Questionnaire 'The Burden of Proof in Tax Matters', EATLP Conference, May 2011, Uppsala, Sweden

Part A: National concepts

1. General rule on the burden of proof

The burden of proof generally is understood to have two main components.[1] Firstly, it points out what has to be established in order to make it possible for the court to grant a motion. Secondly, it also points out who has the responsibility for this. The Swedish tax procedure is, unlike the criminal and civil law procedure, generally based on the written material in the case. Oral proceedings are not uncommon in Swedish tax law cases, but they do not have the same role as the court proceedings in criminal and civil law cases.
In Sweden, the general rule regarding the division of burden of proof is that the tax administration has to prove the income-side and that the taxpayer has to prove the cost-side. This rule relies on the notion that each party must provide the evidence that is easiest for them to obtain. Usually, it is easier for the tax administration to prove that income has been received and for the taxpayer to prove that costs have been made than the other way around. The rule does not have any support in the Procedural Act. However, regarding the obligations for the *tax payer* there is a rule in the Taxation Act (Taxeringslagen 1990:324) that says that there has to be a basis for the motions and real circumstances that the tax payer has to present in the income self assessment.[2] No similar written rule exists regarding the burden of proof for the *tax authority*. But it follows the general obligation for a Swedish authority to justify a decision that some kind of evidence usually needs to be presented in the decision.[3] Normally, it should also be stated in the decision why a motion from the tax payer has not been accepted. The reason for this may be that the tax payer has not fulfilled his burden of proof. As already mentioned, there are no specific rules regarding the burden of proof in the tax courts. However, there are of course rules regarding the obligation to present evidence to the courts. Firstly, it has to be recognised that the procedure in Swedish administrative courts, which for example handles tax cases, relies on the principle that the court has the responsibility for the case being thoroughly investigated.[4] This is a big difference compared to criminal or civil law procedure, where the court has a more relaxed position and can await each party to present their cases. The administrative court has the obligation to order a party to complete its case, if it is necessary for the investigation. Regarding written evidence, it should be sent to the court without delay.[5] Objects that a party would like to present as evidence should in the

[1] Leidhammar, Börje, Bevisprövning i taxeringsmål, Stockholm 1995, p 61.
[2] This rules indirectly follows from 4 chapt. 3 § TL. See also Leidhammar, p. 71
[3] 3 chapt. 1 § TL, 20 § FL (Administrative Procedural Act).
[4] 8 § FPL (Administrative Court Procedural Act). See Leidhammar, Börje, Lindkvist, Gustav, Bevisprövning i mål om genomsyn, Stockholm 2010.
[5] 20 § FPL.

same way be sent to the court without delay.[6] But apart from these obligations for each party, the court may decide to collect an expert opinion from a public authority, a civil servant or somebody else who has got the special knowledge. In tax cases, it is not uncommon that courts asks the National Accounting Board (Bokföringsnämnden, BFN) about the content of Swedish Generally Accepted Accounting Practices in a specific question that influences the taxation.[7] It is also stated that from the verdict in an administrative court case it should be clear the reasons that has been determined for the outcome of the case.[8] In the preparatory works to this regulation it is pointed out that if the question of evidence has been a decisive point, it should be mentioned what the court has found to be proven.[9] From a verdict it should also be clear who has had the responsibility for that a motion has been accepted or not (the burden of proof), which level of proof that has been necessary and why the present evidence has been evaluated in a certain way.[10]

In tax case the difference also must be noted between the burden for the taxpayer to pledge in the court procedure and the burden to investigate during the self assessment and the following procedure.[11] The principle that the court has the responsibility for the case being thoroughly investigated leads to the conclusion that the burden to pledge in the court procedure is not very heavy, but the Swedish tax system relies on cooperation between the tax payer and the tax authority. There is therefore in several situations a burden for the taxpayer to produce information for the tax authority. Some of these situations will be described further on in the report.

Different rules do however apply for proceedings in criminal courts. Like in most other countries, it is the state (the prosecuting attorney) that has to prove that the accused has committed a crime. This difference in the burden of proof between on one hand the tax administration and the tax courts and on the other hand the criminal courts means that it is not unlikely or uncommon that the same case would have different outcomes in the tax process and in the criminal process.[12]

Another important difference is that somebody who might be suspected for a crime cannot be forced to give information that could be used as evidence against him. In a tax law perspective this is an important rule, since there is a general obligation for the tax payer to answer questions from the tax authority and to submit the necessary documentation.[13] This obligation could also be combined with a fine if the obligation is not fulfilled.[14] The problem has been

[6] 21 § FPL.
[7] See Norberg, Claes, & Thorell, Per, Redovisningsfrågor i skattepraxis, second ed., Uppsala 2010, pp. 116 – 120.
[8] 30 § FPL.
[9] Prop. 1971:30, p. 583 – 585.
[10] Leidhammar, p. 76.
[11] Leidhammar, Lindkvist, Bevisprövning i mål om genomsyn, Stockholm 2010, p. 25 – 26.

