Taxation of Workers in Sweden

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TAXATION OF WORKERS IN EUROPE

THE SWEDISH NATIONAL REPORT

1 SWEDISH LAW ON TAXATION OF EMPLOYMENT INCOME

1.1 INTRODUCTION

This report presents Swedish national law and tax treaty practice for the taxation of workers. It begins with an overview of the national income tax system for employment income, then provides issues of deferred remunerations under Swedish law. The last part of the report deals with tax treaty law on selected issues of international taxation of employees, and consists of questions and answers representing Swedish tax treaty practice.

Before undertaking an in-depth examination of the Swedish law on the taxation of employment income, I present two recent changes of importance for the taxation of workers. The newly elected Swedish government of 2006 has declared that the major ambition for economic policy is an increase in employment. To achieve this goal, taxes are used in an increasingly active way. The first change is the introduction of a so-called job tax relief, a tax reduction for income from employment, designed to make it more rewarding for a person to

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2 This report focuses on providing answers to the questions given by the EATLP working group for the Cambridge 2008 conference.
3 My thanks to Senior Tax Manager Frida Haglund, Deloitte & Touche in Stockholm, Sweden; and Tommy Persson, legal expert at the National Tax Agency in Malmö, Sweden.
5 Norberg, Taxation of capital and wage income; towards separated or more integrated personal tax systems? The 2007 Swedish national fiscal report to the annual seminar organised by the Nordic Council for Tax Research, p. 7.
work. The relief is intended to be of greatest value to individuals with low and moderate income.\textsuperscript{6} The second change is the introduction of a tax reduction for white market household services. There are various reasons for introducing this tax reduction – to convert black market services to white market services, to enable individuals to increase their working time and to enable men and women to undertake an equal combination of work and family life.\textsuperscript{7} Further changes for the taxation of workers are expected in order to increase employment.

\textbf{1.2 BASIC FRAMEWORK OF THE TAXATION OF EMPLOYMENT INCOME IN SWEDEN}

Under the Swedish tax system, an individual may have income from three different sources: from employment, business and capital.\textsuperscript{8} The first two sources consist primarily of income derived from work as an employee or as a self-employed person. The source income from business comprises all forms of independent business. If a specific potential income item cannot be included as income in any of the three sources, it is excluded from the income tax base.

For earned income – income from employment and business – the taxation is progressive. After a basic allowance ranging from 11,900 to 31,100 SEK (approximately 1,300 to 3,400 euro), local (county and municipality) income taxes are levied on income through tax rates of approximately 30-33 per cent, as determined by local governments.\textsuperscript{9} In addition to these local taxes, a national

\textsuperscript{6} Government Bill 2006/07:01 pp. 136-139.
\textsuperscript{7} Government Bill 2006/07:94 p. 1.
\textsuperscript{8} Chapter 1, Section 3 Swedish Income Tax Act (SITA).
\textsuperscript{9} The average local income tax for the income year 2007 is 31.55 per cent of taxable earned income.
income tax is levied: 20 per cent for income above 316 700 SEK (about 34 500 euro), rising to 25 per cent above 476 700 SEK (about 52 000 euro).\textsuperscript{10}

Social security contributions are paid by employers: 32,42 per cent of income from the employment of employees and 30,71 per cent for self-employed persons. Considering that payments of social security contributions do not usually result in social benefits, however, these payments ought to be considered to be taxes as well.\textsuperscript{11} Employees and self-employed persons pay a so-called employee social security charge of 7 per cent of their net employment and business income as a contribution to the pension system. A tax reduction is provided for this contribution.\textsuperscript{12}

For income from capital, a flat rate national tax of 30 per cent is levied. No basic allowance exists for capital income.

1.3 DEFINING EMPLOYMENT INCOME

Employment income is defined in Chapter 11, Section 1, Swedish Income Tax Act (SITA). It consists of wages, salaries, pensions and certain benefits, and includes other remunerations which can be classified as neither business income nor capital income.

The level of independence is decisive for the classification of income as either employment income or business income (self-employed activities). The

\textsuperscript{10} Individuals also pay a mandatory funeral contribution (on average, 0,223 per cent of their income) and members of recognized congregations pay a church contribution (on average 0,982 per cent of their income). These contributions are collected through the tax collection system.

\textsuperscript{11} See Melz in Ault & Arnold, \textit{Comparative Income Taxation – A Structural Analysis} (2004), pp. 102-103, in which he refers to an estimation that approximately 60 per cent of the contributions, on average, could be regarded as taxes. Considering the limitations on such benefits, however, this portion is 100 per cent for a higher income earner.

\textsuperscript{12} Social Security Charge Act (\textit{Lag (1994:1744) om allmän pensionsavgift}).
legislation states that income from business activities are conducted professionally and independently, with the later criterion being the most significant. The nature of the assignment, the number of assigners, where the assignment is to be carried out and who sets such working conditions as working hours are examples of circumstances to be considered when judging the issue.

Because the level of independence determines the classification of income as either employment income or business income, an agency worker can be treated as an employee for tax purposes. An example of the independence criterion not being fulfilled would be the case of an agency worker having only one commissioner.

As the taxation of income from employment and business for individuals is considerably higher than is the taxation of distributed income from corporations, special rules are necessary in order to counteract the transformation of earned income to capital income – dividends – by decreasing salaries from corporations in order to increase dividends. The aim of these special rules is to ensure that income created by the work of shareholders in their corporations should be taxed at the rate applicable to earned income, even if distributed as dividends. The rules apply to shares in close corporations, which are defined as corporations controlled by four or fewer persons (including close relatives), if owned by a person who is normally working in the corporation. Application of the rules involves taxing dividends above a certain level and taxing 50 per cent of capital gains as employment income for the individual shareholder. The decisive level is calculated as a normal yield of the

13 Chapter 13, Section 1 SITA.
14 See cases RÅ 1960 ref. 43 and RÅ 2001 ref. 25.
16 Chapters 56-57 SITA.
shareholder’s investment. Dividends below this level are considered to be the ordinary return on invested capital, and are taxed as capital income.

As a deviation from the general rule that royalties constitute business income, royalties can be considered as employment income. That is the case when the royalty payment is derived from employment, an assignment or temporary activity. Thus royalties due to authorship may be taxed as income from employment. Royalty payments received as a consideration for the use of, or the entitlement to use, rights to innovations or manufacturing processes, for instance, are generally taxed as business income. It is assumed that the receiver of the royalties in such cases participates in the payer’s activity to such an extent that the income is to be considered as business income. The duration and extent is relevant, however, when deciding on such issues.

