WHITE-COLLAR ECONOMIC CRIME IN SWEDEN: THE DEBTOR AS CRIMINAL

BY

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1. INTRODUCTION

Ch. 11 of the Swedish Penal Code contains penal provisions concerning crimes in connection with debts. These crimes are subject to public prosecution; preference of charges by an individual is not required.

Penal responsibility for debtors' crimes constitutes an essential part of the system of reactions to economic criminality. The efficacy of the threat of punishment has, however, proved seriously deficient. The greater part of this criminality has escaped the authorities. It has been concealed in so-called "poor man's bankruptcies", constituting the majority of all bankruptcies, in which there has been no duty to report suspicions that a crime has been committed. Since January 1, 1980, new provisions concerning the treatment of bankruptcies in Sweden have been enforced. One consequence of these new rules is that it will henceforth be more difficult to conceal criminality.

The lack of efficacy is not, however, connected only with the low frequency of detection. The penal provisions present considerable problems of construction and application. In this paper one of these questions will be discussed in some detail.

The Swedish penal provisions on debtors' crimes contain throughout the concept of *"debtor"* as a prerequisite. Liability implies that the principal offender should be a debtor. Persons who are not debtors can be held liable according to ch.11, but in that case it will be either as instigators or accessories[1] or also as principals with the support of a special provision,[2] which extends the concept of principal to comprise also a person acting in lieu of a debtor.

The question here dealt with is: when does a person become a debtor under the Penal Code? From what point of time can a debt be considered to exist and thus constitute a debtors' crime? This question appears in many different areas but has, so far, proved a problem in the application of the penal law especially concerning taxes and other public charges.

Ch. 11 deals first with the crime *dishonesty towards creditors*. The most common example of this crime is when a debtor destroys or by gift or other

[1] Ch. 23, sec. 4, para. 2, point 2.
[2] Ch. 11, sec. 7, para. 1.

similar measure dispossesses himself of substantial property and thereby intentionally makes himself insolvent or aggravates his insolvency. Since 1976 a debtor can be found guilty of dishonesty towards creditors even when his action has produced only a serious danger that he will become insolvent.

The crime *careless disregard of creditors* is committed when a debtor continues his business while consuming considerable assets without corresponding benefit for the business or lives extravagantly or embarks on risky undertakings or reckless commitments or takes any other such measure and thereby intentionally or from gross carelessness produces or aggravates insolvency. Since 1976, however, prosecution for such a crime can only take place if such prosecution is in the public interest: if the debtor has, for example, continued the business in order to keep his workforce employed, he is not to be prosecuted.

Incorrect statements and withholding of information in connection with bankruptcy, etc., can involve liability for dishonesty towards or careless disregard of creditors. A debtor who, when bankruptcy is impending, removes from the realm an asset of importance with intent to withhold it from the bankruptcy estate or who withdraws or withholds property from the trustee shall be punished for dishonesty towards creditors.

A debtor who when he is insolvent favours a certain creditor by paying a debt which has not fallen due, by settling the debt by using other than customary means of payment or by handing over security which was not stipulated when the debt was incurred or by taking any other such measure shall, provided that the measure substantially encroaches on the rights of other creditors, be punished for *favouritism to creditor*. The same applies if the debtor improperly favours a certain creditor in another way (e.g. through payment of a due debt) and the rights of other creditors are thereby considerably infringed upon. A debtor who in order to further an agreement secretly gives or promises payment or other benefit is also subject to punishment for favouritism to creditor.

To the category of debtors' crimes belong, finally, *bookkeeping crimes*. These crimes arise when a debtor intentionally or through carelessness sets aside his duty to keep accounts in such a way that the condition or trend of the business cannot in the main be evaluated with the guidance of the accounts. Special prosecution rules apply for this crime.

2. THE CONCEPT OF "DEBTOR" AS A PREREQUISITE

The concept of debtor is not defined in the Penal Code. Nor is any definition of the concept given in the legislative materials concerning the

penal provisions on debtors' crimes (basically unchanged since the 1942 revision of the Criminal Code of 1864). On the other hand, certain comments intended as guidance for the construction are to be found in the report of the Penal Law Committee which forms the basis of the revision. When ch. 11 was revised in certain parts in 1976 the requirement that the principal must be a "debtor" was not touched upon.

In ordinary linguistic usage a debtor is a person—natural or legal—who has creditors, people who have a claim against him. A debtor can have different kinds of creditors. Some—but not all— can be described as *granters of credit* to the debtor. A person who carries on business has, for example, suppliers, bankers and finance companies as credit granters.

In the case of both natural and legal persons who have got into economic difficulties the state with its claims for taxes is as a rule the principal creditor. In this capacity the state cannot be described as a granter of credit. Where the matter concerns preliminary deductions of taxes from the wages and salaries of employees which have been made but not yet paid in, the employer can rather be said to enjoy a credit from the employees. Claims for employers' contributions, e.g. under the national supplementary pension scheme, are definitely not based on credit granting. On the other hand, the state may be a creditor in the sense of a granter of credit as a result of making grants and measures of support of other kinds.

