PRIVATE LAW AND TAX LAW

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1. INTRODUCTION

In Swedish tax legislation extensive use is made of terms and expressions which are derived from private law. This is not in itself remarkable. The nation's economic activities are regulated by private-law rules while at the same time this regulation is closely bound up with economic needs and procedures. Private law, i.e. property law and family law, provides the rules and forms by means of which economic resources can be used and exchanged in the community. This activity, by being taxed in various ways, provides the community with the necessary means for societal activities. It is therefore scarcely surprising that the prerequisites in different rules are often described with the aid of private-law terms. It is difficult to conceive of a system of tax law lacking any connection with private-law terminology and conceptualization.

In what follows there will first be presented an analysis of the way in which private-law terms can be used, above all in property-law and income-law practice. Beginning with the way in which private-law terms should be used in tax law, I shall then go on to discuss how this approach accords with the solutions that Sweden's highest administrative court, the Supreme Administrative Court, has arrived at in its implementation of the law. There then follows a discussion as to whether there should be a reorientation of practice and the extent to which current legislation needs to be amended. In a concluding section I shall deal with the proposals for a general provision on tax avoidance which have recently been presented in Sweden.[1]

2. PRIVATE-LAW CONCEPTS

It has been observed in modern writing on private law that civil-law terms are often used in different meanings in the application of different private-law rules. This circumstance can be exemplified by considering the

[1] See further on this in Sture Bergström, *Skatter och civilrätt. En studie över användningen av civilrättsliga termer i skatterättsliga sammanhang.* (Private Law and Tax Law. A Study of Private-Law Terms Used in Tax-Law Contexts.)

cated situations. To be able to do this it is necessary to have a good knowledge of private law and tax law. A tax lawyer may possess such knowledge in both fields and it is therefore most realistic to maintain that the outcome of the use of private-law terms in tax law should so far as possible be predictable for a tax lawyer at least in more complicated cases. It would, however, seem to be difficult to require that a tax lawyer should always be able to foresee what solution the Supreme Administrative Court will choose to apply on the first occasion when it takes up an attitude on a certain question. This is due to the facts that the Court is a precedent-making instance and that it is impossible with the aid of language to give a completely precise description of a complicated situation.

In order to make it possible to foresee how the tax courts will use private-law terminology in the future, it is important that the courts should give detailed reasons for their decisions and do so in such a way that it can be seen whether they have chosen the solution which is most justifiable from an objective point of view. At present, owing to pressure of time, the Supreme Administrative Court and the other tax courts are in practice unable to achieve this aim. The decisions are often too narrowly concerned with the case at issue and it is therefore sometimes difficult to draw any general conclusions from them.

4. TAX-LAW PRACTICE

By way of introduction I propose to deal with problems that arise in drawing the boundary between gifts and sales in different tax-law rules. Such problems occur, *inter alia,* when parents give real estate to their children and at the same time require the children to take over the liability to repay any mortgages on the property.

In legal practice a variety of solutions are applied. In gift taxation the transaction is divided up into a gift component and a sales component and it is the gift component that is taxed. Such part of the gift as exceeds the value of the property from the tax point of view, i.e. its assessment value, which by definition is less than the market value, will not, however, be subject to taxation. When stamp duty is exacted on real-estate transfers the transaction is considered as a sale if the consideration amounts to at least 85 % of the assessment value. In any other case the transaction is regarded as a gift. In capital gains taxation the boundary between gift and sale is drawn at 100 % of the assessment value if the transaction is designated as a gift. If the transaction has been described as a sale the acquisition is—

somewhat inconsistently—divided into a gift component and a sales component.

The rules that apply in the taxation of capital gains are sometimes unsatisfactory from a material point of view, inasmuch as the assessment value which has to correspond to the value of the gift may often constitute less than 60 % (and sometimes considerably less) of the market value of the property. Better solutions in this form of taxation are obtained if all beneficial transactions where the consideration falls below the real value of the property are classified as gifts irrespective of how they are described. This solution has the advantage that it cannot be used in order to arrive at fabricated deductible capital losses.

In legal practice there has been a case where the action of a father who had bought a property for 245 000 kronor and immediately transferred it to his under-age children for a consideration of 145 000 kronor was accepted. The transfer amount was in excess of the assessment value of the property. The transfer to the children—obviously a transaction with marked beneficial features—was classified as a sale from the point of view of capital gains tax. The father was allowed a deduction of 100 000 kronor, which he set off against share profits obtained during the year. If my solution had been applied, the father would not have been allowed a deduction for the capital loss.