[12] This is the situation regarding for example several cases concerning private person importation of alcoholic beverages to Sweden from other EU member states. In case no 7845-08 from the Administrative Court of Appeal in Gothenburg an importation of beverages was deemed to be commercial by the court, while the same importation had been deemed as non commercial by the Gothenburg District Court.

[13] 3 chapt. 5 § TL.
[14] 3 chapt. 6 § TL.

solved in the way, that there is no obligation to answer questions from the tax authority when there is suspicion that the tax payer may have committed a crime. Under those circumstances, the tax authority therefore should refrain from submitting an answer combined with a fine to the tax payer. The paradox result is that as soon the tax authority finds evidence for a tax crime it suddenly becomes more difficult to find more evidence to prove that a crime really has been committed. In the end, it is of course the prosecuting attorney that has to decide whether to charge the accused or not.

2. Variations on the general rule depending on time period or if it is claimed that the taxpayer has submitted false/incorrect information

The general rule for the division of the burden of proof in the tax procedure in Sweden is as described above. The main rule is however applicable only in the ordinary tax procedure. The Swedish tax procedure relies on the notions of the *income year* and the *taxation year*. The income year is, of course, the year when an income is earned. Concerning limited companies and other juridical persons, it does however not have to correspond to the calendar year.[15] The taxation year is the year when the income self assessment has to be reported to the tax authority and a taxation decision is made by the authority.[16] Normally, the taxation year is the year after the income year.

The ordinary tax procedure lasts for a period of one year after the taxation year, or two years after the income year. After that period the tax administration has to make its decision according to the special rules of additional taxation. In case of an additional tax assessment the tax administration has to prove that the taxpayer has provided incorrect or false Information, or in another way omitted or failed to provide information that he is obliged to provide. During the tax procedure with regard to the additional tax assessment the tax administration bears the burden of proof for both the income- and the cost-side.[17] The purpose of this rule is to provide legal certainty when a tax decision is made after the ordinary period of time has lapsed. A decision about additional tax can be made up to five years after the taxation year.[18] The tax payer still has the right to appeal against the decision.

The European Court of Justice has declared that the Swedish tax penalties are comparable with a penalty according to the European Convention of Human Rights.[19] In order to comply with the demands of the convention, the above mentioned rule that regulates the right to not

[15] 1 chapt. 15 § IL (Income Tax Act).
[16] 1 chapt. 12 § IL.
[17] 5 chapt. 1 § TL.
[18] 19 § TL.
[19] *Västberga Taxi Aktiebolag and Vulic v. Sweden,* 34619/97, *Janosevic v. Sweden,* 36985/97. The tax penalties are however not considered to be penalties according to Swedish law in the way that they should result in a criminal record for the tax payer.

have to give evidence that could be used against oneself in a criminal proceeding was widened to also include any deed that could result in a tax penalty.[20]

3. Burden of proof regarding discretionary decisions on tax issues or regarding estimated assessments

In Sweden, tax assessments may be made by discretionary decisions or by estimates, in situations where the taxpayer has failed to fulfil his bookkeeping obligations or in other respects has not fulfilled his obligations in any other respect towards the tax administration.[21] In such cases the tax administration has to show that its estimate was "probable". If the estimated assessment is probable, then the burden of proof shifts to the taxpayer and he has to provide evidence that the estimate is incorrect. These cases are rather common in the restaurant business and other cash business. The tax administration often conducts investigations regarding these kinds of businesses. Disputes between the tax administration and the tax payer that are frequent concerns for example how much flour that is used in a pizza, the size of a served portion or how much wine that is served in a glass. Evidence is sometimes obtained by the tax authority working "undercover", being served at the restaurant in case as part of tax audit. The further step in the tax audit have sometimes been a meeting at the restaurant between the tax auditors and the tax payer and his/hers auditor in order to weigh and measure the served portions or glasses. Estimated assessments do however also occur regarding persons that only report income from employment. The main condition for an estimated assessment is only that it is not possible to calculate the tax reliable if the tax payer has not reported an income assessment or that there are defaults in the assessment.

4. Variations in burden of proof with respect to tax havens

The general rule in Sweden, that each party must prove whatever is easiest for that party, is not valid regarding the Swedish CFC legislation. In these cases, the tax authority has limited means in obtaining information regarding income from companies in tax havens. The burden of proof for income is in these cases shifted to the tax payer.
Practically, it is stated that he or she that sometimes during the income year has owned shares in a CFC company has to report certain information in the income assessment.[22] This information should include:

- Identification of the foreign company,
- The number of shares owned by the end of the income year,
- The number of votes by the end of the income year, and
- Changes in ownership or in votes during the year.

[20] 3 chapt. 6 § TL in its wording from the 1st of July 2003 and onwards.
[21] 4 chapt. 3 § TL.
[22] 3 chapt. 9 b § LSK (Self Assessment Act).

Furthermore, the tax payer also has to report income and balance sheet set up according to the Swedish Bookkeeping Act (Bokföringslagen 1999:1078, BFN) to the tax authority. The costs of course have to be verified by the tax payer according to the main rule.

5. Level of the burden of proof

The general rule in Sweden concerning the burden of proof within the ordinary time period for taxation is that the tax administration bears the burden of proof for income and the taxpayer for costs. The general rule regarding evidentiary requirements is that each party has to demonstrate that the income or cost is *probable*.

