EU AND INTERNATIONAL TAX COLLECTION NEWS

2014 - 1

Why this newsletter ?

At its meeting on 26 February 2014, the Steering group of Fiscalis project group (FPG) 080 discussed the possibilities to improve the way information about tax collection and recovery issues is shared with and within tax administrations. It was observed that the results of seminars, workshops and project groups, organised at EU level, could be shared on a larger scale within the administrations. More information should be made accessible to more tax officials involved in tax collection and enforcement, and this information should be made available for a longer period of time, on a more permanent basis. It also appears wishful to have a better exchange of useful information on national measures and developments in this field, as these experiences may also be relevant for other countries.

Under these circumstances, the FPG 080 Steering group members decided to launch a newsletter. Its purpose is to inform national officials – and other parties concerned – about developments in the EU and the international tax community with regard to issues related to tax collection, including national tax enforcement and international recovery assistance.

Providing information which is tailored to the needs and interest of tax officials dealing with tax collection and other people involved, it is intended to bring an added value to existing information and communication channels.

No regular periodicity has been foreseen for this newsletter. It will only be distributed if and in so far as there is something to be reported.

Contents

EU activities

Fiscalis project group 080 – Best practices in tax collection – Fiscalis Conference Porto (PT)

On 27 February 2014, the Steering group of Fiscalis Project Group 080 had its eighth meeting, to discuss the preparation of the 2014 reports of this project group.

These reports will include the following topics:
- cost-effective way of dealing with small claims (including direct debiting);
- transfer of information between tax audit and tax recovery services;
- the effect of horizontal monitoring and certification practice with regard to collection and recovery of taxes;
- dissuasive measures;
- how to avoid notification problems caused by absence of information about address changes of the debtor (in purely national situations)?
- insolvency issues.

The reports will be presented and discussed at a Fiscalis conference in Porto (PT) in October 2014.

Fiscalis project group 088 – Central platform for e-forms for mutual recovery assistance

On 28 February 2014, Fiscalis Project Group 088 held its fourth meeting to discuss the e-forms Central Application.

This central application for all electronic forms relating to mutual tax recovery assistance, and administrative cooperation in the field of VAT and other taxes, is expected to go live in 2016. The central application will allow to avoid the national implementation burden for future releases.

This new step in the development of the electronic forms should also allow to improve the presentation of the recovery request forms and the uniform instruments, on the screen as well as on paper.

Fiscalis working visit Helsinki (FI) – Best practices in tax collection

From 10 to 15 March 2014, the Finnish authorities hosted a Fiscalis working visit on tax collection practices.

Commission Recommendation on a new approach to business failure and insolvency

On 12 March 2014, the Commission published a recommendation on a new approach to business failure and insolvency (document C(2014)1500). The recommendation sets out a series of common principles for national insolvency procedures for businesses in financial difficulties. The objective is to shift the focus away from liquidation towards encouraging viable businesses to restructure at an early stage so as to prevent insolvency.
The recommendation also pays attention to the specific issue of tax recovery.

Point 14 of the preamble mentions that: *"Tax authorities also have an interest in an efficient restructuring framework for viable enterprises. In implementing this Recommendation, Member States should be able to take appropriate measures to ensure the collection and recovery of tax revenues respecting the general principles of tax fairness and to take efficient measures in cases of fraud, evasion or abuse."*

Point 4 of the recommendation mentions that: *"When implementing this Recommendation,*

Member States should be able to take appropriate and efficient measures to ensure the enforcement of taxes, in particular in cases of fraud, evasion or abuse."

Other activities

IOTA

On 5-7 March 2014, the IOTA area group on debt management met in Lisbon (PT) to discuss measures helping to promote voluntary payment of tax debts. This meeting focused on tax debt payment support services (offering flexibilities concerning the payment of tax debts and payment arrangements).

OECD

On 10-13 March 2014, the OECD Forum on Tax Administration held a workshop "Working smarter in tax debt management", in Amsterdam (NL).
A best practices report will be issued later this year.

EU – Use of the recovery assistance framework (statistics)

The following tables present an overview of the use of the tax recovery assistance framework offered by Council directive 2010/24/EU (and by the previous directives 76/308/EEC and 2008/55/EC) in the period 2003-2012.

The numbers of the requests are the numbers of the requests received by EU Member States.

Note: these statistics are based on annual reports of all EU Member States. When comparing these figures, it should be taken into account that the number of EU Member States has grown significantly since 2003, and that the conditions for requesting recovery assistance have been changed under the new Directive 2010/24/EU.

	Requests for information received	Requests for notification received
2003	435	123
2004	727	182
2005	1488	654
2006	1730	953
2007	2026	1325
2008	1889	1974
2009	2259	1946
2010	2975	1284
2011	3218	1284
2012	6081	1323
2013	8250	2066

	Presence of officials from other Member States	Presence of officials in other Member States
2012	0	0
2013	0	0

Note: "Presence of officials of one Member States in another Member State" is a new form of recovery assistance. It was only introduced in 2012 (Art. 7 of Council directive 2010/24/EU).

	Requests for precautionary measures received	Requests for recovery received
2003	no statistics available	2797
2004		3735
2005		6327
2006		7041
2007		8443
2008		8221
2009		6575
2010		8587
2011	34	9566
2012	51	7661
2013	102	10391

	Recovered via requests to other Member States in €
2003	6.363.483
2004	6.752.569
2005	19.746.635
2006	40.017.086
2007	30.736.296
2008	39.534.200
2009	31.212.023
2010	41.702.967
2011	62.475.879
2012	32.076.738
2013	41.115.223

EU Court of Justice case law

EU CJ 23 January 2014 C-164/12, DMC (Germany)

Immediate taxation of unrealised capital gains – Restriction on free movement of capital – Preserving the balanced allocation of powers to impose taxes between the Member States – Payment by instalment over a period of 5 years – Bank guarantee

In this case, the EU Court of Justice first of all decided that Article 63 TFEU must be interpreted as meaning that the objective of preserving the balanced allocation of the power to impose taxes between Member States may justify the legislation of a Member State which requires assets in a limited partnership contributed to the capital of a capital company with its registered office in the territory of that Member State to be assessed at their value as part of a going concern, thus giving rise to the taxation, before they actually realised, of the capital gains relating to those assets generated in that territory, if it will in fact be impossible for that Member State to exercise its powers of taxation in relation to those gains when they are in fact realised, which is a matter for the national court to determine.

The judgement

With regard to the second question:

59 By its second question, the referring court asks, in essence, whether the legislation at issue in the main proceedings and the restriction it entails go beyond what is necessary to attain the objective of preserving the balanced allocation of the power to impose taxes between Member States, having regard, in particular, to the methods for collecting income tax such as those provided for in Paragraph 20(6) and the third to sixth sentences of Paragraph 21(2) of the UmwStG 1995.

60 It should be noted, at the outset, that it is proportionate for a Member State, for the purpose of safeguarding the exercise of its powers of taxation, to determine the tax due on the unrealised capital gains that have arisen in its territory at the time when its powers of taxation in respect of the investor in question cease to exist, namely, in the present case, at the time when the investor converts his interest in a limited partnership into shares in a capital company (see, to that effect, *National Grid Indus*, paragraph 52).

61 With regard to the collection of the tax due in respect of the unrealised capital gains, the Court has held that it is appropriate to give the taxable person a choice between, first, immediate payment of the amount of tax due on the unrealised capital gains relating to the assets held by that person and, second, deferred payment of that tax, possibly together with interest in accordance with the applicable national legislation (see, to that effect, *Nation Grid Indus*, paragraph 73, and Case C-38/10 *Commission* v *Portugal* [2012] ECR, paragraphs 31 and 32).

62 In that context, in the light of the fact that the risk of non-recovery increases with the passing of time, the ability to spread payment of the tax owing before the capital gains are actually realised over a period of five years constitutes a satisfactory and proportionate measure for the attainment of the objective of preserving the balanced allocation of the power to impose taxes between Member States.

