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In cases no. 2149–2151-24 and 2711–2716-24, the **Swedish Tax Agency** (Appellant and Respondent) v. **AA** (Respondent and Appellant), the Supreme Administrative Court delivered the following judgment on 11 June 2025.

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

The Supreme Administrative Court overturns the rulings of the administrative court of appeal and the administrative court in those respects pertaining to value added tax and remands the cases in these respects to the administrative court for new proceedings.

The Supreme Administrative Court rejects AA's appeal.

## **BACKGROUND**

1. AA has participated in an activity which has consisted of supplying, in exchange for payment, test takers with the correct answers to the Swedish Scholastic Aptitude Test. The supply has taken place in real time by means of technical equipment. AA was found criminally liable for his collaboration in the activity which was carried out under the HP-hjälpen name. He was sentenced to imprisonment for, among other things, aiding an untrue affirmation, gross crime.
2. In December 2018, the Swedish Tax Agency decided to discretionarily impose on AA income and value added tax regarding the activity in HP-hjälpen from 2015 to 2017. According to the decision, the income taxation would take place in the business activity income category. The Swedish Tax Agency also decided to impose on him employer contributions and hold him liable for non-withheld tax as a consequence of the payments which had been made to other persons who participated in the activity.
3. AA appealed to the Administrative Court in Linköping. He asserted a number of formal objections to the decision of the Swedish Tax Agency including, among others, that the investigation conducted by the Swedish Tax Agency

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was flawed. Substantively, he asserted objections in principle against taxing criminal activities. He also had a number of other objections to taxation.

4. The administrative court, which did not examine the formal objections, overturned the decision of the Swedish Tax Agency in its entirety. As regards income tax, the administrative court stated that, in this case, there was no cause to depart from the main rule pursuant to legal precedent according to which criminal activities are not taxable and that the Swedish Tax Agency thus did not have justification for taxing AA in the business activity income category. As a consequence of the court's position on the question of income taxation, the administrative court further found that the Swedish Tax Agency also did not have justification for imposing on AA employer contributions or to hold him liable for non-withheld taxes.
5. As regards the question whether the activity conducted gave rise to tax liability for value added tax, the administrative court – by reference to precedent from the European Court of Justice – made a comparison between the activity conducted by AA and a legal activity which supplies services the purpose of which is to improve the customers' possibilities to achieve better results on the Swedish Scholastic Aptitude Test. The administrative court made the assessment that the activities were so different in character that they could not be deemed to be in competition with one another and that the activity conducted by AA thus did not give rise to tax liability for value added tax.
6. The Swedish Tax Agency appealed to the Administrative Court of Appeal in Jönköping. The administrative court of appeal overturned the judgment of the administrative court in those respects which pertain to income tax, employer contributions and liability for non-withheld taxes and remanded the cases to the administrative court for new proceedings in these respects. The administrative court of appeal affirmed the administrative court's judgment in that respect which pertained to value added tax.
7. The administrative court of appeal asserted the following on the question of income taxation. HFD 2011 reported case no. 80 may be understood to be an

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expression of the principle that criminal activities are to be assessed in the same manner as legal activities as regards issues of tax liability and the demarcation of income category. Nor are there any other principal impediments to taxation in the current case.

### **CLAIMS, ETC.**

8. *The Swedish Tax Agency* claims that the decision of the Agency, in so far as pertains to value added tax, is to be affirmed but is to take into account the reductions of the amounts stipulated to by the Swedish Tax Agency in the administrative court of appeal as a consequence of legally binding decisions regarding confiscation.
9. AA claims that the judgment of the administrative court is to be affirmed. In the alternative, he claims that the Supreme Administrative Court is to declare that the income from the relevant activity is not taxable in the business activity income category.
10. Each party contest the modification claims made by the other party. The Swedish Tax Agency further claims that, if the criteria for business activity are not deemed to be fulfilled, the income is to be taxed in the employment income category.

### **REASONS FOR THE RULING**

#### **The question in the Supreme Administrative Court**

11. The question addresses the conditions under which criminal activities are to be subject to income tax and value added tax.

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

##### *Income tax*

12. Pursuant to Chapter 13, section 1, first paragraph of the Income Tax Act (1999:1229), income and expenses arising from business activities are

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classified as income from business activities. *Business activities* according to that paragraph refer to gainful activities conducted professionally and independently.

