

# Judicial Review Within Danish Tax Law

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## 1 Introduction

Within Danish Tax Law a special system of appeal has been developed which relates to the tax assessment itself. The local tax authority's decision may thus be appealed to the local Tax Appeal Board whose decision may thereupon be brought before the National Tax Tribunal as the supreme administrative authority. On this basis, the National Tax Tribunal's decision may be brought before the courts.

The body of rules behind the judicial review within the Tax Law has been dealt with partly in the Tax Administration Act, from which the formal conditions for legal proceedings appear, partly in § 63 of the Danish Constitution which treats the substantive review. § 63 of the Constitution thus states that the courts are entitled to determine any question concerning the limits of the public authority. The question is, however, partly how the judicial review concerning tax law questions relate to the review within the common administrative law, and partly how far the courts are allowed to and will go when reviewing the assessments of the tax authorities. An attempt to illustrate these questions will follow.

## 2 Formal Conditions Concerning Proceedings in Court

### 2.1 *The Tax Payer's Actions*

From § 31 of the Tax Administration Act it appears that basically two requirements must be met before a tax payer may bring an action before the courts.

Firstly, it is a condition that the case is brought before the courts at the latest three months after the final administrative instance has made a decision in the case. If the final administrative instance has dismissed the case, the case must be brought before the courts not later than three months after the dismissal.

Secondly, on this basis it is a requirement that the administrative recourse has been utilized before the case is brought before the courts. This appears from § 31, sec. 1.1, of the Tax Administration Act according to which a decision made by a tax-, duty- or customs authority cannot be brought before the courts until a final administrative decision has been made. The decision being final means that it cannot be brought before a higher administrative authority. If the administrative recourse has not been utilized the case will – basically – be dismissed.<sup>1</sup> Three modifications, however, apply concerning this background:

Firstly, the demand for recourse utilization is not valid if the rules distinctly decide that utilization of recourse is not a prerequisite for judicial review. The same applies if the final administrative instance has dismissed the complaint. Such dismissal may for instance be founded on the fact that the National Tax Tribunal is not competent to judge the matter of the case. Finally, a special rule of omission is valid, according to which the case – if more than six months have passed since the case was brought before the National Tax Tribunal – can be brought directly before the courts irrespective of the National Tax Tribunal not having treated the actual facts of the case.

The rules concerning a tax payer's possibility of producing new evidence during the treatment of the case at the courts were most recently amended by Act no. 1098 of 29 December 1997 on a changed appeals structure. The purpose of the amendment was to improve the taxpayer's possibilities of producing new claims and allegations to the case during the hearing before the court. Until the amendment the question had not been governed in the Tax Administration Act, and the limit for producing new claims and allegations was therefore governed by practice. Accordingly the taxpayer has not been able to produce a claim further than the one which the National Tax Tribunal had determined or dismissed.<sup>2</sup> In § 31, sec. 1.2, of the Tax Administration Act it is now specified that the tax payer may produce new claims and allegations during the procedure within the limits applying to the rules of the Administration of Justice Act concerning appeal of civil cases. The rules in question in this connection are especially § 383 of the Administration of Justice Act concerning the possibility of producing new claims and allegations before the courts concerning conditions brought before the previous instance, and § 384 of the Administration of Justice Act concerning production of new claims and allegations on conditions which have not previously been treated in the case.<sup>3</sup>

## **2.2 The Tax Authorities' Proceedings**

The access for the tax authorities to bring a case before the courts is governed by § 32 of the Tax Administration Act. The provision solely applies for cases concerning questions admissible to the National Tax Tribunal. It appears from the provision that it is the Ministry of Taxation which appears as party in the tax

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<sup>1</sup> Cf. TfS 1998.72 Ø and TfS 1994.187 V.

<sup>2</sup> Cf. TfS 1994.408 V and TfS 1995.424 Ø.