63 In the present case, the combined provisions of Paragraph 20(6) and the third to sixth sentences of Paragraph 21(2) of the UmwStG 1995 enable a taxable person to spread over a period of five years, without being required to pay interest, payment of the tax due in respect of the transfer of the shares which that person holds.

64 Accordingly, by giving the tax payer the choice between immediate recovery or recovery spread over a period of five years, the legislation at issue in the main action does not go beyond what is necessary to attain the objective of the preservation of the balanced allocation of the power to impose taxes between Member States.

65 Lastly, with regard to the requirement to provide a bank guarantee, the Court has held that a Member State may take account of the risk of non-recovery of the tax in the national legislation applicable to deferred payments of tax debts (see, to that effect, *National Grid Indus*, paragraph 74).

66 However, such guarantees in themselves constitute a restrictive effect, in that they deprive the taxpayer of the enjoyment of the assets given as guarantee (Case C-9/02 *Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 47, and *N*, paragraph 36).

67 Therefore, such a requirement cannot, as a matter of principle, be imposed without prior assessment of the risk of non-recovery.

68 In particular, in the main proceedings, it is necessary to assess that risk, inter alia, in the light of the fact that, first, the unrealised gains, which are subject to the contested tax, relate solely to one form of assets, namely shares held by only two companies with their registered office in Austria and, second, that those shares are held in a capital company with its registered office in Germany.

69 Consequently, the answer to the second question is that **the national legislation of a Member State which provides for the immediate taxation of unrealised capital gains generated in its territory does not go beyond what is necessary to attain the objective of the preservation of the balanced allocation of the power to impose taxes between Member States, provided that, where the taxable person elects for deferred payment, the requirement to provide a bank guarantee is imposed on the basis of the actual risk of non-recovery of the tax**.

EU CJ 22 October 2013
C-276/12, Sabou (Czech Republic)

Directive 77/799/EEC - Mutual assistance by the authorities of the Member States in the field of direct taxation - Exchange of information on request - Tax proceedings - Fundamental rights - Limit on the scope of the obligations of the requesting and the requested Member States towards the taxpayer - No obligation to inform the taxpayer of the request for assistance - No obligation to invite the taxpayer to take part in the examination of witnesses - Taxpayer's right to challenge the information exchanged - Minimum content of the information exchanged

Facts of the case

In his income tax return for 2004 in the Czech Republic, Mr Sabou claimed to have incurred expenditure in several Member States with a view to a possible transfer to one of the football clubs in those Member States. That expenditure would have reduced his taxable income.

The Czech tax authorities, however, raised doubts over the truthfulness of that expenditure and carried out an inspection involving requests for information from the tax authorities of some other EU Member States concerned, acting in particular on the basis of Directive 77/799. Thus they sought assistance from the Spanish, French and United Kingdom tax authorities, asking them in particular for the views of the football clubs concerned. It followed from the replies of those authorities that none of the clubs allegedly approached knew either Mr Sabou or his agent.

The Czech tax authorities also contacted the Hungarian tax authorities about a number of invoices submitted by Mr Sabou concerning services allegedly provided by a company established in Hungary. The requested authorities replied that that company was only an intermediary of a company established in a non-member country, and that only an inspection carried out in that country would make it possible to obtain reliable answers.

The judgement

With regard to the first two questions:

40 All the Member States which submitted observations to the Court argued that a request for information by one Member State sent to the tax authorities of another Member State does not constitute an act giving rise to such an obligation. They rightly consider that, in tax inspection procedures, the investigation stage, during which information is collected and which includes the request for information by one tax authority to another, must be distinguished from the contentious stage, between the tax authorities and the taxpayer, which begins when the taxpayer is sent the proposed adjustment.

41 Where the authorities gather information, they are not required to notify the taxpayer of this or to obtain his point of view.

42 A request for assistance made by the tax authorities under Directive 77/799 is part of the process of collecting information.

43 The same applies to the reply made by the requested tax authorities and the inquiries carried out to that end by those authorities, including the examination of witnesses.

44 It follows that respect for the rights of the defence of the taxpayer does not require that the taxpayer should take part in the request for information sent by the requesting Member State to the requested Member State. Nor does it require that the taxpayer should be heard at the point when inquiries, which may include the examination of witnesses, are carried out in the requested Member State or before that Member State sends the information to the requesting Member State.

45 None the less, there is nothing to prevent a Member State from extending the right to be heard to other parts of the investigation stage, by involving the taxpayer in various stages of the gathering of information, in particular the examination of witnesses.

46 Accordingly, the answer to the first and second questions is that **European Union law, as it results in particular from Directive 77/799 and the fundamental right to be heard, must be interpreted as not conferring on a taxpayer of a Member State either the right to be informed of a request for assistance from that Member State addressed to another Member State, in particular in order to verify the information provided by that taxpayer in his income tax return, or the right to take part in formulating the request addressed to the requested Member State, or the right to take part in examinations of witnesses organised by the requested Member State.**

With regard to the third question:

47 By its third question, the referring court asks, in essence, whether Directive 77/799 must be interpreted as meaning that, first, the taxpayer may challenge the information concerning him conveyed to the tax authorities of the requesting Member State, and, secondly, when the tax authorities of the requested Member State convey the information gathered, they are bound to mention the sources of

the information and how that information was obtained.

48 It must be observed that Directive 77/799 does not address the taxpayer's right to challenge the accuracy of the information conveyed, and it does not impose any particular obligation with regard to the content of the information conveyed.

49 In those circumstances, only national laws can lay down the relevant rules. The taxpayer may challenge the information concerning him conveyed to the tax authorities of the requesting Member State in accordance with the rules and procedures applicable in the Member State in question.

50 The answer to the third question is therefore that **Directive 77/799 does not govern the question of the circumstances in which the taxpayer may challenge the accuracy of the information conveyed by the requested Member State, and it does not impose any particular obligation with regard to the content of the information conveyed.**

EU CJ 18 October 2012 C-498/10, X (the Netherlands)

Obligation on the recipient of a service, established in the national territory, to withhold at source the wages tax on the remuneration due to a service provider established in another Member State – No such obligation in respect of a service provider established in the same Member State – Impact on freedom to provide services

The judgement

With regard to the first question:

19 By its first question, the Hoge Raad der Nederlanden asks, in essence, whether Article 56 TFEU must be interpreted as meaning that the obligation imposed, under the legislation of a Member State, on the recipient of services to withhold tax on the remuneration paid to service providers established in another Member State, whereas no such obligation exists in relation to remuneration paid to service providers who are established in the Member State at issue, constitutes a restriction on the freedom to provide services within the meaning of that provision.

28 However, it is important to note that, irrespective of the effects that the withholding tax may have on the tax situation of non-resident service providers, such an obligation to withhold tax, inasmuch as it entails an additional administrative burden as well as the related risks concerning liability, is liable to render cross-border services less attractive for resident recipients of services than services provided by resident service providers and to deter those recipients from having recourse to non-resident service providers.

29 That finding is not invalidated by the Netherlands Government's arguments that the impact of the additional administrative burden imposed on the recipient of services, firstly, is negligible in so far as that person is already obliged to withhold other taxes at source and to transfer the amounts withheld to the tax authorities, and, secondly, is offset by the reduction of the administrative burden on the non-resident service provider, who will not have to submit a tax return in the Netherlands in addition to his administrative obligations vis-à-vis the tax authorities of the Member State in which he is established.

30 In that regard, suffice it to point out that a restriction on a fundamental freedom is prohibited by the TFEU even if it is of limited scope or minor importance (see, to that effect, Case C-34/98 *Commission* v *France* [2000] ECR I-995, paragraph 49; Case C-9/02 *de Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 43; Case C-170/05 *Denkavit Internationaal and Denkavit France* [2006] ECR I-11949, paragraph 50; and *Dijkman and Dijkman-Lavaleije*, paragraph 42).

34 In the light of the foregoing, **the answer to the first question is that Article 56 TFEU must be interpreted as meaning that the obligation imposed, under the legislation of the Member State, on the service recipient to withhold at source wages tax on the remuneration paid to service providers established in another Member State, whereas such an obligation does not exist in relation to remuneration paid to service providers who are established in the Member State at issue, constitutes a restriction on the freedom to provide services, within the meaning**

of that provision, in that it entails an additional administrative burden and related liability risks.