However, apart from the general rule there are a number of situations where special evidence requirements seem to be pointed out in the legislation. Some examples will be given in the following text.

Regarding an employee that has received allowance for expenses on a trip during the work; he or she has the right to a specially established deduction ("maximibelopp"). But if the tax payer *shows* that his or her costs actually have been higher, this amount should be deducted.[23] By the word "shows" it is obvious that it is not sufficient that the tax payer makes it probable that he or she has had these costs.

In the case of temporary work in another place than the domicile one of the grounds for deductions for higher living costs states that there is [another] ground for that it *reasonably cannot be questioned* that the tax payer should move to the place of work.[24] This wording seems to leave a large space of discretion to the tax courts.

A loss of cash through a crime may only be deducted in a business activity if it *clearly appears* that the conditions for deduction are fulfilled.[25] In the preparatory works it is stated that a basic prerequisite for deduction is that the tax payer has filed a report to the police.[26] The tax payer also in some other way has to prove the amount that has been stolen. It is obvious a very high level of proof that is needed for a deduction in these cases. The same level for proof is also needed regarding costs that have occurred before a business activity has been started.[27]

In several situations, the tax payer may be taxed in a more favourable way if a transaction is motivated by businesslike reasons. This is the case for example when;

- property is sold to a price below the market value without this being motivated by businesslike reasons,[28]
- debt and interest rates are mainly businesslike motivated,[29] or

[23] 12 chapt. 14 – 16 §§ IL.
[24] 12 chapt. 18 § 1 st. 4 p. IL. See RÅ 1973 ref. 113, RÅ 2002 ref. 74.
[25] 16 chapt. 20 § IL.
[26] Prop. 1996/97:154, pp. 29 - 32.
[27] 16 chapt. 36 § 3 st. IL.
[28] 22 chapt. 3 § IL, 25 chapt 8 § 2 p. IL.
[29] 24 chapt. 10 d § IL.

- cash assets do not have a businesslike connection to the business as it was conducted up to two years before a sale of shares.[30]

On the other hand, there is a main principle in Swedish tax law that businesslike considerations not should be questioned by the tax authority or by the administrative courts.[31] The abovementioned rules therefore seem to be exceptions from the main principle. But equal to that it may be difficult for the tax authority or an administrative court to afterwards estimate the businesslike perspective of a transaction; it seems to be as much difficult for the tax payer to prove that such a perspective was the motive for the transaction. In a decision from the Swedish Advanced Rulings Board (Skatterättsnämnden) the middle of the three abovementioned examples was tried by the board. Its opinion was that the structure of the group of companies involved in the case was built in a way to combine income and expenses for interest rates in favour of the group taxation. The board opinion was also that the tax payer had, against this background, not proved that the structure also was motivated by businesslike considerations. There is however no hint about how the tax payer would have been able to prove that the structure was motivated by these considerations.[32]

6. Evidentiary requirements in discretionary/estimated tax assessments

There are no specific levels of proof for estimated tax assessments that differs from the level of proof for tax penalties, as long as the tax payer has given false information or omitted information from the tax administration.[33] The tax penalty is decided almost in a "mechanical" way if the prerequisites are fulfilled.[34] It is then the task for the tax administration or the tax court to find out if any of the grounds for relief from tax penalty is applicable in the case.[35]

Although the Swedish tax penalties have been deemed to constitute punishment according to the European Convention of Human Rights, it is according to the European Court not necessary to apply the evidentiary requirements according the criminal proceedings in cases regarding tax penalties.[36]

8. Different evidentiary requirements for different types of taxes

In Sweden, in certain cases, the evidentiary requirements seem to differ for different types of taxes in the same case. For example, for false invoices of subcontractors, different types of

[30] 25 a chapt. 14 § 2 p. IL.
[31] RÅ 2000 ref. 31 and prop. 1998/99:15, p. 137.
[32] In a different opinion by one of the members of the board he stated that it was not possible to establish that the debt was mainly motivated by businesslike consideration, since the word "mainly" only can refer to some kind of size and not to a motivation.
[33] 5 chapt. 1 § TL.
[34] However, the Swedish Supreme Administrative Court has stated that the Swedish tax penalties are only compatible with the European Convention of Human Rights if the courts make a nuanced and not to restricted estimation if the conditions are at hand to omit the tax penalty.
[35] 5 chapt. 14 § TL.
[36] See the above mentioned decisions regarding the ECHR.

taxes are involved: income tax, VAT, and social security fees. In a broader perspective, different levels of proof between different kinds of taxes may very well relate to characteristics concerning the specific tax.

