

Separation of Powers

-- Questionnaire --

1. Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

1.1. Does your Government have legislative competence on tax matters?

According to the Swedish constitution (Regeringsformen 8:3) regulations that concerns the economic relation between the state and the citizen and places a burden on the later, must be given in the form of a parliamentary statute. As a consequence, the space for governmental bills regarding taxation is very limited. These bills are rather rare and do usually concern very specific details, e.g. regarding VAT or excise taxes.

1.2. Does your Government draft tax bills proposals and present them to Parliament?

Yes.

1.3. In case your answer to 1.1. and 1.2. is positive:

1.3.1 Does your Government usually exercise that competence?

According to the Parliamentary Act (Riksdagsordningen), proposals to the Parliament can only be given (with some exception) by the government, a Parliamentary committee or a single member of the Parliament.¹ In fact, all statutes that are taken by the Parliament derive from governmental drafts.

1.3.2 Does your Parliament passively accept the draft bills provided by tax authorities or does it discuss them in detail and introduce changes to them?

A draft is handled by a committee before the Parliament goes to vote. The committee has the power to change or amend the draft, but in times of a stable parliamentary majority this is not very common. Usually, the political minority makes a reservation against the draft.

1.4. How does the literature in your country and your domestic Courts interpret the situation as you described it in 1.3. ?

To my knowledge, this has not been seen as a problem.

2. The meaning of legal indeterminacy in tax matters

2.1. Is your domestic tax legislation vague, when defining the tax object, tax subject and/or tax base, leaving a large margin for discretion, or, is it, on the contrary, very detailed, avoiding indeterminate concepts?

¹ 3 chapt. 1 §, 3 chapt. 7 §, 3 chapt. 10 § Riksdagsordningen.

Since taxes only can be levied with support of a statute, tax law cannot be too vague. The rule of law demands that indeterminate language is not used. But even if there is an ambition from the legislator to avoid the use of indeterminate legislation it is not possible to write statutes that do not need interpretation or filling out.

The legislator also has different ambitions regarding different kinds of tax law. In case of the so called close companies, legislation has always been very detailed. As soon as a gap, which could be used by the taxpayer, has been recognized, it is soon filled out by the legislator. But there is a central part of the income tax law that has not been regulated very specific. This was obvious when some of the close company rules were abandoned in 1999 and superseded by common tax law principles. These were not regulated in detail, but derived from the principal statement in the Swedish income tax act that all income that derives from an employment should be taxed.² However, in some cases it was not even quite clear how these common principles should be applied in different cases.³

Sometimes the legislator leaves a large margin of discretion to the courts to fill out details in a rather vague legislation. There have also been central tax law principles that have not been written down in law, but follow from the ruling of the Swedish Supreme Administrative Court and have been used for decades without interference from the legislator. As examples can be mentioned the principles for determination if a transfer of tangible goods or real estate should be taxed as a sale (with a capital gain or loss) or if it is a gift (gifts are from 2004 and on not taxable in Sweden).⁴

2.2. How do you/does the literature in your country evaluate the use of both techniques in tax legislation?

I believe that it is generally accepted that it is impossible for the legislator to write statutes that do not need interpretation or filling out.

2.3. Are there independent domestic Courts obliged to control the constitutionality of tax legislation?

According to the constitution (RF 11:14), every court or public authority has the obligation not to apply a statute that obviously is in breach with a statute of a higher level, for example a tax act that does not comply with the constitution. It is however extremely rare that a statute given by the Parliament has been found unconstitutional. One example is the case of NJA 2000 s. 132, where transitional regulations regarding the application of a change in a statute were found in breach with the constitution. It is very rare that tax legislation has been found in breach of the prohibition of retroactive taxation to the disadvantage of the tax payer in RF 2:10.⁵

It is more common that regulations given by the government or by the tax authority has been found unconstitutional, since these bodies does not have any competence to give binding tax law.⁶

² 11 chapt. 1 § Income Tax Act.

³ SOU 1998:116.

⁴ See RÅ 1943 ref. 19 och RÅ81 1:29.

⁵ See for example RÅ82 1:74.

⁶ For example RÅ 1987 ref. 21, RÅ 1988 ref. 146, RÅ 1988 ref. 151, RÅ 1996 ref. 5.

2.4. Is legal indeterminacy considered to be unconstitutional/ has a tax rule ever been declared unconstitutional due to legal indeterminacy?