With regard to the second and third questions:

35 By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether the restriction on the freedom to provide services resulting from national legislation, such as that at issue in the main proceedings, can be justified by the need to ensure the effective collection of tax and does not go beyond what is necessary to achieve that objective, even taking account of the opportunities for mutual assistance in the recovery of taxes provided by Directive 76/308. That court also raises the question as to whether account should be taken of the fact that that national legislation was amended, the Kingdom of the Netherlands having relinquished the withholding tax at issue in the main proceedings.

39 The Court has already held that the need to ensure the effective collection of income tax constitutes an overriding reason in the general interest capable of justifying a restriction on the freedom to provide services. According to the Court, the procedure of retention at source and the liability rules supporting it constitute a legitimate and appropriate means of ensuring the tax treatment of the income of a person established outside the State of taxation and ensuring that the income concerned does not escape taxation in the State of residence and the State where the services are provided (*FKP Scorpio Konzertproduktionen*, paragraph 36).

41 The Netherlands Government explains, in particular, that the withholding at source at issue in the main proceedings was introduced following the finding by the tax authorities that the system based on tax assessments addressed individually to each non-resident service provider proved to be ineffective as a result of the difficulties and the administrative burden that such a system generated for the non-resident service providers as well as for the authorities. According to the Netherlands Government, the withholding tax at source levied on remuneration paid to sports clubs, from which relevant expenses are deducted, allows the players' income to be taxed in a simpler and more effective manner, both from the point of view of the players and from that of the authorities.

42 In this respect, it should be noted that, in the case of service providers who provide occasional services in a Member State other than that in which they are established, and where they remain only a short period of time, a withholding tax at source constitutes an appropriate means of ensuring the effective collection of the tax due.

43 It is also necessary to determine whether that measure does not go beyond what is necessary to ensure the effective collection of the tax due, in the light of, inter alia, the opportunities presented by Directive 76/308 in the field of mutual assistance for the recovery of taxes.

44 Directive 76/308 establishes common rules on mutual assistance in order to ensure the recovery of claims relating to certain levies, duties and taxes (Case C-233/08 *Kyrian* [2010] ECR I-177, paragraph 34). In accordance with the provisions of that directive, a Member State may request assistance from another Member State in relation to the recovery of income tax payable by a taxpayer resident in the latter Member State (Case C-520/04 *Turpeinen* [2006] ECR I-10685, paragraph 37).

45 It follows from the first, second and third recitals in the preamble to Directive 76/308 that the purpose of that directive is to eliminate obstacles to the establishment and functioning of the common market resulting from the territorial limitation of the scope of application of national provisions relating to recovery.

46 Directive 76/308 thus provides for measures of assistance in the form of the disclosure of information useful for the recovery, notification of instruments to the addressee and the recovery of claims which are the subject of an instrument permitting their enforcement.

47 The extension of the scope of Directive 76/308, in particular to claims relating to taxes on income, by Directive 2001/44, seeks, as is evident from recitals 1, 2 and 3 in the preamble to the latter, to safeguard the 'fiscal neutrality of the internal market' and to protect the financial interests of Member States in view of the growth of tax fraud (Case C-338/01 *Commission* v *Council* [2004] ECR I-4829, paragraph 68). While Directive 2001/44 carries out a degree of approximation of national provisions in the area of taxation inasmuch as it obliges all Member States to treat claims originating in other Member States as being national claims (*Commission* v *Council*, paragraph 75), its aim, as the Advocate General has noted in point 53 of her Opinion, was not to replace the taxation at source as a method of collecting tax.

48 In the present case, it must be noted that the renunciation of withholding tax at source and the recourse to the arrangements governing mutual assistance would, admittedly, allow the elimination of the restriction to the freedom to provide services caused to the recipient of services by the national legislation at issue in the main proceedings.

49 However, such a renunciation would not necessarily eliminate all the formalities for which the service recipient is responsible. As some of the governments which submitted observations to the Court have pointed out, the withholding tax allows the tax authorities to take note of the event giving rise to the tax for which the non-resident service provider is liable. In the absence of such a withholding tax, the tax authorities of the Member State concerned would be likely to be required to impose an obligation on the service recipient, established on the territory of that State, to declare the service carried out by the non-resident service provider.

50 In addition, the renunciation of withholding tax would give rise to the need to collect the tax from the non-resident service provider, something which could, as the Advocate General has observed in point 58 of her Opinion, lead to a serious burden on the foreign service provider in that he would have to submit a tax return in a foreign language and to familiarise himself with a tax system in a Member State other than that in which he is established. The non-resident service provider could thus be deterred from providing a service in the Member State concerned and it might ultimately prove to be more difficult for the service recipient to obtain a service from a Member State other than that in which he is established.

51 Furthermore, such direct collection from the non-resident service provider would also give rise to a significant administrative burden for the tax authorities responsible for the service recipient in view of the large number of services provided on an *ad hoc* basis.

52 In the light of all of those considerations, it must be held, as the Advocate General has observed in point 59 of her Opinion, that the collection of the tax directly from the non-resident service provider would not necessarily constitute a less severe means than deduction at source.

53 In the light of the foregoing, the answer to the second and third questions is that, **in so far as the restriction on the freedom to provide services arising from national legislation, such as that at issue in the main proceedings, results from the obligation to withhold tax at source, in that it entails an additional administrative burden and related liability risks, that restriction can be justified by the need to ensure the effective collection of tax and does not go beyond what is necessary to achieve that purpose, even in the light of the opportunities for mutual assistance in the recovery of taxes presented by Directive 76/308**. The subsequent renunciation of the withholding tax at issue in the main proceedings cannot prejudice either its appropriateness to achieve the aim pursued or its proportionality, both of which must be assessed solely in the light of the objectives pursued.

With regard to the fourth question:

56 (…) the tax treatment of the service provider in the Member State in which he is established is not relevant for the purpose of determining whether the obligation on the recipient of services to withhold that tax at source constitutes a restriction on the freedom to provide services prohibited by Article 56 TFEU.

57 Consequently, the answer to the fourth question is that, **in order to determine whether the obligation on the service recipient to withhold tax at source, in that it entails an additional administrative burden and related liability risks, constitutes a restriction on the freedom to provide services prohibited by Article 56 TFEU, it is irrelevant whether the non-resident service provider may deduct the tax withheld in the Netherlands from the tax for which he is liable in the Member State in which he is established**.

Note

See also the comments of advocate general Kokott in this case. In her opinion of 21 December 2011, she observed, with regard to the impact of directive 76/308/EU:

"52 Even though the directive thus made the cross-border pursuit of tax claims possible, neither its intentions nor its power should be overestimated.

53. It could not completely replace the taxation at source of service providers resident abroad if only because a request for assistance could not be made if the total amount of the relevant claim or claims was less than EUR 1 500. The directive thus made no claim whatsoever to replace that method of collecting tax.

54. It also became evident that the success rate of the assistance granted under the directive left a great deal to be desired. In its proposal for what was to become Directive 2010/24 and in its report of 4 April 2009 for the years 2005 to 2008, the Commission notes that the amounts actually recovered amounted to only approximately 5% of the amounts in respect of which recovery assistance had been requested.

55. Although the Member States cannot in principle rely on deficiencies in the cooperation between their tax authorities in order to justify restrictions on fundamental freedoms, that situation and the conclusions drawn from it by the EU legislature in its adoption of Directive 2010/24 show that Directive 76/308 did not provide for the equivalent of taxation at source as a means of levying and collecting tax.

56. Contrary to the submissions by various governments, taxation at source is not required simply as a means of gaining knowledge of the taxable event in the case of a foreign service provider who stays in a Member State only briefly and possibly on only one occasion. For that, it would be sufficient to oblige the domestic recipient of the service to make an appropriate statement to the tax authority.

57. However, it must be acknowledged, with an eye to Directive 76/308 at least, that the Member States have a legitimate interest in ensuring that the tax is levied and collected by means of taxation at source."

