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In cases no. 4260-23 and 4262-23, **KLK Vård & Utbildning AB** (currently dissolved) (Appellant) v. the **Swedish Tax Agency** (Respondent), the Supreme Administrative Court delivered the following judgment on 23 October 2024.

RULING OF THE SUPREME ADMINISTRATIVE COURT

The Supreme Administrative Court rejects the appeal.

The Supreme Administrative Court grants KLK Vård & Utbildning AB compensation for costs incurred in the Supreme Administrative Court in the amount of SEK 32,200.

BACKGROUND

1. KLK Vård & Utbildning AB has been dissolved following completion of bankruptcy proceedings without a surplus. As a main rule, a dissolved company cannot appear as a party in a judicial process. In practice, however, deviations from the main rule have been made as regards cases involving tax surcharges. A company which has been dissolved following the completion of bankruptcy has been deemed entitled to review by administrative courts by reference to the European Convention on Human Rights (ECHR). On the other hand, a company in such a situation has been regarded as not being covered by the Convention right to a new trial in a court of higher instance given that exceptions to the right may be granted for offences of a minor character.
2. The Swedish Tax Agency took a decision regarding a change to, *inter alia*, income tax and employer's contributions for KLK Vård & Utbildning AB and imposed tax surcharges on the company. As a consequence of the decision, the company's deficit was reduced. The tax surcharge was accordingly established at 40 per cent of one-fourth of the reduction of the deficit. As regards the tax surcharge regarding the employer's contributions, the Swedish Tax Agency was

of the opinion that it was unreasonable to impose tax surcharges in their full amount since the company was entitled to deductions for the employer's contributions. The tax surcharge regarding employer's contributions was accordingly reduced to three-quarters of the full amount.

3. The company appealed to the Administrative Court in Uppsala which rejected the appeal. The company – which had then been dissolved – appealed the claim to the Administrative Court of Appeal in Stockholm which disallowed the appeal. The administrative court of appeal stated that no circumstances have come to light which constituted reason to ascribe to the company eligibility to act as a party notwithstanding that it had been dissolved by means of bankruptcy, and that the company was also not entitled to review in the administrative court of appeal pursuant to the Convention since the offence which gave rise to the imposition of tax surcharges must be regarded as of a minor character.

CLAIMS, ETC.

4. *KLK Vård & Utbildning AB* claims that the Supreme Administrative Court shall overturn the decision of the administrative court of appeal to disallow and remand the case to the administrative court of appeal for substantive adjudication. The company also claims compensation for cost for counsel.
5. *The Swedish Tax Agency* is of the opinion that the appeal, even in light of recent case law from the European Court of Human Rights, is to be rejected.

REASONS FOR THE RULING

The question in the Supreme Administrative Court

6. The question is whether it is compatible with Article 2 of Protocol No. 7 of the ECHR to deny a company which has been dissolved by means of bankruptcy to obtain a decision regarding tax surcharges reviewed by a court of higher instance.

Legislation, etc.*Tax surcharges*

7. Tax surcharges are special charges which, pursuant to Chapter 49, section 4 of the Tax Procedures Act (2011:1244) are charged to a person who has in some manner other than orally provided incorrect information for the purposes of such person's tax assessment. Section 11 provides that tax surcharges for incorrect information regarding final tax are 40 per cent of the tax which, had the incorrect information been accepted, would not have been determined for the person who provided the incorrect information. Tax surcharges on employer's contributions are 20 per cent of the tax which, had the incorrect information been accepted, would not have been determined for, nor had been erroneously credited to, the person who provided the information. Section 14 provides that, in the event incorrect information would have given rise to such deficit from economic activity which was not used during the same tax year, the tax surcharge shall instead be calculated on one-fourth of the deficit which, had the incorrect information been approved, would have erroneously been credited to the person who provided the information.
8. Chapter 51 contains rules regarding exemption from special charges. Pursuant to section 1, the Swedish Tax Agency shall take decisions regarding complete or partial exemption from a special charge if it is unreasonable to impose the charge in the full amount. In conjunction with such determination, special consideration shall be given to whether the error or passivity which led to the charge may be deemed to have been due to age, health or similar circumstances, was due to misjudgement of a rule or the significance of the actual circumstances, or was caused by deceptive or misleading statements of earnings and deductions or information regarding payees in the employer tax returns. In addition, consideration shall be given to whether the charge is not in reasonable proportion to the error or passivity or whether an unreasonably long period of time has

transpired after the Swedish Tax Agency found cause to assume that tax surcharges shall be charged where the person to whom the tax surcharge applies cannot be blamed for the delay.