A third category of creditors consists of employees, who may have claims for wages and fringe benefits. Through the creation of a state guarantee for the payment of wage claims in case of the employer's bankruptcy (Act 1970: 741) and amendment of the Priorities Act (1970: 979) such claims have acquired a special position. Independently of this state guarantee, however, the employees' claims on the employer qualify the latter as a debtor under the Penal Code.

It is evident that the Penal Law Committee had the first-mentioned category of creditors, i.e. granters of credit, principally in mind when formulating the penal provisions on debtors' crimes. In the unpublished material from the Committee's work there is a pronouncement by a Committee member which is enlightening in this connection:

> In the statute text the word "debtor" indicates that he must already be a debtor before the act (the fact that he has a small debt at the grocer's or unpaid taxes is, of course, irrelevant).

The dominating position which the state has as tax creditor and the attention which in different contexts is devoted to the interests of wage earners in Swedish society today could hardly have been foreseen by the

Committee's members forty years ago. The development has meant that the legislative materials now appear antiquated and inadequate in several respects, *inter alia* precisely as regards the debtor prerequisite.

In contrast to earlier Swedish law and current law in many other legal systems, the modern Swedish penal provisions on debtors' crimes framed in accordance with the proposals of the Penal Law Committee contain no requirement that the debtor has declared bankruptcy, etc. It should perhaps be emphasized that such a requirement does not in itself exclude the question here dealt with. If the actor is described as a debtor in the statute text, it is as a rule necessary, despite such a prerequisite for liability, to investigate whether at the time of the act the person concerned had debts which were affected by the act.

3. WHEN DOES A DEBT ARISE?

On one particular point, namely with regard to duty of maintenance under family law, the Penal Law Committee has made a clarifying statement.[3] According to the Committee a person who is liable to pay maintenance allowance under family law cannot be considered free of debt. If a person who under family law has a duty to pay periodic maintenance disposes of property in order to avoid fulfilling this duty, he may incur liability for a debtors' crime. The Committee reports a case in which a man who had been under a duty to pay maintenance allowance to children and a divorced wife had by selling property at an unduly low price made himself unable to pay maintenance allowances falling due later. The meaning of the pronouncement is obviously that it is not necessary that any due allowances should remain unpaid for a person liable to pay maintenance to incur liability for a debtors' crime through economic transactions.

In addition to the case reported, the Committee refers in a footnote to another case. In this a man was sentenced for dishonesty towards creditors in accordance with the pre-1942 Penal Code provision on the ground that he had given away his modest bank assets and sold his smallholding at an unduly low price to his children. This disposal of property meant that a woman who was expecting a child by the man was subsequently unable to obtain economic support for herself and the child. Thus in this case both the gifts and the gift-like sale had taken place before the birth of the expected child. The fact that the Committee notes this case does not

[3] *SOU* 1940: 20 *Straffrättskommitténs betänkande med förslag till lagstiftning om förmögenhetsbrott*, Stockholm 1940, p. 213. The case reported here is 1925 NJA 634; the case mentioned in the footnote is 1939 NJA 472.

necessarily mean that it intended to give the debtor concept such a wide content. What is postulated is that a person who has a duty of periodic maintenance under family law cannot be considered to be debt-free. The Committee presumably had in mind persons who had been placed under a duty of maintenance through agreement or court judgment. It is only in this way that a future duty of payment can be foreseen with such certainty that it is realistic to speak of debt. In the case mentioned in the note a future duty of payment was based on so many unclear presumptions that a court today would scarcely regard the person concerned as a debtor.

The question of when a debt arises has become particularly important in connection with taxes and other public charges. The dominant position of the state as a creditor also makes the state the primary target of economic criminality. The Penal Law Committee—for reasons mentioned above—did not discuss this matter in connection with the debtor prerequisite.

In a number of cases the courts have had to determine from what point of time a debt for tax or other charge is to be considered to exist—and thus to constitute a "debtor"—where penal liability for debtors' crimes is concerned. In these cases such liability has only been possible if, in considering the prerequisite debtor concept, account has been taken of such tax or comparable items as at the time of commission of the crime had not yet been charged or had not fallen due for payment. So far there has been no decision of the Supreme Court providing guidance on this matter. In the legislative work in the field of penal law, the limitation of penal liability to acts by a person who is already a debtor has recently been taken note of. A legislative committee, which was called upon to propose a penal-law compensation for imprisonment in lieu of fines, etc., has pointed out in a report that acts attempting to prevent the execution of fines and the like are to a large extent punishable as debtors' crimes.[4] It is, however, emphasized that such acts, if undertaken at an early stage, may not be punishable because the person concerned is not yet then a debtor in the meaning of the Penal Code; a debt for a fine cannot be considered to exist until there is a final judgment and a debt for a *vite* (conditional fine) does not arise until the sanction in question has been imposed through a judgment or a decision which has acquired legal force. In order to compensate for the abolition of imprisonment as a substitute for fines, etc., the committee proposes that penal liability for debtors' crimes should through an extension of the debtor concept be extended to comprise also certain acts for preventing execution of fines undertaken before the point of time when a debt for a fine, etc., can be considered to exist.