Income from employment covers all forms of income that are not classified as business income or capital income (or is explicitly exempted). Consequently, income from third parties, such as tips, is also taxable.

1.4 ATTRIBUTION OF EMPLOYMENT INCOME

Sweden has no special statutory rules on the assignment of income. Case law principles stipulate that income is taxed to the person who performed the work that triggered taxation. The income source is the performance of services, and the income thus belongs to the person performing the services. This stipulation

17 Chapter 13, Section 11 SITA.
18 See RÅ 1977 ref. 27.
20 Chapter 10, Section 1 SITA.
applies even if the person who performs the service renounces the right to the income before receiving it.\textsuperscript{23} Income earned by an employee but, under contractual arrangements, is received directly by the employee’s spouse, is taxed to the employee.\textsuperscript{24}

1.5 TIMING ASPECTS

Income from employment is taxable on cash basis. It implies that income is taxable when it is disposable. National tax legislation is applicable on any payment made to an individual while a resident of Sweden. According to domestic law, no adjustments are made on the grounds that the income may have been earned while the individual was regarded a non-resident.

Income referenced to a period at least two years previous or subsequent to the point when the income is made available to the taxpayer may, on the initiative of the taxpayer, be subject to special tax assessment.\textsuperscript{25} The income is then divided by the number of years to which the income is connected.\textsuperscript{26} A pension payment replacing many years of monthly payments, for instance, may be taxed in accordance with these rules.\textsuperscript{27}

1.6 BENEFITS

\textsuperscript{23} See case RÅ 1962 ref. 46.
\textsuperscript{25} Chapter 66, Sections 3, 18-21 SITA.
\textsuperscript{26} Chapter 66, Sections 5-10 SITA.
\textsuperscript{27} Lodin, Lindencrona, Melz and Silfverberg, \textit{Inkomstskatt – en läro- och handbok i skatterätt}, 2007, p. 144.
One result of the major Swedish tax reform of 1991 was a broadening of the tax base, aimed at taxing all types of income equally. Prior to the reform, employee benefits used to be a major issue, as some were tax exempt or low-taxed.28

Today, all benefits are, as a rule, taxed at market value,29 a result of the tax policy requiring that taxes be neutral to varying economic options.30 For practical reasons, some benefits are valued at schablonized tax values – using tax-value models. The most important benefit, and technically the most difficult to tax, is the use of company cars.31

For various reasons, some benefits are still tax-free. Some of the benefits provided by employers to all their employees as part of “good employment plans”,32 fall into this category: free coffee at work, for instance, and some forms of exercise.33 Discounts to employees when buying regular products or services manufactured or performed by employers are exempted if such discounts are also available to customers on commercial grounds.34 In addition, benefits of limited value for the employee but of significance to the work performance of the employee are tax exempt.35 The same applies to gifts of limited value, like Christmas and jubilee gifts.36 In addition, more valuable gifts from the employer to an employee may be tax exempt in exceptional cases.37

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28 Norberg, Taxation of capital and wage income; towards separated or more integrated personal tax systems? The 2007 Swedish national fiscal report to the annual seminar organised by the Nordic Council for Tax Research, p. 9.
29 Chapter 61, Section 2 SITA.
30 Norberg, Taxation of capital and wage income; towards separated or more integrated personal tax systems? The 2007 Swedish national fiscal report to the annual seminar organised by the Nordic Council for Tax Research, p. 9.
31 Chapter 61, Sections 5-11 SITA.
32 Chapter 11, Sections 11-12 SITA.
33 Norberg, Taxation of capital and wage income; towards separated or more integrated personal tax systems? The 2007 Swedish national fiscal report to the annual seminar organised by the Nordic Council for Tax Research, p. 9.
34 Chapter 11, Section 13 SITA.
35 Chapter 11, Section 8 SITA.
36 Chapter 11, Section 14 SITA.
37 RÅ 80 1:44.
1.7  DAMAGES

The general rule is that damages due to the termination of employment contracts are taxable as employment income. So-called non-economic damages are taxable only if they are closely connected to the employment. By “non-economic damages”, I refer to damages for intangible losses such as pain, suffering, discomfort and humiliation.

In a case in which a person who had applied for a job was rejected, and the rejection was found to be based on sex, the Swedish Supreme Administrative Court found the damages to be tax exempt. In this case, the receiver of the damages was not an employee, and the damages did not constitute employment income.

1.8  DEDUCTIBLE EXPENSES

The main rule is that all expenses for maintaining taxable income are deductible. Deductions can be classified into three subgroups. 1) Increased living-costs and work-related costs constitute one such group. In principle, these costs are tax-deductible within certain limits. 2) Expenses that are close to personal living costs, such as those associated with commuting, comprise another group. Such costs are tax deductible only to the extent that they exceed 8 000 SEK (about 870 euro) annually. 3) Other costs are tax deductible only if they exceed 1 000 SEK (about 109 euro) per year. This restriction is motivated by the need for simplification.

38 See RÅ 1966 Fi 219 and RÅ 1971 ref. 6.
39 RÅ 1987 ref. 10.
40 RÅ 1984:1:35.
41 Chapter 12, Section 1 SITA.
1.9 DEDUCTION AT SOURCE

The main rule is that employers are required to deduct tax at source. All employers resident in Sweden and foreign employers with a permanent establishment in Sweden are subject to this obligation to withhold tax at source, and to make social security contributions.\(^{43}\) The amount to be deducted should, as far as possible, correspond with the later calculated final tax for the employee.\(^{44}\) The amount to be deducted is based on the salary as well as the value of benefits in kind.\(^{45}\)

In cases in which the employer is not resident, or has a permanent establishment, the employee in Sweden is obligated to make monthly tax payments to the National Tax Agency.\(^{46}\)

Sometimes, in agreement with Swedish employees, non-resident employers with no permanent establishment in Sweden withhold a portion of the employee’s salary, which is supposed to be paid to the Swedish National Tax Agency. If the payment is not subsequently made to the National Tax Agency, however, the amount is not credited to the employee. The National Tax Agency takes the position that amounts withheld by the foreign employer are not considered tax payments in the meaning of the Tax Payment Act.\(^{47}\)

\(^{43}\) Chapter 5, Section 1 Tax Payment Act (SFS 1997:483).
\(^{44}\) Chapter 4, Section 1 Tax Payment Act.
\(^{45}\) Chapter 8, Sections 14-17 Tax Payment Act.
\(^{46}\) Chapter 4, Section 5 Tax Payment Act.
\(^{47}\) See the Swedish National Tax Agency’s general recommendation 130 604256-04/111. Recommendations are, however, not binding for courts upon appeal.
1.10 INTERNATIONAL ASPECTS

