

# **SECRECY AND TRANSPARENCY IN THE TAX ADMINISTRATION**

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## **1. INTRODUCTION**

For me, as a constitutional lawyer, it was both an honour and a true challenge, which gave me quite a lot of fear, to talk on Secrecy and Transparency in the Tax Administration before such a prestigious Auditorium as the first International Conference on Taxpayer Rights, in Washington DC in November 2015. My presentation, that was given in the Panel called “The Rights to Confidentiality and Privacy in an Age of Transparency<sup>1</sup>, dealt with the issue in general and with Swedish law in this field – well-known for its quite wide transparency – in particular. I will here try to summarize it, but I wish to stress that I am more familiar with the constitutional and perhaps administrative aspects of this topic than with the issues that are related to tax law in the strict sense. My main contact with it has been through an important research project on Tax Secrecy and Transparency managed by my colleague Professor Eleonor Kristoffersson, which resulted in an important and global comparative study of the tax system in 37 different countries<sup>2</sup>, as well as an important doctoral dissertation.<sup>3</sup>

In order to start, then, with a few general remarks on the phenomenon of transparency as such, we may note that the Nordic countries and Netherlands are, according to a number of studies, the countries in the world with the greatest amount of transparency within the public administration. It also so happens, according e.g. to a number of studies from Transparency International and other NGO’s, that those countries are among the least corrupt states in the world<sup>4</sup>, which is perhaps not entirely coincidental. In Sweden, where the right to access to documents has been enshrined in the Freedom of Press Act (one of the constitutional acts) since 1766, this has undoubtedly been important. Given the fact that the same political party, the Social Democrats, stayed in power 1932-76, 1982-91 and 1994-2006 and thus truly dominated Swedish political life for three quarters of a century, this would most likely had led to huge corruption had the public administration been less transparent.

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<sup>1</sup> Together with QC Philip Baker, London, and Professor Graeme Cooper, Sydney.

<sup>2</sup> See E. Kristoffersson/M. Lang/P. Pistone/J. Schuch/ C. Starringer/ A. Storck (eds.), *Tax Secrecy and Tax Transparency – The Relevance of Confidentiality in Tax Law*, Vol. 1-2, Peter Lang Academic Research, Frankfurt a.M. 2013

<sup>3</sup> Anna-Maria Hambre, *Tax Confidentiality – A Comparative Study and Impact Assessment of Global Interest*, Örebro Studies in Law No 6, 2015.

<sup>4</sup> See e.g. Corruption Perceptions Index 2014, available at [www.transparency.org/whatwedo/publication/cpi2014](http://www.transparency.org/whatwedo/publication/cpi2014).

Also USA is an open society, at least in comparison with continental European states such as France, Germany, Italy and Spain (as well as the UK). From my own personal experience, working as an EU civil servant at the EU Committee of Regions in Brussels in 2003, I remember conducting a comparative study within this area in 2002. The issue was whether companies and investors could get access to ordinary maps from the public administration, preferably without great costs. To improve this was likely to improve European competitiveness in general, as a very small part of the so-called Lisbon strategy (not to be confused with the Lisbon Treaty, that occurred much (or at least five years) later). It turned out that this was impossible in most EU states, while there were hardly any obstacles at all within the USA! Today, with general access to Google Maps and similar new phenomena, the problem has perhaps disappeared, but the episode may still tell us something about the USA as a comparatively open society, in relation to most EU states. Sometimes I think that Europeans should be more aware of this.

## 2. SWEDISH LAW

Let us now turn our attention to Sweden.

As far as Swedish legislation is concerned, we may note that in the new Swedish law on Secrecy and Transparency of 2009, Offentlighets- och Sekretesslagen, most of the rules on secrecy within the tax administration are to be found in Chapter 27. The main rule here is that full secrecy applies for all the work within the Tax authority that relates to establishing the taxes to be paid by individuals and companies (Chapter 27, Article 1), while the tax decisions themselves are normally public (Chapter 27, Article 6).

”Tax” does here refer to all public fees and dues. The secrecy will last for twenty years, according to Chapter 27, Art. 1, Sect. 3. It will also apply in matters related to taxation or to reduction or even elimination of taxes. It does however only apply in matters related to single individuals, i.e. physical or legal persons; a company owned by a municipality has been considered as falling outside this scope in a ruling 2002 of the Supreme Administrative Court.

When a tax case comes before a court, the rules are slightly more complicated. Then, secrecy will apply if it is to be assumed that the individual would suffer harm should the information in question be revealed or disclosed (so-called *rakt skaderekvisit*), according to Chapter 27, Article 4. Otherwise, the information will then be made public, but should a court in a specific case receive information from a public authority that lacks importance in the tax case itself but which has previously been classified as secret, then that classification is to remain. On the other hand, should that information be relevant for the case, the former classification of the information as secret will normally not remain.

Secrecy as such will never prevent the tax authorities from revealing information to the individual taxpayer, as follows from Chapter 27, Art. 7. On the other hand, a rule in Chapter 17, Art. 2 should be observed here. According to that rule, secrecy will remain also in relation to the individual applicant or taxpayer in matters concerning control of the individual's obligations to pay various taxes or fees to the state (in order to make advanced planification of

such moves or transactions more difficult). Similarly, it should be noted that according to Chapter 10, Article 28, secrecy in a specific matter will never prevent a tax authority from passing on information to another public authority, when any such obligation is required by law. This is important not least in relation to criminal matters, when the tax authorities have an obligation to inform the prosecutor of their suspicions.

