



Swedish tax aspects of providing tax risk insurance



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1 Introduction

We have observed an increase in activity in the tax risk insurance market over the past three years. Certain areas have emerged that are particularly relevant to underwriters.

In this article, we expand on six key aspects of Swedish tax and insurance legislation that impact the strategy chosen by underwriters entering the Swedish market:

- procedural aspects of Swedish tax litigation;
- advance tax payments and respite of tax payment;
- statute of limitations;
- open disclosure and voluntary corrections;
- tax surcharges; and
- key focus areas of the Swedish Tax Agency.

The aim of this article is to provide high level information that will enable a better understanding of the Swedish tax risk insurance market.

2 Insights

2.1 Procedural aspects of Swedish tax litigation

2.1.1 Audit

A tax audit in Sweden is initiated by the Swedish Tax Agency under its sole discretion. An internal decision by the Tax Agency to start an audit as well as the results of the audit are subject to confidentiality, meaning that they are not available to the public. The contents of the audit may become public in the case of an appeal and subsequent ruling from a court since the court rulings are public information.

The Swedish Tax Agency has a wide procedural possibility to request information in an audit. Taxpayers have the right to request the exclusion of specific information from the audit by filing an application with the Swedish administrative courts. If certain documents, that are not granted exclusion, are requested by the Tax Agency there is a legal requirement for the taxpayer to provide the documents during the audit proceedings.

2.1.2 Procedure of the Tax Agency and Swedish administrative courts

The Swedish Tax Agency issues the first legally binding reassessment decision, which can be appealed to the administrative court. While the appeal is addressed to the court, it must initially be submitted to the Swedish Tax Agency. The Tax Agency conducts a first assessment of the appeal before sending it to the court. This assessment rarely results in any changes of the opinion of the Tax Agency. Once the Tax Agency has submitted its reassessment opinion, usually negative based on our experience, the administrative court will review the appeal and all documentation. This is conducted in writing, allowing both the taxpayer and the Tax Agency to provide additional evidence and written statements to support their case. New evidence is permissible at this stage, provided it pertains to the original subject matter of the case. The ruling of the administrative court may be appealed to the Administrative Court of Appeal, where new evidence may be introduced. In rare occasions a leave to appeal is required. The decision of the Administrative Court of Appeal may be appealed to the Supreme Administrative Court. However, for this appeal to be allowed, the Supreme Administrative Court must first grant a leave to appeal. The main reason to grant an appeal in the highest court is if the case has significant precedent-setting value for legal interpretation. Based on our experience, it is difficult to achieve the leave to appeal as the Supreme Administrative Court is restrictive in allowing cases to be reviewed.

2.1.3 Technical procedural aspects

It is possible to apply for an oral hearing at any level of the court system. However, it should be noted that a case may only be heard in an oral hearing once. It is therefore not possible to get an oral hearing in both first and second level of the courts. The taxpayer is not required to reimburse the Swedish Tax Agency for costs associated with the court proceedings. Conversely, the Tax Agency may be required to compensate the taxpayer for legal fees to a certain extent, typically in cases where the taxpayer prevails in an appeal. Such compensation is determined and awarded by the court. However, the awarded amounts rarely cover the full legal fees incurred during the proceedings.

2.2 Advance tax payment and respite of tax payment

2.2.1 Procedural introduction

If the Swedish Tax Agency conducts a reassessment leading to an insured tax risk to materialize the tax and potential tax surcharges would be payable within a month of the reassessment notice depending on the content of the notice. This tax payment is still payable even if the taxpayer submits a formal appeal of the reassessment to the Swedish administrative court, being the first level court. The primary criterion for a respite of tax payment

is described in Section 2.2.2 below and pertains to the degree of uncertainty associated with Tax Agency's conclusions. Additional, less commonly invoked grounds for respite are addressed in Section 2.2.4.

2.2.2 Respite due to uncertain ruling

Under the Tax Procedural Act (Sw. *Skatteförfarandelagen 2011:1244*), the Swedish Tax Agency is obligated to grant a respite of tax or fee payments if there is any uncertainty regarding the final amount to be paid. The standard for "doubt" requires that it is at least as likely that the tax or fee will remain unchanged as that it will be reduced. However, a respite may be granted in cases where the likelihood of a reduction is slightly lower, provided it is not likely that the tax will remain unchanged. In our opinion, it is relatively easy to obtain a respite based on uncertainty when a well-reasoned appeal is submitted. Additionally, when a security is provided, it is uncommon for the Tax Agency to deny a request for respite.

2.2.3 Respite to pay tax surcharges

Tax surcharges hold a significant role in the Swedish tax system due to their structural resemblance to criminal fines. If a taxpayer is required to pay tax surcharges as a result of a reassessment by the Tax Agency, the tax surcharges are always eligible for a respite.