Prior to presenting how the Swedish tax system deals with Swedish residents employed abroad and with non-residents employed in Sweden, as well as foreign expatriates, I am introducing the Swedish rules for unlimited tax liability. The meaning of unlimited tax liability is defined in Chapter 3, Section 3 SITA as a liability to tax in Sweden on all income in Sweden and abroad. There are three categories of individuals who are subject to unlimited tax liability in Sweden according to Chapter 3, Section 3 SITA: individuals who are resident in Sweden, have their habitual abode in Sweden or have substantial connecting links to Sweden and were previously residing in Sweden. In Chapter 3, Section 7 SITA, an open-ended list of ten criteria illustrates the conditions that can constitute a substantial connecting link. There is extensive case law on these criteria, and it is clear that certain circumstances are significant in establishing a substantial connecting link to Sweden: a permanent home in Sweden, family in Sweden or business activities conducted in Sweden, for example.

A) Swedish residents employed abroad.

Swedish law includes two provisions for tax exemption for individuals on employment income earned abroad. Both rules apply only to persons who are subject to unlimited tax liability in Sweden. The so-called six-month rule\(^{48}\) requires that the income is subject to tax in the other state and that the stay in the other country lasts for at least six months. An additional requirement is that the exemption applies to earned income in only one foreign country. The so-called one-year rule\(^{49}\) applies if an individual stays abroad for more than one year, even if the income is tax exempt in the country of employment. This rule accepts the reality that income can be earned in more than one foreign country. The one-year rule requires, however, that grounds for the tax exemption in the

\(^{48}\) Chapter 3, Section 9, Subsection 1 SITA.

\(^{49}\) Chapter 3, Section 9, Subsection 2 SITA.
country of employment are national law and not the result of a tax treaty application. This rule does not apply for employment with the Swedish government, Swedish municipalities or the Swedish Church.

B) Non-residents employed in Sweden

Swedish source country taxation is stipulated in several legal acts. The SITA provides definitions and substantive rules on limited tax liability for individuals. There are also legal acts focusing on employment income and income earned by artists and athletes. In general, a non-resident individual who earns employment income in Sweden is taxed according to the Law on Income Taxation for Non-Residents (SINK), which provides for a tax rate of 25 per cent on gross income. As compensation for not allowing deductions or personal allowances, the tax rate is lower than it is for income subject to the employment income taxation for resident taxpayers. The SINK legislation has been subject to amendments, however, due to the outcome of the case C-169/03 Wallentin. Under certain conditions, it is now possible for a non-resident to choose to be taxed according to the SITA, with the right of deductions and personal allowances.

C) Special tax regime for foreign experts

Since January 2001, Sweden has tax incentives directed towards foreign experts, researchers and other key personnel. The purpose of this regime is to increase Swedish competitiveness by increasing the number of highly qualified foreign employees who come to Sweden to work. This tax incentive comprises a tax exemption of 25 per cent of the individual’s salary, remuneration or other forms of compensation. Moreover, some payments of compensation paid by the

50 Law on Income Taxation for Non-Residents (SINK).
53 Chapter 11, Sections 22-23a SITA.
employer to the individual who is covered by this special regime are tax exempt. This legislation includes various limitations, the most important being that tax relief is granted only for stays in Sweden which are not intended to last longer than five years and that the tax relief may only be granted for three years.

The Special Tax Council for Researchers is the body that decides if an individual fulfils the requirements set out in this legislation.\textsuperscript{54} Such decisions may be appealed within the administrative court system.\textsuperscript{55}

The individual and the employer both benefit from the reduced tax cost, as the tax regime results in reduced social security contributions. However, this tax regime is subject to critique.\textsuperscript{56} The main problem appears to be the difficulty in foreseeing if a person qualifies for the benefits. Moreover, a recent evaluation by the Swedish Institute for Growth Policy Studies shows that the rules have not resulted in an increase of highly qualified foreign personnel working in Sweden.\textsuperscript{57}

2 DEFERRED COMPENSATIONS UNDER SWEDISH LAW

2.1 INTRODUCTION

There is no equivalent to the term “deferred compensation” in common use in Sweden. Schemes involving the deferral of taxation on employment income are common, however.\textsuperscript{58} The use of so-called incentive programmes has grown

\textsuperscript{54} In Swedish Forskarskattenämnden.
\textsuperscript{55} In Swedish Länsrätt, Kammarrätt, Regeringsrätten.
\textsuperscript{56} See for instance http://www.svensktmaringsliv.se/fragar/visa_skatterna/article23114.ece, 12 October 2007.
\textsuperscript{57} See Utvärdering av expertskatten, nr 4, published 28 February 2006 at www.itps.se.
\textsuperscript{58} For a more extensive account of the use of deferred remunerations in Sweden, see Rohdin, Swedish branch report on “International tax aspects of deferred remunerations”, Cahiers de Droit Fiscal International, Volume LXXXVb, 2000, pp. 717-739.
steadily in Sweden over recent years: employee stock option plans and other plans involving financial instruments, pension schemes, profit-sharing and so-called “competence-accounts”. The general aim of these programmes is to recruit highly valued employees and to tie them to the company. In principle, these programmes signify that the employee exchanges salary to a future reward, which is dependent on the nature and conditions of the programme at issue.

Deferred compensations are sometimes used in situations in which non-nationals work in Sweden for a number of years and return to their countries of origin after finishing their employment term. Payments from the former employer are deferred under these conditions and paid when the person is no longer subject to unlimited tax liability in Sweden. The income is consequently subject to a taxation of only 25 per cent on gross income, rather than the considerably higher taxation that follows from an unlimited tax liability.

2.2 PENSIONS

In Sweden, one’s financial situation in old age may depend on pensions from three possible sources: a national pension to which retired persons in Sweden are entitled; an occupational pension that is often a result of employment; and private pension insurance, which many Swedes have purchased over time. Pensions are considered employment income and are taxed in the same way as salaries are. The national pension system is financed by social security

59 Silfverberg, Några aspekter på kontantprincipens tillämpning på tjänsteinkomster, SN 2007 p. 596.
60 Individual accounts for employees established by the employer in order to stimulate personal development and continued education.
61 Silfverberg, Några aspekter på kontantprincipens tillämpning på tjänsteinkomster, SN 2007 p. 596.
contributions. Although deductions are given for private pension premiums, there are restrictions on the deduction allowed.