[4] *SOU* 1980:7 *Kompensation för förvandlingsstraffet. Betänkande av viteskommittén*, Stockholm 1980.

Those persons who have been prosecuted for debtors' crimes on the ground of a "latent" tax debt have usually also had a number of clear debts. The same can be assumed to apply to persons who by taking early action attempt to prevent the execution of expected fines, etc. It is, however, clearly stated in the report of the Penal Law Committee that debts which are not affected by the debtor's insolvency are to be disregarded.[5] Thus, if the assets after the act (giving away, etc.) are sufficient to cover the clear debts, liability cannot be based solely on the circumstance that such debts existed when the act was undertaken. The Penal Law Committee seems to have intended to express this limitation precisely with the requirement that the actor must be a "debtor". This was at any rate the opinion of the Minister of Justice. In connection with a request by one of the bodies to whom the draft legislation had been sent for comment that the Committee's standpoint in this respect should be more clearly expressed in the statute text, the Minister held that this standpoint should be considered to emerge sufficiently clearly from the fact that the actor is called a debtor.[6]

The question of when a debt arises is of importance in a number of different respects and is encountered in a large number of different areas of the law. The creation of a tax debt has in recent years been discussed *inter alia* in connection with legislation on preference in bankruptcy and on *betalningssäkring* (measures to ensure payment of taxes and other public charges, hereinafter called measures of conservancy). The question is of importance for the examination of bankruptcy petitions, the determination of bankruptcy claims, the possibilities of avoidance of fraudulent or voluntary settlements (recovery), and so on. It is obvious that decisions in such respects are of interest for the question of the meaning of the requirement that the principal in a debtors' crime must be a debtor. In the absence of formal reference in the legislative materials concerning the penal provisions it cannot, however, be presumed that the meaning of the debtor concept in other areas of the law is to be determinative in the application of the rules on liability for crime. Moreover, as will be shown below, the point of time of creation of debt is far from uniform in different areas of the law.

4. THE CONCEPT OF "INSOLVENCY"

In the present context there is reason to pay some attention to another prerequisite which the Act sets up for liability for a debtors' crime, namely insolvency. In order to lead to liability for dishonesty towards creditors under ch. 11, sec. 1, para. 1, point 1, an intentional disposal of assets must

[5] *SOU* 1940: 20, p. 213.
[6] *Prop.* 1942: 4, p. 126.

have led to insolvency or to aggravation of an already existing insolvency. The same applies to certain other procedures which according to sec. 3 may constitute careless disregard of creditors. According to sec. 4, liability for favouritism to creditor requires the actor to have been insolvent at the time of committing the act.

The term insolvency is taken from bankruptcy law. There, however, it is used in combination with certain presumptive rules; thus, for example, a debtor is considered insolvent and consequently a bankruptcy petition will be approved if the debtor at a special procedure of enforcement undertaken within the six months immediately preceding the petition was found to lack assets for the full payment of the enforcement claim.[7] Without access to such presumptive rules the concept has proved difficult to define. The prosecutors have not found it easy to meet the requirements for evidence, especially regarding the requisite connection between any given act and the insolvency which has occurred, a requirement which the courts have upheld in cases concerning liability for debtors' crimes. This difficulty was one of the main reasons for the partial revision of the penal provisions on debtors' crimes undertaken in 1976. Nowadays, as is mentioned in the introduction, a person who has merely caused a serious *risk* that he will become insolvent may be held liable for dishonesty towards creditors. According to the legislative materials this means that it is not necessary that there exist a proved connection between a certain act and a subsequently occurring insolvency.[8] The amendment was not intended to change the content of the insolvency concept. That concept was already earlier based on an assessment of future ability to pay, i.e. a person's ability to pay his debts as and when they fall due. In such an assessment a forecast must be made, and this may mean that assets not yet acquired and debts not yet incurred are also taken into account. Thus into the insolvency prerequisite there has been introduced a certain measure of regard to circumstances which are still uncertain when the act is committed. This construction argues against the theory that the debtor prerequisite was also intended to have such a prognostic character.