In income-tax respects and in some measure also in net-wealth-tax respects legal persons are tax subjects. Here the question arises to what extent the legal person, e.g. a joint stock company, is defined in the same way in, above all, income-tax rules and in private-law contexts. Legal practice with regard to joint stock companies, non-profit-making associations, economic associations, deceased persons' estates, estates of bankrupts and foundations indicates that these legal persons have broadly speaking been defined in the same way in tax law as in private law. There are, however, certain differences. One example concerns estates of bankrupts. These are considered to constitute tax subjects in indirect taxation but not in direct taxation. It has been asserted that there are special practical reasons which make it difficult to levy income tax on estates of bankrupts. No such difficulty arises in treating a bankrupt estate which is carrying on business as a tax subject in indirect taxation, where the tax can be regarded as a normal cost of the gainful activity. This shows that it is useful to have different solutions in the application of different tax rules.

According to the practice of the Supreme Administrative Court the buyer in real-estate transactions (and no longer the seller) is to be taxed in respect of the property as a capital asset and in respect of the income from the property as from the date when the ownership under private law

passed from seller to buyer. This means that the buyer is to be regarded as the owner of the property in income-tax and net-wealth-tax contexts as soon as a valid sales contract exists, provided the seller has not expressly reserved to himself the ownership of the property until some later date. In the latter case the seller is taxed up to and including that date and the buyer is taxed thereafter. In capital gains taxation, however, the seller is in principle considered always to have disposed of the property in connection with the sales contract, irrespective of when the ownership is considered to have been transferred.

In modern writing on private law, however, the ownership is not considered to pass from seller to buyer at any fixed point of time. Instead, the different privileges and liabilities of ownership are considered to pass successively from seller to buyer at different points of time. In private-law connections these different legal effects are linked to different phases during the successive transfer of ownership on the basis of what is most appropriate in the application of the different rules.

The "private-law" approach of the Supreme Administrative Court is obviously out of phase with the view held in modern writing on private law that the right of ownership passes successively.

Moreover, the solutions of the Supreme Administrative Court sometimes lead from the point of equity to unsatisfactory results which accord ill with the function and purpose of the various tax rules. In the current real-estate taxation it is the buyer who is normally taxed for the yield from the property as soon as the sales contract is in existence. On the other hand, the buyer usually does not receive the yield from the property (or become liable for its costs) until he has entered into possession, which often takes place several months later. This means that it is difficult to find any appropriate way of taxing the seller for the yield (e.g. rent) he receives or to grant him deductions for the costs he has had in respect of the period up to the buyer's entry into possession of the property. How this is to be done is obscure in Swedish tax law and this leads to problems. Inasmuch as the yield from the property is taxed, the function and purpose of the tax rules indicate that the most appropriate course would be to tax the seller up to the date of entry into possession and thereafter to tax the buyer. This solution, as distinguished from present solutions, is in accordance with the approach used in private law. From the point of view of legal security the proposed solution is to be preferred to the solutions applied in present court practice, which have created uncertainty, not least among legal scholars, as to the basis for the Court's practice.

In net-wealth and capital-gains taxation it is, however, most appropriate to consider the property as having been disposed of (or acquired) through

the sales contract. This is the most important document, which establishes that the purchase has taken place. It is unusual that a sale of real estate is revoked after a valid sales contract has been entered into. In those cases where the sale has been revoked it has been the practice of the Supreme Administrative Court to order the remission of the seller's capital-gains tax through the process of judicial review. In this way it is possible to rectify the materially objectionable results that the revocation of an already taxed sale may produce.

A contract clause to the effect that the seller of real estate reserves to himself the ownership of the property is void under private law and should therefore not be taken into account in connection with taxation. In my opinion, the Supreme Administrative Court should alter its practice on this question also.

Both the solutions recommended by me and the practice of the Supreme Administrative Court lead, however, to problems of coordination between the capital-gains-tax rules and the rules for regular taxation of the property if the owner of the property has previously enjoyed deductions for depreciation of the property. In capital-gains taxation the seller's costs are reduced by a deduction for depreciation up to the time of the disposal of the property (which is considered to occur in connection with the sales contract). The seller then avoids being taxed for deductions in respect of depreciation for which he has been allowed deductions during the period between the conclusion of the sales contract and the buyer's entry into possession. This lack of coordination between the regular real-estate taxation and the capital-gains taxation will also occur under the current practice, if the seller reserves to himself the ownership of the property in the sales contract. An amendment of the capital-gains-tax rules should therefore take place as soon as possible. The seller should instead be taxed for deductions allowed for depreciation during his continued possession of the property.

