

Sweden, Supreme Court, Nytt Juridiskt Arkiv Avdelning I, NJA 2013 s 502, decision 11 June 2013

Deciding bodies and decisions

The Supreme Court of Sweden (Högsta domstolen) Nytt Juridiskt Arkiv Avdelning I, NJA 2013 s 502, decision 11 June 2013

Area of law

Criminal Law

Subject matter

Tax crime – Sanctions – Ne bis in idem rule

Issue of whether the Swedish system with regard to incorrect information in tax proceedings, entailing double sanctions (tax surcharge and criminal sanction) in two different proceedings against one and the same person was compatible with the right not to be tried or punished twice for the same crime under Article 4 7th Amendment ECHR and Article 50 Charter.

Summary Facts Of The Case

The defendant was prosecuted for grave tax crime and grave accountancy crime in respect of three separate transactions, each obscuring the distinction between his own incomes and tax liabilities and those of a company controlled by the defendant. In connection to these transactions, the defendant had also wilfully submitted incorrect information in tax revenues. The defendant personally and the company had both been subjected to tax surcharges in November 2009. In June 2010, the defendant was prosecuted. The legal issue was whether and, if so, to what extent the decisions on tax surcharges barred the prosecution.

The Supreme Court traced the background to and reasons for the Swedish system of double penalties for tax offences. The Supreme Court then cited Article 4(1) 7th Amendment ECHR and Article 50 Charter, both protecting the right not to be tried or punished twice in criminal proceedings for the same criminal offence. The Court noted that Article 4(1) 7th Amendment ECHR concerned double trials in the same Convention State, while Article 50 Charter concerned double trials in the Union. The Court also recognised that the Charter did not confer new competences on the Union and that it applied only when EU law was applicable. The Court finally noted that the Charter had the same legal status as the EU Treaties, making it part of primary EU law.

The Supreme Court acknowledged that it had previously concluded that sanctions related to tax offences fell outside the scope of application of the Charter. In light of the judgment of the ECJ in case C-617/10 Åkerberg Fransson, however, the Supreme Court recognised a need to re-evaluate its previous stance. Citing that judgment and relevant ECtHR case law, the Supreme Court now

concluded that Article 50 Charter did apply when incorrect information in tax revenues related to value added tax led to tax surcharges and prosecution for tax crime.

The Supreme Court noted that, pursuant to the judgment of the ECJ in case C-617/10 Åkerberg Fransson, it was under a duty to give full effect to the rights of the Charter and, if necessary, to set aside national provisions contrary to it without requiring clear legal support in the Charter or EU case law ("clear support" being the Swedish constitutional prerequisite for the setting aside of statutory provisions by courts).

Citing Åkerberg Fransson, the Supreme Court went on to assess whether both sanctions related to tax offences were penal in character. Citing relevant national and ECtHR case law, the Supreme Court held that tax surcharges were penal in character within the meaning of Article 4(1) 7th Amendment ECHR, and that the assessment must have the same result under Article 50 Charter. The Supreme Court further held that tax surcharges and tax crime related to the same act if they were based on the same incorrect information in tax revenues. By contrast, the Supreme Court held that tax surcharges and accountancy crime did not normally relate to the same act.

The Supreme Court thus concluded that Article 50 Charter was applicable to tax surcharges and tax crime prosecution in respect of breaches of rules on value added tax. The Court was nevertheless concerned that application of the right in Article 50 Charter might come into conflict with the duty of Member States to provide sanctions that were effective, proportionate and dissuasive in the event of a breach of EU law. The Court held in that regard that it was crucial that national law protecting the right not to be tried or punished twice in criminal proceedings for the same criminal offence more broadly than Article 50 Charter did not impede the effectiveness of EU law. The Court stressed that the final balancing assessment should be made by the ECJ.

With regard to tax offences not within the scope of Article 50 Charter, the Supreme Court held that the similarities between Article 4(1) 7th Amendment ECHR and Article 50 Charter were such that they should be interpreted equally. Considerations of legal foreseeability and equal treatment led to the same result. The Court therefore held that the level of protection against double trials and double penalties should be the same notwithstanding which of these provisions were applicable.

Concerning tax surcharges imposed on legal persons and subsequent prosecutions of private parties controlling that legal person, the Supreme Court held that the right not to be tried or punished twice in criminal proceedings for the same criminal offence would apply in circumstances where the tax surcharge was pursued against the private party at issue notwithstanding that primary liability was with the legal person.