The European Convention on Human Rights

9. Article 6, paragraph 1 of the ECHR states that everyone, in the determination of any criminal charge, is entitled to a fair and public hearing by an independent and impartial tribunal.
10. Article 2, paragraph 1 of Protocol No. 7 of the ECHR states that everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. Pursuant to Article 2, paragraph 2, exceptions to this right may be made as regards offences of a minor character, as prescribed by law.

Companies dissolved following completion of bankruptcy

11. In the event a company has been placed into bankruptcy and such has been completed without surplus, the company is dissolved upon completion of the bankruptcy. This is stated in Chapter 25, section 50, first paragraph of the Companies Act (2005:551).

The Court's assessment

12. The Supreme Administrative Court has previously found that the system involving tax surcharges entails a criminal charge within the meaning of Article 6 of the ECHR and observed that a taxpayer is thereby at all times entitled to a review in the administrative court of a tax surcharge imposed by an administrative authority. This principle was deemed to apply also in respect of a company which is dissolved following completion of bankruptcy and as a consequence otherwise

lacks legal capacity and eligibility to act as a party (RÅ 2000 reported case 66 I and RÅ 2002 reported case 76).

13. However, in RÅ 2003 reported case 53, the Supreme Administrative Court has made the determination regarding tax surcharges that a taxpayer cannot base any right to adjudication in two court instances on Article 2 of Protocol No. 7 of the ECHR since a term of imprisonment is not a possible sentence for alleged provision of incorrect information forming the basis of the imposition of tax surcharges.
14. The European Court of Human Rights has subsequently specified the breadth of the examination in Article 2, paragraph 2 and stated that, even where the absence of a penalty of imprisonment is an important factor in the determination of whether an act is to be regarded as of minor character or not, it is neither a determining factor nor the only criterion to be taken into account. Consideration must be given to the circumstances in the individual case (judgments of 30 June 2020 in the case of *Saquetti Iglesias v. Spain*, paragraphs 36–42, and of 26 October 2021 in the case of *Kindlhofer v. Austria*, paragraphs 37–43). It is apparent from the cases that crimes which are punishable by fines are not always of minor character within the meaning of the Convention and that the theoretical possibility of a penalty of imprisonment being imposed does not automatically exclude the fact that a crime may be of a minor character.
15. Taking into account that there are currently cases from the European Court of Human Rights concerning the exemption rule in Article 2, paragraph 2 of Protocol No. 7 of the ECHR, there is cause to again consider the question whether a dissolved company may be entitled to examination in two court instances in a case regarding tax surcharges.
16. The Supreme Administrative Court notes that, in conjunction with the determination of whether an act is of a minor character, the circumstances – over and above the question regarding imprisonment as a possible sentence – in the

individual case shall be considered in light of the purpose and formulation of the sanction.

17. As regards the purpose and formulation of the tax surcharge, it should be noted in particular that tax surcharges relating to incorrect information are imposed in relation to the tax relief that the incorrect information would have generated by virtue of it being based on a certain per cent, 40 per cent at the most, of the tax which would not have been determined had the incorrect information been accepted. In conjunction with a decision regarding tax surcharges, furthermore, a number of grounds for exemption are to be considered which cover the taxpayer's individual circumstances, the proportion between the surcharge and the act or the passivity giving rise to the tax surcharge and the processing time. In addition, a tax surcharge may never be converted into a custodial sentence.
 18. Accordingly, it follows directly from the legislation that a decision regarding tax surcharges entails a balancing of proportions and an examination of the circumstances in the individual case.
 19. Against this background, the Supreme Administrative Court finds that there are no reasons to deviate from the assessment made in RÅ 2003 reported case 53, i.e. that a tax surcharge constitutes a sanction for an offence of a minor character within the meaning referred to in Article 2, paragraph 2 of Protocol No. 7 of the ECHR.
 20. Accordingly, the appeal shall be rejected.
 21. The company is granted compensation for costs of counsel incurred in the Supreme Administrative Court in the amount of SEK 32,200 (RÅ 2000 reported case 41).
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Case no.
4260-23
4262-23

Justices Henrik Jermsten, Thomas Bull, Per Classon, Mahmut Baran and Linda Haggren have participated in the ruling.

Judge Referee: Erika Karlsson.