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In cases no. 5599-23 and 5600-23, **AA** (Appellant) v. the **Swedish Tax Agency** (Respondent), the Supreme Administrative Court delivered the following judgment on 14 June 2024.

RULING OF THE SUPREME ADMINISTRATIVE COURT

The Supreme Administrative Court grants the appeal in part and reduces the tax surcharges to half of the amounts following from the ruling of the administrative court.

The Supreme Administrative Court grants AA compensation for costs incurred in the Supreme Administrative Court in the amount of SEK 36,000.

BACKGROUND

1. A person who has provided incorrect information for the purposes of such person's tax assessment may be liable to pay tax surcharges. Where it is unreasonable to charge tax surcharges in the full amount, the Swedish Tax Agency shall take a decision regarding a whole or partial exemption. In conjunction with the determination of whether such charge is unreasonable, consideration shall be given, *inter alia*, as to whether an unreasonably long period of time has elapsed since the Swedish Tax Agency found cause to assume that a tax surcharge is to be imposed where the person to whom the fine applies cannot be blamed for the delay.

2. The Swedish Tax Agency determined that horse-related activity conducted by a company in which AA was an active partner during the 2016 and 2017 tax years did not constitute economic activity since that part of the company's operations had not been conducted professionally for the purpose of gain. The Swedish Tax Agency was of the opinion that the company's expenses in the horse-related activity were to be regarded as her earned income.

3. The Swedish Tax Agency further decided to impose tax surcharges on the basis that AA had provided incorrect information regarding her income during the aforementioned tax years. The bases for the tax surcharges were determined to be SEK 396,497 for 2016 and SEK 647,273 for 2017.

4. AA appealed to the Administrative Court in Stockholm which, in a judgment of 24 August 2020, reduced the bases for the tax surcharges by SEK 12,938 for 2016 and by SEK 229,990 for 2017.

5. The Administrative Court of Appeal in Stockholm rejected AA's appeal on 10 July 2023. In conjunction with its examination, the administrative court of appeal considered whether exemption from the tax surcharges was to be granted as a consequence of the long processing time at the administrative court of appeal and found that the conditions for exemption were not fulfilled.

CLAIMS, ETC.

6. *AA* claims that she should be completely exempted from the imposed tax surcharges. She further claims compensation for costs incurred in the Supreme Administrative Court in the amount of SEK 41,625.

7. *The Swedish Tax Agency* is of the opinion that the appeal is to be rejected and states that the cases have been complex in nature and that a part of the delay was due to AA's actions. At her request, the cases were stayed during a period of time, and this delay cannot be attributed to the public. In the event an exemption is granted, the Swedish Tax Agency is of the opinion that it should be set at a fixed amount of SEK 20,000.

REASONS FOR THE RULING

The question in the cases

8. The question in the cases is whether the processing of decisions regarding tax surcharges has been delayed so long that there is reason for exemption from the tax surcharges and, if such is the case, how the exemption is to be determined.

Legislation, etc.

9. Chapter 51, section 1, first paragraph of the Tax Procedures Act (2011:1244) provides that the Swedish Tax Agency shall take a decision regarding complete or partial exemption from tax surcharges where it is unreasonable to charge the tax surcharge in the full amount. In conjunction with the determination, consideration shall, pursuant to the second paragraph (3), be given in particular as to whether an unreasonably long period of time has elapsed since the Swedish Tax Agency found cause to assume that tax surcharges shall be charged where the person to whom the tax surcharge applies cannot be blamed for the delay.

10. The regime in Chapter 51, section 1 of the Tax Procedures Act is to be interpreted in the light of Article 6(1) and Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (*cf*. Government Bill 2002/03:106, p. 243). Article 6(1) states that, in the determination of any criminal charge, everyone is entitled to a fair and public hearing within a reasonable time and, in accordance with Article 13, everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority.

11. In several cases, the European Court of Human Rights has stated certain criteria which should be taken into account in conjunction with the determination of whether protracted processing by the courts has entailed violation of Article 6(1). In such context, consideration shall be given to the complexity of the case, the number of instances in which the case has been addressed, the manner in which the courts and authorities have handled the case, the contribution if any by the applicant to the delay and what is at stake for the applicant (see, for example, the judgment of the European Court of Human Rights of 27 June 2000 in the case *Frydlender v. France*, paragraph 43). As regards the processing, consideration shall be given in particular as to whether there have been any prolonged periods of inactivity (judgment of the European Court of Human Rights of 6 February 2007 in the case *Wassdahl v. Sweden*, paragraph 32).

The Court's assessment

Has an unreasonably long period of time elapsed?