This leads to a scenario where, even if a respite is not granted, for the underlying tax liability—such as in cases where the *uncertain ruling* criterion is not met — the taxpayer may still be granted a respite for the tax surcharges. As a result, the taxpayer may be obligated to pay the reassessed taxes while being allowed a respite for the associated surcharges.

2.2.4 Specific merits for respite

When processing a case under a tax treaty, the government, or the designated authority for processing such case, may grant a respite of payment for the tax associated with the case.

If the person liable to pay the tax or fee has requested a review or filed an appeal against the decision, and if paying the tax or fee would result in significant hardship for the liable party or otherwise seem unreasonable, the Swedish Tax Agency is obligated to grant respite.

There is also a specific ground for respite of tax in cases involving exit taxation.

If exceptional circumstances exist, the Swedish Tax Agency may grant a respite of tax or duty payments. This general provision is aimed at providing a discretionary respite even if the main grounds do not apply. It must be clear from the investigation that a respite does not result in credit losses for the public sector. If the taxpayer is expected to be unable to pay the tax or duty after the respite period, a respite should not be granted. However, in such cases, the taxpayer may offer security to eliminate the risk of credit losses.

2.2.5 Security

If it can be assumed that the tax or duty will not be paid on time, a respite may only be granted if security is provided to ensure payment of the tax or duty.

The above does not apply if:

- the amount of the respite is relatively insignificant;
- it can be assumed that the tax or duty will not ultimately be due;
- the respite pertains to a tax surcharge, recall fee, account fee, documentation fee, reporting fee, platform fee, or control fee;
- the public representative at the Swedish Tax Agency has applied for an advance ruling; or
- there are other special circumstances justifying the respite.

The most common form of security is provided by a bank.

2.2.6 Interest

When a respite of tax payment is granted, the tax account of the taxpayer is credited with the amount. Interest is then calculated on this amount from the day following the original due date of the payment, i.e. from the interest calculation date. For example, if the tax or charge was due on 12 March and the respite is granted on 20 March, interest will begin to accrue from 13 March, in accordance with the respite decision. Worth noting is that such interest is not deductible.

2.3 Statute of limitations

2.3.1 Introduction

The ability for the Swedish Tax Agency to reassess taxation for previous years to the detriment of the taxpayer is governed by two different regulations: the ordinary procedure (the general rule) and reassessment under the rules for post-taxation.

2.3.2 The general rule

The general rule can be applied within a two-year period, beginning from the end of the calendar year in which a tax year expires.

The investigation procedure must remain unchanged, be initiated by the Swedish Tax Agency on its own initiative, and cannot be triggered by an appeal from the taxpayer.

The two-year period is determined by the end of the accounting period, which is the the following tax year. If a taxable event under review by the Tax Agency occurs during 2025 in a company with a calendar year as its financial year, the Swedish Tax Agency can decide on a tax reassessment until 31 December 2027.

If the tax return is submitted late, the two-year period may be extended. In such a case, the reassessment decision may be announced within one year from the date the tax return was received by the Swedish Tax

Agency.

If the taxpayer has not submitted a tax return, a reassessment decision may be issued within six years from the end of the calendar year in which the relevant tax year expired.

2.3.3 Post taxation

Under certain circumstances, reassessment of previous tax years can occur on the Tax Agency's initiative after the two-year period. A decision on post-taxation may be announced within six years, beginning from the end of the calendar year in which the relevant tax year expired, when the taxable under review occurs. This can occur in the following situations:

- misstatements in the tax return;
- miscalculations in the tax return;
- a decision issued by a court or the Tax Agency concerning taxes or fees outlined in specific provisions of the Tax Procedural Act;
- missing or incorrect statements of earnings and deductions; and
- certain situations involving shell companies.

Using the same example as in the previous point, if a taxable event under review by the Tax Agency in a company with calendar year as its financial year during 2025, the Swedish Tax Agency can decide on a tax reassessment until 31 December 2031.

The key difference between the general rule and reassessment under the post-taxation rules, aside from the extended time frame, is that the Swedish Tax Agency does not have to meet a certain requirement within the first two years.

For post-taxation to occur, the Tax Agency must generally prove that misstatements have occurred in the tax return. The Tax Agency is required to prove that there is a causal link between the incorrect information and the incorrect decision made. Misstatements occur, for example, when the taxpayer has failed to disclose relevant information. As discussed below, misstatements in the tax return can be avoided by utilizing the open disclosure regime.

2.4 Open disclosure and voluntary correction

2.4.1 Open disclosure

An open disclosure occurs when a taxpayer provides an explanation for a tax deduction or any other transaction or series of events affecting the tax return. The open disclosure is made either under *other information* or in a special annex to the tax return and is primarily used when it is uncertain if, for example, a specific expense is deductible or if any other uncertainty arises as to the treatment of taxes.

Those who make an open disclosure are not required to pay a tax surcharge if the treatment chosen in the tax return is later disallowed by the Swedish Tax Agency. By submitting an open disclosure, no misstatement is

considered to occur in the tax return, as the information is available for the Tax Agency to assess independently.