Legal indeterminacy is not in itself unconstitutional. If a tax rule is vague it has to be interpreted by the tax authority and the administrative courts. But since there is a prohibition against taxation without the support of a tax act given by the Parliament a rule that is too vague can not be the ground for taxation. It has been observed by the doctrine that the Supreme Administrative Court has in recent years been more reluctant to interpretate a tax rule far from the central wording regardless if it is in the benefit of the tax payer or the tax authority.⁷

3. The consequences of legal indeterminacy in tax matters

3.1. In case of legal indeterminacy not considered to be unconstitutional, who has the final word regarding the interpretation of the rule – the tax authorities or the domestic Courts?

The Supreme Administrative Court (of course except in matters regarding EC Tax Law.)

3.2. Is there a constitutional basis for either the tax authorities or the domestic Courts having the final word on interpretation of indeterminate legal rules?

This is not pointed out in wording in the constitution, except that no public authority may decide how a court should judge in a single case.⁸ But since the decisions of the tax authority can be appealed to the administrative courts it is obvious that the Supreme Administrative Court has the final word.

3.3. Is legal indeterminacy normally fulfilled by regulations, administrative rulings and/or case law?

As mentioned above, the space for the government to make binding rules is very limited and is in the same way limited for the Tax Administration. Binding rules can only be given when there is an authorization regarding the execution of the statute given by the Parliament. (RF 8:13) In the same way, the Tax Administration has a very limited space to provide binding regulations. In some cases, the Supreme Administrative Court have found that the Tax authority has gone beyond its competence and regulated matters which according to the constitution should be given in law by the Parliament.⁹

However, the tax authority produces a lot of non binding material. Of most importance are the *common advices*, which are in theory not binding for either the tax payer or the tax authority, but in practice are followed strictly by the tax authority and to large extent by the courts.

3.4. Are administrative rulings binding to the taxpayer and/or the Courts?

⁷ See Tjernberg, Mats, Regeringsrättens strikta lagtolkning, Skattenytt 2003, pp. 14 – 22.

⁸ 11 chapt. 2 § RF.

⁹ See footnote no. 6.

See 3.3.

4. Relationship between the Tax Administration and the Domestic Tax Courts:

4.1. Do your domestic Courts control application of tax law by your Tax Administration?

The Courts does not control the application of tax law by the Tax Administration except when there is an appeal from a taxpayer against a decision from the Tax Administration.

4.2. Do your domestic Courts, in their case law, take into account rulings and binding information emerging from your Tax Administration?

Binding regulations must be taken in account by the courts, but as described above, common advices are not binding for the courts, but often followed.

4.3. Does your Tax Administration take into account the domestic courts case law and/or the ECJ case law when applying the law?

At the time of the Swedish adhesion to the EU, knowledge of EC tax law was limited at the Tax Administration. Since then, a major increase in competence has been made. The Tax Administration closely follows the development regarding direct and indirect taxation in the ECJ case law. It has been observed in the doctrine that the tax authority sometimes might take the position of a constitutional court and declare national legislation incompatible with the community law.¹⁰ This situation has occurred regarding losses from business conducted abroad. The Tax Administration has declared a view more restraint in accepting losses from business conducted abroad than what follows from the ECJ decision C-446/03 *Marks & Spencer*.

4.4. Is there a principle of reciprocal observation of the interpretation of tax law by the Tax Administration and domestic Courts?

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4.5. Is your Tax Administration legally bound to the decisions of supreme courts and/or the ECJ?

The case law of the domestic courts are not legally binding in Sweden, even if decisions by the Supreme Administrative Court are normally followed by lower courts and by the tax authority. Of course, the tax administration is bound by the principle of loyalty to fulfill the demands of community law.

4.6. Does your Tax Administration circumvent your domestic courts' case law?

¹⁰ Pålsson, Robert, *Likhet inför skattelag*, pp. 200 – 203.

The tax administration does not openly try to circumvent decisions by the Supreme administrative court. But the administration is likely to argue that the circumstances in the pending case are not the same as in the court decision.

5. Relationship between different legal sources (legal pluralism):

5.1. How do your Parliament, Tax Administration and Courts react before the different legal sources in tax matters (tax treaties and other treaties, EC Treaty, secondary law and soft law)?

When a new tax act or changes in an existing act is being prepared in the Ministry of Finance, EC law is normally taken in consideration. Of course, interpretation of EC law is sometimes made in a way benefiting for the fiscal interest.