12. The period of time to be examined commenced when AA received the Swedish Tax Agency's proposed decisions in May 2018. The cases have been processed in four judicial instances, and the total processing time to date has amounted to approximately six years. Taking into account the lengthy series of judicial instances, this period of time cannot be deemed to be unreasonably long. However, there is reason to examine more closely the processing time in the administrative court of appeal, which amounted to slightly more than two years and eight months.

13. At the request of AA, the cases in the administrative court of appeal were stayed pending a ruling from the Supreme Administrative Court in which the

company was a party. Processing was reinstated after seven months. When communications subsequently ceased, a period of one year and seven months elapsed before the administrative court of appeal issued its judgment. It may be gleaned from the judgment of the administrative court of appeal that the court had worked with the cases for a period of three months during this time and that other time pertained exclusively to down time.

14. The stay itself appears to be well justified, and the time during which the cases were stayed is not remarkably long. Processing in the cases was reinstated when the reason for the stay ceased. Thus far, there is no reason to criticise the administrative court of appeal's processing time. However, following cessation of the communications, one year and seven months elapsed before the administrative court of appeal issued its judgment and, during this period of time, it was only for a period of three months during which there was any activity in the cases.

15. The cases may be said to have been relatively complex in nature and concerned, *inter alia*, the manner in which the company's activity is to be classified, either as a hobby or as economic activity. However, the complexity of the cases is no acceptable explanation why the processing of the cases stopped for such a long period of time as was the case. In addition, the cases involved amounts which were material to AA.

16. The Swedish Tax Agency has pointed out that AA did not take the opportunity to request a declaration of precedence in the administrative court of appeal in accordance with the Declaration of Precedence Act (2009:1058), and that part of the delay may thereby be deemed to be self-inflicted. In the view of the Supreme Administrative Court, the fact that an individual does not request a declaration of precedence is not something which releases the court from its

responsibility for the processing of the case. The fact that AA did not request a declaration of precedence is thus irrelevant in the context.

17. The Supreme Administrative Court is of the opinion that the administrative court of appeal's delay may be deemed to have persisted up to, in any case, one year and, furthermore, that this delay entailed that at the time of the judgment of the administrative court of appeal an unreasonably long period of time had elapsed after the Swedish Tax Agency found cause to assume that tax surcharges would be charged.

How is the exemption from tax surcharges to be determined?

18. According to the Swedish Tax Agency, the exemption question is linked to the procedural safeguards enumerated in the European Convention, and exemption should thus not be granted in an amount exceeding that equal to the compensation AA would receive in tort proceedings as a consequence of a Convention infringement.

19. The Swedish Tax Agency has adduced the Supreme Court's ruling in case NJA 2012, p. 1038 I. It is stated therein that mitigation of a sanction as a compensatory legal remedy in conjunction with an infringement of rights should be in reasonable proportion to damages as such legal remedy and, when the sanction is comprised of fines, the court shall accordingly strive to mitigate the pecuniary penalty such that, as regards the defendant, it would not have made any great difference if he had instead received compensation in the form of damages (paragraphs 22 and 32).

20. The Supreme Court's statement thus pertains to mitigation of a sanction as compensation for a rights infringement. The Court states that this is a form of compensation beside the penal sanction system, and the mitigation does not

rest on penal grounds but, rather, on Convention law and, in the absence of such compensatory legal remedy, Sweden would have committed a Convention violation (paragraphs 19 and 20).

21. The Swedish Tax Agency has also referred to HFD 2014 reported case no. 12 which addresses a waiver of the requirement to repay erroneously disbursed sickness allowance. This case also examined the question of waiver due to protracted processing based on Convention law. By reference to case NJA 2012, p. 1038 I, the Court emphasises that a waiver made for the purpose of making amends to an individual for a Convention infringement is to be distinguished from a waiver made on the basis of express provisions in Swedish law.

22. The current cases concern an application of the rules of the Tax Procedures Act regarding exemption from tax surcharges and not compensation for a Convention infringement. The Supreme Administrative Court thus turns to the question of whether there is cause, pursuant to that act, to grant exemption from tax surcharges.

23. The provision regarding exemption from tax surcharges due to unreasonably long processing time was implemented through legislation in 2003 in the then applicable Taxation Act from 1990. At the same time, a possibility was implemented to reduce the tax surcharge to one-half or one-fourth; previously, exemption could apply only to the entire tax surcharge. The preparatory works state that the tax surcharge in the case of an unreasonably long processing time should, as a main rule, be reduced by half (Government Bill 2002/03:106, p. 240).

