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In case no. 6422-18, **Nordic Oriental Shipmanagement Aktiebolag** (Appellant) v. **the Swedish Tax Agency** (Respondent), the Supreme Administrative Court delivered the following decision on 14 May 2020.

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## **DECISION OF THE SUPREME ADMINISTRATIVE COURT**

The Supreme Administrative Court rejects the appeal.

Nordic Oriental Shipmanagement Aktiebolag is granted compensation for costs incurred in the administrative court of appeal and the Supreme Administrative Court in a total amount of SEK 75,000.

## **BACKGROUND**

1. When the Swedish Tax Agency performs an audit of a taxpayer, the Agency may, under certain circumstances, take measures to secure evidence in order to search for and seize documents necessary for the audit without first notifying the taxpayer. A document which is not covered by the control may not be examined, and the taxpayer has the possibility to request exemption of such a document. The document to which the request pertains is to be submitted to the administrative court which is to decide whether or not the document is covered by the control.
2. The securing of evidence is a coercive measure which may constitute a violation of the right to respect for private life and correspondence prescribed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the ECHR. Article 13 provides that everyone whose rights are violated shall have an effective remedy before a national authority.
3. The Swedish Tax Agency applied to the Administrative Court in Stockholm for authorisation to carry out measures to secure evidence at the business premises of Nordic Oriental Shipmanagement Aktiebolag (the company) and, provided

documents were not found there, on the premises of two other legal persons in the same corporate group.

4. The administrative court granted the application and ordered that the measures could take place without notifying the relevant parties in advance. The judgment was served on the company only in conjunction with the execution of the measures to secure evidence.
5. The company appealed to the Administrative Court of Appeal in Stockholm which dismissed the case on the basis that the company's assertions and what had otherwise come to light in the matter did not show that the company, notwithstanding that the measures had been executed, had a substantial interest in appealing the judgment of the administrative court. In addition, the administrative court of appeal dismissed the company's claim for compensation for costs in the case.

#### **CLAIMS, ETC.**

6. *Nordic Oriental Shipmanagement Aktiebolag* requests that the Supreme Administrative Court set aside the decision of the administrative court of appeal and remand the case to the administrative court for an examination on the merits. The company further claims compensation for its costs incurred in the administrative court of appeal and the Supreme Administrative Court and asserts the following.
7. The measures to secure evidence entail a violation of the company's rights pursuant to Article 8 of the ECHR and, pursuant to Article 13, the company must thus have access to an effective remedy. The right to an effective remedy is not limited to cases of apparent infringements of the Convention, but is also applicable when an individual, on reasonable grounds, claims to have been subjected to a violation. By virtue of its decision to dismiss the case without an

examination on the merits, the administrative court of appeal has deprived the company of its right to an effective remedy.

8. *The Swedish Tax Agency* consents to the company's claim for a remand and that the company be granted compensation in the amount of SEK 15,000 in the administrative court of appeal and SEK 35,000 in the Supreme Administrative Court and states the following.
9. The right to an examination on the merits should be able to be made dependent on whether the individual, on reasonable grounds, can claim a violation of rights under the Convention. Where, in an individual case, no reasonable ground is deemed to subsist according to which a violation has occurred, the administrative court of appeal should be unconstrained in dismissing a case without an examination on the merits where it involves measures to secure evidence which have already been executed. In determining whether the company has reasonable grounds to claim that a violation of Article 8 of the ECHR has occurred, the requirements should not be overly stringent taking into account that it involved an unannounced coercive measure.

## **REASONS FOR THE RULING**

### **The question in the case**

10. The question in the case is whether an administrative court of appeal, given Articles 8 and 13 of the ECHR, is obliged to try an appeal on the merits of a judgment rendered by an administrative court notwithstanding that measures to secure evidence had already been executed at the time of the examination by the administrative court of appeal.

**Legislation, etc.**

11. Pursuant to Chapter 45, section 2, first paragraph of the Tax Procedures Act (2011:1244), securing of evidence refers, *inter alia*, to the coercive measures of search and seizure of documents. Decisions regarding securing of evidence are taken in accordance with section 13, first paragraph by the administrative court and may be appealed to the administrative court of appeal. Section 16, second paragraph provides that, where there is a manifest risk of sabotage in the event of prior notice of the decision to the person covered by the decision, notice of the decision may be given only in conjunction with the execution of the measure.
12. According to Article 8 of the ECHR, everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. The Article applies both in respect of natural and legal persons.
13. Article 13 provides that everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.
14. In RÅ 2007 reported case no. 80, the county administrative court decided that the Swedish Tax Agency could perform an audit at a company without prior notice to the company. The company appealed to the administrative court of appeal which dismissed the case since the decision had already been executed. The Supreme Administrative Court was not of the opinion that the company, after the measures had been executed, had a substantial interest in subsequently obtaining

reconsideration of the decision rendered by the administrative court of appeal and rejected the appeal.

