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In case no. 7304-22, the **Swedish Tax Agency** (Appellant) v. **OX2 AB** (Respondent), the Supreme Administrative Court delivered the following judgment on 20 March 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. Value added tax shall be paid to the State on such intra-country turnover of goods and services that is taxable. A service which is connected with a property is supplied within the country only if the property is situated here. In such a case, the main rule is that the value added tax shall be paid by the purchaser, provided the purchaser is registered for value added tax and the party who supplies the service is a foreign, taxable person.
2. OX2 AB plans to establish an offshore wind farm within Sweden's exclusive economic zone. As part of the work of obtaining the necessary permits in accordance with the environmental legislation, the company has entered into an agreement with a foreign sub-contractor who will assist with various types of assessments of the effects of the planned activities on the area's natural environment. The company applied for an advance ruling in order to learn whether the service in question is connected with a property (question 1) and, if such is the case, whether the company is liable to pay value added tax on the acquisition when the property is situated outside the Swedish territorial sea but within Sweden's exclusive economic zone (question 2). The following is stated in the application.
3. The sub-contractor has expertise in marine biology, ornithology and acoustics. The assignment concerns remote investigations of the marine area's natural

environment, such as modelling, impact analyses and second party opinions regarding the estimated environmental impact following from the establishment and operation of wind farms in the area. The sub-contractor has neither a registered office nor a fixed establishment in Sweden and is thus a foreign taxable person.

4. The Board for Advance Tax Rulings found that the acquisition in question concerns a service supplied in Sweden with connection with a property. According to the Board, OX2 was therefore liable to pay value added tax on the acquisition, unless the sub-contractor registers for value added tax in Sweden.

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

5. *The Swedish Tax Agency* claims that the advance ruling is to be affirmed.
6. *OX2 AB* is also of the opinion that the advance ruling is to be affirmed.

#### **REASONS FOR THE RULING**

##### **Question in the case**

7. The main question in the case is whether a service relating to the examination of a marine area within Sweden's exclusive economic zone is connected with a property which is situated in Sweden and is thereby to be regarded as supplied within the country.

##### **Legislation, etc.**

8. Pursuant to Chapter 1, section 1, first paragraph (1) of the Value Added Tax Act (1994:200), value added tax shall be paid to the State on such intra-country turnover of goods or services that is taxable and made by a person liable to pay tax, to the extent that the taxable person is not exempt from tax on the turnover.

9. Chapter 5, section 8 of the Value Added Tax Act states that a service connected with a property is supplied within the country if the property is situated in Sweden. *Property* means, pursuant to Chapter 1, section 11, immovable property according to Article 13b of Council Implementing Regulation 282/2011 laying down implementing measures for the VAT Directive (2006/112/EU). *Immovable property* means, according to said article, *inter alia*, any specific part of the earth, on or below its surface, over which title and possession can be created.
10. Article 47 of the VAT Directive states that the place of supply of services connected with immovable property, including the services of experts and services for the preparation and coordination of construction work shall be the place where the immovable property is located.
11. Article 31a (1) of the Implementing Regulation states that services connected with immovable property as referred to in Article 47 of the VAT Directive shall cover only those services that have a sufficiently direct connection with the property which, according to Article 31a (1) (b), *inter alia*, is the case where they are provided to, or directed towards, an immovable property, having as their object the legal or physical alteration of that property. Such services also include, according to Article 31a (2) (f) surveying and assessment of the risk and integrity of immovable property.
12. According to Chapter 1, section 2, first paragraph (1) of the Value Added Tax Act, the party who supplies such goods and services as referred to in section 1, first paragraph (1) is liable to pay tax except where otherwise provided in 1 (a)–4 (f). It follows from 4 (c), in so far as is of interest now, that with the acquisition of such good or service connected with a property as referred to in Chapter 5, section 8, the purchaser shall – where the party who sells the good or service is a foreign person liable to pay tax and the purchaser is registered for value added tax here – be liable to pay tax on the turnover unless the party who sells the good or service requests to be taxed in accordance with section 2 (d).

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

*Does the service have a connection with a property?*

13. The first question to be considered by the Supreme Administrative Court is whether the service acquired by OX2 is connected with a property, by which is meant immovable property in accordance with Article 13b of the Implementing Regulation.
14. *Immovable property* means any specific part of the earth, on or below its surface, over which title and possession can be created. According to the Supreme Administrative Court, the marine area whose natural environment is to be examined is covered by this definition (*cf.* judgment of the European Court of Justice in *Heger Rudi GmbH*, C-166/05, EU:C:2006:533, paragraph 20, and Government Bill 2016/17:14, p. 20). The area thus constitutes a property in accordance with Chapter 5, section 8 of the Value Added Tax Act.
15. In addition, the connecting requirement must be interpreted in the light of Article 47 of the VAT Directive and Article 31a of the Implementing Regulation. It follows therefrom that the service shall have a sufficiently direct connection with the immovable property which, for example, is the case where it is provided to, or directed towards, an immovable property, having as its object the legal or physical alteration of that property.
16. The service in question refers to both the legal and physical alteration of the property in that the result of the examinations is to be used as a basis for establishing a wind farm. The connection of the service with the immovable property is, furthermore, comparable to the connection that the services relating to the surveying and assessment of the risk and integrity of an immovable property have to that property, which are services that, in accordance with Article 31a (2) (f) of the Implementing Directive, have a sufficiently direct connection with that property. Accordingly, the Supreme Administrative Court is of the opinion that

the service in question fulfils the connecting requirement in Chapter 5, section 8 of the Value Added Tax Act.

*Is the service supplied within the country?*

17. The next question is whether the service is supplied within the country, which requires that the property, which is situated within Sweden's exclusive economic zone, is situated in Sweden.
18. Article 5.2 of the VAT Directive provides that *Member State* and the *territory of a Member State* mean the territory of each Member State to which the Treaties apply, with the exception of certain specific national territories.
19. With reference to the United Nations Convention on the Law of the Sea, the European Court of Justice has found that the territories of the Member States cover the territorial sea, its bed and its subsoil (*Aktiebolaget NN*, C-111/05, EU:C:2007:195, paragraphs 56 and 57). The Member States have sovereignty over these territories. As regards the exclusive economic zone, the European Court of Justice stated that the sovereignty of a coastal State is merely functional and limited to the right to explore and exploit those areas in accordance with Articles 56–77 of the Convention on the Law of the Sea (paragraph 59). A condition for the service in question to be deemed supplied within the country is, thus, that it involves activities that fall within Sweden's sovereignty under the Convention on the Law of the Sea.
20. According to Article 56 (1) (a) of the Convention on the Law of the Sea, the coastal State has sovereign rights for the purpose of exploring and exploiting natural resources on the seabed and its subsoil and the waters superjacent. As regards other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds, the coastal State has sovereign rights.

21. The current service pertains to examinations of the natural environment of the marine area. The service constitutes part of an exploitation of the area in order to enable the establishment of a wind farm. Accordingly, the Supreme Administrative Court finds that the service falls within Sweden's sovereignty in accordance with the Convention on the Law of the Sea. The service is thus supplied within the country, and OX2 is liable to pay tax on the turnover unless the sub-contractor registers for value added tax in Sweden.
22. Accordingly, the advance ruling of the Board for Advance Tax Rulings shall therefore be affirmed.

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

Judge Referee: Jonas Ljungberg.