13. Chapter 10, section 1, first paragraph states that the employment income category includes income and expenses arising from employment to the extent they are not included in the business activity or capital income categories. According to the second paragraph, *employment* means employment, assignment and other income-generating activities of a permanent or temporary nature.

*Employer's contributions and liability for non-withheld tax*

14. Pursuant to Chapter 2, section 1, first paragraph of the Social Insurance Contribution Act (2000:980), anyone who pays compensation subject to contributions shall pay employer contributions. Section 10 states that salaries and other compensation for work are subject to tax.
15. According to Chapter 10, section 2, first paragraph of the Tax Procedures Act (2011:1244), anyone who pays compensation for work shall withhold tax. Chapter 59, section 2 states that the Swedish Tax Agency may decide that anyone who has paid compensation without withholding the correct amount of tax must pay the amount that should have been withheld.

*Value added tax*

16. On 1 July 2023, the Value Added Tax Act (2023:200) entered into force. However, it follows from the transitional provisions of the act that the previous Value Added Tax Act (1994:200) is applicable to the circumstances in the cases.
17. According to Chapter 1, section 1, first paragraph (1) of the 1994 act, value added tax shall be paid on such domestic supply of services as is taxable, and payment is made by the taxable person in that capacity. Comparable provisions are found in Chapter 3, section 1 (3) of the 2023 act and in Article 2.1 (c) of the Value Added Tax Directive (2006/112/EC).

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

#### *Income tax, employer contributions and liability for non-withheld tax*

18. There is no statutory provision by which income from criminal activities is precluded from being subject to tax.
19. The relevant activity in the cases has consisted in its entirety of helping persons cheat on the Swedish Scholastic Aptitude Test in exchange for payment. In RÅ 1991 reported case no. 6, the Supreme Administrative Court found that an activity which was based on criminal offences in its entirety did not constitute activity subject to income tax. The activity in question consisted of the sales of misappropriated oil, and the income was to be referred to the prior business income category, which pertained to business activity which was conducted professionally, i.e. was distinguished by independence, a certain regularity and permanence and, as a rule, for profit purposes.
20. The Supreme Administrative Court stated the following in the case. As regards an activity which is entirely based on criminal offences, it is to be kept in mind that the proceeds of criminal offences pursuant to the Swedish Criminal Code are to be confiscated where such is not obviously unreasonable. Accordingly, viewed objectively, an activity which is exclusively based on criminal offences may not be deemed to result in a profit according to the Swedish Criminal Code.
21. In that case, legislation was applied which has long been repealed. Accordingly, an examination must be carried out as to whether the statement by the Supreme Administrative Court in that case is still valid.
22. As regards taxation in the business activity income category pursuant to the Income Tax Act, there is – in the same manner as in the older regime – a requirement of a profit purpose in order for the income from an activity which is conducted by a natural person to be able to be taxed.

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23. In addition, it may be noted that the purpose of the confiscation rules remains the neutralisation of the gains from the criminal activity (*cf.* Government Bill 2023/24:144, p. 238).
24. With reference to the aforementioned, the Supreme Administrative Court finds that what is stated in the case continues to apply in respect of the conditions for taxing physical persons in the business activity income category.
25. On the other hand, the case no longer provides any guidance on the question of what is to be applied in taxing income from criminal activity in the employment income category. The demarcation of the income category has changed in such a manner that, among other things, even a permanent activity without a profit purpose can currently be taxed in the income category.
26. There is also a ruling from the Supreme Administrative Court which specifically has in view taxing income from criminal activities in the employment income category. In HFD 2022 reported case no. 80, a person had been sentenced to prison for, among other things, having prepared false invoices for some companies. The income from the activity was taxed as income from employment. The Supreme Administrative Court noted that, since the income was not exempted from tax in accordance with any provision in the Income Tax Act, it was subject to tax. The fact that it was a question of income from criminal activities accordingly did not preclude taxation.
27. Such activity which is now at issue in the current cases was criminalised on 31 August 2016 (*cf.* Regulations [Statute Book of the Swedish Council for Higher Education 2016:4] amending the Statute Book of the Swedish Council for Higher Education [Statute Book of the Swedish Council for Higher Education 2015:3] regarding the Swedish Scholastic Aptitude Test). Commencing on that date, a test taker who cheats can be guilty of making an untrue affirmation pursuant to Chapter 15, section 10 of the Swedish Criminal Code, and a person who aids such person in cheating or, expressed another way, promotes the act, may be guilty of aiding the making of an untrue affirmation. The proceeds of

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the offense shall, according to the Swedish Criminal Code, be declared confiscated where such is not obviously unreasonable.