2.3 TAX PROBLEMS OF DEFERRED COMPENSATION

1. Timing
To achieve the main purpose of the schemes of deferred compensations, it is necessary that the employee not be taxed when earning the salary, but only later, when receiving the remuneration. In this section, I present the Swedish case law on the time of taxation for certain types of deferred compensations.

The cash principle is explicitly stated in Chapter 10, Section 8 SITA, which holds that income is taxed when taxpayers have the income at their disposal or when the income is made available to them in any other way. Employee stock option plans are subject to detailed tax provisions, which are presented in Section D.

A. Time of the agreement between employee and employer on deferred payment
An agreement between an employee and an employer on deferred payment that is concluded prior to the service in question being rendered results in taxation at the time the salary is actually paid to the employee (Type 1 B).

The situation differs when the employee already has a claim to monetary remuneration but agrees with the employer to postpone payment (Type 1 A). In such cases, remuneration is considered to be at the employee’s disposal at the

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63 See Chapter 59, Section 5 SITA.
64 This part is based on Silfverberg, Några aspekter på kontantprincipens tillämpning på tjänstekomster, SN 2007 p. 597-608.
65 My translation of: Inkomster skall tas upp som intäkt det beskattningsår då de kan disponeras eller på något annat sätt komma den skatskyldige till del.
66 RÅ 1933 not. 655 and RÅ 1956 not. 905.
normal time; therefore the contract has no bearing on the time of taxation. Such an agreement is valid only for the time of taxation if the employer can demonstrate an inability to pay and the employee, consequently, cannot expect to receive payment. In case RÅ 2000 ref. 4, however, the deferral of taxation was accepted even if the agreement for postponing the payment was concluded after the period of earning but before the income was made available to the employee. Subsequent case law shows that this principle of deferred taxation of employment income is applicable to other types of remunerations as well.67

B. The employee’s possibility of influencing time of payment
The question of disposal is dependent upon the employee’s ability to influence the decision about the date the postponed payment will be made. In other words, if the employee has been allowed to decide when the postponed payment must be paid, is the income then considered to be at the employee’s disposal when making such decision?

If the employee is free to decide the time of payment, the income is considered to be at the employee’s disposal; consequently, taxation occurs immediately.68 In order to achieve deferred taxation, limits must be imposed on the employee’s possibility for disposal. The limitation can take the form of time restrictions – in which case, taxation most likely occurs when the time restriction has expired.69

C. Transferral of funds to a third party
It is possible for the employer to transfer the money to a third person, in which case the employee obtains a claim against this third person – but cannot exercise that claim for a certain period. The question is the point in time for taxation.

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67 See RÅ 2002 ref. 83.
68 RÅ 1993 ref. 19.
69 RÅ 1977 Aa 174 a.
In the case RÅ 1996 ref. 92, questions in relation to a stock purchase plan were considered. In this case, the trustee had acquired shares on behalf of the employees in accordance with a stock purchase plan in which employees in different countries acquired savings in the form of shares in the parent company. The local employer also transferred funds to the trustee on behalf of the employees – funds that were used to acquire shares in the parent company. According to the stock option plan, the benefits involved were forfeited if the employment lasted for less than five years. The Swedish Supreme Administrative Court found that the employees could not be considered as the owners of the shares until the qualification time of five years had ended. According to Silfverberg, the case indicates that transferral of funds to a third party gives rise to taxation when the benefits are secured from the perspective of the employee.\textsuperscript{70} This stipulation applies even if the payment takes place at a later time.

\textbf{D. Acquisition of financial instruments by employees}

In situations in which employees are offered the opportunity to purchase financial instruments at a price below market value, the difference between the offered price and the market value constitutes a benefit which is taxed as employment income at cash basis – at the time of acquisition.\textsuperscript{71} There is one exception to this general rule: If an employee is offered the opportunity to acquire shares of the company in which that employee works, and the offered price is below market value, the price difference shall not be considered a tax benefit – income – in cases in which all of the three following conditions are fulfilled:

\textsuperscript{70} Silfverberg, \textit{Några aspekter på kontantprincipens tillämpning på tjänsteinkomster}, SN 2007 p. 605.

\textsuperscript{71} Chapter 10, Section 11, Paragraph 1 SITA.
- The same offer to acquire shares in the company is given to investors who are not employees or shareholders of the company;
- Employees and shareholders in the company do not acquire more than 20 per cent of the shares being offered;
- An individual employee taking part in the offer does not acquire shares for a value greater than 30 000 SEK (about 3 300 euro).72

The Swedish income tax system differentiates between employee stock options and securities. An employee stock option is a right to purchase a security at a future date. However, unlike regular options which would be classified as securities, employee stock options are restricted by means of limitations in terms of, for example, exercise or alienation before a certain date.73 As securities are treated like any other type of financial instrument and employee stock options are subject to special income tax treatment, the distinction between the two types of contracts is vital. An employee stock option acquired by an employee that is subject to unlimited tax liability in Sweden throughout the duration of the employee stock option constitutes taxable income for its holder when the restrictions connected to the option cease to exist – when it is exercised or disposed of.74 If the holder of an employee stock option is no longer a resident or no longer has his or hers habitual abode in Sweden, the value of the option constitutes taxable income for its holder at that point. However, the Swedish Tax Agency takes the position that such exit taxation breaches Article 39 EC when the taxpayer moves to another EU/EEA country and is, therefore, inapplicable.75 Instead the main rule applies, which gives that taxation takes

72 Chapter 11, Section 15 SITA.
73 Chapter 10, Section 11, Paragraph 2 SITA.
74 RÅ 2004 ref. 35.
75 See the Swedish National Tax Agency’s general recommendation 131 581221-05/111. Recommendations are, however, not binding for courts upon appeal. See also Lindberg & Horvath, Exitskatten på personaloptioner strider mot EG-fördraget – exempel på praktiska problem vid tillämpningen, SN 2006 pp. 220-225 och Lindberg & Horvath, Exitskatten på personaloptioner, SN 2007 pp. 157-165.
place when the right is exercised. A ruling by the Board of Advanced Tax Rulings confirms this interpretation of Community law.\textsuperscript{76} In response, the Swedish government has presented a proposal involving the removal of the exit taxation.\textsuperscript{77} However, the proposal has not resulted in legislative changes.

In Sweden, employee stock options which are only possible to settle net in cash are generally known as synthetic options. Employee stock options may be options settled by terms of delivery, however, as well as by cash settlement. The taxable income an employee stock option constitutes is the difference between the strike price of the option and the value of its underlying shares at the time the option is exercised.