European Court of Human Rights

ECHR 25 July 2013
27183/04 Rousk v Sweden

A tax inspector had granted respite for the main part of a tax debt. Due to a lack of communication between the tax inspector and the tax collector, and a lack of diligence of the latter, this respite was not taken into account and the house of the tax debtor was sold at an auction. The tax debtor was evicted from his own house.

The tax debtor alleged that the Enforcement Authority's measures had caused violations of his right to the peaceful enjoyment of his property contrary to Article 1 of Protocol No. 1 of the Convention as well as his right to respect for his private and family life and home, contrary to Article 8 of the Convention.

The judgement

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

81. The applicant complained that his property rights had been violated because the sale of his property at public auction and the ensuing eviction were completely disproportionate to the aims pursued and because a number of his belongings had been destroyed or discarded during the eviction. Moreover, the property had been sold for a price far below market value, causing him substantial financial loss. He invoked Article 1 of Protocol No. 1 to the Convention, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

93. The applicant submitted that his right to the peaceful enjoyment of his possessions had been violated when his property was sold at public auction, and he was subsequently evicted, for an enforceable debt amounting to no more than SEK 6,721 on the day of the sale. In his view, this measure constituted an irrevocable and definite deprivation of his property and was completely disproportionate to the aims pursued, in particular as the decision to sell the property had not gained legal force when the property was sold and when he was evicted.

94. He stressed that he had been suffering from severe depression at the time of the events and that this was the single reason for his failure to submit his tax return in time and for not having applied sooner for respite to submit his tax return.

96. The applicant further argued that the Tax Authority had failed to comply with section 8 of the Ordinance on the Collection of Debts to the State when it did not promptly notify the Enforcement Authority that it had granted him respite from the payment of the tax debt. The Tax Authority ought to have known that there was an impending risk of his property being sold since it was the Tax Authority that had sought the enforcement in the first place. Moreover, the Tax Authority also failed to treat his request for respite promptly, granting it only on 3 September 2003, more than a month after he had submitted the first request and despite him having informed the Authority about the urgency of the matter and having submitted his tax return. To the applicant this revealed a flaw in the system which weighed heavily when considering the proportionality of the measure.

97. As concerned the proportionality of the enforcement measures against him, the applicant submitted that when using a system of early enforcement of tax debts as applied in Sweden, the State had to provide extra safeguards especially if, as in his case, there were indications prior to the *fait accompli* that the debt should not be enforced. He pointed out that, according to the Court's case-law, proceedings leading to a possible interference with a person's property rights must afford the individual a reasonable opportunity of putting his or her case to the responsible authorities for the purpose of effectively challenging the measures (*Jokela v. Finland*, no. 28856/95, § 45, ECHR 2002-IV). In the present case, a tax debt had been enforced after the Tax Authority had granted respite from payment. Although the remaining debt amounted to no more than SEK 6,721, he was never given the chance to pay that sum even though he had assets, such as a car, to cover it.

98. Furthermore, the applicant had assumed that the Tax Authority and the Enforcement Authority, both representatives of the State, communicated properly with each other. He had also expected the authorities to inform him of his rights and guide him towards other possibilities to pay his debt, as public authorities in Sweden have a "service obligation" (*serviceskyldighet*) towards private individuals (section 4 of the Public Administration Act, *förvaltningslagen*, 1986:223). They were also aware that his property had a taxation value of SEK 1,372,000 while his mortgage amounted to SEK 960,000, leaving room for him to take a supplementary loan to cover the debt. By not guiding him to find a solution and having ignored the seriousness of his illness, of which it was aware, the Enforcement Authority had not acted in good faith.

99. Even if the authorities could not be blamed for what happened before the property was sold, the applicant held that they could have rectified the situation immediately when they were informed of it, by annulling the sale and thereby avoiding the eviction. According to the applicant, the Swedish system obviously lacked sufficient procedural safeguards to correct an erroneous enforcement after it had been executed.

100. In conclusion, the applicant claimed that the early enforcement of the tax debt under such rare circumstances as in his case was not essential for the State in order to justify the serious consequences suffered by him. Thus, the measures taken had failed to strike a fair balance and he had to bear an excessive burden in violation of Article 1 of Protocol No. 1 to the Convention.

3. The Court's assessment

108. The Court reiterates that Article 1 of Protocol No. 1 guarantees in substance the right to property. It contains three distinct rules which have

been frequently repeated in the Court's case-law since being set out in the case of *Sporrong and Lönnroth v. Sweden* (judgment of 23 September 1982, § 61, Series A no. 52):

> "... The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph."

111. Against this background, the Court finds that it is most appropriate to examine the applicant's complaints under the head of "control the use of property ... to secure the payment of taxes", which comes under the third rule contained in the second paragraph of Article 1 of Protocol No. 1. That paragraph explicitly reserves the right of Contracting States to pass such laws as they may deem necessary to secure the payment of taxes (see *Gasus*, cited above, § 59). It is clear to the Court that measures of that kind, taken in order to facilitate the enforcement of tax debts and secure tax revenue to the State, are in the general interest. Moreover, the measures taken by the Enforcement Authority were in accordance with national legislation, as specified above.

114. As to the present case, the Court notes from the outset that the applicant complains that his property was sold at public auction for a price far below market value, causing him substantial financial loss in violation of his property rights. However, the Court observes that the documents submitted by the applicant in support of his claim are not sufficiently specific to substantiate that the evaluation of the market value of his property by an independent company in July 2003 was incorrect or inaccurate. Moreover, it notes that the Enforcement Authority rejected a first round of bidding, as the final bid was considered too low, and that in the second round of bidding, the final bid which was accepted amounted to 80% of the estimated market value. To the Court, taking into account also the higher risk for the buyer of the property under these circumstances compared to a sale on the open market, this must be considered to be within an acceptable margin, not raising an issue under Article 1 of Protocol No. 1.

115. As concerns the proportionality of the actual sale of his property on public auction and the ensuing eviction, the Court notes on the one hand that the applicant failed to fulfil his legal obligation to submit his tax return for the tax assessment year 2002 by the prescribed deadline of 31 March 2002. Moreover, he did not respond in any way to the repeated actions by the Tax Authority between July 2002, when it first ordered him to submit his tax return, and April 2003, when it reminded him of his duty to pay the tax debt established by the Tax Authority's discretionary assessment. The Court further observes that the applicant continued to remain passive after the tax debt had been transferred to the Enforcement Authority, of which the applicant was aware at least as from the end of April 2003 when an enforcement officer had come to his home for a pre-planned visit and he was absent. On this occasion, the officer had left a note for the applicant requesting him to contact the Enforcement Authority, which he failed to do.

116. Here the Court notes the applicant's submission that he had been suffering from serious depression and therefore had not been capable of acting to protect his interests. In this respect, the Court observes that his tax return was due in March 2002 and that the applicant only sought help for his depression seven months later, in October 2002, and did not start treatment for it until February 2003. Thus, for more than one year, he neither sent a letter to the Tax Authority informing it of his illness, nor did he ask his wife to help him do so. He also did not contact a lawyer or accountant to deal with the matter on his behalf. It should be recalled that the applicant was the owner of a close company and thus it must be expected that he was aware of his statutory obligations and the likely consequences if he failed to fulfil them. The Court therefore agrees with the Government that the applicant had time and the opportunity to avoid enforcement measures being taken against him to ensure the payment of his tax debts.

117. On the other hand the Court notes that tax debts to the State are enforceable following the Tax Authority's decision on final tax even if there has been a request for reconsideration or an appeal to the administrative courts (Chapter 23, sections 7 and 8, of the Tax Payment Act). Likewise, enforcement

measures are not automatically suspended when a debtor appeals against such measures (Chapter 2, section 19, of the Enforcement Code). While such mechanisms must be considered acceptable and falling within the State's wide margin of appreciation under the second paragraph of Article 1 of Protocol No. 1, the Court considers that it is necessary that they are accompanied by procedural safeguards to ensure that individuals are not put in a position where their appeals are effectively circumscribed and they are unable to protect correctly their interests. The Court observes that such safeguards exist under Swedish law, *inter alia*, through the possibility to request the Tax Authority to grant respite from the payment of taxes (Chapter 17, sections 2, 2(a) and 3, of the Tax Payment Act). If such a request has been granted, no enforcement measures may be taken for the amount covered by the respite (Chapter 17, section 10, of the Tax Payment Act). Moreover, a debtor may request the Enforcement Authority to grant deferment of payment (sections 7 and 8 of the Debt Collection Act) or a stay on the enforcement measure (Chapter 8, section 3, of the Enforcement Code).