### **The Court's assessment**

*Should the administrative court of appeal have determined the appeal on the merits?*

15. Such measures for the securing of evidence as are at issue in this case entail an infringement of the right to respect for private life and correspondence pursuant to Article 8 of the ECHR. In the event the measures for the securing of evidence are decided or executed in such a manner that entails a violation of Article 8, it follows from Article 13 that the person subjected to the measures shall have an effective remedy before a national authority.
16. The purpose of Article 13 is to provide a remedy for individuals for examination at national level of alleged violations of the Convention before they turn to the European Court (Government Bill 2017/18:7, p. 10; *cf.*, also, the judgment of the European Court of Human Rights of 26 October 2000 in the case of Kudła v. Poland, paragraph 152).
17. It is firstly the respective Convention State which shall determine what constitutes an effective remedy, and the States have been granted a certain margin of appreciation. One premise is that, as regards an ongoing violation, an effective remedy must aim at bringing an end to the violation. Another premise is that the remedy is available in connection with the proceedings in which the violation occurred. An individual can, for example, often overcome faults in a decision or judgment by bringing an appeal and arguing before a higher court that a violation of the Convention has occurred and thereby achieve a change to the decision or judgment. This is often the most efficient and fastest way of remedying a violation of the Convention. (*Ibid.*, Government Bill, p. 11 ff.).

18. In other situations, a compensatory remedy may constitute an effective remedy. The European Court of Human Rights has made clear in several judgments that the possibility in Sweden to request damages from the Office of the Chancellor of Justice or to bring an action for damages against the State before a court of general jurisdiction and thereby obtain an examination of whether an alleged Convention violation has occurred constitutes an effective remedy (see, *ibid.*, Government Bill, p. 13 ff. and decisions by the European Court applicable to Sweden reported therein). In addition, the Supreme Administrative Court has stated that the waiver of various sanction fees may be granted as compensation for violations of the right to access to a court of law within a reasonable time, and the Court has also reduced claims for repayment of erroneously disbursed sickness benefits in such a situation (see HFD 2014 reported case no. 12 and references to previous cases therein).
19. Whether or not a remedy is effective in remedying a Convention violation turns, in summary, on whether the remedy can lead to a termination of the violation or provide redress to a victim of Convention violations. Appealing a judgment or a decision to a higher instance may be effective if the appeal provides a real possibility for the individual to effect a material change. When this is not possible, compensatory remedies such as damages may instead be the most suitable and effective remedy.
20. A judgment by an administrative court regarding measures to secure evidence may be appealed to the administrative court of appeal. However, in a case such as the one at hand in which the issue regarding measures to secure evidence which had already been executed at the time of the appeal, it is practically impossible for the individual to avoid or mitigate the effects of the judgment by means of an appeal.
21. For this reason, the Supreme Administrative Court is of the opinion that an administrative court of appeal is not obliged to examine the merits of a judgment

of an administrative court regarding coercive measures when the measures have already been executed unless the appellant has a substantial interest in obtaining such an examination (RÅ 2007 reported case no. 80).

22. Since it is not possible for an individual, by means of an appeal to the administrative court of appeal, to avoid or mitigate the effects of a decision regarding measures to secure evidence which have already been executed, it does not appear that the possibility to appeal such a decision is an effective remedy and this is so irrespective of whether the administrative court of appeal makes an examination on the merits. In such a case, it appears that the possibility to obtain redress in the form of damages is the most suitable and effective remedy. The Supreme Administrative Court thus finds no cause to now hold a view other than that expressed by the Court in the 2007 case.
23. The circumstances in the case do not show that the company, after the measures in question had been executed, had a substantial interest in having the decision reconsidered by the administrative court of appeal. Accordingly, the appeal is rejected.

*Compensation for costs*

24. The case pertains to an issue which is of importance for the application of law. Therefore, the conditions are fulfilled for granting the company compensation for costs for counsel reasonably necessary to preserve its rights.
25. The company has requested compensation for cost of counsel in the amount of SEK 92,475 for 35.15 hours of work in the administrative court of appeal and the amount of SEK 111,633 for 35.5 hours of work in the Supreme Administrative Court. The company has been represented by two counsel, and the average hourly cost amounts to SEK 2,630 and SEK 3,144 respectively which, in light of the

nature of the case, does not appear to be remarkably high but, rather, is acceptable.

26. The company has submitted accounts for the work activities performed. The accounts provide, however, no information regarding time committed for each activity nor who of the two counsel performed them (*cf.* case HFD 2019 reported case no. 16). As regards work performed in the administrative court of appeal, it is, furthermore, such that it pertained, to a limited extent, to the issue for which the Supreme Administrative Court chose to grant leave to appeal.
27. With regard to the stated deficiencies in the company's cost accounting and the fact that the work, to a limited extent, pertained to the issue which the Supreme Administrative Court has now examined, an overall reasonableness assessment must be carried out. In this assessment, the Supreme Administrative Court finds that the company should be granted compensation for a total amount of SEK 75,000 for the proceedings before the administrative court of appeal and the Supreme Administrative Court.

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Justices Margit Knutsson, Mahmut Baran, Leif Gäverth, Kristina Svahn Starrsjö and Helena Rosén Andersson have participated in the ruling.

Judge Referee: Charlotta Alsterstad Lindfors.