24. When the Tax Procedures Act was promulgated, the fixed levels for partial exemption from tax surcharges were abolished. The preparatory works provide that the purpose was to create greater freedom to determine the amount of the tax surcharge in conjunction with partial exemption. However, it was emphasised that, even if the levels in the statutory text were abolished, fixed bases must exist for various typical cases and it was thus necessary that certain standards were established. In other cases, there would be a risk that the nuancing would be carried so far that it would result in a lack of uniformity in case law. According to the government, exemption at the then applicable levels entailed in most cases a reasonable nuancing. In such cases, a partial exemption would continue to be granted in the amount of one-half or one-fourth (Government Bill 2010/11:165, part 1, p. 477).

25. Nothing can be gleaned from the preparatory works for the Tax Procedures Act other than that the statement regarding the reduction to some of the earlier, fixed levels was intended to apply to all grounds for exemption, i.e. also those dealing with unreasonably long processing time. There is nothing to suggest that it was intended that the extent of the exemption in such situation would be determined in some other manner, e.g. guided by case law applicable to damages in conjunction with a Convention infringement. Furthermore, nothing is said which contravenes the previously stated main rule according to which reduction by half for unreasonably long processing time is to continue to serve as guidance.

26. In the event the tax surcharge in an individual case is not sufficiently high that halving it would be less than what the individual is entitled to as damages for a Convention infringement, the tax surcharge should be reduced further and possibly waived in its entirety. In other cases, the individual would need to

initiate yet a further proceeding in order to be able to obtain full compensation for the protracted processing (*cf.* HFD 2014 reported case no. 12).

27. In summary, the Supreme Administrative Court finds that the tax surcharges are to be reduced by half. The administrative court has, for reasons other than those as are currently relevant, reduced the tax surcharges by certain amounts, and the reduction shall therefore proceed on the basis of the tax surcharges that remain following the judgment of the administrative court (*cf.* HFD 2014 reported case no. 12).

Compensation for costs

28. AA has received a partial grant of her appeal. The cases pertain, furthermore, to a question which is of importance for the guidance of the application of law. Accordingly, she is entitled to reasonable compensation for her costs of counsel incurred in the Supreme Administrative Court.

29. AA has claimed compensation for costs of counsel incurred in the Supreme Administrative Court in the amount of SEK 41,625, including VAT, for 9.25 hours' work.

30. It is apparent from the first claim for compensation submitted that part of the claimed compensation relates to a review of the judgment of the administrative court of appeal, which is not compensated in the Supreme Administrative Court (HFD 2023 reported case no. 47). In a subsequent submission, AA has claimed compensation for one hour's work in developing the reasons why she should receive compensation for a review of the judgment of the administrative court of appeal. Such question is not relevant for the guidance of the

application of law and thus there is no reason to provide her compensation for such cost either.

31. Otherwise, the claimed compensation is reasonable. Accordingly, AA shall be granted compensation in the amount of SEK 36,000, equivalent to eight hours' work.

Justices Helena Jäderblom, Margit Knutsson, Leif Gäverth (dissenting opinion), Mats Anderson and Martin Nilsson have participated in the ruling.

Judge Referee: Emelie Liljeberg.

Case no.
5599-23
5600-23

DISSENTING OPINION

Justice Leif Gäverth dissents as regards the question of how AA shall be compensated because she was subjected to an unreasonably long delay in the processing of the cases in the administrative court of appeal and states the following.

1. AA's right to a trial within a reasonable time has been disregarded as a consequence of the delay of the administrative court of appeal in the processing of the cases. In light of the fact that it is the long processing time itself which constitutes the violation of the right to trial within a reasonable time, the gravity of the violation is not, in principle, affected by the amount of the tax surcharge imposed on her.

2. The compensation which may be involved for the violation to which AA has been subjected constitutes a form of non-pecuniary damages. The loss should be valued from her perspective, and the compensation should be in proportion to the gravity of the violation (*cf.* Government Bill 2017/18:7, pp. 40 and 65; *cf.* also Government Official Report 2010:87, pp. 190 and 407).

3. Where someone has been subjected to a Convention infringement, e.g. having been denied the right to a trial within a reasonable time, the compensation shall be provided in the relevant case where possible (*cf., inter alia,* Government Bill 2017/18:7, p. 13 and HFD 2014 reported case no. 12). When the case relates to an imposed tax surcharge, it is generally fully possible to grant compensation within the context of that case. As regards tax surcharges, there is a particular provision thereon in Chapter 51, section 1, second paragraph (3) of the Tax Procedures Act. The issue is then one of reducing the tax surcharge.

4. In the event it is the delay in processing of a case concerning tax surcharges which constitutes the violation forming the basis of damage, a compensation model which is exclusively based on the reduction of a tax surcharge by a certain per cent or share, e.g. half, entails that a person on whom a high tax surcharge is imposed is awarded greater compensation than a person on whom, in an otherwise similar situation, a lower tax surcharge is imposed. In other words, a higher amount of tax avoidance affords greater compensation than a lower amount of tax avoidance. It may be questioned whether such a difference in the level of the compensation is acceptable from a justice perspective. Such a model may even be perceived as nearly offensive (*cf*. Government Bill 2017/18:7, p. 39).

