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In case no. 642-23, the **Swedish Tax Agency** (Appellant) v. **AA** (Respondent), the Supreme Administrative Court delivered the following judgment on 28 August 2023.

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## **RULING OF THE SUPREME ADMINISTRATIVE COURT**

The Supreme Administrative Court affirms the advance ruling of the Board for Advance Tax Rulings.

## **BACKGROUND**

1. In Sweden, a contribution made by an employer to an occupational pension insurance for an employee is normally not taxable for the employee. Disbursements under the occupational pension insurance constitute pension for the employee and are taxed in the income from employment category.
2. According to the tax convention between Sweden and Italy, salaries, wages and similar remuneration derived on the basis of employment (income from dependent personal services) are, as a main rule, taxed only in the state in which the person to whom remuneration is paid resides. It follows from the convention that pensions and other similar remuneration are also normally taxed only in the state of residence.
3. If a person who resides in Sweden derives income which, according to the provisions of the tax convention, may be taxed in Italy, the convention provides that double taxation shall be avoided by deducting an equal amount from the income tax paid in Sweden.
4. AA is the managing director of a Swedish limited company. He is a Swedish citizen, but lives and works in Italy, where he is resident for tax purposes. He has been offered the opportunity to take out a defined premium occupational pension

insurance with a Swedish insurance company to which the employer will make monthly contributions to secure his future pension.

5. AA applied for an advance ruling in order to obtain clarification on the tax consequences of the offer. The application states that he will be taxed in Italy for the contributions to the occupational pension insurance. When pension is later disbursed under the insurance, he will be fully taxable in Sweden and be resident for tax purposes here. The disbursements under the occupational pension insurance will thus be taxed in Sweden.
6. According to the application, AA wants to learn whether the contributions to the occupational pension insurance and the disbursements thereunder will be deemed to be the same income and whether the disbursements are governed by a provision of the tax convention other than those applicable to the contributions to the insurance. Finally, he wants to learn whether the tax paid in Italy due to the contributions will create an entitlement to deduction in conjunction with taxation of the disbursements under the insurance.
7. The Board for Advance Tax Rulings found that the contributions to and the disbursements under the occupational pension insurance are the same income, that the disbursements under the insurance constitute pension and are covered by a provision in the convention other than the provision that, according to the facts presented, covers the contributions to the insurance, and that AA, in conjunction with taxation of the disbursements under the insurance, is entitled to a deduction for the tax which he has paid in Italy on the amount contributed to the insurance.

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

8. *The Swedish Tax Agency* claims that the advance ruling is to be affirmed.
9. AA is also of the opinion that the advance ruling is to be affirmed.

## REASONS FOR THE RULING

### The question in the case

10. The primary question in the case is whether there is an entitlement to deduction, by application of the tax convention with Italy, for Italian tax paid on contributions to an occupational pension insurance in conjunction with the taxation of the disbursements subsequently obtained by the taxpayer under the insurance.

### Legislation, etc.

11. Pursuant to Chapter 11, section 1, first paragraph of the Income Tax Act (1999:1229), pensions shall be reported as income in the income from employment category. *Pension* means, according to Chapter 10, section 5, first paragraph (4), *inter alia*, remuneration disbursed based on pension insurance.
12. Article 18 of the tax convention between Sweden and Italy regulates the allocation between the states of taxation of pensions and other similar remuneration. According to paragraph 1, subject to the provisions of Article 19(2), such remuneration paid to a resident of a Contracting State shall be taxable only in that State. The exception in Article 19(2) is not relevant in the present case.
13. The allocation of taxation of other income from dependent personal services is regulated mainly by Article 15. That article stipulates that, subject to the provisions of, *inter alia*, Article 18, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

14. Article 24 contains provisions for the avoidance of double taxation. In so far as is relevant here, paragraph 2 provides that where a resident of Sweden derives income which may be taxed in Italy in accordance with the provisions of the convention, Sweden shall deduct from the Swedish income tax of that resident an amount equal to the income tax paid in Italy.

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

15. AA has posed his questions in order to obtain clarity as to whether, in accordance with the tax convention with Italy, he will be entitled to deduction for paid Italian tax in conjunction with subsequent taxation in Sweden of the disbursements he receives under the occupational pension insurance.
16. According to Chapter 10, section 5, first paragraph (4) of the Income Tax Act, disbursements under the occupational pension insurance constitute pension and are taxable in accordance with Chapter 11, section 1. According to Article 3(2) of the tax convention between Sweden and Italy, this also has effect in conjunction with the application of the convention provisions, which means that the disbursements are covered by Article 18 regarding pensions and similar remuneration (HFD 2019 reported case no. 13). Sweden, which will be the state of residence when the disbursements are made, will be entitled to tax the income by application of this article.
17. In order for the entitlement to deduction to exist in accordance with Article 24(2) of the tax convention, it is necessary that the income taxed in Italy pertains to the same income as the Swedish tax measure and that Italy may tax the income in accordance with the provisions of the convention.
18. The Supreme Administrative Court notes that both the contributions and the disbursements will be based on, and shall constitute compensation for, the work performed by AA in Italy. Accordingly, there is a clear connection between the funds transferred through the contributions to the occupational pension insurance

and the disbursements which are subsequently made under the insurance to AA. Thus, the same income is involved. The fact that taxation takes place at a different time in Sweden than in Italy does not prevent it from being regarded as the same income as is taxed in both countries (HFD 2013 reported case no. 23 and HFD 2015 reported case no. 60).

19. One of the conditions presented for the questions posed is that Italy will tax the contributions to the occupational pension insurance and that taxation will take place pursuant to Article 15 of the tax convention. In Sweden, the disbursements will be covered by Article 18 (see paragraph 16). It is not apparent from the tax convention that the income must be taxed in accordance with the same article in the Contracting States in order for a deduction to be relevant. Since the disbursements AA receives under the occupational pension insurance is the same income which Italy, in accordance with the conditions presented, may tax in accordance with the tax convention when the contributions to the insurance are made, he is also entitled to deduct an amount from the Swedish income tax equal to the income tax he has paid in Italy.
20. This means that the advance ruling of the Board for Advance Tax Rulings shall be affirmed.

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Justices Henrik Jermsten, Margit Knutsson, Marie Jönsson, Linda Haggren and Martin Nilsson have participated in the ruling.

Judge Referee: Veronica Montell.