This is not in any case very much surprising, since the construction of these taxes differs. Regarding VAT it is generally seen as a benefit to be considered as a taxable person.[37] It is obvious that the person or company that applies for registration as taxable person in some way has to prove that he is conducting taxable transactions. As stated by the ECJ, it is however not possible for a national tax administration to afterwards withdraw a decision of registration as taxable person, unless the applier has given false information.[38]

Anybody who claims for a deduction has the burden of proof for that the conditions for deduction are at hand and that he or she is a taxable person.[39] It must be proved that the purchased goods or services actually are intended for use in the business. The evidence required for deduction of VAT is clearly pointed out in the legislation; the general principle is that a claim for deduction should be supported by an invoice.[40] If there are special reasons, an invoice is not needed. Examples of situations where special reasons are at hand are if the purchase could be verified with the contract between the parties involved.[41] Contrary to the income taxation, detailed rules concerning the requirements for the invoices are stated in the legislation.[42] This is also, of course, to large extent due to the harmonisation of VAT. It should however be noted, that both regarding the income tax and the VAT there is a close connection to the accounting legislation and the accounting standards, since they lay a framework for the documentation needed to fulfil the bookkeeping obligation.

As mentioned above, a case of false invoices to subcontractor often involves both VAT and social fees. The evidentiary requirements are however quite different. As already stated, a claim for deduction of VAT must be supported by an invoice. The burden of proof then shifts to the tax authority, which have to prove that the invoice is false. Social fees on the other hand, are laid when an employment is at hand. Regardless if the subcontractor has paid social fees or not for his employees the tax authority has to prove that the persons were not employed by the subcontractor, but by the company who has received the invoice.

Regarding the excise taxes, the level of proof is much higher for registration as authorised warehouse keeper for excise taxes, than for registration as person taxable for VAT. This is due to the harmonised rules regarding excise taxes.[43] A person that applies for registration as authorised warehouse keeper must, among others, show that he has the capacity to store a certain volume of goods, that there are sufficient anti-theft security and that there is an insurance cover.[44] Prior to 2010, transportation of untaxed goods could not take place if the

[37] Kleerup, Jan, Kristoffersson, Eleonor, Melz, Peter, Öberg, Jesper, Mervärdesskatt i teori och praktik, 2nd ed., Stockholm 2010, p. 32.
[38] See for example C-110/94 Intercommunale voor zeewaterontzilting (INZO) v Belgian State [1996] ECR I-0857.
[39] 268/83 Rompelman v Minister van Financiën ECR [1986] 655.
[40] 8 chapt. 17 § ML (Value Added Tax Act).
[41] Prop. 2007/08:25 p. 221.
[42] 11 chapt. ML.
[43] Dir. 2008/118/EC.
[44] 4 § RSFS 1996:18.

transport was followed by *accompanying documents*, which constituted a set of documents with four or five pages. Since 2010, these documents must be set up in electronic form.[45] The high level of required documentation is strongly connected to the severe responsibility that the tax payer has for the untaxed goods.
Another interesting design of tax Swedish law is the "recycling" of the arm's length's principle in the Energy Tax Act (LSE, 1994:1776). Regarding the special reductions for energy tax on "energy intensive" businesses the arm's length's has been copied by the legislator word by word from the Income Tax Act.[46] The purpose of this regulation is to prevent that goods are sold between companies in the same group at a higher price than market value in order to obtain a more favourable taxation. In difference from the income taxation, this rule is only applicable on transaction between Swedish companies. In other respects, it raises the same kind of questions regarding the burden of proof as the arm's length's principle does in income taxation.

9. General rule on evaluation of evidence and the limitations to such a rule

In Sweden there exists the principle of a free assessment of evidence. A consequence of this is that the evidence in a case is also freely evaluated by the tax administration and ultimately by the tax court. The principle of the free assessment and evaluation of evidence both in civil and criminal courts and in the administrative courts is statutory.[47]

Part B: Burden of Proof in Anti-Abuse Provisions

10. General anti-abuse provision

In Swedish tax law there is a general anti-abuse provision, which is applicable on income tax to municipal or state.[48] There is no similar provision regarding VAT, excise taxes or social fees.

The anti-abuse provision sets up four prerequisites that are needed for application of the provision. In taxation, an *act* should not be regarded if:

- the act, alone or together with other acts, is part of a scheme that leads to a substantial tax benefit for the tax payer,

- the taxpayer has directly or indirectly taken part in the act or acts,

[45] 6 chapt. LSE.
[46] 9 chapt. 9 a § LSE.
[47] 35 chapt. 1 § RB (Common Procedural Act.)
[48] Lag (1995:575) mot skatteflykt.

- the tax benefit should considering the circumstances can be supposed to be the main reason for the act, and

- taxation based on the act should be contradiction the aim of tax legislation, its common design or the specific regulations that are directly applicable or that has been circumvented by the act.

The anti-abuse provision can only be applied by a tax court after request from the tax administration.[49] The tax administration has therefore no competence itself to decide about application of the provision. There are no special rules regarding the division of the burden of proof in these cases. Therefore the general principle of division of burden of proof in the tax field should be applicable.[50] It is also obvious that the tax administration bears the burden to proof that the anti-abuse provision is applicable. The taxpayer may present business documentation that proves the economic benefit of the transactions.[51] It seems that the legislator's intention has been that the transactions should be judged according to "common Sence".