5. DEBTS FOR TAXES AND PUBLIC CHARGES

5.1. *Cases concerning debtors' crimes*

The question of when a tax debt can be considered to exist where liability for debtors' crimes is at issue arose as early as the mid-fifties.[9] The pro-

[7] Sec. 3 of the Bankruptcy Act (1921: 225).
[8] *Prop.* 1975/76: 82, p. 95.
[9] 1956 NJA 1.

secutor claimed that B should be held liable for, *inter alia*, gross dishonesty towards creditors in respect of a number of measures which B had undertaken during 1945. The prosecutor alleged that during the tax years 1941–44 B had declared a lower income and net wealth than he actually had; he had thereby incurred a tax debt at the close of each of these years and was thus to be regarded as a debtor. When the case was tried in the court of first instance, additional assessments which were made in 1945 in respect of the years stated were submitted to the Supreme Administrative Court for consideration. The prosecutor's case was dismissed on the ground that it had not been proved that B had placed himself in a state of insolvency through the transactions demonstrated by the prosecutor. In the judgment it was, however, stated that B must thereby, as maintained by the prosecutor, be considered to have had a tax debt of somewhat over 300 000 Sw. cr. The question was not discussed in the appellate courts.

In the Supreme Court's file on the case, mention is made of a written opinion by Professor Seve Ljungman on the question: When does a tax debt arise in a case where by making an incorrect tax return a person has avoided taxation in respect of income and net wealth? The opinion had been requested by the prosecutor in the case. In it Professor Ljungman referred to his work *Om skattefordran och skatterestitution* (Tax Claims and Restitution of Tax), in which he states that it is scarcely possible to establish in Swedish law any uniform point of time for the emergence of tax liability, even with regard to the ordinary annual taxation. According to Ljungman it would, however, seem most natural to take as this point of time the *expiration of the tax year* during which the taxable income was received and the *expiration of the year* when the taxable net wealth existed. The same view had been put forward by a Justice of the Supreme Administrative Court, Carl Kuylenstierna, in a review of Professor Gösta Eberstein's work *Om skatt till stat eller kommun enligt svensk rätt* (Tax Payable to State or Municipalities according to Swedish Law).[10] Eberstein had stated that, as a matter of principle, tax liability arises in connection with the occurrence of the fact to which the legislator has linked the particular tax, e.g. with regard to income tax the *acquisition of the income* being taxed.

Ljungman emphasizes in his written opinion that the debtor concept in penal legislation cannot be construed without an analysis of the legislative materials concerning the penal provisions. Upon making such an analysis of the short comments of the Penal Law Committee a basic distinction is, according to Ljungman, to be found between *already existing commitments* and *new commitments* which the person concerned has incurred *after* having

[10] *SvJT* 1932, p. 37.

disposed of his assets. Tax which can be expected at the close of the tax year should be assigned to the former category. Theoretically the tax debt can, as far as its amount is concerned, be exactly computed at the end of the tax year. As a matter of fact, the exact debt amount is, Ljungman points out, of minor importance where liability for dishonesty towards creditors is concerned; it is sufficient that the actor should be aware that there exists a debt the payment of which will be impeded or made impossible as a result of his acts. Thus Ljungman shows a preference for the point of time represented by the expiration of the tax year, but emphasizes the importance of the prerequisite of intent: if before the assessment the taxpayer has no reasonable cause to expect any tax claim, he should escape liability for a debtors' crime, even though objectively he is to be regarded as a debtor.

The question of the point of time for the arising of tax debts has recently come up in a number of lower court cases concerning liability for debtors' crimes. In December 1976 the Gothenburg District Court[11] convicted a person, H, of dishonesty towards creditors because in June 1973 he had given away the shares in his enterprise to his son and had thereby made himself insolvent. In evaluating H's economic situation at the time of the act the Court included as debts extra tax (fixed as a result of additional assessment) for income during the tax years 1970 and 1971, as well as *skattetillägg* (tax addition). The Court of Appeal of Western Sweden reversed the decision in its judgment of May 18, 1977, on the ground of a statement made there by the accused concerning further assets in the form of a claim on the company, a statement which had not been refuted.[12] In its reasons for the judgment, however, the Court of Appeal states that the claim for extra tax must be considered to have already existed when H took the measures on which the prosecution was based. The tax addition was, on the other hand, the result of a separate examination and therefore the state's claim in that respect was considered to have arisen only through a decision of the County Tax Appeal Court after the completion of the gift. The judgment was not appealed from.

The same question arose in a case decided by the Sollentuna District Court on January 10, 1980.[13] A person was sentenced for gross dishonesty towards creditors because by settling upon the distribution of marital property he had disposed of assets at a time when according to the Court he was, owing to a latent tax debt, a debtor under the Penal Code. The

[11] Div.5 DB 780/1976. The letters "DB" are used by the courts for filing and retrieval purposes. "Div." refers to the particular division of the court which made the judgment.
[12] Div.4 DB 56/1977.
[13] DB 14/1980.

distribution had taken place on September 1, 1975, and in 1976 the man was additionally assessed in respect of the years 1971–74 for income totalling about 450 000 Sw. cr. At the time of the distribution there existed according to the District Court a latent tax debt on the basis of this undeclared income of rather more than 300 000 Sw. cr.

By using the expression "latent tax debt" the District Court may seem to be avoiding the question of whether and at what time a debt had arisen as to the income tax. Essentially, however, the Court held that liability for debtors' crimes can be incurred from a tax debt not yet fixed at the time of the act. The judgment was not appealed from.