118. In the present case, the applicant used some of these possibilities. Hence, on 28 July 2003, after he had been informed that the Enforcement Authority had decided to sell his property at public auction, he requested it to stay the sale for a period of two months on the ground that he had not been able to submit his tax return in time due to personal reasons. On the same day, he also requested the Tax Authority to grant him respite from the payment of his tax debt as he intended to submit his income tax return for 2002. The applicant further asked the Enforcement Authority to provide him with a copy of the writ of execution so that he could appeal against it to the District Court, which indeed he did on 10 August 2003, after having received the decision. Thus, in the Court's opinion, at this point in time, the applicant took advantage of the procedural safeguards provided by law to protect his interests.

119. As to the authorities' handling of these requests, the Court first notes that nothing indicates that the writ of execution was ever formally served on the applicant but sent to him by ordinary mail and allegedly not received by him. The Court finds this rather remarkable, considering the obligation laid down in section 9 of the Enforcement Ordinance and the importance of the decision and the effects on the applicant's possibilities to appeal against it. This is particularly so as Chapter 12, section 11, of the Enforcement Code stipulates that property should be sold within four months of the decision to attach it. In any event, as noted above, the applicant was made aware of the writ of execution in July 2003 and received a copy of the decision at the beginning of August 2003, at which point he appealed against it. The Court observes that the District Court rejected the appeal on 28 August 2003. It thereby ensured that the writ of execution benefitted from judicial review before the public auction took place. The Court has regard though to the fact that the writ of execution had not gained legal force when the property was actually sold and that, on 15 September 2003, within the statutory time-limit, the applicant made a further appeal to the Court of Appeal.

120. With regard to the request for a stay on the sale at public auction, the Court notes that the Enforcement Authority rejected the request two days after receiving it, finding that there was an enforceable debt, that the petitioner (the State) opposed a stay on execution and that there were no special circumstances to justify a stay. Upon appeal to the District Court, where the applicant submitted a medical certificate and stated that he had requested respite from the payment of his tax debt and would submit his tax return, the court, on 28 August 2003, upheld the Enforcement Authority's decision in full. Thus, the Court considers that the applicant's request was dealt with expeditiously by the Enforcement Authority and the District Court, guaranteeing him access to court before the decision to sell the property was enforced by the public auction. Again, however, even though the law provides for further appeal to the Court of Appeal and the Supreme Court, the applicant was effectively deprived of this right since the enforcement took place before the Court of Appeal could consider the appeal and it therefore struck the case out of its list of cases.

121. Turning to the request for respite from the payment of his tax debts, the Court observes that the applicant sent this to the Tax Authority by fax and letter on 28 July 2003 but that, apparently, it was sorted wrongly or lost in the incoming mail and therefore not dealt with by the Authority. The Government have acknowledged that, if the request had been dealt with, it might, directly or indirectly through further actions by the applicant, have

influenced the Enforcement Authority's decision to sell the property. The Court does not consider that it is in a position to speculate about whether such a request would have been granted or not, or what a positive or negative decision would have led the applicant to do or how it might have influenced the Enforcement Authority in its decision to proceed with the public auction. It suffices for the Court to note that this error may have had an impact on how the case developed and showed a lack of due diligence on the part of the authorities.

122. In any event, it notes that the applicant reiterated his request to the Tax Authority for respite from the payment of his taxes on 28 August 2003 and, at the same time, submitted his tax return for 2002 and a medical certificate concerning his illness. He also informed the Tax Authority of the urgency of the matter, albeit without stating that the date for the public auction had been set for 3 September 2003. A few days later, on 1 September, he sent another fax to the Tax Authority stressing that it was of the highest importance to him that the request be considered promptly. The Court finds that these repeated requests within a few days of each other and stating the urgency must be considered enough for the Tax Authority to have realised the importance of treating the request without delay. This is particularly so since the Tax Authority knew about the enforcement proceedings and since, according to Chapter 12, section 11, of the Enforcement Code, the sale of real property and site-leasehold rights should take place within four months of the attachment. Moreover, the Court observes that the Tax Authority and the Enforcement Authority have access to each other's databases (see above § 74) and the Tax Authority could therefore easily have verified the status of the enforcement proceedings concerning the applicant in the Enforcement Authority's database. It would then have seen that the public auction to sell the applicant's property was scheduled for 3 September 2003. The Tax Authority does not appear to have done so. As it was, the Tax Authority took two days to grant respite which, in the Court's opinion, under normal circumstances may be acceptable but in the particular circumstances of the present case, as set out above, was not sufficiently prompt, noting that the request was only granted on the same day that the public auction took place.

123. The Court does not find it necessary to establish whether the public auction took place just before respite was granted or just after, which is in dispute between the parties. It considers that, since the Tax Authority was not aware that the public auction was taking place on 3 September 2003, there was no special reason for it to inform the Enforcement Authority of its decision the same day by fax or a telephone call. As it was, the Enforcement Authority was officially informed of the decision on 8 September 2003. However, the Court stresses that, on the day of the decision, the Tax Authority registered the respite in the applicant's tax account in its database to which the Enforcement Authority had access. Consequently, the Enforcement Authority could have seen that respite had been granted if it had verified that account late on 3 September or the next day. In any event, it would have been after the sale had taken place. Here, the Court points out that the petitioner in the present case was the State, represented by the Enforcement Authority, following an enforceable tax debt submitted by the Tax Authority to the Enforcement Authority. In such a situation, the Court considers that it is not unreasonable to expect the authorities involved to keep each other informed about developments of direct relevance to the enforcement proceedings, such as a request for, and the grant of, respite. In the present case, there appears to the Court to have been a lack of effective communication between the two authorities. Moreover, the Court observes that the applicant, in his appeal to the District Court dated 3 August 2003 against the Enforcement Authority's decision not to stay the sale of his property, stated that he had requested respite from the payment of his tax debt. Thus, the Enforcement Authority was aware of this circumstance well before the public auction took place and could therefore reasonably have been expected to verify its state of proceedings and/or outcome directly with the Tax Authority before selling the applicant's property.

124. The Court further observes that the Enforcement Authority was informed that the applicant had paid some of his other debts (to the TPMD) in July 2003, a fact it acknowledged in its submission to the District Court in reply to the applicant's appeal concerning the request for a stay on the sale of his property at the beginning of August 2003, before the public auction took place. Still, in its reply of 17 September 2003 to the District Court, in the proceedings relating to the applicant's appeal against the actual sale of his property at public auction, the Enforcement

Authority included these previously discharged debts to justify the sale of the property despite the respite from payment of the tax debt. The Court finds that this conduct on the part of the Enforcement Authority showed a serious lack of diligence having regard to the very grave consequences that the sale and later the eviction entailed for the applicant.

125. Furthermore, the Court observes that in accordance with Chapter 3, section 21, of the Enforcement Code a measure for enforcement already taken shall lapse, if possible, if respite from payment has been granted. Since the Enforcement Authority was officially informed about the respite on 8 September 2003, less than one week after the sale of the property and over one month before the eviction took place, and knew that the applicant's enforceable debt then amounted to only SEK 6,721, the Court notes that the Enforcement Authority could have repealed the sale, as could the domestic courts upon appeal by the applicant. To the Court, both the decision to uphold the sale and the ensuing eviction of the applicant appear excessive and disproportionate, especially since the applicant had other assets, such as a car, which could have been seized and sold to cover what little remained of his enforceable debts. This is particularly so because the authorities knew that the proceedings concerning the writ of execution were still ongoing and thus had not yet gained legal force.