Still, this means that the tax decisions themselves are normally public, as follows from Chapter 27, Article 6. The newspapers – in particular the less serious parts of the press – do regularly publish lists of who earns the most “in your neighborhood” or who had the highest income raise last year or similar facts.<sup>5</sup> This kind of publicity does perhaps not exist in so many other countries, but so far, Swedish people have been able to live with it.

Finally, a few words should be said about the relation between secrecy and the constitutionally protected freedom of civil servants to disclose information that follows from the Freedom of Press Act of 1949 (Tryckfrihetsförordningen, Chapter 1, Art. 1 and the whole Chapter 2), regulating books and the press, as well as the Freedom of Speech Act of 1991, regulating other media (Yttrandefrihetsgrundlagen, Chapter 1, Art. 2). As follows from Chapter 27, Art. 10 of the new “Official Secrets Act”, the secrecy in tax matters will sometimes overrule this freedom of information for so-called *whistleblowers*, but other times that will not happen.<sup>6</sup> This is something that must be considered in each specific case, then. For instance, the secrecy within tax authorities before a decision is made may never legally be broken, which is also the case in the situations where secrecy does actually prevail during court proceedings.

### 3. CONCLUDING REMARKS

An analysis of the pros and cons of such a transparent tax system as the Swedish one must more or less by necessity also be an analysis of transparency within the public administration in general. And then, we must always keep in mind the overall, general purpose of transparency within the public administration, namely to combat corruption and abuse or misuse of public power. All power corrupts (and absolute power corrupts absolutely), as lord Acton once put it. There is no reason, then, to exempt the tax administration from this general criteria.

Many surveys throughout the world show the very high correlation or connection between high transparency and low corruption (as well as the opposite). It is also very likely that

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<sup>5</sup> In fact, in order to profit the most from this kind of information, there are articles each week – mainly on Sundays – with headlines such as “which couples earn most together”, “which women under 35 earn most” or which pensioners earn most or whatever. The phantasy among the journalists involved is admirable, but it is surprising that people want to know so many statistical – sometimes even boring – details.

<sup>6</sup> This freedom comprises the right of every person, including public officials, to anonymously communicate information of interest to newspapers, even in breach of a duty of secrecy. The rule, however, encounters a few exceptions. Firstly, a qualified secrecy (a characteristic which must be expressly mentioned in the legislation) cannot be breached. Secondly, whistleblowing only covers the communication of information. It is never legitimate to transmit entire acts covered by secrecy. Thirdly, a series of crimes against national security, such as treason and espionage, are excluded from constitutional protection.

transparency as such makes the public administration more efficient, since it knows that it is working in the limelight or spotlight of the media and the public. Thus, it has to worry about its own reputation and can not afford to be lazy or incompetent.

However, such a wide degree of transparency as the Swedish one may also entail certain problems. There may for example be certain risks for the integrity of individuals involved, although it is hard to find concrete and specific examples. Article 8 of the European Convention of Human Rights (ECHR), protecting the integrity of the individual and the family, has no equivalent in the Swedish Constitution, which is worth noticing.<sup>7</sup> However, complaints on this very point, related to the work of the tax administration, have been few and rare.<sup>8</sup> The system seems to enjoy a basic legitimacy, due to the general trust put in the work of the public administration.

What one could perhaps wish for, however, are better possibilities for financial compensation from the state for those who have actually suffered from damages to their integrity. According to Chapter 3 § 2 of the Tort Liability Act (Skadeståndslagen, 1972:207), the State or a municipality must compensate personal injuries, property damages and pure economic losses (in this case, even without the requirement of a crime) caused in connection to the exercise of their authority (by so-called *myndighetsutövning*). The meaning of “pertinent to the exercise of public authority” is far from obvious and is not explained in the Tort Liability Act. One must therefore resort to the preparatory works (which are an important source of law in the Swedish legal system<sup>9</sup>) and case law. Here, some shortcomings may be found and this is perhaps one of the main flaws in a regulation with ancient roots, that is otherwise working quite well and may therefore perhaps be of general, international interest.

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<sup>7</sup> Here, a case from the European Court of Human Rights that is often mentioned and quoted in Swedish legal doctrine as an example of a violation of ECHR that would not have been contrary to Swedish law is *Caroline von Hannover v. Germany* from 2004, where the former Princess Caroline of Monaco successfully brought an action against Germany for intrusion against her privacy. The background was that paparazzi photographs had taken photos of her shopping in and then leaving a supermarket. She claimed that this violated her privacy due to the very fact that she was followed in a normal, casual kind of situation. Having lost the case against a newspaper in German courts, she won the case against Germany in the Strasbourg court. Under Swedish law, her chances to win the case before a court would have been extremely small or none at all.

<sup>8</sup> A related problem could be a risk of criminal actions against wealthy persons, who are relatively easy to find due to the kind of newspaper publications mentioned above in fn. 5. A few such examples may be found, but the system is still accepted.

<sup>9</sup> The preparatory works indicate that actions falling into the category of “pertinent to the exercise of public authority” should have the form of decisions with immediate legal effects for an individual or be part of the decisional process of a public authority and thus have at least indirect legal effects for an individual; see [prop. 1972:5 p. 499-500](#). It appears therefore that the scenario invoked by Chapter 3 § 2 must at the very least include a functional connection with the exercise of public authority. The same interpretation seems to be espoused by case law.