5. PROPOSALS FOR AN ACT TO COUNTER TAX AVOIDANCE

5.1. *Introduction*

From the preceding section it will be seen that the tax courts seem to take as their point of departure that private-law terms have a unitary private-law meaning which normally should also be used in tax law. However, examination of this matter in section 4 has shown that it is more natural to

allow private-law terms to have a different functional connotation in different tax-law contexts. This private-law-inspired approach makes possible a smooth and correct use of private-law terms in tax law provided the chosen type of transaction does not differ from the transactions embraced by the circumvented rule. In many attempts to avoid tax, however, the taxpayer chooses an alternative mode of action which is quite different from anything that the circumvented rule is intended for, and in that case this approach cannot be used.[2] For example, a taxpayer presents assets to his children instead of selling them himself. The functionally-orientated approach which I advocate cannot be used in support of intervention against this type of tax avoidance. The reason for this is that the method does not provide scope for an analogous application of the circumvented rule in cases which lack the essential prerequisite of the private-law term. The question here is whether it is possible to use private-law terms in a way which from the point of view of principle is different in tax law from what it is in private law.

In Sweden an Act to counter tax avoidance is now being prepared. The purpose of the proposed legislation is in part to provide support for an analogous application of the circumvented rules in order to make it possible to deal with the tax-avoidance problems which arise because the taxpayer chooses other private-law transactions than those that circumvented rules are intended for. I shall discuss to what extent this group of tax-avoidance problems can be solved througt the introduction of general provisions on tax avoidance which would be based on the proposals for such provisions presented in *SOU* 1975:77 and *Ds B* 1978:6. As a background for the discussion I shall first give a brief account of the experience gained in law from general provisions against tax avoidance in foreign law as well as practice concerning tax-avoidance transactions in Swedish tax law.

5.2. *General Tax-Avoidance Provisions in Foreign Law*

General rules against tax avoidance occur in the tax systems of a number of countries.

In West Germany it is a general principle of interpretation—up to December 31, 1976, this principle was laid down in law in sec. 1 of the *Steueranpassungsgesetz*—that all tax laws shall be interpreted in accordance with their economic content. This principle of interpretation is called "die

[2] Cf. above, pp. 35 f.

wirtschaftliche Betrachtungsweise" and is used in judicial practice as a support for construing private-law terms in an appropriate way from a tax point of view. In German legal writing conclusions by analogy are, however, generally held permissible only if they are done with the support of the general provisions on tax avoidance in sec. 42 of the *Abgabenordnung* of 1977, which replaced the *Steueranpassungsgesetz* and which applies over the whole tax field. According to these provisions the tax rules cannot be circumvented by a misuse of private-law forms and principles. The highest tax court in West Germany, the Bundesfinanzhof, strongly emphasizes, however, that the *Ordnungsfunktion* of private law—tax law should follow private-law solutions and concepts in order thereby to maintain the unity of the legal order—requires that normally private-law terms should be used in their private-law connotations in tax law. "Die wirtschaftliche Betrachtungsweise" and the general tax-avoidance provisions in sec. 42 of the *Abgabenordnung* appear therefore to be used nowadays in judicial practice mainly to solve such conflicts as are due to the taxpayer's having attempted to obtain advantages in taxation by choosing unusual alternative modes of action which are not justified by other economic grounds than tax considerations, nor by private-law considerations.

In Finnish tax law there is a general provision against tax avoidance in sec. 56 of the Taxation Act. This provision is applicable if it is evident that the taxpayer has undertaken a legal measure with a view to circumventing the tax rules. The practice of the Finnish Supreme Administrative Court shows that it applies this provision cautiously. Despite the linguistically wide scope of the rule, it has mainly been applied to various standardized attempts to circumvent the tax rules, where the tax advantages to be gained have been the main reason for undertaking the transactions. In those situations where other motives have also played a part in the tax-avoidance transactions, it has been considered that the tax-avoidance rule is not applicable.

In the French statute on income tax there is a general tax-avoidance rule, but case law showing how this rule is used is lacking. It has been asserted that this is due to the fact that the tax authorities and the taxpayers often settle differences without going to court and therefore the question of using this rule seldom arises.