Finally, the Supreme Court held that the prohibition against double trials and double penalties would apply from the date of the decision by the Skatteverket (Swedish Tax Agency) to impose a tax surcharge. Accordingly, prosecution for tax crime related to the same act would be barred from that date, notwithstanding whether the tax surcharge was appealed.

The Supreme Court thus dismissed the prosecution for grave tax crime on the counts where the defendant had been subjected to a tax surcharge for the same act but rejected the appeal of the defendant on the other counts.

Relation to the scope of the Charter

Article 50 Charter (Right not to be tried or punished twice in criminal proceedings for the same criminal offence)

The case was within the scope of application of the Charter insofar as it concerned value added tax rules derived from Directive 2006/112/EC. In the judgment, reference to the Charter was made by the Supreme Court. No reference was made to the Explanations.

Impact on Jurisprudence

Precedent delivered by the full Supreme Court. Following this case, the Supreme Court and Supreme Administrative Court have created a new body of case law on ne bis in idem.

Impact on Legislation / Policy

By adapting to the views expressed by the European Court of Justice in Case C-617/10 Åkerberg Fransson, this case marked the end of the so-called “lower court rebellion” with regard to the Swedish Supreme Court’s interpretation of the ne bis in idem rule. Following this case, the Supreme Court and Supreme Administrative Court have created a new body of case law on ne bis in idem. The shift has also prompted the legislator to repeal the system of double sanctions and reform the system of sanctions for tax offences.

Sources - EU and national law

National Law

- 2, 10, 15-16 §§ skattebrottslagen (Tax Crimes Act sections 2, 10, 15-16)
- 49 kap 4-6 §§, 51 kap 1 §, 59 kap 11-21 §§ skatteförfarandelagen (Tax Proceedings Act chapter 49 sections 4-6, chapter 51 s 1, chapter 59 sections 11-21)
- 5 kap 1 § taxeringslagen (Taxation Act (repealed) chapter 5 s 1)
- 11 kap 5 § brottsbalken (Penal Code chapter 11 s 5)
- 25 kap aktiebolagslagen (Companies Act chapter 25)
- 11 kap 2 § lagen om ekonomiska föreningar (Economic Associations Act chapter 11 s 2)
- 2 kap 20 § lagen om handelsbolag och enkla bolag (Partnerships Act chapter 2 s 20)
- 30 kap 9 §, 45 kap 1 § rättegångsbalken (Code of Judicial Procedure chapter 30 s 9, chapter 45 s 1)
- Prop 1971:10 p 196 et seq, 201, 209 et seq, 236, 240 (legislative travaux préparatoires)
- Prop 1993/94:117 p 37 et seq (legislative travaux préparatoires)
- Prop 2002/03:106 p 102 et seq (legislative travaux préparatoires)
- Prop 2004/05:69 p 31 et seq (legislative travaux préparatoires)
- Prop 2010/11:165 p 445, 965 (legislative travaux préparatoires)
- Bet 1993/94:KU24 p 18 et seq (legislative travaux préparatoires)
- Bet 2002/03:SkU16 p 11 et seq (legislative travaux préparatoires)

- NJA 2004 s 510 I and II (national case law)
- NJA 2010 s 168 I and II (national case law)
- NJA 2011 s 444 (national case law)
- NJA 2012 s 1038 I (national case law)

EU Law

- Articles 4(3), 6 TEU
- Article 325 TFEU
- Articles 50-53 Charter
- Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax
- Article 4(1) 7th Amendment ECHR

Sources - CJEU Case Law

Case C-489/10 Bonda, paras 37, 39

Case C-617/10 Åkerberg Fransson, paras 33, 36

Case C-399/11 Melloni, para 60

Sources - ECtHR Case Law

ECtHR case 60619/00 Rosenquist v Sweden

ECtHR case 14939/03 Zolotukhin v Russia, paras 52-53, 78, 80-84

ECtHR case 13079/03 Ruotsalainen v Finland, paras 48-57

ECtHR case 2376/03 Tsonev v Bulgaria, para 51

ECtHR case 4455/10 Marguš v Croatia

ECtHR joined cases 3653/05, 14729/05, 20908/05, 26242/05, 36083/05, 16519/06 Asadbeyli and others v Azerbajdzjan

ECtHR joined cases 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 Engel and others v Netherlands

ECtHR case 16137/04 Kurdov and Ivanov v Bulgaria

ECtHR case 41265/98 Manasson v Sweden

ECtHR case 9631/04 Carlberg v Sweden, para 69

ECtHR case 31982/96 RT v Switzerland

ECtHR case 73661/01 Nilsson v Sweden

ECtHR case 53785/09 Tomasovic v Croatia