There is substantial case law available as to how much information is required for a disclosure to qualify as an open disclosure and effectively eliminate the risk of a reassessment. Each case will need to be assessed individually, based on all the facts available.

Providing an open disclosure means that the sometimes difficult to assess matters are brought into the light and increases the likelihood of further questions from the Tax Agency.

2.4.2 Voluntary correction

If a taxpayer discovers an error in a previously filed tax return, it is possible to voluntarily correct previous income tax returns and thereby reduce the risk of a tax surcharge. A voluntary correction involves correcting previously submitted information on your own initiative by submitting corrected income tax returns for previous years. Examples of items that may need to be adjusted are capital income, such as dividends on shares or interest income.

In order for a correction to be considered voluntary, it is required, that the taxpayer acts before the Tax Agency has initiated an investigation. It is also essential to fully disclose all relevant information. The applicable time limit for voluntary corrections is directly linked to the provisions outlined in Section 2.3 above. If the statute of limitations has already expired, there is no need to submit a voluntary correction. A voluntary correction is assessed manually by the Tax Agency, meaning that the risk of follow up questions increase.

2.5 Tax surcharge

2.5.1 Tax legislation

If incorrect information has been provided for tax purposes, for example in a tax return, the taxpayer may liable to pay a tax surcharge. Incorrect information may include, for example, claiming a deduction for an expense that was not incurred or failing to declare income.

For instance, if a dividend is not declared as a taxable income under the participation exemption and it turns out that not all requirements to apply the exemption were at hand.

Tax surcharges are also levied if you are subject to discretionary taxation. Discretionary taxation may be applied in two situations:

- if the tax or the basis for the tax cannot be reliably calculated due to deficiencies in your tax return or the supporting documentation; or
- if you have failed to submit a tax return.

If you have not submitted an income tax return, you can avoid tax surcharge by submitting an income tax return within four months of the last day of the month in which the Swedish Tax Agency issued its decision regarding tax surcharge.

If the taxpayer has not received notification of the tax surcharge by the end of the month in which the Tax Agency issued its decision, the four-month period will instead be calculated from the date the taxpayer became aware of the tax surcharge.

Similar rules apply to tax returns related to employer contributions and VAT, but the time limit in these cases is two months.

For final corporate income tax, the surcharge is 40% of the tax that would not have been assessed if the incorrect information had been accepted. However, if the incorrect information is due to an amount being attributed to the wrong tax year, the tax surcharge is reduced to 10% instead of 40%.

For taxes other than final corporate income tax - such as VAT, employer contributions or when applying for an excise duty refund - the tax surcharge is 20% of the tax that would not have been assessed or that was incorrectly credited to you if the Swedish Tax Agency had accepted the incorrect information. If, on the other hand, the incorrect information is due to attributing an amount to the wrong tax year or accounting period, the tax surcharge is reduced to 2% or 5%.

When determining the basis for a tax surcharge, only circumstances directly related to the issue that led to the surcharge are considered.

2.5.2 Insurability

In 2023, the Swedish Financial Supervisory Authority issued a statement concluding that providing insurance for fines or administrative sanction fees is not consistent with good insurance standards.^[1] This applies to both Swedish insurers and foreign insurers conducting business in Sweden.

In the case of W&I (Warranties and Indemnities) insurance, this should not pose an issue, since the insurance typically covers a contractual payment of damages corresponding to a fine or penalty that someone else has been liable to pay. However, in situations where the co-insured entity's tax surcharges are covered under specific tax risk insurance, there may be a risk that the statement applies to insurance against tax surcharges. Our assessment is that it is likely that tax surcharges at least falls within the general scope of the statement. It is however uncertain what the practical implications may be in any given case since it is not entirely clear to what extent the guidance is actually applicable in relation to tax surcharges. We also understand that insurance payments related to tax surcharges have been made in another Nordic country with similar rules.

One possible solution to the problem regarding tax risk insurance could be to adopt the approach used in W&I insurance, where one party in a transaction indemnifies the other, and that the insurance policy covers the indemnity payment rather than the actual tax surcharges. The view of the authorities on this proposed alternative is unclear, and it is difficult to predict with certainty what the outcome would be if tested in a Swedish court.

2.6 Special focus areas of the Swedish Tax Agency

The Swedish Tax Agency does not have consistent focus areas from year to year. Instead, the Tax Agency chooses a few specific topics each year that have specific relevance for that specific year. For example, due to the pandemic, the Swedish Tax Agency estimated that income from e-commerce and the rental of private homes

increased in 2020, prompting a focused review of these areas in the tax returns submitted in 2021. In 2024, the special focus areas included cryptocurrency trading, home rentals, gig economy income and e-commerce sales. The focus areas for 2025 will be revealed in March.

[1] <https://www.fi.se/en/published/legal-positions/listing-of-legal-positions/insurance-against-fines-and-administrative-sanction-fees/>

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