126. Therefore, **having regard to all of the circumstances set out above, the Court concludes that the sale of the applicant's property at public auction, and the ensuing eviction of the applicant from his home, for an enforceable debt that amounted to only SEK 6,721 on the day of the public auction, imposed an individual and excessive burden on the applicant**.

127. **There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention**.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

128. The applicant complained that the sale of his home and the ensuing eviction had also violated his right to respect for his private and family life and his home. He relied on Article 8 the Convention, which reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

2. The Court's assessment

134. The Court notes that the sale of the applicant's property and the ensuing eviction interfered with his right to respect for his private and family life and deprived him of his home within the meaning of Article 8 § 1 of the Convention. As in the case of *Zehentner v. Austria* (no. 20082/02, § 54, 16 July 2009), the sale at public auction deprived the applicant legally of his home, and was a necessary pre-condition for the eviction, which factually deprived him of his home.

135. Next, the Court observes that the interference was in accordance with the law, primarily the Enforcement Code, and had the legitimate aims of protecting the rights and freedoms of others, namely that of the purchaser of the property, as well as the economic well-being of the country, by ensuring the collection of taxes.

136. However, the Court reiterates that for an interference to be considered "necessary in a democratic society", it needs to be proportionate to the legitimate aims pursued and answer to a "pressing social need". While it is for the national authorities to make the initial assessment of necessity, the final evaluation of whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention (see, *Zehentner*, cited above, § 56, with further references). Moreover, States enjoy a certain margin of appreciation since the national authorities, by reason of their direct and continuous contact with the vital forces of their countries, are in principle better placed than an international court to evaluate local needs and conditions. However, this margin will vary according to the nature of the Convention right at stake, its importance for the individual as well as the public interest. Thus, the margin will

tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (ibid. § 57).

139. Turning to the present case, the Court reiterates its findings above under Article 1 of Protocol No. 1 to the Convention (§§ 117-127) in relation to the various domestic proceedings and stresses that none of those proceedings were finally adjudicated before the sale at public auction and the ensuing eviction of the applicant from his home took place. While this may have been in the interest of efficient enforcement proceedings, the Court is not convinced that the applicant's interests were adequately protected in view of this most extreme form of interference with his right to respect for his home. It notes that, on 6 October 2003, when the Enforcement Authority decided that the applicant should be evicted, it knew that the applicant had been granted respite from payment of his enforceable tax debt and that only a very minor debt remained enforceable. Furthermore, it knew that the applicant's appeal against the writ of execution was still pending before the Court of Appeal and that his appeal against the actual sale of the property was pending before District Court. Although the District Court rejected the appeal on 15 October 2003, a week before the actual eviction took place, the Court notes that this decision did not become final since the applicant appealed against it to the Court of Appeal within the statutory time-limit. Thus, the Court considers that, in order to ensure that the remedies and procedural safeguards existing in domestic law were in fact available and sufficient, not only in theory but also in practice (see, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII), the eviction should have been postponed until the underlying contentious issues had been resolved.

140. In relation to this, the Court observes that although the applicant was under an obligation to move out of his home by 1 October 2003, he was only paid the amount of money which remained from the sale of the property, after all debts and costs had been paid, on 27 January 2004 when the sale of the property gained legal force. In the Court's view, this placed an additional financial burden on the applicant which, in the circumstances of the case, appears excessive, in particular with regard to his need to find a new home.

141. As regards the interests of the purchaser, the Court acknowledges that he had a legitimate interest in having access to the purchased property within a reasonable time and gaining legal certainty that the purchase was final. However, as noted above (§ 114), the purchaser can often buy a property at public auction at a somewhat lower price compared to buying on the open market, partly because of the increased risks involved, of which he or she should clearly be aware. Moreover, the Court notes that the purchaser had to pay only 10% of the purchase price on the day of the public auction (the remainder appears to have been paid on 1 October 2003 at the distribution meeting), thereby limiting his immediate financial investment.

142. **Having regard to all of the above, and in particular the lack of effective procedural safeguards for the applicant to protect his interests, the Court considers that neither the purchaser's interests nor the State's general interests outweigh those of the applicant in present case. It follows that there has been a violation of Article 8 of the Convention**.

Sweden – Supreme Court (Högsta Domstolen) 27 December 2013, D.W. and A.W.

According to Swedish law, if different kinds of property are available from the debtor and a choice has to be made about what property to seize, the starting point should be that primarily such seizeable property should be considered, that can be used to pay the claim with the least costs, losses or other inconvenience for the debtor.

According to Article 8 of the European Convention on Human Rights, each individual has the right to have his home respected. This means that strong arguments are needed to seize a dwelling. Therefore, Article 8 must be considered in the weighing of interests that has to be made under the national law.

Also of importance in this circumstance is the account to be taken of the best interest of the child which is prescribed in the UN Convention of 1989 on the Rights of the Child. (In this case, the tax debtors had a girl of around 8 years and a boy of about 2 years. The boy was chronically ill and

needed particular care. The girl was suspected of having a neuro-psychiatric disability.)

ORIGINAL TEXT

Mål nr: Ö2656-13

KLAGANDE
1. D W
2. AW

MOTPART
Skatteverket
171 94 Solna

SAKEN
Utmätning

ÖVERKLAGAT AVGÖRANDE
Hovrätten över Skåne och Blekinges beslut 2013-05-17 i mål ÖÄ 1182-13
Med ändring av hovrättens beslut häver Högsta domstolen utmätningen av DWs andel i fastigheten och pantbreven.

YRKANDEN I HÖGSTA DOMSTOLEN

DW och AW har yrkat att Högsta domstolen häver utmätningen av fastigheten X 18.

Skatteverket har motsatt sig att hovrättens beslut ändras.

SKÄL

Bakgrund

1. DW och AW äger fastigheten X 18 med hälften vardera. De bor där tillsammans med sina två barn, en flicka i åttaårsåldern och en pojke i tvåårsåldern. Pojken har en kronisk sjukdom som gör att han behöver särskild omsorg. Flickan misstänks ha en neuropsykiatrisk funktionsnedsättning.

2. För betalning av DWs skatteskulder på 625000 kr beslutade Kronofogdemyndigheten om utmätning av hans andel i fastigheten och i två pantbrev i fastigheten. Därefter beslutades om utmätning av DWs lön med 6730 kr i månaden. Kronofogdemyndigheten uppskattade fastighetens värde till 875000 kr. Värdet på DWs andel bedömdes alltså uppgå till 437500 kr. Efter avdrag för förrättningskostnader och utdelning till den kreditgivare som hade säkerhet i fastigheten beräknades en försäljning ge ungefär 36000 kr till betalning av skatteskulderna. En av skattefordringarna preskriberas vid utgången av år 2017, de två andra vid utgången av år 2018.

3. DW och AW överklagade Kronofogdemyndighetens beslut om utmätning av fastigheten och andelen i två pantbrev. De gjorde gällande bl.a. att utmätningen inte är försvarlig med hänsyn till situationen i familjen och svårigheterna att hitta en ny bostad. De föreslog att löneutmätning i stället sker med ett högre belopp under en tid.

4. Tingsrätten ändrade inte Kronofogdemyndighetens beslut. Hovrätten har fastställt tingsrättens beslut.

Utmätningsordningen

5. I princip får all gäldenärens egendom tas i anspråk genom utmätning, såvida egendomen inte är undantagen som s.k. benefícium. Till skillnad från bostadsrätt och hyresrätt kan fast egendom inte undantas från utmätning som benefícium. Att fastigheten utgör gäldenärens bostad har således ingen betydelse i detta hänseende.

6. Utsökningsbalken innehåller dock vissa generella bestämmelser om den utmätningsordning som ska följas. Utmätningsordningen har betydelse främst för de fall där sökanden inte har särskild förmånsrätt för sin fordran (jfr 4 kap. 4 § utsökningsbalken).