11. Alternative or supplementary approaches

In Sweden, the look-through approach has a position as an alternative method of anti-abuse beside the general anti-abuse provision. The look-through approach does not follow from the legislation, but has in several cases been used by the Swedish Supreme Administrative court. It has been lively discussed in the Swedish legal doctrine, how the principle should be described in a legal theory perspective. It has been discussed if the look-through principle means that the court looks through a legally binding contract and uses an economic approach to the transaction (similar to *substance over form*[52] in accounting or *wirtschaftliche Betrachtungsweise*[53] in German tax law) or if the principle should be understood as a way for the court to change the civil law classification of a transaction that has been erroneous classified by the parties, e.g. from leasing to purchase or vice veers.[54] It seems at the moment to be more common with the later opinion in the doctrine. It has also been discussed in what legal way the look through approach is used by the courts, which obviously has a major importance for the burden of proof. If the principle should be regarded as a principle of interpretation of law, it might not require any specific considerations regarding the division of the burden of proof. If, on the other hand, the principle is regarded as a method to evaluate the real circumstances in a case, the burden of proof for the tax authority in order to apply the principle will be of major importance. It has however in the doctrine been pointed out that since it in every decision making must be taken in consideration the burden of proof it is not necessary that a non objectionable definition of the look-through principle is made.[55]

[49] 4 § lag mot skatteflykt.
[50] SOU 1975:77, p. 67, Rabe, Hellenius, det svenska skattesystemet, 23rd ed., Stockholm 2010, p. 503 – 504, Rosander, Ulrika, Generalklausul mot skatteflykt, Jönköping 2007, p. 100 - 101.
[51] SOU 1975:77, p. 67.
[52] See Johansson, Kjell, Substance over form, Stockholm 2010.
[53] Tipke, Klaus, Lang, Joachim, Steuerrecht, 17th ed., Köln 2002, p. 7.
[54] See further Leidhammar, Lindkvist, Bevisprövning i mål om genomsyn, pp. 32 – 36.
[55] Leidhammar, Lindkvist, Bevisprövning i mål om genomsyn, p. 36.

In application of the look-through principle the general principles of the division of burden of proof in Swedish tax law are used. Regarding the ordinary income assessment, normally the level of proof is set at "probable". It has been argued that the cases from the Swedish Supreme Administrative Court only refer to if something has been proved or not.[56] It is unclear what level of proof that is needed in order to apply the look-through principle.

12. Special anti-abuse provisions

Sweden does not have any kind of other anti-abuse provisions in particular law areas. Situations where a risk for abuse has been found likely by the legislator has instead often resulted in special material tax law rules. This has been the case regarding so called shell companies, e. i. companies which mainly have cash as assets. If the shares in a shell company are sold, a special shell company assessment should be reported to the tax authority.[57]

Another example of recent intervention from the legislator is the prohibition of deduction of certain interest rates, which are paid to a company with an economic connection to the tax payer and are connected to a debt which arises in a purchase of shares in another company in economic connection to the tax payer.[58] As described above, this rule is not applicable if debt and interest rates are mainly businesslike motivated. Some special rules have been given regarding the level of proof that is needed for the tax authority to show the economic connection between the tax payer and the receiver of the interest rates. If there is a temporary debt to a company without any economic connection to the tax payer, and this debt is replaced by a debt to a company that has an economic connection, the situation should be regarded as if the company with no economic connection to the tax payer also has such connection.[59] According to the preparatory works, the time period between the occurrence of the first debt and the replacement with a debt to a company with an economic connection to the tax payer is very important.[60] If there has been long time between the first and the second debt the prohibition of deduction should not be applicable. There is also a rule that indicates that the prohibition of deductions also is applicable if there is a debt to a company without any economic connection to the tax payer, but a company with an economic connection has a claim against the first company and *there could be considered to be a connection* between the debt and the claim and it refers to a purchase of shares from a company in an economic connection with the tax payer.[61] In the original draft, the wording was that *the debt was assignable to a claim.* The wording was criticised on the ground that it would be almost impossible for the tax authority to prove that there was a connection between the debt, the claim and the purchase. The final wording was supposed to make the regulation easier to apply by the tax authority and the administrative courts.

[56] Leidhammar, Lindkvist, Bevisprövning i mål om genomsyn, p. 310.
[57] 25 a chapt. 9 – 18 §§ IL.
[58] 24 chapt. 10 a – 10 e §§ IL.
[59] 24 chapt. 10 b § IL.
[60] Prop. 2008/09:65, p. 56.
[61] 24 chapt. 10 c § IL.

Regarding the Swedish CFC-regulations there is a special exception from application of the regulations. Even if a net income is as low as it qualifies for CFC-taxation, these rules should not be applicable if it is a foreign company in another EES-country and it is a real establishment with business motivated activity.[62] The exception is a result from the *Cadbury Schweppes*-case, which specifies that the CFC-regulations in the EES-area only can be applied against artificial arrangements in order to avoid the tax that should have been paid.[63] Special requirements are given in order to make it possible for the tax payer to prove the activity in the foreign company is a legitimate business. Especially it should be regarded if the foreign company has its own resources in its homeland as premises and equipment necessary for its business, enough of personnel necessary to independently run the business, and that the personnel of the foreign company independently makes its own decisions.[64] It is clear that a comprehensive view should be taken.[65]