E. The deduction of salary expenses

According to Swedish law, the general rule is that the employer must deduct salary payments in the year in which the services are rendered.\textsuperscript{78} In principle, it is therefore possible for the employer to reduce taxable profits in the case of deferred remuneration, in the same way as in the case of cash payments, but having the advantage of using the funds until the payment is made.

2.4 CHARACTERISATION

Income from employment covers all forms of income that are not classified as income from business or from capital.\textsuperscript{79} Income in the form of salary and other cash remunerations and benefits are taxed as income from employment.\textsuperscript{80} Sick pay, pensions, termination payments and some forms of life annuities are also

\textsuperscript{76} Ruling of 26 September 2006.
\textsuperscript{77} Government Directive 2006:23 \textit{Slopad avskattning för personaloptioner}.
\textsuperscript{79} Chapter 10, Section 1 SITA.
\textsuperscript{80} Chapter 11, Section 1 SITA.
taxed as income from employment. Therefore, the national tax classification of a deferred payment is of not of central importance, as it will be taxed as employment income. The classification is of interest primarily when dealing with equity-based incentives and, of course, in the application of tax treaties.

2.5 ADMINISTRATION

The main administrative problem appears to be payments from companies outside Sweden to individuals residing in Sweden. In such cases there is a considerable risk that the National Tax Agency does not receive information on the payment.

2.6 INTERNATIONAL TAX PROBLEMS

Most Swedish tax treaties follow Article 15 OECD Model with respect to the taxation of income from employment. As for pensions, Sweden usually diverges from Article 18 of the OECD Model to secure the right to tax national pensions paid from Sweden to pensioners living abroad. Moreover, some Swedish tax treaties include amendments to the article dealing with the taxation of other income in order to secure source taxation of annuities and similar payments paid by private insurance companies established in Sweden to pensioners living outside Sweden.

In the case RÅ 2001 not. 88, the Swedish Supreme Administrative Court interpreted the former tax treaty between Germany and Sweden with respect to

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81 See answers under the heading “Timing”.
82 For legislation governing such situations see, for instance, Chapter 8, Section 14, Subsection 3 Tax Payment Act.
84 See, for instance, Article 20 of the 1988 tax treaty between Cyprus and Sweden and case 6956-06 of the Swedish Supreme Administrative Court.
the classification of a severance payment. In this case, the Court found that the payment was covered by Article 18 on pensions. According to the employment contract, the severance payment was to be calculated as the monthly salary multiplied by 24. The severance payment was paid monthly, and it was possible for the employee to opt for a calculation that considers the number of months until age 65. This case does not, however, legitimate an interpretation that all severance payments in Sweden are treated as pension payments when it comes to tax treaty application.

According to the case RÅ 2003 ref 20, certain types of national pensions are not covered by Articles 18 on pensions or 19 concerning the taxation of remuneration with respect to government services – but by Article 21 on the taxation of other income. The tax treaty in question was the treaty between France and Sweden.

In a tax treaty context, deferred remuneration emphasises the necessity of determining the time when the income is earned – relevant, for instance, when the taxpayer changes state of residence after the time the work is performed but before the income is made available to the income earner. According to Swedish national law, taxation takes place when the income is controlled by the taxpayer or the income has been made available to the taxpayer in any other way. Consequently, national law considers the residence state to be the state where the individual resides when the income is made available to him or her. This issue of tax treaty interpretation has been discussed in relation to Article 15.4 (a) of the Nordic Convention. The tax treaty provision states that “[n]otwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a) an aircraft in

85 Se also RÅ R79 1:17.
86 See the Swedish National Tax Agency’s general recommendation 131 636217-05/111. Recommendations are not binding, however, for courts upon appeal.
international traffic, may only be taxed in the contracting state in which the person who earns the income is resident.”

The question was whether “earned” was to be interpreted as the point at which whatever decisively caused the income to accrue actually occurred or the point at which income was made available to the taxpayer. The question occurred because the taxpayer, a pilot, moved from another Nordic country to Sweden. The former residence state taxed a deferred payment from his employer, according to its national legislation, due to the fact that the pilot was a resident of that state when the work was performed. Sweden taxed the income at the time it was available to him. This situation involves the specific characteristic that the work was not performed in any of the contracting states, but in third states (the aircraft operated in international traffic). The Swedish National Tax Agency concluded that neither national tax law nor the applicable tax treaty contained substantive rules which could solve the problem of double taxation. Therefore, the only way to solve the problem was through the mutual agreement procedure found in Article 28 of the Nordic convention.

In Swedish national law no rules exist with the explicit purpose to solve international tax problems caused by deferred remunerations.

Is a deferred compensation which is subject to double taxation that is not alleviated by the applicable tax treaty considered to be an obstacle to free movement? The Court of Justice of the European Communities (ECJ) held in the Gilly case, and subsequently reiterated in the Saint-Gobain case, that

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87 My own translation of: Utan hinder av föregående bestämmelser i denna artikel beskattas inkomst av arbete, som utförs ombord på a) luftfartyg i internationell trafik, endast i den avtalsslutande stat där den som förvärvar arbetsinkomsten har hemvist.


89 Case C-336/96 Mr and Mrs Robert Gilly v Directeur des services fiscaux du Bas-Rhin [1998] ECR I-2793.

Member States are at liberty, in the framework of tax treaties, to determine the connecting factors for the purpose of allocating powers of taxation among themselves.\textsuperscript{91} Distributive rules prescribing which national tax system that should apply are, therefore, in line with free movement law. Generally, the distributive rules state whether and to what extent income in a cross-border situation may be taxed by the residence state or the source state.\textsuperscript{92}

This case law implies that the ECJ differentiates between allocation and exercise of powers of taxation under a tax treaty.\textsuperscript{93} When the taxing rights are allocated under the treaty, the next step consists of exercising the taxing rights. The exercise of taxing rights can, in principle, be described as applying standards of taxation within the limits drawn by the distributive rules.\textsuperscript{94} Once a Member State has been allocated the right to tax under a tax treaty, it is under an obligation to exercise that right in full respect of free movement law. Accordingly, dealing with the issue of tax treaty provisions being potentially in breach of free movement law, the focus should be directed towards provisions that include substantive rules determining how a contracting state exercises its powers of taxation. Van Thiel concludes that tax treaties contain relatively few substantive rules to determine how one of the contracting states should exercise a right to tax, once that right has been allocated to it.\textsuperscript{95} As examples, van Thiel mentions rules prescribing how the source state should determine the profits of a PE, treaty articles prescribing shared rights to tax in situations in which the source state is allowed to apply a withholding tax rate that does not exceed a

\textsuperscript{92} See Lehner, \textit{The Influence of EU Law on Tax Treaties from a German Perspective}, Bulletin 2000, p. 466.
\textsuperscript{93} Farmer, \textit{EC Law and Double Taxation Agreements}, ECTJ vol. 3, 1999, issue 3, p. 150.
certain ceiling, and rules relating to Article 23 of the OECD Model. Because this latter article does not include much specification, additions are common.