In the cases mentioned above it has been sufficient for conviction that an income tax debt could be assumed to exist when the tax year ended. The question of whether such a debt could be considered to originate still earlier arose in a recent case in the Stockholm District Court.[14] The case concerned trading with profits in companies. According to the District Court the determinative factor for the resolution of the question of liability for dishonesty towards creditors was whether the companies in question could be regarded as debtors on the ground of latent tax debts at the time of the transactions. The prosecutor maintained that the companies, in addition to certain debts concerning value-added tax, pension contributions and withholding tax on income for self-employed persons, which had later been paid at the due date, had had latent tax debts in respect of income from business. The companies had had considerable untaxed profits during *the then current tax year*. The opinion contains a detailed analysis of legislative pronouncements and cases discussing the question of when tax debts arise. The conclusion is that the state's claim for income tax, in relation to liability for debtors's crimes, cannot be taken into account until the tax year has come to an end. Despite this conclusion the Court found that criminal liability existed, since at the time of the disposal of their assets the companies had no realistic possibilities of escaping taxation and the creation of the debt was therefore unavoidable.

The judgment of the District Court is difficult to understand. The Court seems to have drifted away from the question of whether the debtor prerequisite is fulfilled and, by stating that insolvency was produced through the transactions, to have considered these transactions punishable despite the fact that—as is expressly pointed out—the debts that were affected by the transactions had then not yet arisen.

The judgment of the District Court was appealed to the Svea Court of Appeal.[15] In the judgment of this Court the question of liability for dis-

[14] Div. 15 DB 538/1979.
[15] Div. 1 DB 75/1980.

honesty towards creditors was decided in a quite different way. The Court held that a debtor's crime could have been committed only if at the time of the transaction the companies were debtors on account of tax "debts" that were then latent although not yet charged. The Court states that this was not the case: the companies could not be considered as debtors in this respect until the tax year had come to an end.

The Court of Appeal, while thus dismissing most of the charges concerning dishonesty towards creditors, sentenced the defendants to long terms of imprisonment for tax crimes. The judgment has been appealed by the defendants. The Prosecutor General did *not* appeal the decision. The question of liability for dishonesty towards creditors will thus, in as far as the charges were dismissed, not be considered by the Supreme Court.

5.2 *Determination of the date of origin of tax and similar debts in other legal areas*

So far the discussion has focussed on cases concerning debtors' crimes. It is of interest to consider how debts for taxes and other public charges are determined to arise for purposes other than the determination of criminal liability. The Supreme Court has accepted a non-final assessment as a *ground for bankruptcy.*[16] The closely related question concerning when tax claims rank as bankruptcy claims is discussed by Supreme Court Justice Lars Welamson in his book *Konkursrätt* (Bankruptcy Law).[17] According to Welamson an appropriate rule may be that a tax claim ranks as a bankruptcy claim either if the tax year it relates to has come to an end or if the tax has been charged or has fallen due for payment before the declaration of bankruptcy.

The question of the point of time at which a claim for tax is considered to arise with regard to *preference* in bankruptcy was resolved through legislation in 1971. In the ministerial memorandum which was the basis of this legislation it was stated that the Treasury's claim for income tax arose and had priority at the time of the acquisition of income, irrespective of the time of assessment.[18] When the draft legislation was sent out for comment criticism was, however, levelled on this point, and in the final Government Bill it was pointed out that such a regulation would necessitate costly inquiries.[19] The Bill, which was adopted by the Riksdag, establishes instead

[16] 1956 NJA 417.
[17] Welamson, *Konkursrätt*, Stockholm 1961, pp. 447 f. Lars Welamson who was at the time Professor of Procedural Law in the University of Stockholm is now a Supreme Court Judge.
[18] *DsFi* 1971: 6, pp. 6 f. and 33 f.
[19] *Prop.* 1971: 142, pp. 39 f.

that claims for final tax or other charges have priority only if the *period* to which the tax or charge is to be referred *has ended* before the decision on surrender of property in bankruptcy has been announced.[20]

In another connection the question has been answered in legislation during recent years, namely as regards the possibility of securing payment of claims for tax, customs duties or other charges through measures of conservancy. The committee which in 1975 put forward a draft act on this matter considered that such measures should be applicable also during current tax periods in certain cases.[21] In the committee's draft legislation there was a formal definition of the debtor concept, namely a person who had been assigned or according to law could be assigned the duty of payment in respect of a claim. A number of bodies whose opinion on the draft legislation had been invited were critical of the proposal that measures of conservancy should be applicable during a current tax period, and these criticisms were considered by the ministry.[22] With regard to final tax the Act as adopted requires that the tax year should have come to an end.[23] The discussion below also deals with the question of measures of conservancy regarding claims on preliminary tax.