Another rule regarding international taxation with a much longer history is the special rule in the Income Tax Act which aims to clarify whether a person who previously has been living in Sweden still has an important connection to the country.[66] Even before the introduction of the Municipal Tax Act in 1928 it was statutory that a person with a certain connection to Sweden could be considered to be living in the country.[67] In the current wording, a number of criteria should be considered when deciding if a person who previously has been living in Sweden still should be taxable in the country. For example, it should be considered if the person is a Swedish citizen, how long he was living in Sweden or if he still conducts business in the country. Regarding the burden of proof, it is clear from the Income Tax Act that in the first five years after a person has left Sweden, he or she has to prove the lack of an *important* connection to the country. After a period of five years it is the tax authority that has the burden to prove that the person still has such a connection to Sweden. The tax authority has in a statement declared its view that it is not the intentions of a person leaving the country that should be considered but the real circumstances.[68]

[62] 39 chapt. 7 a § IL.
[63] C-196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. the Commissioners of Inland Revenue* REG [2006] I-07995.
[64] 39 chapt. 7 a § IL.
[65] See further Andersson, Mari, Saldén Enérus, Anita, Tivéus, Ulf, Inkomstskattelagen, En kommentar.
[66] 3 chapt. 7 § IL.
[67] Andersson, Mari, Saldén Enérus, Tivéus, Inkomstskattelagen.
[68] 13th of June 2008, no. 131 390381-08/111.

13. Competent authority

As already mentioned, it is the administrative courts that decide about application of the general anti-abuse provision. There however no special rules regarding the division of burden of proof in these cases.

14. Judicial review

A decision from the administrative court which includes application of the anti-abuse provision can of course be appealed in the way other tax case decisions may be appealed. A decision from the local administrative court may then be appealed to the Administrative Court of appeal (they are four in Sweden). A decision from one of the courts of appeal may be appealed to the Swedish Supreme Administrative Court (from 2011 Högsta Förvaltningsdomstolen, previously Regeringsrätten). An appeal to this court is only accepted if the court grants permission for trial, which is normally only granted if the case is of general interest. There is no difference in the level of burden of proof between different courts.

15. Case law

The Swedish anti-abuse provision has been tried by the Swedish Supreme Administrative Court in a fairly number of cases. However, the cases that reach the final court do normally not include questions regarding proof. Therefore, in most decisions, there are no references to the division of the burden of proof. A vast majority of the decisions regarding the anti-abuse provision are decisions in cases of advanced rulings. There is a difference between a decision from the Supreme Administrative Court regarding an appeal against a verdict from a lower court and an appeal against an advance ruling from the Swedish Advanced Rulings Board (Skatterättsnämnden). In the latter kind of cases, the tax payer has an obligation to present as much evidence as necessary to make it possible for the board to formulate an advanced ruling. If the tax payer has not supported with sufficient information, an advanced ruling should not be given. On the other hand, if there is enough information for an advanced ruling, it might very well be in favour of the tax administration. In RÅ 2007 ref. 52, the taxpayer had received an advance ruling with the meaning that the anti- abuse provision was not applicable in his case. The Supreme Administrative Court however, found that the whole chain of transactions in the case had not been accounted for and that it was therefore not reasonably to only try part of the chain of transactions against the anti-abuse provision.

The compatibility of burden-of-proof provisions in anti-abuse matters with the Swedish Constitution does not seem to have been a question in case law, but has been discussed by the doctrine. Hultqvist has argued that the use of the anti-abuse provision leads to an analogy or a

reducing application of the tax law, which is contrary to the Swedish Constitution.[69] Bergström has objected that application of the anti-abuse provision in itself cannot be an analogy since the provision is a part of the Swedish legislation.[70] Rosander is of the opinion that the Swedish anti-abuse provision is compatible with the prerequisite that tax can only be levied with the support from legislation. [71]

Part C: The burden of proof and European tax law

16. EC law and the reversal of the burden of proof

The Swedish tax legislation does not contain any provision that deem certain situations to have occurred primarily as the result of tax evasion or tax avoidance. The tax legislation earlier contained a provision that might have been incompatible with the Leur-Bloem judgment. If the owner of a close company after the merger owned 25 % or more of the receiving company this company also had to be a close company.[72] The motive for the provision was to avoid that shares were transferred to what in those days was called "Administrative company" (förvaltningsföretag)[73]and in that way avoid the special tax rules for close companies.[74] In the doctrine, it was argued that the provision was incompatible with the Leur-Bloem judgment.[75] Eventually, the provision was abolished with the motivation that it no longer was needed in order to prevent tax evasion.[76] There was no clear opinion from the government regarding the incompatibility of the provision.
Earlier legislation regarding mergers has been found contradictory to the Leur-Bloem judgement by the Swedish tax courts.[77]

17. Reversal of the burden of proof and time limits

Swedish tax law does at the moment not contain any time limit. However, it is stated that at the end of the year of the merger the receiving company should own at least 50 % of the votes of the shares in the sold company.[78] It has been argued that this provision might be in breach of EU law.[79] If there are specific motivations for the receiving company to sell the shares before the end of the year, it is enough that the company has owned at least 50 % of the votes sometime during this year. It is obvious that this is a rule of burden of proof; with the content that it is for the receiving company to prove that there were specific motivations sometime during the year. As it has been pointed out in the literature, it is nevertheless not up to the tax authority to decide when specific motivations have occurred.[80] Application of the provision may be tried by the tax courts. It does however not seen to have been any important issue in the court cases.

