

Unofficial translation

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"The government should quickly strengthen the legislation against cum-cum schemes"

"The erosion of the Swedish tax base that has been going on for the past 20 years cannot continue forever. Sweden is doomed to ultimately fall into political extremism unless all political parties begin to accept social responsibility and jointly work for the introduction of long-term sustainable tax rules aimed at protecting our tax base", write Torsten Fensby and Leif Rosenfeld.

TT News Agency's investigations published earlier this week indicated that Sweden has also been exposed to so-called cum-ex scams.

One may ask why the Swedish Tax Agency did not carry out this review itself given what has been discovered in other countries. Anyway, the Tax Agency should now urgently carry out an internal investigation to try to identify the structures and determine the extent of these scams in Sweden.

However, the tax revenue stolen through cum-ex scams is probably peanuts compared to what have been lost through cum-cum schemes.

In short, this type of aggressive tax planning means that shares owned by a foreign shareholder, just before the dividend is paid, are lent or temporarily sold to a Swedish "nominee". (1) Since the nominee is the registered owner of the shares, the dividend is paid to the nominee.

The nominee then returns or sells back the shares, normally at the same price, and also gives the original foreign shareholder the dividend received, except for a premium deduction.

Thus, the original foreign shareholder does not have to pay any withholding tax on the dividend.

The rule that exists to prevent cum-cum arrangements, the so-called “nominee rule”, has been applied only in a few cases. The Swedish Tax Agency has justified its inaction with its difficulty of satisfying the rule’s criteria as its applicability depends entirely on facts and circumstances.

We agree that the nominee rule in its current form is difficult to apply. The Administrative Appellate Court in Sundsvall tried in 2007, in the Carnegie case, for the first and (as far as we know) only time the nominee rule and considered it applicable to the examined scheme.

Against this background, the question arises as to what measures the Swedish Tax Agency took after the Carnegie case to prevent new cum-cum schemes. In any case, the legal situation does not appear to have been further clarified.

The government had the opportunity to strengthen the legislation in 2015 when the so-called 'anti-abuse rule' was implemented following the EU's revision of the parent and subsidiary directive.

However, the opposition from the business community's consultative bodies was so compact that the government in practice failed to correctly implement the directive’s new provision into Swedish law! Despite the current weaknesses of the nominee rule, it was left unchanged.

The above is quite telling of the climate that prevails in Sweden today when the government and authorities try to counteract international tax avoidance and evasion through concrete measures.

The difficulties in introducing any meaningful rules against cum-cum schemes have meant that it is in principle legal or at least perceived as legal in Sweden to erode the tax base via such schemes. Several billions have probably been lost through such activities.

However, it is actually not difficult to address aggressive tax planning via cum-cum schemes. Many countries have practically eliminated the use of such schemes by introducing a minimum period ("waiting period") that the shares must be held before and after the dividend payment.

Applicants for repayment of withholding tax often also have the burden of proving that the share loan or share sale carried out during the qualifying period is entirely commercial.

The government is currently reviewing the Coupon Tax Act. This provides the government with a golden opportunity to introduce rules that once and for all put an end to cum-cum schemes in Sweden. However, this presupposes that there is a bipartisan will to protect the Swedish tax base against aggressive tax planning. The deafening silence of the entire political corps after the scandal does not inspire hope.

By way of comparison, the French Parliament has already set up a bipartisan commission to investigate both cum-cum schemes and cum-ex scams. The French government has stated that it will act "ruthlessly" if it turns out that crimes have been committed. The French prosecutor's office has also launched an investigation into reported cum-ex scams.

The base erosion that has been going on for the past 20 years cannot continue forever. The industry's representatives should also realize this. It is simply against the industry's own long-term interests to block all attempts by incumbent governments to effectively combat aggressive tax planning.

Sweden is doomed to ultimately fall into political extremism unless all political parties begin to accept social responsibility and jointly work for the introduction of long-term sustainable tax rules aimed at protecting our tax base.

(1) Note that citation marks are added because the nominee concept does not exist in Swedish law