

TRANSLATION FROM SWEDISH

RÅ 1987 ref 157

RÅ 1987

Ref 158

The provisions of § 2.4, para. 9 of the Law on State Income Tax that there should be no capital gains tax on transfer of corporate shares within a group do not apply where the parent company is a foreign company (RÅ 1986 ref 147). Because of the prohibition of discrimination in the double taxation agreement with the Netherlands, however, it is considered that there could be no liability to capital gains tax in the case of such a transfer between Swedish subsidiaries of a group with a Dutch parent company. Interim ruling concerning income tax.

§ 2.4, para. 9 of the Law on State Income Tax (1947:576); Article 27 §4 of the Double Taxation Agreement (1968:771) with the Netherlands

In its application to the National Tax Board for a interim ruling Nissaström-företagen A.B (Nissaström) alleged, in substance, the following : Nissaström provisionally entered into an agreement with Pelly Industriföretag (Pelly) for the transfer to Pelly of all Nissaström's shares in Turessons Metall AB. All the shares in Nissaström and Pelly are owned by the Dutch company Altamon B.V. As sister

companies, Nissaström and Pelly thus belong to the same group. There is no question of shares held for the administration of real estate, securities or similar moveable property. - With reference to the facts cited, Nissaström requested answers to the following questions : Do the provisions of §35.3, para. 6 of the Local Taxation Law apply to the share transfer, notwithstanding the fact that the vendor, Nissaström, and the purchaser, Pelly, which are both Swedish stock companies, are wholly owned by a common foreign parent company, and should therefore capital gains tax not apply?

The Legal Committee declared in an interim ruling on 3 February 1986 that the provisions of §35.3, para. 6 of the Local Taxation Law, in the wording of the law prior to 1 January 1985, or § 2.4, para. 9 of the Law on State Income Tax in the wording of the law from and including the aforementioned date, applied to the share transfer in question, notwithstanding the fact that the vendor's and purchaser's common parent company was a foreign stock company and that in the circumstances stated in the case, the capital gains that might arise because of the transfer should not therefore be taxable.

After the General Representative for Central Local Government Cases had lodged an appeal against the interim decision, the Supreme Administrative Court issued a judgment in the case on 10 October 1986 (RÅ 1986 ref 147). In the judgment, the Supreme Administrative Court laid down - varying the interim ruling appealed against - that the suspension rule in the above section of the law does not apply to the share transfer set out in the company's statement. The Supreme Administrative Court further declared, with reference to the fact that the company put forward a claim during the case that Article §27.4 concerning the application of the double taxation agreement between Sweden and the Netherlands, that the case should be referred back to the National Tax Board for this claim to be heard.

The National Tax Board's Committee for Legal Matters (10.04.1987, Herrlin, Enslöw, Francke, Rosén, Vester, Gustafson, Nilsson, Virin) issued the following interim ruling : Nissaström should not be liable to tax on capital gains that might arise because of the transfer. - *Grounds.* Article §27.4 of the double taxation agreement with the Netherlands is worded as follows : "Companies in one of the states whose capital is wholly or partly owned or controlled, directly or indirectly, by one or more persons domiciled in the other state should not be the subject of any taxation or any tax demand associated therewith in the first-named state which is of another kind or more oppressive than the taxation or tax demand associated therewith to which another similar company in the first-named state would or could be subject." Article §3.1d shows that the word "person" includes, inter alia, a company.

Apart from certain linguistic variations, the above wording corresponds with the wording of Article 24, para. 6 of the OECD model agreement. In the commentary on this paragraph it is stated, inter alia, that the paragraph prohibits a state entering into an agreement from treating a company less favourably if its capital is wholly or partly owned or controlled, directly or indirectly, by one or more persons domiciled in the other state entering into the agreement. (p. 194 in the Swedish translation by Francke et al of the OECD report in question).

The Supreme Administrative Court's *ratio decidendi* shows that the outcome is

based on the interpretation that the requirement in the suspension rule that the parent company should be a stock company or economic association has the meaning that the question should relate to a Swedish stock company or a Swedish economic association. The application of the suspension rule is thus prevented by the fact that Nissaström is owned by a foreign (Dutch) stock company and not by a Swedish one. With regard to the wording of Article §27.4 of the double taxation agreement with the Netherlands and the aim of the provisions as can be gathered from the commentary on the OECD model agreement, to allow a restricted possibility for Nissaström to apply the suspension rule is considered to be contrary to the provisions. The consequence of this must be that Nissaström's tax liability should be the same as if the suspension rule had applied. The capital gain as a result of the share transfer should thus not be taxable.

The General Representative for Central Local Government Cases appealed and called upon the Supreme Administrative Court to state that the discrimination rule in the agreement with the Netherlands did not apply to the share transfer set out in the statement.

The Supreme Administrative Court (19.11.1987, Deklin, Berglöf, Werner, Holstad) did not vary the National Tax Board's interim ruling.

Reported 04.11.1987, case number 2225-1987

Literature : Model double taxation agreement relating to income and property, Report of OECD's Committee on Tax Questions 1977, pp. 181-183, 194: Dahlman-Fredborg, Taxation in the Case of Foreign Domicile, 3rd Edition, pp 244-245.

452
RÅ 1987

Note 690 November

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Note 687. Decision of the General Representative on an interim ruling re income tax.
See RÅ 1987 ref. 158.