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[69] Hultqvist, Anders, Legalitetsprincipen vid inkomstbeskattningen, Stockholm 1995, p. 526.
[70] Bergström, Sture, JT 1995/95, p. 483.
[71] Rosander, Ulrika, Generalklausul mot skatteflykt, Jönköping 2007, p. 83.
[72] 48 a chapt. 6 a § IL, abolished 2009-01-01.
[73] 24 chapt. 14 § IL in its wording according to SFS 1999:1229.
[74] See 57 chapt. IL.
[75] Ståhl, Kristina, Fusionsdirektivet, Uppsala 2005, p. 223 – 225.
[76] Prop. 2008/09:65, p. 78 – 79.
[77] 5 § 3 lagen (1998:1601) om uppskov med beskattning vid andelsbyten, see case no. 2626-03 and 4120-03, both decided by the Administrative Court of Appeal in Stockholm 2004-08-27.
[78] 48 a chapt. 8 § IL, 49 chapt. 12 § IL.
[79] Ståhl, Fusionsdirektivet, p. 225.
[80] Ståhl, Fusionsdirektivet, p. 226.

18. Reversal of the burden of proof and transactions with non-domestic entities

Swedish tax law does not have a specific provision of this kind.

19. Donations to foreign charitable institutions and the burden of proof

Donations to charitable institutions are not deductable at all according to current Swedish legislation. There are therefore no special provisions regarding foreign institutions.

20. The burden of proof and proportionality

The Swedish main rules for the burden of proof seem to be in line with the ECJ decisions.

Part D: Burden of Proof in Cross-Border Situations (International Tax Law)

Transfer Pricing Aspects

21. The burden of proof between tax authorities and taxpayers

The main provision regarding the application of the arm's length principle prescribes that if the result of a business is lower as a consequence of conditions that differ from what should have been decided by independent businesses the income should be calculated to the amount it should have reached if the conditions were not at hand.[81] This provision is only valid if the business that receives a higher income is not liable to pay tax in Sweden according to Swedish law or tax treaty and there is probable cause to except that there is an economic connection between the businesses. There is also a condition for application of the arm's length principle that it is not by the circumstances clear that conditions have been decided on other reasons than the economic connection. The last condition for application of the provision obviously is a condition regarding the burden of proof. In the following article, the legislator clarifies when an economic connection is at hand:
- when a businessman, directly or indirectly, participates in management or monitoring in another businessman's company or owns a part of this company's capital, or
- the same persons, directly or indirectly, participates in management or monitoring in both companies or owns parts of these companies capital.[82]
It is clear from the preparatory works to these rules that the intention of the legislator was to place the burden of proof on the businessmen to prove that the price was set because of other reasons than the economic connection.[83] In situations where there are in an economic connection, it is therefore easier for the tax payer to show that the prices have been set by other reasons than the economic connection, then it would be for the tax authority. It is

[81] 14 chapt. 19 § IL.
[82] 14 chapt. 20 § IL.
[83] Prop. 1982/83:73, p. 11 – 12.

however the tax authority that has the primary obligation to prove that the transfer pricing operations are *not* at arm's length.[84]

22. Set of documents

Despite that the arm's lengths principle has been in use in some form in Sweden at least since 1928, statutory requirement to prepare documentation proving the arm's length value in the determination of transfer pricing is a novelty in the legislation. It was not until the 1st of January 2007 that such a requirement was introduced into Swedish legislation. The requirement for documentation is only valid when there is an economic connection as described above.[85] However, the statutory requirement does not concern all companies that have such an economic connection. Regarding situations where the economic connection only relates to a company's direct or indirect share in one or several other companies, the documentation is only required if the share in each line is more than 50 %. The documentation that is necessary is the following:[86]

- A description of the company, its organisation and its business,
- Information about the kind and the extent of the transactions,
- A functional analysis,
- A description of the chosen transfer pricing method, and
- A comparability analysis.

The more precise obligation to present documents will be described below.

It was not until 2010 that Sweden launched an advanced price agreements system (APA) regarding determination of arm's length prices at international transactions.[87] The advanced ruling system is applicable when there is an economic connection as described above. An application of an advanced ruling regarding transfer pricing can be filed by business that are, or could be expected to be, liable to pay tax in Sweden according to Swedish legislation and is also subject to a tax treaty. It is only possible to get an advanced ruling if it concerns country which has entered a mutual agreement with Sweden about transfer pricing. The advanced ruling is normally binding for the tax administration in three to five years. The price for an advanced ruling is 150 000 SEK, so it is obvious that the option to apply for a ruling only is intended for larger operations.