By way of summary, it may be said that the general provisions on tax avoidance in the countries dealt with above have not led to the disappearance of tax-avoidance problems.

5.3. *Judicial Practice concerning Tax-Avoidance Transactions in Swedish Tax Law*

The practice of the Supreme Administrative Court concerning tax-avoidance transactions shows that in principle the Court holds that legal transactions should be taken into account in tax-law cases—i.e. ought to be considered correctly classified under tax law—if they are valid and binding under private law. If a transaction or a combination of transactions is an obvious construction, and consequently economic, tax-law and private-law reasons for accepting the procedure in a tax-law evaluation are lacking, the Supreme Administrative Court has in some cases not accepted their private-law designations. Instead the tax-law content of the transactions has been made the basis for the taxation. A commonly attempted way of circumventing the tax rules is to undertake a series of transactions instead of the transaction or transactions which the legislator had in mind. Concerning these "series transactions" the Supreme Administrative Court has laid down in the so-called Nordbäck case (*Regeringsrättens Årsbok* 1953 ref. 10) that the transactions are not to be regarded as a whole. Instead, each step in the series of transactions is to be evaluated separately. Only if each step can be accepted in a tax-law evaluation can approval be given to the whole series of transactions. This can be illustrated by an example from the Court's practice.

In Sweden the national income-tax rates applied to physical persons are progressive. With a view to paying the least possible total tax for the family as a whole, parents have divided their income from business among themselves and their under-age children in equal shares by forming a family partnership. The Supreme Administrative Court has accepted the first step—the formation of a partnership—if the partnership agreement was valid. On the other hand, the Court has taken the view that the agreement to distribute profits between the parents and the children lacked any reasonable economic justification, inasmuch as the agreement gave the children advantages not available to an outside participant. This step could therefore not be accepted in a tax-law evaluation. Instead, the father was taxed for the profit of the company after the children had been allotted reasonable interest on invested capital. It should, however, be stressed that the Supreme Administrative Court has intervened against tax avoidance only in a few flagrant cases.

It further appears from the Supreme Administrative Court's practice that the taxpayer's intention to avoid tax has not been accorded any significance where the Court judges various tax-avoidance transactions. Although the material is sparse, it seems justifiable to say that the Court

evaluates the taxpayer's procedures in the same way whether the results will be advantageous or disadvantageous for him.

Probably the relatively formal way in which the Supreme Administrative Court interprets private-law terms is to be explained by the fact that the Court primarily considers that it is the business of the legislator to change unsatisfactory solutions, whether it be the public revenue or the taxpayer that has been the sufferer.

5.4. *Proposals for Legislation against Tax Avoidance in Swedish Tax Law*

In Sweden the legislator and the tax authorities have considered it profoundly unsatisfactory that the taxpayers have succeeded in making such considerable tax savings as they have through tax-avoidance transactions. (They do not, of course, object to the taxpayers' adapting themselves to the tax laws and attempting to minimize their taxes by "tax planning".)

In October 1975 a group of experts—set up by the Government Commission on taxation of business enterprises—submitted a report entitled *Allmän skatteflyktsklausul* ("General provisions on tax avoidance"), *SOU* 1975: 77, which contained proposals aimed at stopping tax-avoidance attempts within the whole tax area. The departmental work on these proposals resulted in June 1978 in a memorandum entitled *Lag mot skatteflykt* ("Act to Counter Tax Avoidance"), *Ds B* 1978: 6, the text of which was sent to various interested parties for comment during 1978. In this draft Act the general tax-avoidance provision applies only to income and net-wealth taxation. At the time of writing it is uncertain when a Government Bill on tax avoidance can be expected.

The proposals of the group of experts for a general provision on tax avoidance consisted of the following two sections:[3]

> Sec. 3. If a taxpayer enters into an agreement or undertakes any other transaction which, by itself or together with another transaction in which he takes part directly or indirectly, provides him with a tax benefit in conflict with the spirit and intention of the legislation and if owing to the circumstances it is probable that the said benefit constitutes his main advantage from the transaction, the tax or assessment for tax shall be determined without regard to this or, if such basis cannot be applied or would lead to an unfair result, shall be determined at a reasonable amount.
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> Sec. 4. The provisions in sec. 3 shall not apply if the taxpayer shows that it is probable that the transaction came about and acquired its content mainly for organizational or marketing reasons or otherwise with an economic purpose other than that of obtaining benefits in the taxation.

