

# THE SUPREME ADMINISTRATIVE COURT

## JUDGEMENT

Case No 1348-24 1349-24

delivered in Stockholm on 25 November 2024

## PLAINTIFF

[.....] AB

Agent.....

## RESPONDENT

Swedish Tax Agency 171 94 Solna

## DECISION UNDER APPEAL

Judgment of the Administrative Court of Appeal in Stockholm of 25 January 2024 in cases 7076-21 and 7077-21

## THE CASE

Income tax etc.

## DECISION OF THE SUPREME ADMINISTRATIVE COURT

The Supreme Administrative Court sets aside the judgement of the Administrative Court of Appeal and refers the cases back to the Administrative Court of Appeal for consideration in accordance with what is stated in paragraph 19.

The Supreme Administrative Court awards [.....] AB compensation for costs in the Supreme Administrative Court in the amount of SEK 119,990.

## BACKGROUND

1. There is a tax treaty between the Nordic countries which aims, inter alia, to avoid double taxation of income.
2. The tax treaty provides that transactions between associated companies in different countries may be taxed on the basis of the arm's length principle, that is to say, as if the companies were independent of each other. Under Article 9(2), if a country taxes a company in accordance with this principle on income that is also taxed by another company in another country, the other country must make a 'corresponding adjustment' to the tax of the other company. However, such an adjustment shall only be made if the other country considers the adjustment to be justified. The adjustment shall be made in accordance with the other provisions of the agreement and, if necessary, the competent authorities of the countries concerned shall consult with each other. In Sweden, the competent authority is the Swedish Tax Agency.
3. [.....] has during the income years 2011 and 2012 had interest income from a related company in Norway. This income has been taxed in Sweden. However, the Norwegian tax authority, applying the arm's length principle, has refused to allow the Norwegian company to deduct part of the corresponding interest expenses.
4. [.....] requested, on the basis of the decision in Norway, a review of the Tax Agency's decision for the 2011 and 2012 income years and claimed that the corresponding interest income should not be taxed in Sweden. The company argued, inter alia, that a corresponding adjustment should be made in accordance with Article 9(2) of the Nordic Tax Convention.
5. The Tax Agency found that the Norwegian tax authority's decision was not compatible with the arm's length principle and did not change its earlier decision. [ ] appealed to the Administrative Court in Stockholm, which made the opposite assessment and exempted the interest income from taxation.
6. The Swedish Tax Agency appealed to the Administrative Court of Appeal in Stockholm, which found that the provision on corresponding adjustment in Article 9(2) of the Nordic tax convention is not addressed to the courts and that the interest income could therefore not be exempted from taxation. The Administrative Court of Appeal attached importance, inter alia, to the statement in the article that the competent authorities in the countries concerned shall consult each other where necessary and that the competent authority does not refer to the courts but, in Sweden, to the Swedish Tax Agency.

7. [.....] AB claims, first, that the interest income should not be taxed and, second, that the judgment of the Administrative Court of Appeal should be set aside and the cases referred back to the Administrative Court of Appeal for consideration of the merits in accordance with Article 9(2) of the Nordic Tax Convention. The company also claims compensation for costs in the Supreme Administrative Court.

8. The Swedish Tax Agency considers that the interest income should be taxed in its entirety but grants the request that the Administrative Court of Appeal's judgement be set aside and the cases referred back to the Administrative Court of Appeal and that the company be awarded compensation for its costs in the Supreme Administrative Court. The Swedish Tax Agency submits the following.

9. The Swedish Tax Agency has applied Article 9(2) in its capacity as a tax authority in the context of a review case and not in its capacity as a competent authority. In the Authority's view, the courts may also apply the article following an appeal against the Tax Agency's reassessment decision.

## REASONS FOR THE JUDGEMENT

Legal regulation, etc.

10. Article 9(2) of the Agreement between the Nordic countries for the avoidance of double taxation with respect to taxes on income and on capital states the following. Where a Contracting State includes in the income of an enterprise of that State - and taxes accordingly - income on which an enterprise of another Contracting State is taxed in that other State and the income so included is income which would have accrued to the enterprise of the first-mentioned State if the conditions made between the enterprises had been those which would have been made between independent enterprises, then that other State shall make the appropriate adjustment to the amount of tax imposed on the income therein if that other State considers the adjustment to be justified both in principle and in amount. Any such adjustment shall be made in accordance with the other provisions of the Agreement and the competent authorities of the Contracting States concerned shall consult each other as necessary.

11. According to the Ordinance (1998:1314) on the application of the double taxation agreement between the Nordic countries, 'competent authority' means the Swedish Tax Agency.

12. Sections 1 and 2 of the Act (1996:1512) on the double taxation convention between the Nordic countries (the transposition act) provide that the convention applies as law in Sweden and that the taxation rules of the convention are to be applied only in so far as they entail a restriction of the tax liability in Sweden which would otherwise exist.

The Supreme Administrative Court's assessment

Income tax

13. [.....] has had interest income which is taxable in Sweden under domestic tax law and which falls within the scope of the Nordic tax treaty. The question is whether the taxation should be reduced on the basis that the borrower has not been allowed to deduct the corresponding interest expenses in Norway.

14. Articles 6 to 24 of the tax treaty contain provisions on the allocation of taxing rights between the contracting States. Sweden is bound under international law by the tax treaty, which has been given the same status as other Swedish legislation by the transposition law. If application of the treaty results in a certain income not being taxable in Sweden, the tax treaty must take precedence over internal tax provisions (cf. RÅ 2008 ref. 24 and HFD 2010 ref. 112).

15. Thus, in its taxation activities, the Swedish Tax Agency must take into account the tax treaties in force with other countries and apply the taxation rules in those treaties which entail a restriction of tax liability in Sweden. In the assessment that the court has to make following an appeal against a taxation decision, the court must also apply treaty provisions that restrict tax liability.

16. Article 9(2) of the Nordic Tax Convention provides, in a case such as the present, that a corresponding adjustment is to be made in the tax assessment if the adjustment is considered justified both in principle and in terms of amount. This is something that the Swedish Tax Agency does in its capacity as taxing authority.

17 If the Swedish Tax Agency considers that the conditions for adjustment are not met and the authority's decision is appealed to the court, it is the court's responsibility to determine whether the Swedish Tax Agency was justified in its decision. If the court finds that the taxation measure in the other country is in accordance with the arm's length principle, a corresponding adjustment must be made. The fact that the Swedish Tax Agency, as the competent authority, can initiate consultations with another country does not mean that only the Swedish Tax Agency can make a corresponding adjustment in accordance with Article 9(2) and that the administrative courts would be prevented from doing so.

18. It follows from the above that, following an appeal against a tax assessment decision, an administrative court may consider whether a corresponding adjustment under Article 9(2) of the Nordic tax convention should be made.

19. The Administrative Court of Appeal has not taken a position on whether Article 9(2) of the Nordic tax treaty restricts the company's tax liability in Sweden. The judgement of the Court of Appeal shall therefore be set aside and the cases shall be referred back to the Court of Appeal for such consideration.

Compensation for costs

20. The company has claimed compensation of SEK 119,990 for legal costs in the Supreme Administrative Court. The cases concern an issue of importance for the application of the law and the company shall therefore be awarded compensation for costs. The amount claimed is reasonable.

The following Justices participated in the judgement: .....

The rapporteur was the Registrar.....