The time of origin of a tax debt is of importance with regard to *recovery*, despite the fact that nowadays, according to the Act on preferential tax claims, etc., payment of due taxes or other charges cannot be recovered.[24] In the leading case[25] the Supreme Court, in applying ch. 13, sec. 2, of the Marriage Code, considered a tax debt which at the time of the distribution of marital property had not yet been fixed in amount to have arisen before the judicial separation; therefore the trustee in bankruptcy's plea for recovery of the marital property was granted on the ground that the husband had at the time of the distribution of the property substantially renounced his right by not providing financial cover from the marital property for this tax debt. The Court of Appeal had expressed the opinion that a tax debt concerning income arises not later than the end of the year during which the income was received even though it is not until later that the amount of the tax is determined through assessment and charging. Additional assessment is also considered to be a measure whereby a tax debt arising earlier is determined. In its reasoning the Supreme Court confines itself to the question of the application of ch. 13, sec. 2, of the

[20] Sec. 3, para. 1, of the Act (1971: 1072) on preferential tax claims, etc.
[21] *SOU* 1975: 104, pp. 77 ff.
[22] *Prop.* 1978/79: 28, p. 119.
[23] Sec. 4 of the Act (1978: 880) on measures of conservancy regarding taxes, customs duties and other public charges.
[24] Sec. 28 of the Bankruptcy Act.
[25] 1971 NJA 85.

Marriage Code. In that respect a tax debt is stated to arise not later than at the expiration of the tax year.

In the case just mentioned, the courts applied the provision on recovery of distributed marital property in sec. 33, para. 1, first sentence, of the Bankruptcy Act, as it then read. According to that provision the debtor's economic position after the distribution of property was irrelevant to the matter of recovery—no rebutting evidence on this could be submitted. The present provision on recovery of distributed marital property is somewhat differently formulated. According to sec. 32 of the Bankruptcy Act since July 1, 1975, the respondent can avoid recovery if he can prove that the debtor after the distribution had remaining distrainable property which obviously corresponded to his debts. It is thus the balance sheet solvency and not the ability to meet debts as they fall due which is here determinative. This deviation from the general rule is justified in the legislative materials by the fact that in principle there must exist an estate inventory as a basis for the distribution of property and from this the sufficiency but not the solvency can be inferred.[26]

The amendment of the recovery provision has probably not disturbed the principle established in the leading case.[27] Income tax relating to income during a concluded tax year should be included as debt in an inventory made in connection with a distribution of marital property and such a debt item affects the assessment of sufficiency concerning a spouse who has renounced his right in the distribution. On the other hand, the formulation of sec. 32 of the Bankruptcy Act seems to preclude the taking into account, with regard to recovery, of tax relating to the tax year during which the distribution of the property took place.

> In another leading case[28] the question was considered of whether in the distribution of marital property the value of real property should be determined with regard to the capital-gains tax that a future sale of the property would attract. In this case, reference was made to the above-mentioned case at footnote 27 as authority for the proposition that a latent tax debt must be taken into account at the distribution. The District Court and the Court of Appeal, however, made a distinction between latent and hypothetical tax debts according to which the capital-gains tax at a possible later sale referred to in this case would be assigned to the latter category and would not be taken into account. On the other hand, the majority of the Supreme Court finds that this tax must be taken into account, but points out that in calculating the amount of the deduction there may be reason to expect that a sale does not take place until a later date, with consequent tax advantages. The report of the

[26] *Prop.* 1975: 6, pp. 144 and 215.
[27] 1971 NJA 85.
[28] 1975 NJA 288.

case contains parts of opinions submitted by the Swedish Bar Association and the Swedish Bankers' Association in which the consideration of latent (and hypothetical) tax debts is discussed in various contexts.

It should be pointed out that the debtor concept has in part a different content in the application of the provisions concerning *collection of tax*. The duty to pay often arises before the end of the taxation period. The system of deduction of tax at source means that the greater part of the state and municipal income tax is collected through deductions from wages (withholding tax) or as preliminarily assessed and charged tax on income for the self-employed. Withholding tax has to be paid not later than the 18th day of the "collection month" (March, May, July, September, November and January) which falls immediately after the end of the month when the tax deduction was made. Withholding tax on income for the self-employed has to be paid in equal amounts on the 18th day of each of the "collection months". If payment of tax is neglected, a number of legal rules come into operation: among other things, attachment and sale or garnishment may take place and a so-called residue charge is payable. Measures of conservancy may be used to collect withholding tax currently due or overdue.

In this connection it should be mentioned that a tax debt is considered to have arisen during an ongoing taxation period when calculating the *net proceeds of a deceased person's estate.* In such cases the inventory should include as debts all taxes unpaid at the time of death, both those based on earlier years and those which fall on the income of the taxable year up to the time of death. The question of how the tax debts of an estate should be computed is a matter in debate, but there seems to be agreement that the determinative point is whether the income to which the tax relates is income of the deceased: if that is the case the tax, even if it has not yet been definitely fixed as to amount, is a debt of the deceased person's estate, deductible in calculating the inheritance tax.[29] The introduction of the system of deduction of tax at source has reduced the practical importance of this question, but nevertheless the preliminary tax is an approximate amount and a supplementary inventory may become necessary if the final tax differs from the preliminary tax.

