inherent in the treaty – the aims of avoiding double taxation and preventing fiscal evasion.[40] The Court has accepted that the result of its tax treaty interpretation has been both double taxation and double non-taxation.[41] Consequently, the Swedish case law on tax treaty interpretation does not indicate that the aim of preventing fiscal evasion is of such relevance that a deviation from the ordinary methods of tax treaty interpretation and application is in order. The Court's argumentation is regrettable from this perspective as well, as it certainly decreases the necessary predictability of tax treaty application.

As should be clear from my reasoning in this article, I find it fundamental that the Court's argumentation in the present case not be allowed to set standards for tax treaty application in Sweden. In general, there are two possible ways of limiting the effects of this judgment: either the Supreme Administrative Court in a future case, in full chamber, can clearly show that the argumentation does not represent the Court's view on the relationship between Swedish domestic law and tax treaties; or the Government can, by means of legislation, make a correction. These procedures can be illustrated by the consequences that followed a Supreme Administrative Court decision on tax treaty interpretation from 1995.[42] The question was the tax treatment of a dual-resident taxpayer. An individual was considered to be a resident according to the domestic law in both Sweden and Kenya. The application of the tax treaty's tie-breaker rules resulted in tax treaty residence in Kenya. Most surprisingly, the Court then found that the individual was to be considered a non-resident

Notes

[39] See Section 3.B.3.

[40] Hilling, 'Swedish National Report on Double Non-Taxation', in *Cahiers de Droit Fiscal International* 2004, vol. 89a, 674.

[41] Ibid.

[42] RÅ 1995 Ref. 69

under Swedish domestic law. In other words, the Court held that the tax treaty classification resulted in a re-classification in terms of domestic law. The legislator reacted instantly, and a new Act on tax treaty application became a reality. Due to case law developments, this piece of legislation was later removed.[43] It will be of great interest to watch the consequences of the present judgment.

Notes

[43] RÅ 1996 Ref. 38.