5. The same objection to such a model may be asserted in cases where a very high tax surcharge has been imposed on a person who suffered a shorter, but nonetheless unreasonable, delay in the processing while someone else on whom a lower tax surcharge has been imposed has suffered a much more lengthy delay. The compensation to these two persons will differ in that the former will be compensated in a greater amount than the latter notwithstanding that the latter has been subjected to a more serious violation. The compensation to the individuals will not primarily be due to the gravity of the violation in this example either, which raises misgivings.

6. If such a model was also applied in respect of sanction charges, which are also comparable to penalties within the meaning of the European Convention (see, for example, Government Official Report 2014:46, pp. 191 ff.) and which may vary between a few thousand Swedish kronor and up to hundreds of millions of Swedish kronor, the aforementioned differences in amounts of compensation would be even greater.

7. It is true that the legislature has stated that, in conjunction with exemption from tax surcharges as a consequence of protracted processing, the tax surcharge should, as a main rule, be reduced by half (Government Bill 2002/03:106, p. 240). This statement was made, however, in connection with the legislature nuancing the rules regarding exemption from tax surcharges in such a way that tax surcharges could be reduced to one-half or to one-fourth in lieu of, as previously, when the only alternatives were full tax surcharge or total exemption in conjunction with incorrect information or discretionary taxation.

8. As regard the unreasonably long processing time as grounds for exemption, it was implemented for the purpose of better aligning the tax surcharge system with the requirements of the European Convention for trial within a reasonable time (Government Bill 2002/03:106, pp. 82 f. and 145 f.). However, prior thereto, the Supreme Administrative Court had stated that such a possibility was available within the framework of the exemption rules pursuant to the European Convention (see RÅ 2000 reported case no. 66 I).

9. In conjunction with the promulgation of the Tax Procedures Act in 2011, the fixed levels for exemption from tax surcharges were removed. The purpose was to achieve greater flexibility in the application of the exemption rules. In order to achieve a reasonable result, it was believed that there was a need in certain cases to be able to reduce a particular tax surcharge to a level other than the two fixed levels. The legislature also sought to bring the grounds for exemption regarding tax surcharges in line with the rules regarding exemptions from customs surcharges in respect of which there were no fixed levels (Government Bill 2010/11:165, part 1, p. 477).

10. In my view, the aforementioned may be understood such that, in conjunction with exemption from tax surcharges as a consequence of protracted processing,

there is no express impediment to reducing the tax surcharge to an amount other than that which previously followed from the fixed levels. As I see the matter, the court is free to award the individual a well-balanced compensation by reducing the tax surcharge by an amount which is in proportion to the delayed processing.

11. In addition, this basis for exemption from tax surcharges – protracted processing – differs from other grounds for exemption which are related either to circumstances concerning the taxpayer or circumstances pertaining to the incorrect information. In my view, this entails that, as regards protracted processing, a certain freedom should exist in relation to the manner in which the exemption rules are handled concerning other bases for exemption.

12. In the determination of the amount of the compensation in the form of reduced tax surcharges – the non-pecuniary damage – payable in conjunction with a violation of the right to trial within a reasonable time, there is cause to take into account the manner in which such compensation has been determined in other similar contexts. The closest for comparison is the decisions of the Office of the Chancellor of Justice regarding damages in conjunction with unreasonably long processing time, the manner in which the Supreme Court has handled similar issues, and the case law which has evolved through rulings from the European Court of Human Rights (*cf.* case NJA 2012, p. 211 I, paragraph 18, case NJA 2012, p. 1038 I, paragraph 12 and Government Bill 2017/18:7, pp. 36 f. and 66).

13. A decisive reason for selecting this model in lieu of that supported by the majority is that the compensation awarded to the individual as a consequence of a violation of the right to a trial within a reasonable time will not be directly contingent upon the amount of the sanction imposed but, rather, will instead be

dependent on the gravity of the violation and the damage which the individual has thereby incurred. The amount of the compensation is then limited only by the amount of the tax surcharge. In those cases in which this is not deemed to provide sufficient compensation, the taxpayer may request additional compensation by turning to the Office of the Chancellor of Justice or bringing an action for damages in a general court.

14. Against this background and taking into account the precedence which has been developed by the Office of the Chancellor of Justice and the Supreme Court subject to certain influence from the legal developments within the European Court of Human Rights (see, also, HFD 2014 reported case no. 12), I find that the compensation awarded to AA for the violation should consist of a reduction of the imposed tax surcharge of SEK 15,000.