5.3. *Comments*

As is pointed out in the introduction, the solutions in different respects of the question of the time of origin for tax claims or claims for other charges

[29] Cf. Englund, *Beskattning av arv och gåva*, 3rd ed. Stockholm 1978, pp. 57 ff.; from court practice, e.g. the cases 1960 NJA 152 and 1970 NJA 529 (II).

cannot be considered of decisive importance for the construction of the debtor concept in the Penal Code. Instead, guidance has to be sought primarily in the pronouncements which are to be found in the legislative materials concerning these penal provisions. Since the legislative pronouncements are brief and do not directly relate to this category of claims, the task of construction is difficult.

Professor Ljungman emphasizes in his written opinion in the 1956 case cited above[30] that the Penal Law Committee makes a clear distinction between already existing financial commitments and new commitments which did not arise until after an act suspected to be a debtors' crime had been undertaken. The Committee postulates that debtors' crimes are acts which are directed against the interests of existing creditors by reducing their prospects of payment. What then is meant by already existing financial commitments and which persons are creditors existing at a given point of time?

In construing these penal provisions it must be remembered that in a number of different respects it has been considered decisive that the expiration of a tax period occur before a tax claim can be considered to exist. Thus, for example, a claim for *final tax,* in respect of which there has been no preliminary charge, cannot be secured by measures of conservancy before the end of the tax year. In view of the fact that penal liability is the most powerful sanction available to a government, it is at least arguable that, if other legal rules fix this point of time as determinative, then *a fortiori* this same point of time should apply in determining liability for crime.

As is mentioned above, a claim for withholding tax can be secured by measures of conservancy if the tax is currently due or overdue. Preliminary tax which has not been paid by the due date is to be collected by force. If withholding tax on wages is at issue these measures will be addressed to the employer. The latter's duty to deliver money collected at source in respect of his employees constitutes a special kind of debt which is not based on statutory rules on tax liability but on administrative regulations. Such a debt should also provide grounds for liability for a debtors' crime on the part of the employer where the debt relates to a concluded or ongoing collection month. This circumstance is not, however, of importance for the problem concerning the time of origin of the claim between the tax authority and the taxpayer.

Can the possibility of securing payment and enforcing collection of a claim for preliminary tax for self-employed persons justify considering a

[30] See pp. 117 ff.

taxpayer a debtor for the amount in penal law respects during an ongoing tax year? In my opinion the answer should be no. Such a construction should be rejected merely for the reason that in the area of tax administration—an area that both in principle and in practice is entirely distinct from the domain of penal law—legislative measures introduced *after* the enactment of penal law legislation, cannot simply by force of their introduction be allowed to carry with them an expansion of penal liability.

Further, according to law income tax is to be paid annually.[31] The size of the final, progressively computed tax depends on financial events during the whole of the tax year. It is not until the tax year has ended that the amount of the tax can be computed exactly. It is true that tax charged on a preliminary basis may turn out to tally exactly with the final tax, but divergences are extremely common. In certain cases it is not until the end of the tax year that it is possible to determine whether any tax at all is payable. If tax charged on a preliminary basis were to be taken into account in determining whether a person is a debtor in the penal law sense, then on the basis of the circumstance just mentioned two problems would arise.

In the first place, it would be necessary to solve the problem arising when some one has been convicted of a debtors' crime on the basis of preliminary tax liability and the subsequently charged final tax does not amount to a sum necessary for jurisdiction under the Penal Code to attach. The question of liability cannot be considered independently of this problem. In this context it may be mentioned that in the draft referred to above at footnote 4 concerning extended penal liability for debtors' crimes in connection with the abolition of imprisonment as a substitute for fines, etc., it has been recommended that liability should be limited to those cases where a debt for fines, etc., also subsequently arises. A similar solution appears necessary if preliminary tax, too, is to be taken into account when deciding if a person was a debtor at the time of a transaction.

The other difficulty which can be foreseen is connected with the requirement of intent. The debtor must usually have criminal intent to be liable for a debtors' crime. This intent may be difficult to prove if the person liable to pay preliminary tax maintains that he had definitely calculated that his income, owing to the possibility of deductions, etc., would not involve liability for any final tax. This difficulty is even more obvious where tax not charged on a preliminary basis is concerned. In the cases reported above it has throughout been a question of tax fixed by additional assessment after the act. If the acts were undertaken after the end of the tax year the possibilities of proving awareness of a tax debt may be relatively

[31] Sec. 1, para. 1, Act (1947: 576) on state income tax.

good. To prove such intent in a transaction during the tax year would be considerably more difficult. Such a situation existed in one of the cases reported above, but there special events (company transfers) entailed tax consequences which could not, in the opinion of the District Court, have been eliminated through later events or transactions.[32] According to the final judgment of the Court of Appeal those "latent tax debts" did not give rise to debtor status. Thus the question of intent in this respect did not arise.