23. Imposition of penalties and burden of proof

It is a statutory requirement to prepare the documents, but there is no specific penalty for the case that the requirement is not fulfilled. However, the tax authority has the power to order a tax payer to send in or complete the required documentation.[88] An order can be combined with a fine, but must in these cases be decided by the Administrative Court.[89] It is not possible

[84] Prop. 2005/06:169, p. 102.
[85] 19 chapt. 2 a § LSK.
[86] 19 chapt. 2 b § LSK.
[87] Lag (2009:1289) om prissättningsbesked vid internationella transaktioner.
[88] 17 chapt. 1 § LSK.
[89] 17 chapt. 8 § LSK.

to appeal against a decision from the tax authority regarding the obligation to present documentation on transfer pricing.[90]

24. Type of documents to be provided

Although the wording in the legislation (see above) is not precise on this point, the tax authority has produced detail information about what kind of documents that has to be provided. Normally, according to the Swedish constitution tax rules must be given in statutory acts by the Swedish parliament (Riksdagen).[91] This is what usually is referred to as the principle of legality in Swedish tax law. This means that the space for independent rule production from the government or the tax authority. Regarding the requirement for documentation there is however, an authorisation from the parliament to the government or to the authority that has been decided by the government to give further regulations concerning the requirement for documentation.[92] The tax authority has given detailed rules and information about transfer pricing between companies in economic connection.[93] The most important information that is needed is the following:

- A description of the company, its organisation and its business: The documentation should contain a description of the group's legal structure where it is stated ownership and how the company controls or is being controlled by other companies in the group.[94] The company's and the group's organic structure and operational business should be mentioned. Important changes in the company and in the group during the accounting year should be reported. The description should also cover such financial information that is relevant for the application of the chosen transfer pricing method and should also contain specific information about the line of business of the company that are important for the transfer pricing.[95]
- Information about the kind and the extent of the transactions: The documentation should, amongst others, contain information about:[96]
- 1. Type of transaction,
- 2. Value,
- 3. Quantity,
- 4. Other terms of agreement,
- 5. Possible connection to other transactions that are important for the transfer pricing, and
- 6. Cost basis, division and profit from indirect debited services.
- A functional analysis: in this analysis should be described the companies roles and also contain a specification of the companies functions, assets and risk and their economic importance,[97]
- A description of the chosen transfer pricing method: in the information from the company it should be stated how the chosen transfer pricing method is applied,[98]

[90] 19 chapt. 3 § LSK.
[91] 8 chapt. 3 § RF.
[92] 19 chapt. 2 b § LSK.
[93] SKVFS 2007:1 Skatteverkets föreskrifter om dokumentation av prissättning mellan företag i intressegemenskap, SKV M 2007:25 Skatteverkets information om dokumentation av prissättning av transaktioner mellan företag i intressegemenskap.
[94] 3 § SKVFS 2007:1.
[95] 4 § SKVFS 2007:1.
[96] 5 § SKVFS 2007:1.
[97] 7 § SKVFS 2007:1.
[98] 8 § SKVFS 2007:1.

- A comparability analysis: the company should contain a description of used internal and external comparable transaction and explain how the selection of these transactions has been made.[99] In cases where comparable transaction not have been identified the documentation should contain a description about how the company has made certain that the transfer pricing method is in accordance with the arm's length's principle.

The tax payer has the obligation to provide all this information.

The documents can be set according to the code of conduct "European Union Transfer Pricing Documentation" (EUTPD) and should be considered to equal the Swedish rules.[100]

25. Choice of transfer pricing method

Nothing is said in the legislation or in the tax authority's regulations about which transfer pricing methods that are allowed. However, it is from the tax authority's publications obvious that's it is intended that the tax payer follows the OECD guidelines.[101] The tax authority therefore refers to the conclusion of the guidelines, that some of the traditional transaction based methods preferably should be used. These are the "Comparable uncontrolled price method" (CUP), "Cost plus method" (Cost Plus) and the "Resale price method" (RPM). Other methods may be used if it is unsuitable to use the traditional transaction based methods or if these methods cannot be used when there are no comparable transactions.
Documentation should contain a description of the transfer pricing method that the company has chosen and how the method has been adjusted to meet conditions in the specific case.[102] Since the five methods mentioned in the OECD guidelines are accepted internationally, the companies that use another method should carefully describe this method. The company should thoroughly state how the method is constructed and how it is intending to lead to arm's length's prices. There is however no obligation to account for why a certain method has been chosen or why other methods has not been chosen. It is therefore correct to conclude that the choice of method may very well be based on the nature of the goods or service sold, but there is definitely no demand in the legislation for a choice on that basis.

26. Burden of proof and bilateral conventions

There is no national legislation concerning this issue.

27. Burden of proof and information exchange procedures

There is no statutory obligation for the tax authority to exchange information with an authority in another country before a tax assessment regarding transfer pricing or another issues concerning international taxation. As mentioned above, the tax authority has anyhow the burden to prove that the transfer pricing differs from the arm's length's principle.

[99] 9 § SKVFS 2007:1.
[100] 15 § SKVFS 2007:1.
[101] SKV M 2007:25, p. 20. See also Dahlberg, Mattias, Internationell beskattning, 2nd ed., Lund 2007.
[102] SKV M 2007:25, p. 20.