Tax treaty problems in relation to deferred compensations appear to derive either from the issue of characterisation of the income or from timing mismatches.\textsuperscript{96} The problems occur due to national law and the application of different tax treaty articles to the same income. As a result, double taxation is not avoided. In principle, therefore, it is not possible to identify one single provision in a tax treaty that gives rise to the problems, because the issue is more general: the lack of a common view on classification of income and the absence of common rules on the time of taxation. Given the current state of Community law, my opinion is that the tax treaty problems relating to deferred compensation cannot likely be solved under free movement law. If it is possible to identify that the problem in a cross-border situation is a provision in the domestic law of a Member State rather than a tax treaty provision, the chances of successfully invoking free movement law increases significantly.

3 SELECTED AND RECENT ISSUES OF INTERNATIONAL TAXATION OF EMPLOYEES (TAX TREATY LAW)\textsuperscript{97}

I. Introduction

Since the beginning of the work of the OECD on tax treaties, the Article on income from dependent personal services has remained unchanged apart from several smaller amendments. Nevertheless, there is still a lack of a consistent international approach in respect of many cases that arise in practice. The goal of this report is therefore to identify

\textsuperscript{96} Mössner, General report on "International Tax Aspects of deferred remunerations", Cahiers de Droit Fiscal International, Volume LXXXVb, 2000, p. 103.

\textsuperscript{97} In this chapter the questions provided by the EATLP working group are included in the report, and are given in italics.
the issues that are most discussed at the moment and to provide an overview of possible solutions in order to create a basis for a more focused and best-practice-orientated discussion.

Sweden has more than 80 tax treaties in force. The guidance provided by the case law on the issues dealt with in this chapter is limited. I have been forced, therefore, to rely upon other material as well. The Swedish Tax Agency’s officially published views on some of the questions are presented, for instance. Moreover, in order to provide a fair view of the Swedish position, I have discussed the questions with both tax practitioners and representatives of the Swedish Tax Agency.

II. Personal scope of Art. 15 OECD Model

1. Treaty entitlement of employer

Article 15 addresses the situation of an employee who is subject to resident taxation in one contracting State A and exercises his work in the other contracting State B. In this respect, the question of the position of the employer may arise. Assume that the employer is a resident of State C subject to the domestic rules on withholding wage tax. May the employer invoke the Treaty between A and B arguing that the wages are taxable in those States but not in C with the consequence that he is not obliged to withhold wage tax. Or are we allowed to apply the Treaty between C and A with the result that the employer can argue that he is treaty entitled and, therefore, not obliged to withhold wage tax as the employee is not exercising his work in State C. In other words, does Article 15 also cover the withholding obligation of the employer or is it limited to the obligation of the employee to pay income/wage tax?
This issue should also be seen in the context of the procedural requirements most countries apply. If the employer himself may rely on a treaty, the tax authorities will not be entitled to ask the employer to request first a declaration from the tax authorities before he may refrain from withholding. On the other hand, it could be argued that treaties only refer to the material obligation to pay taxes. States are then free to apply procedural rules without having regard to the treaty restrictions and they would be allowed to apply a withholding - refund system even in cases where the State of the employer clearly has no right to tax the salary of the employee.

In terms of the withholding of wage tax, a foreign employer with no permanent establishment in Sweden is not obligated to withhold tax on wages paid to an employee. This situation applies even if the employee is liable to pay tax in Sweden. Instead, the employee is obligated to make monthly payments to the Swedish Tax Agency.

Should there be a liability to withhold taxes on employment but the income should not be taxed in Sweden under a tax treaty, it is possible to apply for an adjustment of the tax to be withheld (to zero if the income is not taxable in Sweden).98

2. Partnerships as employers

Assume the following case:

A partnership that was established for the purpose of investing in real estate, is carrying on its administration activities in Germany. The partnership has more than 45 employees and a turnover that is comparable to the biggest companies doing business in

98 See Chapter 11, Section 11 and Chapter 10, Section 2 Tax Payment Act.
this sector of the economy. While the unlimited liable partner is a German company, the partnership has hundreds of limited liable partners living all over the world.

Mr. A, a resident of State A and employee of a company resident in A not related to the Germany company, was seconded to the Germany partnership for 143 days. A-Corp. continues to pay his remuneration but the salary is reimbursed by the German partnership. The question arises whether Germany may be allowed to tax A’s salary or whether State A as the State of residence may tax his income. There are doubts because (1) the partnership is not doing business in terms of Art. 7 OECD-MC but the profits are taxed in the hands of the partners according to Art. 6 OECD-MC and (2) the partnership is not resident according to Art. 4 OECD-MC. On the other hand, the partnership is treated as having legal personality for civil law purposes under German law and, therefore, considered as being the employer. According to para. 6.2 of the OECD Commentary on Art. 15, it should be considered that, in the case of fiscally transparent partnerships, Art. 15(2)(b) OECD-MC applies at the level of the partners rather than at the level of a fiscally transparent partnership. The question arises whether this interpretation of the OECD really makes it possible to solve such cases in a reasonable way.

Applying the terms “employer” and “resident” to the partners will not solve this situation.

III. Scope of Article 15 OECD Model

1. The relationship between Article 15 and 16

In its decision of 23 February 2005, the German Federal Tax Court ruled that the income received by a German resident taxpayer who was a manager of the German parent and at the same time member of the “consejo de administración” of a Spanish
subsidiary had to be treated in a uniform way. According to the Spanish version of the treaty between Germany and Spain, Article 16 covers the remuneration of a member of a “consejo de administración” and, accordingly, the respective remuneration should be taxable in Spain only. However, in this case the German parent continued to pay a salary for the overall activities without making a difference between the activities of the taxpayer. Nevertheless, the German parent withheld Spanish wage tax on the salary attributable to the activities exercised in Spain. The German court disagreed arguing that neither the whole remuneration nor a clearly separated part of the remuneration was paid in respect of the Spanish activities. In such a case a split of the whole remuneration was not possible (attraction principle) and the overall remuneration fell under Article 15. The question arises whether this opinion was correct or whether a split of the remuneration should be made on the basis of objective criteria like e.g. the hours he worked for the German parent and the Spanish subsidiary, respectively.