In my view there are good reasons for taking today the same standpoint as Professor Ljungman in his opinion in the 1956 case cited above,[33] namely that only income tax relating to a concluded tax year can be taken into account in judging whether a person (natural or legal) is a debtor under the Penal Code. It is true that the system of withholding tax at source can be said to mean that the obligation to pay income tax arises *during* the tax year and that therefore even tax charged on a preliminary basis for a concluded or ongoing collection month constitutes what the Penal Law Committee described as already existing commitments. It may, however, be objected that income tax by law is to be paid annually and that any calculation before the end of the tax year—except possibly in quite special cases—must necessarily be uncertain. These arguments apply also with regard to income tax for an ongoing tax year which has been fixed only through additional assessment after the commission of an act suspected to be a crime. If, on the other hand, the tax year had ended when the act was committed there should be no difficulty in regarding the tax as a debt as far as liability for debtors' crime is concerned, despite the fact that additional assessment had not then yet taken place or acquired legal force.

As far as *employers' contributions* are concerned, it can be maintained in the same way that by law such contributions are to be paid annually.[34]

[32] Cf. *SOU* 1975: 104, p. 79: "... in the case of a claim which is based on a transaction during a tax period not yet concluded it is in the nature of the case that the amount of the claim often cannot be fixed with a sufficient degree of certainty. The reason for this is that transactions subsequently undertaken by the debtor may reduce or entirely eliminate the claim which is in question ... It is, however, possible to conceive of cases—e.g., in computing preliminary tax according to the Tax Collection Act or preliminary charges in accordance with the Act on collection of certain charges in accordance with the National Insurance Act, etc.—where the circumstances suggest that the debtor has no possibilities whatever of dealing with the increase which has occurred in the basis of taxes or charges by undertaking bookkeeping arrangements or other legal transactions. Transactions of, so to speak, a non-recurrent nature which involve liability for tax or other charges, and which palpably affect the taxpayer's economic situation may thus sometimes make it possible to determine both the basis and amount of a claim with a sufficient degree of certainty."

[33] See pp. 117ff.

[34] Ch. 19, sec. 1, National Insurance Act (1962: 381), sec. 2 of the Act (1973: 372) on employers' contributions to unemployment insurance and cash labour-market relief, sec. 2 of the Act (1975: 335) on employers' contributions to labour-market training, ch. 7, sec. 1, of the Act (1976: 380) on industrial injuries insurance, sec. 21 of the Act (1979: 84) on partial pension insurance.

The fact that the contribution, if it exceeds 1000 Sw.cr., is collected through preliminary charging is not reason enough to judge the matter differently.[35] The preliminary contribution is payable in an amount corresponding to the final contribution charged to the employer during the year immediately preceding. It would involve obvious difficulties to take into account so undetermined a "debt" as an unpaid contribution during an ongoing employment year when determining whether a person is a debtor in the sense of the Penal Code.

With regard to value-added tax, the prerequisites for liability are formulated in the statute in an entirely different way from those concerning income tax. According to sec. 4 of the Act[36] on value-added tax, liability to pay tax occurs when goods are delivered, a service is supplied or a withdrawal takes place. If compensation wholly or in part for goods or services which have been ordered is obtained in advance, liability for tax for the compensation occurs when it is received in cash or becomes available to the taxpayer in some other way. Reporting takes place continuously for definite periods of time (reporting periods) of two calendar months, on a tax return which must be submitted not later than the fifth day of the second month after the expiration of the reporting period to which the return relates. The tax for the reporting period falls due for payment on the same day. The tax is considered to be charged when the taxpayer has submitted his return. If a return is not submitted or is incorrect, the taxpayer may incur liability for the payment of back taxes.

The wording to the effect that tax liability arises when the goods are delivered, etc., suggests that value-added tax should also be taken into account from that same point of time when penal liability is in question. On the other hand, it may be argued to the contrary that the right to make deductions for ingoing tax means that the size of the value-added tax cannot be definitely calculated before the end of the reporting period. As is discussed above, this can involve practical difficulties in proving a debtors' crime. It is possible that a value-added-tax debt should not, as far as liability for a debtors' crime is concerned, be considered to exist before the expiration of the reporting period, despite the wording to the effect that tax liability arises earlier.

The categories of taxes and public charges here dealt with show how complicated and differentiated the administrative system is. It does not appear satisfactory to allow the basic requirement for penal liability, i.e. that a person (natural or legal) be a "debtor" at the time of the act com-

[35] Sec. 19, Act (1959: 552) on the collection of certain charges in accordance with the National Insurance Act, etc.
[36] Act (1968: 430).

plained of, to be defined by administrative routines which have come into existence for practical reasons connected with the collection of taxes. The obligation to pay taxes and other charges as a ground for penal liability must in principle embody the substance of the tax provisions fixing liability for tax and other charges. If, however, this technical underpinning is to be held to justify giving penal liability for debtors' crimes a wider scope, then this expansion of the penal law should be expressly stated in new legislation.