[3] See *SOU* 1975: 77.

The group of experts set up the following three prerequisites for the application of the proposed provision on tax avoidance:

1. The taxpayer must have undertaken a transaction.
2. This transaction must alone or in combination with one or several transactions in which the taxpayer was involved directly or indirectly provide him with a tax benefit in conflict with the *spirit and intention of the legislation.*
3. It must in view of the circumstances be probable that this benefit constituted the taxpayer's *main benefit from the transaction.*

If these three prerequisites were fulfilled the taxpayer's transactions were to be regarded as tax avoidance and lead to a rectification of the tax outcome unless the taxpayer could show that his purpose in undertaking these transactions had not been dishonest. If he could show this be so he would be allowed to retain his tax benefit.

The group of experts envisaged that the tax benefit would be in conflict with the legislator's intentions (see prerequisite 2 above). They considered that it would usually be possible to discover what the legislator had intended. They considered that in certain cases it would be clear from the statements of reasons for the proposals that certain procedures were unacceptable or that certain transactions could lead to countermeasures in the form of special rules on tax avoidance. The experts stressed, however, that as a rule tax-avoidance measures came more or less as a surprise to the legislative authorities. But in their view it could be established without much difficulty whether the tax-avoidance transactions were in conflict with the "*spirit and intention*" of the legislation. Guidance in this matter could be obtained from the general plan and formulation of the legislation.

The group of experts was, however, aware that difficulties might sometimes be encountered in deciding whether a tax benefit was in conflict with the spirit and intention of the legislation. It expressed the opinion that in the last resort it was a matter for those implementing the law to determine whether a procedure was in conflict with the aims of the legislation.

The third prerequisite laid down by the group of experts was that the tax benefit should be the main advantage derived by the taxpayer from the procedure. In the group's opinion this prerequisite was fulfilled by such transactions as from a normal commmercial point of view were clearly to be regarded as an unnecessarily devious way of achieving the desired economic results or in some other way constituted an artificial device. In such cases the transaction appeared as being rather meaningless if the tax effects were disregarded. If, on the other hand, the procedure seemed to be a natural way of carrying out the transactions the tax-avoidance provi-

sions were not applicable. This applied even if the taxpayer achieved a very favourable tax result.

The proposals of the committee of experts were processed in the Ministry for the Budget and the result was a departmental memorandum in which the draft tax-avoidance provisions read as follows:[4]

> Sec. 2. Assessment for tax shall not be determind on the basis of transactions which the taxpayer undertakes if
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> (1) the transaction by itself or together with another transaction in which the taxpayer participates directly or indirectly leads to a tax not inconsiderably lower than the most reasonable transaction which—apart from tax benefits—would have given an economic result of equal value.
>
> (2) the said tax benefit is in conflict with the bases for the tax provision or provisions which would come into question if the taxpayer had instead taken the action as referred to in point (1), and
>
> (3) it must be presumed, having regard to the circumstances, that the said tax benefit in all essential respects constitutes what the taxpayer intended to achieve by taking the action instead of the most natural action as referred to under point (1).
>
> Sec. 3. In cases such as referred to in sec, 2 the assessment shall instead be determined on the basis of the most natural transaction which, apart from the tax benefit, would have given an economic result of equal value. If such a procedure cannot be applied or would lead to an unfair result the assessment shall be determined at a reasonable amount.

In the Ministry's proposals it is emphasized that the tax-avoidance provisions shall be limited so as to embrace only genuine tax-avoidance transactions, which are described in the following way:

> In these cases the taxpayer has intended to achieve a certain economic result which in itself has nothing to do with the taxation, e.g. withdrawing profits from a company or transferring money to his children. If he chooses the "normal" or most natural procedure, there occurs a definite tax effect, e.g. that the profit withdrawn is taxed as dividend or that a deduction is not granted for the transfer to the children. In order to achieve the intended result and at the same time to reduce his tax, the taxpayer chooses instead of the "normal" procedure a roundabout way involving other transactions which are valid in private law, which—if they were to be accepted—would mean that no tax would be paid on dividend or that a deduction would be obtained.... It is quite clear that any general provision against tax avoidance must primarily cover these and other cases of actual circumvention.[5]

The tax-avoidance provisions in the Ministry's proposals are mainly designed to resolve the problems which arise when taxpayers have recourse to transactions other than those for which the circumvented rule is in-

[4] See *Ds B* 1978: 6.
[5] *Ds B* 1978: 6, p. 77.

tended. The tax-avoidance provisions would then make possible an analogous application of the circumvented tax rule.