7. Som en allmän regel gäller enligt 4 kap. 3 § första stycket utsökningsbalken att utmätning ska ske endast om det belopp som kan beräknas flyta in, efter avdrag för kostnader som uppkommer efter utmätningen, ger ett överskott som gör åtgärden försvarlig. Det är själva det förväntade överskottet vid en realisation som står i blickfånget, och utmätning kan aktualiseras så snart överskottet täcker mer än de kostnader som beräknas uppkomma efter utmätningen. När andra utmätningsbara tillgångar saknas, finns det inte något egentligt utrymme för att ge omständigheter av annat slag än det förväntade överskottet en mer avgörande eller självständig betydelse. Det förhållandet att en utmätning avser en bostadsfastighet kan inte hindra en utmätning. Detta hänger samman med att ett undantag för sådana fastigheter i realiteten skulle innebära att egendom togs undan från utmätning i vidare mån än som följer av bestämmelserna om beneficium. (Se NJA 2010 s. 3971 och II.)

8. Vidare finns i 4 kap. 3 § andra stycket utsökningsbalken en bestämmelse för det fallet att olika slags egendom finns att tillgå hos gäldenären och det kan bli fråga om att välja vilken egendom som ska utmätas. Som utgångspunkt gäller enligt bestämmelsen att det i första hand bör tas i anspråk sådan utmätningsbar egendom som kan användas till fordringens betalning med minsta kostnad, förlust eller annan olägenhet för gäldenären.

9. Vid tillämpningen av 4 kap. 3 § andra stycket utsökningsbalken ska det göras en intresseavvägning. Vid valet mellan olika slag av egendom bör enligt lagförarbetena beaktas inte bara sökandens rätt att få betalning utan även hans intresse av att betalning flyter in utan onödigt dröjsmål. Tidsfaktorn är dock inte avsedd att ges så stor betydelse om sökandens intresse av en snabb betalning inte är särskilt starkt och någon särskild risk inte är förenad med att man avvaktar. Samtidigt bör i rimlig utsträckning hänsyn tas till gäldenärens behöriga

intressen, inte minst intresset av att onödig värdeförstöring inte sker. Om det kan anses skäligen förenligt med sökandens intresse och i övrigt bedöms motiverat, bör enligt förarbetena hänsyn tas till gäldenärens önskemål. Normalt bör fast egendom utmätas sist. (Jfr Lagberedningen i SOU 1973:22 s. 218 f. och prop. 1980/81:8 s. 361 f.)

10. Enligt artikel 8 i Europakonventionen har den enskilde rätt till respekt för sitt hem. Det innebär att det krävs starka skäl för att en bostad ska kunna tas i anspråk. Artikel 8 ska därför beaktas vid den intresseavvägning som ska göras enligt 4 kap. 3 § andra stycket utsökningsbalken. Av betydelse är då också det hänsynstagande till barnets bästa som följer av FN:s konvention år 1989 om barnets rättigheter.

11. I utmätningsordningen ligger således att — i den man det är möjligt — annan tillgänglig egendom än bostad bör tas i anspråk för betalning av sökandens fordran.

Bedömningen i detta fall

12. I detta fall finns annan egendom än bostaden tillgänglig för utmätning, nämligen DWs lön (jfr däremot NJA 2010 s. 397II). Det kan visserligen inte antas att skattefordringarna kommer att bli helt betalda genom den pågående löneutmätningen. En försäljning av fastigheten beräknas dock bara ge ett i sammanhanget mindre belopp, motsvarande vad som under en förhållandevis begränsad tid kan förväntas flyta in genom löneutmätning. Skattefordringarna preskriberas först om några år, och såvitt framkommit har Skatteverket inte heller av något annat skäl ett starkt intresse av att det nu sker en utmätning och försäljning av fastigheten. En sådan åtgärd skulle däremot i dag innebära betydande olägenheter för D W och hans familj.

13. En avvägning av de intressen som gör sig gällande leder till slutsatsen att det för närvarande inte finns tillräckliga skäl för utmätning även av fastigheten. Utmätningen av DWs andel i fastigheten och i pantbreven ska därför hävas.

TRANSLATION OF THE RULING OF THE SWEDISH SUPREME COURT (HÖGSTA DOMSTOLEN)

Case No. Ö2656-13

APPELLANT
1. D W
2. AW
Representing 1-2: Lawyer AL

OPPONENT
Skatteverket (tax administration)
171 94 Solna

SUBJECT
Seizure

OPPOSED DECISION
Decision by Hovrätten över Skåne och Blekinge, i.e. the Appeal Court of Skåne and Blekinge in South of Sweden, 2013-05-17 in Case ÖÄ 1182-13

Changing the Decision of the Appeal Court, the Supreme Court revokes the seizure of DW's part of the building and the land charge certificates (pantbrev).

APPLICATION TO THE SUPREME COURT

DW and AW have asked the Supreme Court to revoke the seizure of building X 18.

Skatteverket has opposed the change of the Supreme Court Decision.

REASONING

Background

1. DW and AW are owners of the building X 18 in equal shares of 50%. They live there together with their two children, a girl of around 8 years of age and a boy of about 2. The boy is chronically ill and needs particular care. The girl is suspected of having a neuro-psychiatric disability.

2. For the payment of DW's tax debts of 625.000 SEK, the Enforcement Administration (Kronofogdemyndigheten) decided to seize his part of the building and his part of two land charge certificates for the real estate. Following this, it was decided to seize DW's salary with 6.730 SEK per month. The Enforcement Administration estimated the value of the building to be 875.000 SEK. The value of DW's share would thus be 437 500 SEK. After subtracting survey costs and distribution to the creditor who had the building as security, a sale was calculated to raise about 36.000 SEK towards paying the tax debt. One of the tax debts lapses at the end of 2017, the two others at the end of 2018.

3. D W and AW appealed against the Decision by Kronofogdemyndigheten to seize the property and the shares of two land charge certificates. They claimed, amongst other things, that a seizure is not

justifiable against the background of the family situation and the difficulties of finding a new dwelling. They suggested instead a seizure of the salary with a higher amount during a certain time.

4. The District Court did not change the Decision of Kronofogdemyndigheten. The Appeal Court has confirmed the Decision of the District Court.

Utmätningsordningen (Legislation about seizure of property)

5. In principle, all of the debtor's property may be seized, so far as it is not exempted as so-called *benefícium*. Contrary to a Condominium or a Tenancy, real estate cannot be excluded from seizure as *benefícium*. The fact that the property is the dwelling of the debtor therefore has no importance in this matter.

6. However, the Debt Enforcement Code (Utsökningsbalken) contains some general rules about the legislation about seizure to apply. Such legislation is of importance primarily in cases where the applicant does not have a special preferential claim (see 4 chap. 4 § *utsökningsbalken*).

7. As a general rule, according to 4 chapter 3 § first paragraph of the *utsökningsbalken,* seizure should only be carried out if the amount expected to be raised, after subtraction of costs in connection with the seizure, would engender a surplus which justifies the seizure. It is this expected surplus of a seizure that should be taken into consideration, and seizure can be carried out as soon as the surplus covers more than the costs that are expected to arise after the seizure. If there are no other seizeable assets there is no real room for allowing other circumstances than the expected surplus a more decisive or independent role. The fact that a seizure concerns a dwelling cannot be grounds to exclude the seizure. One reason for this is that an exemption for such buildings would in practice mean that property was excluded from seizure to a larger degree than what is intended by the rules about *beneficium*. (See NJA 2010 p. 3971 and II.)

8. Further, 4 chapter 3 § second paragraph in *utsökningsbalken* prescribes what to do if different kinds of property are available from the debtor and a choice may have to be made about what property to seize. **The starting point, according to this rule, is to be that primarily such seizeable property should be considered, that can be used to pay the claim with the least costs, losses or other inconvenience for the debtor.**

9. When applying 4 chapter 3 § second paragraph in *utsökningsbalken* the different interests should be weighed against each other. When choosing which property to seize, one should, according to the explanatory memorandum, consider not only the claimants right to payment, but also his interest in receiving the payment without undue delays. The time factor is however not meant to be given too much importance if the claimants interest in a swift payment is not particularly strong and there is no particular risk involved in waiting. At the same time one should take reasonable account of the justifiable interests of the debtor, not least the interest of avoiding unnecessary loss of value. If justifiably compatible with the interests of the claimant and deemed motivated, the wishes of the debtor should, according to the explanatory memorandum, be taken into account. Normally, real estate should be seized last. (See Legislative drafting (Lagberedningen) in SOU 1973:22 p. 218 f. and legislative proposal 1980/81:8 p. 361 f.).

