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In case no. 3849-20, AA (Appellant) v. the **Swedish Tax Agency** (Respondent), the Supreme Administrative Court delivered the following judgment on 22 November 2021.

RULING OF THE SUPREME ADMINISTRATIVE COURT

The Supreme Administrative Court rejects the appeal.

The Supreme Administrative Court grants AA compensation for costs incurred in the Supreme Administrative Court in the amount of SEK 170,000.

BACKGROUND

1. A capital loss which arises when a person disposes of an asset may be deducted in the *capital* income category. The main rule is that *disposal* means sale, exchange and similar transfers of assets. Furthermore, a security is deemed to have been disposed of also when a company which issued it is placed into liquidation. The security is then deemed to have been disposed of notwithstanding that the company has not yet been dissolved.
2. A limited company may be compelled to liquidate if it does not meet the requirements applicable to limited companies, so-called compulsory liquidation, or itself elect to liquidate, so-called voluntary liquidation. According to certain foreign legal systems, a company may, in lieu of undergoing voluntary liquidation, elect to be dissolved by means of a simplified deregistration procedure, a so-called strike off. Such a procedure normally entails that the company, following an application, is removed from the company register after which the company is deemed to be dissolved.
3. AA owned a company resident in the Cayman Islands. It follows from the “Written Resolutions of the Member of the Company” that the company, in

November 2014, resolved to carry out a final distribution, equal to the company's net assets, to be paid to the owner and that the company would apply to be removed from the Register of Companies and dissolved since it did not conduct any operations and was otherwise dormant. The company's assets were distributed to AA in December 2014 and the company was removed from the Register of Companies in March 2015.

4. In a supplement to its income tax return for the 2014 tax year, AA submitted information regarding winding-up of the company and claimed deductions for capital losses relating to the shares in the company. AA claimed that the shares had been sold in 2014 since the decision to wind up the company by means of a strike off was taken then and corresponds to a decision to liquidate.
5. The Swedish Tax Agency rejected AA's claim with the explanation that the company had not been liquidated and the shares could not thereby be deemed to have been disposed of in 2014. The Swedish Tax Agency instead decided that AA was to be taxed on dividends equal to the funds which were distributed to him.
6. AA appealed the decision of the Swedish Tax Agency to the Administrative Court in Stockholm which granted the appeal. The administrative court found that the strike off procedure in the Cayman Islands corresponded to a liquidation according to Swedish law, that the shares in the company had been disposed of in 2014 and that the loss was final in the same tax year.
7. After the Swedish Tax Agency appealed the judgment, the Administrative Court of Appeal in Stockholm granted the appeal and affirmed the decision of the Swedish Tax Agency. The administrative court of appeal concurred with the assessment of the administrative court that the strike off procedure in the Cayman Islands corresponded to a liquidation in accordance with Swedish law. However, the administrative court of appeal made the determination that the strike off procedure had legal effect only in conjunction with the deregistration of the company and consequential dissolution, and that the shares could therefore be

deemed to have been disposed of only at that time, i.e. in March 2015. The distribution to AA took place in the year prior to the year of disposal and was thus to be reported as a dividend in accordance with the decision of the Swedish Tax Agency.

CLAIMS, ETC.

8. AA claims that the Supreme Administrative Court shall modify the judgment of the administrative court of appeal and that he is to be taxed in accordance with the ruling of the administrative court. He further claims compensation for costs in the Supreme Administrative Court in the amount of SEK 223,425 including value added tax and states the following.
9. The shares are to be deemed disposed of in 2014. The regime should be applied in such a manner that the term *liquidation* is interpreted on the basis of what is meant by the term in normal parlance. In conjunction with such an assessment, the strike off procedure in the Cayman Islands should be deemed to correspond to a liquidation since the procedure has the same purpose and leads to the same result as a liquidation, i.e. that the operation is wound up and the company is dissolved. It would also entail a restriction on the free movement of capital to treat a dissolution after a strike off in a manner other than as a dissolution following a liquidation since the situations are objectively comparable as regards purpose and result.
10. *The Swedish Tax Agency* is of the position that the appeal should be rejected. The procedures do not demonstrate such similarities that a strike off in the Cayman Islands is to be deemed to correspond to a liquidation in the sense referred to in the relevant tax provisions. The Swedish Tax Agency is of the opinion that AA should be granted compensation for costs incurred in the Supreme Administrative Court.