In my opinion, neither the proposals in the Ministry's memorandum nor those in the report of the group of experts for tax-avoidance provisions constitute an effective weapon against tax avoidance. I shall, however, confine myself to a brief criticism of the Ministry's proposals.

In the first prerequisite listed in the Ministry's memorandum it is stated that there must be a normal transaction which is economically of equal value—disregarding the tax consequences—to the transaction which the taxpayer has chosen. There are, however, tax-avoidance transactions which are distinguished by the fact that the transaction chosen does not lead to the same economic result as the "normal" alternative of mode of action. These economic—and private-law—disadvantages resulting from the transaction are more than offset by the tax advantages. In these cases the tax-avoidance provisions will probably not be applicable if the wording of the provisions is strictly adhered to. Furthermore, it is conceivable that the most natural procedure is not to take any action at all. A parent, for example, can instead of retaining an asset (the normal procedure) choose to present it to his children with a view to achieving tax advantages. Since the tax-avoidance provisions start from the presumption that one transaction has taken place instead of another, the tax-avoidance rule cannot be applied. The technical solution chosen is therefore not appropriate.

According to sec. 2, point (2), of the Ministry's proposals the tax advantage must be in conflict with the bases for the circumvented rule or rules. The committee of experts' expression "the spirit and intention of the legislation" has been dropped in favour of "the bases of the legislation". The explanation given for this is that the expression used by the experts is too vague and indistinct. It should appear from the text of the statute that the examination of the aim of the legislation should be restricted to the circumvented rules and the *travaux préparatoires* for these. The drafters are aware that it may sometimes be difficult to establish the bases of the legislation. But they consider that the rule of law implies that in these cases the provisions should not be applied.

It is, however, typical of most of the attempts at circumvention which the tax-avoidance provisions are meant to combat that the taxpayers use one or several tax rules with a view to circumventing one or several other tax rules. In tax-planning cases the rule (or rules) used will then be applied. If, on the other hand, tax-avoidance exists, the circumvented rule must be applied analogously with the support of the tax-avoidance provisions. The *travaux préparatoires* for the different tax rules are often relatively brief. It may therefore sometimes be difficult to discover from them in detail what

purpose the legislator had in mind. It is then occasionally difficult to discover from the *travaux préparatoires* for the circumvented rules in what situations these are intended to be applied to combat the rules used. Sometimes it can be gathered from the *travaux préparatoires* of the rule used that this rule was probably not intended to cover the transaction chosen. It also occurs that it can be deduced that the rule used is to be applied to a certain procedure despite the fact that the taxpayer will thereby succeed in circumventing other rules. It is obvious that account should be taken of the purposes both of the circumvented rules and the rules used. These different purposes should then be weighed against each other—if they are mutually contradictory—in order to establish whether the taxpayer's transactions are in conflict with the (collective) aims of the legislation. If this method is not adopted, it is easy to arrive at a wrong result. For the rest the Ministry's memorandum has evaluated various transactions as arguments and illustrations to show that they conflict with the bases of the legislation and it has also referred to the aims of the rule used. This, however, is obviously in conflict with the statute text. In other words, it will probably be difficult to discover the aims of the legislation if, as in the draft in the Ministry's memorandum, only the aims of the circumvented legislation are examined.

The group of experts proposed that the tax-avoidance provisions should not be applied even if the prerequisites in sec. 3 were fulfilled, provided the taxpayer could make it appear probable that the transaction had come about and had been given its contents for economic reasons other than that of obtaining tax benefits. In the Ministry's memorandum this rule is, quite correctly, dropped, it being considered that the taxpayer's motives must be taken into account when examining whether the prerequisites in the tax-avoidance provisions are fulfilled or not.

In the Ministry's memorandum no reasons are given to explain why the group of experts' requirement that the tax benefits shall constitute the taxpayer's main advantage from the transaction is replaced by the requirement that the tax benefit shall essentially be what the taxpayer intended to achieve by choosing the transactions actually undertaken in preference to the most natural transaction. It is, however, possible that it was intended thereby to stress that the tax-avoidance provisions are only to be used against obviously artificial transactions where the tax benefit is the essential gain.