10. **According to Article 8 in the European Convention on Human Rights, each individual has the right to have his home respected. This means that strong arguments are needed to seize a dwelling. Therefore, Article 8 must be considered in the weighing of interests according to 4 chapter 3 § second paragraph in *utsökningsbalken*. Also of importance in this circumstance is the account to be taken of the best interest of the child which is prescribed in the UN Convention of 1989 on the Rights of the Child**.

11. In the legislation about seizure it is therefore considered that - as far as possible - other available property than a dwelling be considered for payment of the claim.

Assessment in the present case

12. In this case there is other property besides the dwelling available for seizure, i.e. the salary of DW (however, see also NJA 2010 p. 397II). One cannot expect the tax debts to be completely covered by the ongoing seizure of salary, but sale of the building is only expected to raise a minor amount, in the circumstances, comparable to what would, during a relatively limited period of time, be raised from the seizure of salary. The tax debts only lapse

in a couple of years, and it does not appear as if Skatteverket should have a strong interest in a seizure and sale of the building right now for any other reason. Such an action today would, however, lead to considerable inconveniences for DW and his family.

13. **Weighing the different interests in the case, one can conclude that there are not sufficient grounds, today, for a seizure of the building as well. The seizure of DW's share of the building and the land charge certificates should therefore be revoked**.

COMMENTS on the UN Convention on the Rights of the Child related to a Swedish Supreme Court's decision[1]

In the (Swedish) Supreme Court's decision on 27 December 2013, case number Ö 2656-13, about seizure the court has taken into consideration the European Convention on Human Rights.[2] In addition the court has stated: "Also of importance in this circumstance is the account to be taken of the best interest of the child which is prescribed in the UN Convention of 1989 on the Rights of the Child" (Child's Convention).[3] The Supreme Court's decision means a marking that the Child's Convention constitutes a source of law and raises the question on what principal position and meaning the Child's Convention has in the activities of the (Swedish) Enforcement Authority while awaiting a possible incorporation of the Convention with Swedish law.

The Child's Convention has after a decision by the Parliament been ratified by the Government and entered into force in relation to Sweden on 2 September 1990.[4] After ratification the Convention is binding for Sweden based on public international law despite Sweden has not yet incorporated it with Swedish legislation.[5] It is very unusual that Sweden ratifies a convention and not incorporates it in Swedish legislation. The question about if Sweden shall incorporate the Child's Convention with Swedish legislation is subject to a Government investigation.[6]

In contrast to the European Convention on Human Rights the Child's Convention lacks provisions on an international court which may decide on cases about the application of the convention. This means that Swedish courts and authorities, if it is not possible to conclude that Swedish legislation already corresponds with the Child's Convention, at the interpretation of the provisions of the convention, in the absence of guiding judgments from the Supreme Court or the Supreme administrative court, independently have to apply the Child's Convention.

Guidance on the application and interpretation for the Enforcement Authority about the provisions of the Child's Convention are found in the Vienna Convention on the Law of Treaties of 23 May 1969.[7]

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Announced

M. Berglund, *Cross-Border Enforcement of Claims in the EU – History, Present Time and Future*, Kluwer law International, 2nd ed., 2014, 389 p. (www.kluwerlaw.com)

[1] Translation of Swedish Memorandum.
[2] *See* Högsta domstolens beslut den 27 december 2013 i mål nr Ö 2656-13, point 10, first-third sentences.
[3] *See* point 10, last sentence.
[4] The Convention is published in English and Swedish in Sveriges överenskommelser med främmande stater (Sweden's agreements with foreign States), SÖ 1990:20, http://www.regeringen.se/sb/d/6551/a/69025.
[5] *See* (N.B. in Swedish) avsnitt 1 Internationella konventioner i svensk rätt jämfört med avsnitt 5.2 Folkrättsliga argument i Rättsutlåtande om inkorporation av Barnkonventionen, Working paper 2011:4, tillgängligt via http://uu.diva-portal.org av Karin Åhman vid Uppsala universitet.
[6] *See* (N.B. in Swedish) Kommittédirektiv Översyn av barnets rättigheter i svensk rätt, Dir. 2013:35, http://www.regeringen.se/sb/d/16823/a/213636. Jämför även avsnitt 2 Barnkonventionen i svensk rätt i Rättsutlåtande om inkorporation av Barnkonventionen, Working paper 2011:4, tillgängligt via http://uu.diva-portal.org av Karin Åhman vid Uppsala universitet.
[7] The Convention is published in English and Swedish in Sveriges överenskommelser med främmande stater (Sweden's agreements with foreign States), SÖ 1975:1, http://www.regeringen.se/sb/d/1431/a/15582.

Review of publications

E. KEMMEREN, "Recovery of income taxes: ECJ tends to allow Member States more leeway"
EC Tax Review, 2013/1, 2-8

This article analyses the EUCJ case law with regard to unilateral measures, taken by EU Member States to guarantee the collection of their taxes (withholding taxes and bank guarantees).
In the author's view, the court rulings are inconsistent. He comes to the conclusion that the latest judgements give Member States more leeway in respect of the recovery of (income) taxes. He deplores this evolution and observes that *"rules on the assistance of recovery of taxes in transnational situations better fit to the concept of an internal market than a system of withholding taxes or measures such as the provision of a bank guarantee. The Court really missed an excellent opportunity to oblige Member States to better cooperate with each other to ensure that they can effectively exercise their taxing rights."*

R. SEER, "Recent Development in Exchange of Information within the EU for Tax Matters"
EC Tax Review 2013-2, 66-77

This article gives a systematic overview of the recent developments by explaining the contents and function of the legal sources. He describes information exchanges based on bilateral legal basis (based on provisions modelled on Art. 26 and Art. 27 of the OECD Model Convention or the agreements modelled on the OECD Model Convention 2002 (TIEA)), the EU directives 2011/16/EU and 2010/24/EU, Rubik agreements).
This article focuses on information exchange regarding income of capital. The description of the intergovernmental administrative assistance in tax collection is very general.

CFE – ECJ Task Force, "Opinion Statement of the CFE on the Decision of the European Court of Justice of 29 November 2011 in Case C-371/10, National Grid Indus BV and Business Exit Taxes within the European Union"
European Taxation 2013, 276-280.

This opinion statement focuses on the EUCJ judgement in case C-371/10 National Grid Indus, concerning the compatibility of exit taxation on business with EU fundamental freedoms. In this case, the Court accepted that in some circumstances, ti may be appropriate to require the payment of a bank guarantee for the purpose of obtaining the deferral of an exit tax. In the view of the CFE, *"the proportionality of bank guarantees as a tool to secure the effective recovery of tax is to be regarded as an exceptional situation that should apply only in case that are particularly difficult to trace."*

R. SEER, "Voluntary compliance"
Bulletin for International Taxation 2013, 584-590

This article describes the concept of voluntary tax compliance and highlights some factors that influence the taxpayers' behaviour.
Some key messages:
- a fair and coherent tax law system is important for increasing "voluntary" compliance;
- tax compliance also requires tax enforcement, which also means a significant audit rate;
- withholding taxes are inevitable elements of an effectively structured tax enforcement system, guaranteeing high tax compliance rates;
- third parties involved in this need to have the possibility of requesting cost-free rulings from the tax authorities if they are in doubt about their withholding liabilities.

E. THOMAS, Comments on ECHR 25 July 2013, 27183/04, Rousk v Sweden
Highlights & Insights on European Taxation, 2013-9, p. 5, Nr. 9/70.

In this very short comment, the author comes to the conclusion that the auction of the home of a tax debtor is a measure of last resort. In his view, *"Only in the case no respite for the enforceable tax debt has been granted, the writ of the execution has gained legal force, and there are no other assets to be sold to cover the tax debts, can the auction of the home of the taxpayer take place lawfully."*
→ See p. 10 for the main considerations of this judgment.