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In cases no. 1348-24 and 1349-24, **Played Holding AB** (Appellant) v. the **Swedish Tax Agency** (Respondent), the Supreme Administrative Court delivered the following judgment on 25 November 2024.

RULING OF THE SUPREME ADMINISTRATIVE COURT

The Supreme Administrative Court overturns the judgment of the administrative court of appeal and remands the cases to the administrative court of appeal for examination in accordance with what is stated in paragraph 19.

The Supreme Administrative Court grants Played Holding AB compensation for costs incurred in the Supreme Administrative Court in the amount of SEK 119,990.

BACKGROUND

1. There is a tax convention between the Nordic countries the purpose of which is, *inter alia*, to avoid double taxation of income.
2. The tax convention contains rules according to which transactions between associated companies in different countries may be taxed on the basis of the so-called arm's length principle, i.e. as though the companies were independent of one another. Article 9.2 provides that where a country, in accordance with this principle, taxes a company for an income for which another company is also taxed in another country, the other country shall perform a so-called corresponding adjustment of the tax for such other company. Such an adjustment, however, shall be made only where the other country is of the view that the adjustment is justified. In conjunction with the adjustment, the other provisions of the convention shall be observed and, where necessary, the competent authorities of the relevant countries shall consult each other. In Sweden, the Swedish Tax Agency is the competent authority.

3. Played Holding AB has had interest income during the 2011 and 2012 income years from an associated company in Norway. This income has been taxed in Sweden. The Norwegian tax authority has, by application of the arm's length principle, however, denied the Norwegian company deductions for parts of corresponding interest expenses.
4. As a consequence of the decision in Norway, Played Holding requested reconsideration of the decision of the Swedish Tax Agency for the 2011 and 2012 income years and claimed that corresponding interest income was not to be taxed in Sweden. The company stated, *inter alia*, that a corresponding adjustment was to be made in accordance with Article 9.2 of the Nordic Tax Convention.
5. The Swedish Tax Agency found that the decision of the Norwegian tax authority was not compatible with the arm's length principle and did not alter its earlier decision. Played Holding appealed to the Administrative Court in Stockholm which reached the opposite conclusion and exempted the interest income from taxation.
6. The Swedish Tax Agency appealed to the Administrative Court of Appeal in Stockholm which found that the provision regarding corresponding adjustment in Article 9.2 of the Nordic Tax Convention is not intended for the courts and that the interest income accordingly could not be exempted from taxation. The administrative court of appeal ascribed, *inter alia*, weight to the provision in the article according to which the competent authorities in the relevant countries shall, where necessary, consult one another and that *competent authority* did not refer to the courts but, rather, it is the Swedish Tax Agency in Sweden which is the competent authority.

CLAIMS, ETC.

7. *Played Holding AB* primarily claims that the interest income is not to be taxed and, in the alternative, that the judgment of the administrative court of appeal is to be overturned and the cases are to be remanded to the administrative court of appeal for adjudication on the merits in accordance with Article 9.2 of the Nordic Tax Convention. The company further claims compensation for costs incurred in the Supreme Administrative Court.
8. *The Swedish Tax Agency* is of the position that the interest income is to be taxed in its entirety, but consents to the claim that the judgment of the administrative court of appeal is to be overturned and the cases are to be remanded to the administrative court of appeal, and that the company is to be granted compensation for its costs incurred in the Supreme Administrative Court. The Swedish Tax Agency states the following.
9. The Swedish Tax Agency has applied Article 9.2 in its capacity as the taxing authority within the framework of a reconsideration matter and not in its capacity as competent authority. It is the position of the agency that the courts, following the appeal of the reconsideration decision by the Swedish Tax Agency, can also apply the article.

REASONS FOR THE RULING

Legislation, etc.

10. Article 9.2 of the convention between the Nordic countries to avoid double taxation regarding taxes on income and on capital states the following. Where a contracting state includes in the profits of an enterprise of that state – and taxes accordingly – profits on which an enterprise of the other contracting state has been charged to tax in that other state and the profits so included are profits which would have accrued to the enterprise of the first mentioned state if the conditions

made between the two enterprises had been those which would have been made between independent enterprises, then that other state shall make an appropriate adjustment to the amount of the tax charged therein on those profits, where such other state is of the opinion that the adjustment is justified both in principle and in terms of the amount. In determining such adjustment, due regard shall be had to other provisions of the convention and the competent authorities of the relevant contracting states shall if necessary consult each other.

11. According to the Ordinance Regarding the Application of the Double Taxation Convention Between the Nordic Countries (1998:1314), *competent authority* means the Swedish Tax Agency.
12. It is apparent from sections 1 and 2 of the Double Taxation Convention Between the Nordic Countries Act (1996:1512) (the implementing act), that the convention applies as law in Sweden and that the taxation rules of the convention are to be applied only to the extent they entail a limitation of the tax liability in Sweden which would otherwise exist.

The Court's assessment

Income tax

13. Played Holding has had interest income which is taxable in Sweden in accordance with domestic tax law and falls within the area of application of the Nordic Tax Convention. The question is whether the tax is to be reduced due to the fact that the borrower has not been granted a deduction for corresponding interest expenses in Norway.
14. Articles 6–24 of the tax convention contain provisions regarding the allocation of the right to tax between the contracting states. Under international law, Sweden is bound by the tax convention which, by virtue of the implementing act, is ascribed the same position as other Swedish laws. In the event an application of the

convention results in certain income not being able to be taxed in Sweden, the tax convention shall be afforded precedence over domestic tax provisions (*cf.* RÅ 2008 reported case no. 24 and HFD 2010 reported case no. 112).

15. In its taxation activities, the Swedish Tax Agency shall accordingly comply with applicable tax conventions with other countries and apply the taxation rules in the conventions which entail a limitation on the tax liability in Sweden. In the examination to be conducted by the court following an appeal of the tax decision, the court shall also apply convention provisions which limit the tax liability.
16. Article 9.2 of the Nordic Tax Convention prescribes in cases such as this that a corresponding adjustment is to be carried out in conjunction with taxation where the adjustment is determined to be justified both in principle and in terms of the amount. This is something which the Swedish Tax Agency does in its capacity as the taxing authority.
17. In the event the Swedish Tax Agency is of the opinion that the conditions for adjustment are not fulfilled and the decision of the agency is appealed to a court, it is incumbent upon the court to examine whether the Swedish Tax Agency has grounds for its decision. In the event the court determines that the tax measure in the other country complies with the arm's length principle, a corresponding adjustment shall be made. The fact that the Swedish Tax Agency in its capacity as competent authority can initiate consultations with another country does not mean that it is solely the Swedish Tax Agency which can make a corresponding adjustment in accordance with Article 9.2 and that the administrative courts are prevented from doing so.
18. It follows from the aforementioned that administrative courts, following appeal of a tax decision, can examine whether a corresponding adjustment in accordance with Article 9.2 of the Nordic Tax Convention shall be made.

19. The administrative court of appeal has not considered whether Article 9.2 of the Nordic Tax Convention limits the company's tax liability in Sweden. Accordingly, the judgment of the administrative court of appeal shall be overturned and the cases shall be remanded to the administrative court of appeal for such examination.

Compensation for costs

20. The company has claimed compensation in the amount of SEK 119,990 for costs of counsel incurred in the Supreme Administrative Court. The cases relate to a question which is of importance for the guidance of the application of law and the company shall accordingly be granted compensation for costs. The claimed amount is reasonable.

Justices Henrik Jermsten, Margit Knutsson, Mahmut Baran, Ulrik von Essen and Martin Nilsson have participated in the ruling.

Judge Referee: Gustav Granholm.