28. The Swedish Tax Agency's decision pertains to the 2015–2017 tax years. In light of the above, the Supreme Court finds that, for the period during which the activity was criminalized, no profit purpose in the activity can be deemed to exist and, accordingly, the income did not constitute income from business activities. With this assessment, the fact that the income from the activity may have been greater than the value of that confiscated by a general court is not relevant. It can be observed in this context that there are no conditions for taxation in the business activity income category of income from activities for the period of time commencing and including 31 August 2016.
29. According to the Swedish Tax Agency, however, the income from the activities is, in any event, to be taxed in the employment income category.
30. It is apparent from paragraph 26 that the fact that what is involved is income from criminal activities does not preclude taxation in the employment income category. However, AA has asserted other objections to taxation in that income category. These objections should not be examined by the Supreme Administrative Court as the court of first instance. The same applies to the formal objections which AA has had to the decision of the Swedish Tax Agency and the question regarding taxation for the period of time when the activity was not criminalised.
31. As found by the Supreme Administrative Court, the cases shall thus be remanded to the administrative court for new proceedings pertaining to the questions regarding income tax, the imposition of employer contributions and liability for non-withheld tax.

*Value added tax*

32. Neither the Value Added Tax Act nor the Value Added Tax Directive contain any exemption from tax for illegal activities. In accordance with settled case law from the European Court of Justice, furthermore, it is apparent that the

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principle of fiscal neutrality precludes any general distinction between lawful and unlawful transactions as regards the levying of VAT (see, for example, *The Rank Group*, C-259/10 and C-260/10, EU:C:2011:719, para. 45, and case law therein). Exemption from taxation may only arise in special situations in which all competition between a lawful economic sector and an unlawful sector is precluded owing to the special characteristics of certain goods or services (*Salumets et al.*, C-455/98, EU:C:2000:352, para. 19). The European Court of Justice has only made exceptions for counterfeit bills and narcotics.

33. As stated in paragraph 27 above, the supply of assistance in cheating on the Swedish Scholastic Aptitude Test was criminalised on 31 August 2016. In the view of the Supreme Administrative Court, this service does not possess a special characteristic by which all competition with a legal economic sector is precluded.
34. Accordingly, the Supreme Administrative Court finds that the conditions are not present to exempt the activity from liability for value added taxation by reference to the unlawful character of the activity. The rulings of the administrative court of appeal and the administrative court shall accordingly be overturned in those respects they pertain to value added tax, and the cases in those respects shall be remanded to the administrative court for examination of AA's other objections to the decision of the Swedish Tax Agency.

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Justices Kristina Ståhl, Per Classon, Mahmut Baran, Leif Gäverth (dissenting opinion) and Magnus Medin have participated in the ruling.

Judge Referee: Emelie Liljeberg.



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### **DISSENTING OPINION**

Justice Leif Gäverth dissents as regards taxation for the period of time after the relevant activity was criminalised and, in that respect, is of the opinion that the appeal of the Swedish Tax Agency is to be rejected and AA's appeal is to be granted and states the following.

1. It follows from settled case law that, where goods or services are supplied in contravention of special provisions or in the absence of necessary permits, and the supply is carried out by means of an otherwise permissible activity, the income therefrom is, as a rule, taxable.
2. Examples of cases in which goods have been sold in an existing business in contravention of certain provisions or in the absence of necessary permits and taxation has taken place include RÅ 1947 case notice no. Fi 1008 and RÅ 1949 case notice no. Fi 1113. Taxation has also occurred when a trader, within the context of such trader's business, has prepared false invoices on behalf of a customer and been found guilty of untrue certification and aiding tax fraud (RÅ 1988 reported case no. 69). In RÅ 2005 reported case no. 14, the Supreme Administrative Court was to decide whether the conditions were present in order to tax a taxi business which was operated without the necessary permits. The Court found that the business met the criteria for business operations and the fact that permits were lacking did not mean that the income was tax-free.
3. In a comparable manner, taxation has occurred in the income category relating to the temporary pursuit of economic activities when shares, in contravention of currency provisions, were conveyed out of the country and sold (RÅ 1965 case notice no. Fi 2053 and RÅ 1968 case notice no. Fi 209).