Article 16 normally refers to the specific remuneration paid to the board of directors of a company. In cases in which this role is part of another position and not specifically reimbursed, it would lead to significant administrative problems if a portion of the remuneration were taxed in the country where the company is situated – the company in which the individual is a board member. If a “hypotetical income for the work as a director” should be taxed in this country (Spain, in the above example), however, the first basis for determining the income should be the remuneration of the other directors of that board. Please note that there has been no judgment from Swedish courts dealing with a comparable situation.

2. The relationship between Article 15 and 18

Payments received by an employee after his employment has ceased to exist may constitute either a later payment of salaries (Art. 15) or a pension (Art. 18). The criterion used for differing between both items of income is whether such payments are
aimed to bridge the period until the employee reaches the age at which he receives his state pension or alike. The Dutch courts use the test whether the time period until the moment of retirement has been taken into consideration when the amount of consideration was calculated. The US Technical Explanations want to recognize such payments as pensions only if the employee worked for at least 5 years for his employer and if he has reached an age of 55. Other countries consider such payments as golden handshakes and classify them as salaries in terms of Art. 15. Are there criteria that could be accepted by all countries?

In the case RÅ 2001 not. 88, the Swedish Supreme Administrative Court interpreted the former tax treaty between Germany and Sweden with respect to the classification of a severance payment. In this case, the Court found that the severance payment should be classified as pension, but the case cannot be interpreted so that all severance payments are treated as pension payments in Sweden when a tax treaty is applied. In this case, the employment contract stated that the severance payment was to be calculated as 24 multiplied by the monthly salary. The severance payment was paid monthly, and it was possible for the employee to opt for a calculation considering the number of months left until he reached the age of 65.

III. The term "Salaries, wages and similar remuneration derived .. in respect of an employment"

One of the basic problems of tax treaty law is the classification of income. The OECD-Model fails to define the term "salaries, wages and similar remuneration". The OECD-Comm. only enumerates typical forms of income which an employee is capable of receiving in respect of employment. However, it seems to be generally accepted that the term should be understood as broad as possible. Nevertheless, it is still unclear which
role domestic law plays and whether there should be a close relationship between employment and the payment in question.

1. Fictitious salaries

The law of some countries contains fictions according to which certain income is deemed to be taxed as salary, e.g. Dutch law stipulates that manager-shareholders of a company receive a minimum salary even if nothing is paid or Belgian reclassifies rental income to salary under certain conditions. Dutch courts refuse to classify the deemed salaries as income in terms of Art. 15 arguing that the other treaty partner had different expectations and that the treatment of such deemed payments as salaries was inconsistent with an interpretation in good faith. However, the conclusion could be that treaties that were concluded at the time when the law on fictitious salaries already existed should be interpreted differently. In this case the expectations of the treaty partner were not frustrated and the source State could rely on Art. 3(2) of the OECD Model. Or requires the context otherwise because a salary is not paid or because there is no sufficient causality between payment and employment.

According to the more recent opinion of the OECD, that Art. 23 should be interpreted in the way that the source State should classify the income under its domestic law and the State of residence should avoid double taxation accordingly, it seems that such fictions would fall under Art. 15 without further problems. Or should this OECD opinion be subject to an implied limitation of good faith? And are States free to treat anything as salary even if there is a clear lack of causality?

Swedish law contains the fiction according to which certain income is deemed to be taxed as salary. That is the case for rental income paid by an employer to an employee when the remuneration exceeds market value.
The interpretation and application of Article 23 in light of the recent opinion by the OECD has not been subject to discussion in Sweden. I cannot see, however, that the OECD opinion on Article 23 is subject to an implied limitation of good faith. The classification under domestic legislation is therefore decisive.

2. Severance payments

Payments such as golden handshakes are neither late payments of salaries nor pensions. These difficulties result in the classification of the income still being debated. Courts in Germany and the Netherlands have stated that there is no direct link between the employment and the payment as such.

a) The first question, that should be answered, therefore, is whether such an indirect link is sufficient to treat severance payments as salaries or similar remuneration in terms of Art. 15. We could however argue that this issue is a question of doubt where domestic law should be decisive, either via Art. 3(2) or via an interpretation of Art. 23 (in the latter case, however, Art. 21 would cover such severance payments if the law of the source State classifies such payments as other income).

As a starting point, domestic law must be decisive, and any double taxation should be resolved by substantive rules of the applicable tax treaty or by mutual agreement. How a severance payment is taxed in Sweden according to domestic law depends on the basis for the payment and the calculation of the payment.

b) Assuming that Art. 15 governs the issue, the next question would be whether (1) the severance payment should be attributed to the period of time the employee has exercised his work before his contract was terminated. (For discussion assume a taxpayer who worked for a UK branch of a Dutch bank the last 5 years and before that 5 years for a German branch of the same bank. After his contract was terminated he moved back to
the Netherlands where he received the golden handshake paid by the UK branch. Accordingly the payment would be taxable in the UK/Germany and not in the State of residence if we attribute the income to the work abroad).

It is not possible to comment on this situation from a Swedish perspective without knowing the agreement around the severance payment.

(2) The German courts and the tax administration, however, assume that by applying Art. 15, such payments should not be attributed to the work abroad but are taxable in the State of residence. The arguments are not totally clear but we may assume that the court believes that Art. 15(1), first sentence should be understood as a catch-all clause in cases where income cannot be attributed to work exercised in the other contracting State - the link between employment and payment being not sufficiently strong.

It is not possible to comment on this situation from a Swedish perspective without knowing the agreement surrounding the severance payment.

(3) Differently, the Dutch Hoge Raad applies Art. 15 and attributes the income to the work exercised abroad. However, because of the indirect link between employment and payment, the court wants to limit the attribution to the last 5 years before the payment was made. Taking the above example, the payment would be taxable in the UK only.

Nothing in the Swedish tax law would support this type of argument, but if it is stated in the severance agreement that the payment is in relation to the previous five years of work, then this view can be supported.

(4) Would it make a difference if the severance payment was made by the Dutch bank, i.e. his formal employer?
No, it does not appear to make a difference.

**IV. The 183-day-clause**

Since the OECD published its report on the 183-days-clause and changed the Commentary accordingly, most of the discussed issues are settled. It is clear that the basic criterion is the day-of-presence principle that is absolutely workable in practice. Only some special problems still remain to be solved.