REASONS FOR THE RULING

The question in the case

11. The question in the case is whether shares in a company which is dissolved following an application regarding so-called strike off in accordance with the Companies Law in the Cayman Islands is to be deemed to be a disposal in accordance with Chapter 44 of the Income Tax Act (1999:1229).

Legislation, etc.

12. According to Chapter 41, section 1, first paragraph of the Income Tax Act, the *capital* income category also includes income and expenditures relating to holdings of assets and liabilities and in the form of capital gains and capital losses. *Capital loss* means, according to section 2, *inter alia*, losses in conjunction with the disposal of assets. According to Chapter 44, section 26 of the Income Tax Act, capital losses are not to be deducted as a cost prior to the tax year in which the loss is definitive.
13. According to the main rule in Chapter 44, section 3 of the Income Tax Act, *disposal of assets* means the sale, exchange and similar transfers of assets. Section 7, first paragraph provides further that a security is deemed to have been disposed of if the company which has issued it is placed into liquidation.
14. Chapter 2, section 2, first paragraph of the Income Tax Act states that the terms and expressions used also cover comparable foreign phenomena unless otherwise stated or it is apparent from the circumstances that it is only Swedish phenomena which are intended.
15. The preparatory works relating to Chapter 2, section 2 of the Income Tax Act provide that it is not possible to state how closely the foreign phenomenon must correspond to the Swedish one in order to be deemed to be comparable thereto.

This must be dependent on the type of phenomenon and the rule in question (Government Bill 1999/2000:2, part 1, p. 519). It may be determined in individual cases whether the similarities are so great that the foreign phenomenon may be deemed to correspond to the Swedish term (*ibid.*, Government Bill, Part 2, p. 22).

16. According to Chapter 42, section 1, first paragraph of the Income Tax Act, interest income, dividends, income from renting out private residences and other income from holdings of assets and capital gains are to be reported as income unless otherwise stated in the chapter or in Chapter 8. It is apparent from section 12 that dividends are to be reported by the person who is entitled to the dividend when it may be disposed of.
17. According to Article 63 of the TFEU, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

The Court's assessment

The taxation question

18. Initially, it may be observed that the Swedish tax rules applicable to disposals of shares upon liquidation cover comparable foreign phenomena and are formulated in such a manner that they do not disadvantage foreign phenomena. As far as is relevant now, what AA has stated regarding the free movement of capital thus constitutes no impediment to the application of Chapter 2, section 2, first paragraph of the Income Tax Act.
19. The question whether a certain foreign phenomenon is to be deemed comparable to a Swedish one must be determined on a case-by-case basis taking into account, *inter alia*, the formulation and purpose of the tax rule in question. It follows from case law that, in the assessment, great weight is ascribed to whether the foreign

phenomenon may be deemed by civil law to correspond to the Swedish phenomenon in question (see, for example, RÅ 2009 reported case no. 100).