In the Ministry's memorandum it is emphasized that the tax-avoidance provisions are not to be applied to "exceptional" procedures if the taxpayer can show that considerations of business efficiency lay behind the choice of the alternative mode of action. At the same time it is pointed out

that other motives which may directly or indirectly be of economic significance can also be accepted. The memorandum states that what comes first to mind in this connection is certain family-law considerations. It does not, however, say which considerations can be accepted.

Many apparently artificial transactions lead or can lead to not inconsiderable economic and private-law consequences in comparison with the most natural modes of action. If a taxpayer chooses to convert his private business into a joint stock company carrying on business and his aim in so doing is only to save tax, the formation of the company as such can hardly be attacked with the support of the tax-avoidance provisions. This is due to the act that the company formation in itself will or may lead to considerable economic and private-law consequences. On the other hand, agreements entered into by the joint stock company can be attacked.[6] If assets are transferred to under-aged children this act may have considerable economic and private-law effects. The parent's possibility of free disposal over the assets are restricted to a considerable extent by the legal rules on guardianship. These protect the child against any attempt by the parent to deal with the assets in any way he pleases in order to further his own economic interests. Experiences from West German and Finnish tax law also indicate that it will be difficult to use the tax-avoidance provisions against such tax-avoidance transactions as are likely to have noteworthy private-law and economic consequences.[7]

Another weakness of the proposals is that the drafters have not discussed the question of how to deal with the problems which arise when the taxpayers adapt their actions according to the new tax-avoidance provisions. In the experts' report and in the Ministry's memorandum the point of departure is that in principle the private-law freedom of contract shall continue to be accepted in Swedish tax law. The tax-avoidance provisions are intended only to make possible adjustments of the materially most objectionable ways of using this principle. There are therefore probably many different ways of achieving to a large extent the economic results which the taxpayer is seeking, while at the same time these solutions differ in economic and private-law respects from the mode of action for which the circumvented rule is intended. If the economic differences between the chosen transaction and the most natural transaction are not inconsiderable, the tax-avoidance provisions cannot be applied. Experiences from, *inter alia*, Finnish tax law indicate that to a large extent the taxpayers have possibilities of adapting themselves to the field of application of the tax-

[6] Cf. above, p. 41.
[7] See above, p. 40.

avoidance provisions. The provisions would therefore probably not be a very effective weapon against tax avoidance.

Even if tax-avoidance provisions are not likely to be effective in combating tax avoidance, they will enable analogous application to the taxpayer's disadvantage to be made to a greater extent than is the case at present. The equilibrium which exists in the system at present will thereby be disturbed. Consequently, the rules should be applied analogously in more cases to the disadvantage of the taxpayer than to his advantage. The reason for this is that the tax rules are seldom used analogously to the taxpayer's advantage in judicial practice in cases where the taxpayer has chosen a solution which in fact does not express what he wished to achieve. In my opinion, it is important that the tax rules should be applied in the same way irrespective of whether the result will be to the advantage or to the disadvantage of the taxpayer in relation to what he expected.

One objection which is usually made to general provisions against tax avoidance is that these provisions do not fulfil normal requirements of the rule of law. Taxpayers are considered to have justifiable requirements of being able to foresee as far as possible the tax effects of different alternative modes of action. The authors of both the experts' report and the ministerial memorandum consider, however, that their draft provisions fulfil the requirements of the rule of law. In the ministerial memorandum it is stressed that the tax-avoidance provisions give a fairly definite description of the procedures which it is intended to combat, the so-called "tax-avoidance transactions proper".[8] It is moreover proposed that the taxpayer should have an unconditional right to an advance ruling as to whether a planned transaction is or is not covered by the tax-avoidance provisions. This advance ruling is to be binding on the tax authorities if it is invoked by the taxpayer in connection with the assessment. This would mean an extension of the present right to obtain an advance ruling.

The uncertainty as to how the tax-avoidance provisions will be applied by the tax courts will be greatest in the period immediately after the rules have entered into force. After the Supreme Administrative Court has established the principles according to which the tax-avoidance provisions are to be applied in different situations, the degree of foreseeability will increase. Experiences from foreign tax law—e.g. Finnish tax law—indicate that tax-avoidance provisions can quite adequately fulfil normal requirements of the rule of law even though in Finnish tax law (sec. 56, Taxation Act) the provisions are formulated a good deal more vaguely than the

[8] See above, p. 44.

proposed Swedish tax-avoidance provisions. The proposed extended right of obtaining advance rulings will, if it is used properly, help to ensure that the main outlines of the area of application of the tax-avoidance provisions will be established relatively quickly. For this, however, it is a prerequisite that the advance rulings shall be published without unnecessary delay and be formulated in such a way as to reveal the principles applied. In situations where it is doubtful whether the tax-avoidance provisions can be applied or not, the taxpayers should be aware that they undertake the transactions at their own risk if they do not apply for an advance ruling. It is clear from both the experts' proposals and the ministerial memorandum that this general preventive effect is an important aim of the legislative proposals. The taxpayers' possibilities of foreseeing the attitudes likely to be taken by the courts are sufficiently well ensured in the proposals.