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4. The purport of the case law which has long applied is set forth in the statements of the Supreme Administrative Court in RÅ 1991 reported case no. 6. That case involved a person who had stolen oil from his employer which he, in turn, sold but without conducting any business in which the sale of oil could be included as part. He had been taxed by the lower courts for the profit as business income. The Supreme Administrative Court reversed the assessment and stated that criminal activities as such cannot constitute a source of gain. In addition, the Court stated that, had the criminal activity been part of a legal activity on the other hand, there might be cause to regard the income therefrom as taxable.
5. In RÅ 1992 case notice no. 327, in which a person who worked as a volunteer for an association had embezzled funds from it, and in RÅ 1987 case notice no. 184 in which an employee had embezzled funds from such employee's employer, the embezzled amounts were taxed in the employment income category by the lower courts. The Supreme Administrative Court found, however, as in RÅ 1991 reported case no. 6, that taxation was not to take place since the embezzled funds were not deemed to be taxable.
6. In those cases in which the income from unlawful activities has been taxed, a deduction has been granted as a rule for the amount declared confiscated.
7. The majority raises, among others, HFD 2011 reported case no. 80 in support of the notion that income from criminal activities may currently be taxed in the employment income category (see paras. 26 and 30 above). The case involved a person who, through various companies, had issued untrue invoices to a limited company which conducted construction operations. The invoices were expensed by the recipient company for the purpose of freeing up funds to pay undeclared wages. He was sentenced for aiding gross accounting offences and aiding gross tax offences. He received certain compensation for his participation for which he was taxed as employment income.

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8. In my view, the ruling in HFD 2011 reported case no. 80 falls within the principles expressed by the Supreme Administrative Court in RÅ 1991 reported case no. 6. In a manner comparable to that in RÅ 1988 reported case no. 69, it involved the preparation of false invoices in the context of a legal business for the purpose of evading taxes and contributions.
9. The majority further draws attention to the fact that the Supreme Administrative Court stated in RÅ 1991 reported case no. 6 that the confiscation provisions in the Swedish Criminal Code normally give rise to a situation in which the criminal activity, viewed objectively, cannot be regarded as leading to a profit. This circumstance would then constitute grounds for taxation not occurring in the business activity income category (see paras. 20 and 24 above). On the other hand, the majority reaches the conclusion that the case can no longer be adduced in support of the notion that taxation cannot occur in the employment income category since that income category is devoid of a requirement of profit purpose for taxation (see para. 25).
10. On the other hand, it may be objected that taxation in such case should also not be able to occur in the employment income category where there are grounds for confiscation since *employment* is defined as employment, assignment and other income-generating activities of a permanent or temporary nature (Chapter 10, section 1, second paragraph of the Income Tax Act). A confiscation should, viewed objectively, lead to the illegal activity not being deemed to be “income-generating”.
11. The Supreme Administrative Court’s above-mentioned statement in RÅ 1991 reported case no. 6 thus remains relevant when taxation of criminal activities is involved. The fact that the employment income category underwent a certain limited expansion in conjunction with the 1990 tax reform, primarily in that so-called hobby income became subject to tax (Government Bill 1989/90:110 p. 305 ff.), leads to no other judgement.

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12. My conclusion is thus that AA is not liable to tax for income tax for the period after the relevant activity was criminalised on 31 August 2016 (see, above, para. 27), but that liability to tax exists for the period of time prior thereto. The issue of employer contributions and liability for non-withheld tax can be assessed in a comparable way.
13. As regards the issue of whether the activity conducted is liable to value added tax, I make the same assessment as the administrative court and administrative court of appeal for the period of time after 31 August 2016. It has not come to light that there has been, or could have been, any legal activity which could have competed with the activity conducted under the HP-hjälpen designation.