In a recently decided decision, RÅ 2008 ref 24, the Supreme Administrative Court found that an internal Swedish statute (regarding CFC-regulations) should be applied instead of an older tax treaty.

5.2. How is the hierarchy of different tax legal sources recognized by the constitution and the different domestic powers (Parliament, Tax Administration and Courts)?

According to RF 8:3 regulations regarding the condition between the private person (or the company) must be given in the form of a Parliamentary act. This has not only been interpreted as a hindrance for the government or the Tax Administration to establish binding regulations except regarding execution of Parliamentary acts. Furthermore, it has been seen as a hindrance for the tax administration or a court to levy tax without the support of a Parliamentary act.

5.3. Does the taxpayer have access to different legal remedies that assure him/her effective protection of his/her rights granted by tax treaties, EC law and domestic law, or are those legal remedies in fact limited to protection of rights granted by domestic law?

The tax payer has rather generous possibilities to apply against a decision. An appeal (or a demand for a new decision by the Tax Administration) can be made up to six years after the year when the entrance of tax liability occurred. The formal possibility of an appeal does of course not necessarily mean that the tax payer will have success. EC law is supposed to be protected by domestic law.

In cases of misbehavior by the Tax Administration, it is possible to make a complaint at the Justitieombudsmannen (JO). The outcome of such complains can however only be that the Tax Administration can be cited. If an obvious error has been made, it is possible to apply for damage according to 3 chapt. 2 § act of damages (1972:207).

II

Please answer the following questionnaire, which aims at confirming your answers in I

1. Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

1.1. Does your Parliament control tax authorities in an efficient way? **yes** - no

1.2. Do tax authorities influence tax legislation to a major degree? **yes** - no

1.3. Does your Parliament

a) usually accept the bills provided by tax authorities? **yes** - no

b) refuse the bills provided by tax authorities? never - sometimes - **often**

c) improve the bills provided by tax authorities? never - sometimes - **often**

Tax bills are not provided by tax authorities, see 1.2.

1.4. Is your Parliament able to discuss the bills thoroughly? **yes** - no

1.5. Is there sufficient knowledge of tax law in Parliament? **yes** - **no**

1.6. Are tax rules often so vague, that tax authorities have to fill the gaps themselves by administrative regulations? never - sometimes - **often**

1.7. Have tax authorities the competence to typify and fill out the legal gaps without control by the Parliament? never - sometimes - **often**

2. Relationship between the Parliament and the Domestic Tax Courts

2.1. Are there independent (Tax) Courts in your country entitled to control legislation? **yes**

2.2. If "yes", do they control tax legislation: 0 ex ante or 0 **ex post**?

2.3. Are Courts competent to clarify whether a specific written tax rule is compatible with constitutional standards? **yes** - no

2.4. If a high Court is convinced that a specific tax law violates constitutional standards, is the court in this case allowed to ignore the law? **yes** - no

3. Relationship between the Tax Administration and the Domestic Tax Courts

3. 1. Are there independent (Tax) Courts in your country, obliged to control your Tax Administration?

yes

3.2. Are your domestic Courts bound to administrative regulations/orders/rulings, which are issued by tax authorities? **yes** - **no**

If "no", do the courts follow them in fact? never - sometimes – **often** - very often

3.3. Are first instance Court decisions on a tax case, normally accepted by the Tax Administration (i.e. do they not try to appeal against the decision)? never - **sometimes** - often - very often

Please report statistics if available!

3.4. Is a final judicial decision on a single tax case, followed by the Tax Administration not only in this case but also in all other similar cases? never - sometimes - often - **very often**

3.5. How does the Tax Administration react when it is convinced that the final judicial decision is wrong or not "acceptable" because, e.g., it is too expensive for the public?

a) Does it accept the (from their point of view) wrong decision? never - sometimes - often - **very often**

b) Does it try in another similar case to convince the Court to decide in a different way? never - **sometimes** - often - very often

c) Does it try to influence the Parliament to change the law? never - **sometimes** - often - very often

d) Does it make sure that the Internal Revenue Service will not follow this decision in similar cases? never - sometimes - often - very often

not applicable

e) Does it try "to hide" such a decision, e.g., not publishing the decision with the result that the Internal Revenue Service does not know this decision? never - sometimes - often - very often

not applicable

If possible, please add statistics to the answers!