20. It is apparent from the investigation that the company which is now relevant was a legal person which, from a corporate-law perspective, was most closely similar to a Swedish limited company. In the examination of whether the strike off procedure in the Cayman Islands may be deemed comparable to a liquidation, a comparison should accordingly be conducted with the rules of the Companies Act (2005:551).
21. The voluntary liquidation procedure according to the Companies Act may be briefly described in the following way. Once the annual general meeting has adopted a resolution according to which the company is to be placed into liquidation, a liquidator is appointed who assumes the position of the board of directors and managing director and who is tasked with carrying out the liquidation. During the period of time the liquidation is underway, the general meeting may not adopt resolutions regarding distributions of profits (*cf.* Government Bill 2000/01:150, p. 109 f.). When the period of time for notice to unknown creditors has expired and all known liabilities have been settled, the liquidator shall distribute the company's remaining assets. After the liquidator has presented the final accounting, the company is dissolved. In the event subsequent, additional liquidation measures are necessary, e.g. if an action is brought against the company, the liquidation shall continue.
22. The strike off procedure in accordance with the Companies Law in the Cayman Islands can be described as follows. After the body which most closely corresponds to the annual general meeting has taken a decision to do so, the company applies to be removed from the Register of Companies. The application shall state that the company has wound up its operations and has no assets or liabilities. The registration authority thereafter publishes in an official publication the fact that it intends to strike the company off the registry within a certain period of time, commonly three or six months. After the registration authority has

decided to strike a company off the Register of Companies, the company is dissolved. The dissolved company can, following a decision of a court, be re-registered. This occurs upon application to be made within two or, under certain circumstances, ten years. The consequence of a re-registration is that the company is not to be deemed to have ceased to exist. In the decision regarding re-registration, the court issues orders the purpose of which is, to the extent possible, to place the company and others in the same situation as though the company had never been de-registered.

23. Thus, it may be observed that the relevant strike off procedure is comparable to the voluntary liquidation procedure pursuant to the Companies Act in the sense that it serves the same, overall purpose, namely to dissolve the company. However, there are material differences between the procedures. The restriction on the possibility of the company organs to carry out a legal act on behalf of the company which is a consequence of the appointment of a liquidator does not exist, for example, in the strike off procedure. Furthermore, the strike off rules make re-registration of the dissolved company possible, which entails that the operation in it may be resumed. No comparable regulation exists for a company which has been dissolved following a liquidation pursuant to the Companies Act.
24. In the view of the Supreme Administrative Court, these differences are sufficiently significant that the relevant strike off procedure cannot be deemed to correspond to a liquidation procedure in accordance with Swedish law. The shares in AA's company shall thus not be deemed disposed of by liquidation in accordance with Chapter 44, section 7 of the Income Tax Act. Furthermore, the strike off procedure cannot be deemed to entail a disposal in accordance with the main rule in Chapter 44, section 3 of the Income Tax Act. This entails, in accordance with the decision of the Swedish Tax Agency, that the funds distributed by the company to AA in 2014 are to be reported as dividends. Accordingly, the appeal is rejected.

Compensation for costs

25. The case involves a question which is of importance for the guidance of the application of law. Accordingly, the conditions are present for granting AA compensation for costs reasonably required by him to uphold his rights.
26. AA has claimed compensation for costs incurred in the Supreme Administrative Court in the amount of SEK 223,425. The claimed amount pertains to costs for 47.5 hours' work with an average hourly charge of approximately SEK 4,700. In the view of the Supreme Administrative Court, the character and degree of difficulty of the case is such that such hourly charge is reasonable. As regards the reasonableness of the stated expenditure of time, the following should be taken into account.
27. According to the submitted work specification, 20 hours has been spent to review the judgment of the administrative court of appeal and preparation of the appeal, and 27.5 hours to review the reply of the Swedish Tax Agency and the preparation of submissions. AA was successful in the proceedings in the administrative court but lost in the administrative court of appeal and has, for this reason, the need to specifically argue the question of leave to appeal in the Supreme Administrative Court and to develop his action as a consequence of the judgment of the administrative court of appeal. The two submissions in the Supreme Administrative Court contain, however, to a not insignificant extent, repetitions of what was stated in the lower courts. The stated time expenditure for the work involved thus appears to be altogether excessive.
28. In summary, the Supreme Administrative Court is of the opinion that a reasonableness assessment must be made. In this assessment, the Supreme Administrative Court finds that AA should be granted compensation in a total

amount of SEK 170,000 for his costs incurred in the Supreme Administrative Court.

Justices Jermsten, Svahn Starrsjö, Rosén Andersson, Anderson and Jönsson have participated in the ruling.

Judge Referee: Daniel Böcker