By way of summary it can be said that the drafters of the ministerial memorandum have intended to give the tax-avoidance provisions a clearly delimited and relatively restrictive field of application. However, in both documents the reasons for the three prerequisites of the tax-avoidance provisions are not clearly explained and the provisions are technically imperfect. This is likely to lead to considerable problems of implementation. It will probably be found that the provisions cannot be applied to the extent intended. Among other things it has been overlooked that it is necessary to take into consideration the aims both of the circumvented and the used rule in order to discover whether the procedure is in conflict with the legislation as a whole. Instead, it is proposed that only the aims of the circumvented rule shall be taken into consideration. Nor has account been taken of the fact that the taxpayers often have economic and private-law subsidiary aims when they attempt to circumvent various tax provisions even though the tax advantages are an important incentive. It may therefore be difficult for the tax authorities to succeed in showing that in all essential respects the tax advantages were what the taxpayer intended to achieve by undertaking the transactions. At the same time these experiences indicate that interventions against tax-avoidance transactions are taken to different lengths (depending on the readiness of the courts to intervene).[9]

The legal-security aspects, however, are well protected in the Ministry's memorandum. The tax-avoidance provisions will probably not be an effective weapon against attempts to avoid tax. Experience from foreign law indicates that tax-avoidance problems cannot be solved by means of general tax-avoidance provisions even if these are drafted in very broad terms.

[9] See above, pp. 40 ff.

6. CONCLUDING COMMENTS

This paper shows that private-law terms in private law often have in part varying meanings according to the functions and aims of the various rules. I recommend that private-law terms shall be used in tax law consistently as in private law in a flexible sense. Thus, it will be more generally ensured, in contrast to what applies at present, that private-law terms are used in the same way in tax law as in private law. This approach can also be used as a support for intervening against tax avoidance so long as the transaction chosen by the taxpayer does not differ too much from the procedures covered by the circumvented rule. It means that the chosen transaction must have the same essential prerequisites as the transactions covered by the rule. Sometimes the taxpayers succeed in circumventing various tax rules by choosing entirely different modes of action from those for which the rules are intended. An attempt is being made to stop these tax-avoidance attempts by introducing general provisions against tax avoidance. The present study shows, however, that this is not a particularly effective means of solving such problems.

Another solution would be to introduce general rules of interpretation in which it would be emphasized that the total aims of the legislation should be taken into account to a greater extent than at present in the practice of the tax courts. Such rules should apply irrespective of whether the result would be to the advantage or to the disadvantage of the taxpayers. Experiences from German tax law indicate that such rules have the effect of influencing the courts to apply the tax rules to a greater extent from the point of view of the aims of the tax laws than is at present the case. What result will be achieved will probably depend on the way in which the courts choose to apply these interpretation rules in practice. The experience from Germany suggests that the problems of tax avoidance are not solved in this way.[10]

In my opinion, no general solutions of these problems are to be found. Several different avenues of attack must be used. First and foremost, the legislation must be drafted as carefully as possible. It should be particularly borne in mind that modes of action which are economically similar should be given the same tax-law effects. The legislation can subsequently be supplemented by general rules of interpretation which will make it possible to deal with, from the point of equity, the most objectionable consequences of tax-avoidance transactions and other procedures in a way which is appropriate from the tax-law point of view, whether the taxpayer has or has not attempted to circumvent the tax rules. In these cir-

[10] See above, p. 40.

cumstances it will be possible to conceive of a type of tax-avoidance provisions. These provisions must then be supplemented by directives as to how the courts are to apply the rules analogously to the same extent to the taxpayer's advantage as to his disadvantage. In this way it will be possible to make some progress towards overcoming, *inter alia,* tax-avoidance problems. We should, however, be aware that it is probably difficult if not impossible to ensure that the Swedish income- and net-wealth-tax laws are not used in a way which was not intended by the legislator.