1. Change of State of residence

A taxpayer resident in the Netherlands works for his Dutch employer in Germany since 1st of June, 01. On 1st of October, he moves to Belgium while continuing his work in Germany until the end of the year. The Dutch employer has no PE in Germany. Both treaties, G - NL and G - B, contain a 183 days clause that refers to the calendar year.

a) If we assume that his stay exceeded 183 days within the period of his stay in Germany, is Germany allowed to tax the income attributable to the activities in Germany?

Yes, as the stay exceeds 183 days.

b) The treaty between Germany and Belgium allows, including days that were not spent in Germany (e.g. weekends), for the purpose of the calculation of the 183 days. Thus, it could happen that according to the treaty with NL, the taxpayer did not stay longer than 183 days but did indeed according to the treaty with Belgium. How should we solve this case?
The income received while living in the Netherlands is not taxable in Germany, but the income received while living in Belgium is taxable. This has not been tested by the Swedish courts, but is the view of the national reporter.

2. Truck drivers

A German truck driver works for a Luxembourg transport enterprise. Every morning he goes to Luxembourg and drives from there to Rotterdam passing Belgium and the Netherlands and back. In principle, he is more than 183 days in Belgium and the Netherlands as also parts of day count as a full day for purposes of the calculation of the 183 days. As his employer is a resident of Luxembourg, the stays in Luxembourg will be taxable there.

a) How should the salary be split up between the countries involved? By using the duration of stay in the relevant countries? By dividing the salary by the number of countries involved including the State of residence?

It appears that the solution of dividing the salary by the number of countries involved is workable.

b) Should the OECD change the Model and include truck drivers in Art. 15(3)?

Yes.

c) Assume the truck driver was obliged to work on 220 days. He didn’t work for 30 of those days, being on holidays in the south of Germany. Should the holidays be taxable in Germany only or should we attribute the holidays to the countries involved according to the formula we have found?
It cannot be recommended to allocate taxing rights to a country where the employee is merely spending holidays. Rather, the holidays may be attributed to the countries involved according to the formula.

V. Hiring-out-of-labour

Paragraph 2 of Article 15 of the OECD Model provides that a non-resident employee who performs services in a country is not subject to tax in that country under certain circumstances. It has been suggested that the exact scope of the paragraph is unclear when services are provided through intermediaries.

Paragraph 8 of the Commentary on Art. 15 addresses the issue but is widely understood to be applied only in cases of abuse. This makes sense if we consider that the employer (the person who provides work for the employees) normally renders services to which Art. 7 should apply. Nevertheless, the courts and tax offices of some countries apply the economic employer concept, in terms of Art. 15(2)(b), which is usually used in relation to seconding employees to a foreign company and also to the issue of hiring-out of labour.

An OECD working group (Proposed clarification of the scope of paragraph 2 of Article 15 of the Model Tax Convention, Public Discussion Draft, 5 April 2004) has discussed the issues involved but has come, in part, to strange results. It first proposes that countries should include a specific provision in their tax treaties that provides for taxation in the State of activity. Second, and more importantly here, the group allows treaty partners to interpret the term "employer" in a material way without making a reference to abuse. It enumerates certain factors in order to avoid any disagreements between States. These factors, however, do not take into consideration the specific factors related to the hiring-out of labour. The question, therefore, arises whether we
should treat the regular secondment of employees in the same way as cases of hiring-out of labour.

The Working Group’s proposal contains several examples. Strangely enough, only one example addresses the case of hiring-out of labour (no. 4). The example, however, starts from the assumption that the hiring company pays the employee’s remuneration, social contributions, travel expenses and other employment benefits and charges. This is totally atypical for cases of hiring-out of labour where, normally, the client receives an invoice only for service fees so that he will not know the fee calculation made by the employer nor how much salary and which employment benefits the employee receives. Thus, the question arises how we should solve the example under realistic conditions and, in particular, whether, also in case of a service fee paid, we may speak of a payment made by or made on behalf of an employer in terms of Art. 15(2)(b).

Sweden does not apply the concept of economic employer, but the Swedish Administrative Court has rules in this direction. The case which is presented below, however, was seen as an abuse of the rules, and the Court thereby put an end to this abuse.

In the case RÅ 2001 ref. 50 (Brynäs), the Court interpreted the term “employer” in the context of social security law. In its argumentation, the Court explicitly referred to the Commentary on Article 15 OECD Model. Three foreign hockey players were employed by a company in the Isle of Man. They played hockey on the Swedish team, Brynäs. A leasing fee was paid by Brynäs to the company in the Isle of Man, which paid a small salary to the three players. The salary was taxed in Sweden. The remaining amount was reserved by the company on the Isle of Man and was to be paid to the players when they returned to their country of residence. If accepted by the Swedish Tax Agency, this structure results in postponed taxation, reduced tax rate, and social security fees. The
structure was questioned, however, and the Supreme Administrative Court interpreted the contracts as if Brynäs were to be considered the real employer of the players and the total amount paid to the company on Isle of Man was considered as employment income for the players in Sweden. When interpreting the term “employer” in the national social security legislation, the Court made explicit references to Paragraph 8 of the Commentary on Article 15. The Court held that when deciding if Brynäs were to be considered the employer, a comprehensive view of the circumstances was necessary. The economic and social treatment of the players is of substantial importance. In order to accept the formal arrangements, it is required that the intermediary bear the responsibility or risk for the results produced by the employee’s work.

VI. Enterprise operating a ship in international traffic

During the last years, problems arose when courts had to determine the term “enterprise” in terms of Art. 15(3). From the context, it seems to be clear that it has to be the enterprise that operates the ship. There are, however, cases where it is either unclear which enterprise should be considered or a choice must be made between two or more enterprises.

a) An Italian shipping company buys a ship for the purpose of cruises in the Adriatic. In order to finance the acquisition, the ship is sold to a Cyprian company and chartered “fully equipped” by the Italian company. The salaries of the employees are paid by the Cyprian company. The Italian company pays a monthly overall charter rate. Is the Italian company the “enterprise” (and economic employer?) in terms of Art. 15(3) thereby allowing Italy to tax the salaries of the employees or should we take into consideration that the remuneration is paid by the Cyprian company, therefore deductible in Cyprus and taxable there.
b) Does it matter if the Cyprian company hires the sailors from a third company engaged in personnel services and being a resident of Indonesia?

c) How would the case be if the Italian company charters the ship without a crew but the Cyprian company provides for a captain. His salary is paid by the Cyprian Company and part of the charter rate paid by the Italian company as a service fee.

To my knowledge, these issues have not been subject to discussion in Sweden. It is not possible, therefore, to present any material or standpoints representing Swedish practice.
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