<sup>3</sup> For a detailed analysis of the rules, see Schiersing, Niels: *Om nye påstande og anbringender i retssager om skattespørgsmål*, in TfS 1998.266.

cases before the courts. In TfS 1993.204 the Ministry of Taxation has published case regulations, whose main contents state that the Ministry of Taxation will only bring tax cases before the courts if they are test cases or if there are special reasons for legal proceedings. A test case in this connection would apply especially if the outcome of the case may be presumed to be of importance to a major number of taxpayers, whereas special reasons might be the fact that the case concerns large amounts of money.

The proceedings of the Ministry of Taxation are – as is the case for the taxpayer – subject to a time limit, as the legal proceedings must be taken at the latest three months after the National Tax Tribunal has made its order.

On the contrary, the Ministry of Taxation is not subject to the demand for employment of recourse. This appears from the decision TfS 1995.333 V, where the High Court in its reasoning established that § 31, sec. 1, of the Tax Administration Act does not apply concerning the Ministry of Taxation.<sup>4</sup>

Nor is the Ministry of Taxation submitted correspondingly to the same limitations as the taxpayer when it comes to bringing forward new evidence during the proceedings, as the Ministry of Taxation during proceedings is freely allowed to bring new claims and allegations despite of the fact that they concern conditions not dealt with previously.<sup>5</sup> Based on criticism of such differential treatment,<sup>6</sup> the Ministry of Taxation has published a commentary in TfS 1996.635 in which the strongest argument for the Ministry of Taxation's unlimited permission to bring forward new evidence is argued to be the consideration of reaching the substantially correct decision. It may be reasonably maintained that similar concerns ought to apply to the taxpayer. Furthermore, the Ministry of Taxation has prepared a set of case regulations published in TfS 1997.737, according to which the Ministry of Taxation will not bring forward more rigorous claims or allegations during proceedings unless reasons of principle speak in their favour or if special reasons warrant it.<sup>7</sup>

### 3 Preliminary Conclusion

As will have appeared from the above-mentioned, the formal regulations within the Tax Administration Act lay down certain limits for the judicial review within the Tax Law, cf. thus the rules on time limits concerning the Tax Administration Act, §§ 31 and 32. Furthermore, the provision of the Tax Administration Act, §

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<sup>4</sup> This is presumably to be seen in the light of the special rule of § 42 of the Act on State Tax, according to which the Ministry of Taxation can bring directly before the courts demands for payment of the not sufficiently paid amount without the very basis, i.e. the taxable income, being altered.

<sup>5</sup> Cf. thus TfS 1984.149 and TfS 1995.333 V.

<sup>6</sup> Cf. Møll Petersen, Bente: *Retssikkerhedsproblemer ved domstolsbehandling i skattesager*, in TfS 1996.567.

<sup>7</sup> As an example of special reasons the case regulations mention the particular rule of omission within § 31, sec. 2, of the Tax Administration Act, according to which a case may be brought before the courts if more than six months have passed since the case was brought before the final administrative authority and no decision has yet been made in the case.

31, sec. 1.1, concerning the taxpayer's recourse employment constitutes a formal limitation of the judicial review to the taxpayer.

The question is, however, whether further substantive limitations of the judicial review apply or whether the courts instead carry out a thorough review of all the tax cases brought in. The basis must be that also tax cases are submitted to a thorough judicial review, as § 63 of the Constitution prescribes that the courts are entitled to hear and determine any question concerning the limits of the public authority. The question is, however, whether this basis is modified in practice. To be able to answer this question in detail it is necessary primarily to deal more generally with the judicial review of the decisions of the public administration as the Tax Law, as is known, is a public law discipline systematically classified under the special Administrative Law and therefore submitted to the general rules and principles on Administrative Law.

#### 4 The Common Review Situation Within Administrative Law<sup>8</sup>

The intensity of the judicial review within the Administrative Law depends to a large extent on the fact how the rule of law, whose reach the courts will review, has been drafted. Basically, the rules of law can thus be classified into three categories:

1. The precise rules
2. The indefinite and elastic rules
3. The very imprecise rules

When the judicial review includes precise rules or indefinite and elastic rules it is traditionally referred to as an application of law, meaning that the public administration's application of law is reviewed.<sup>9</sup> First of all, the judicial review includes the abstract interpretation of the rule of law thus seeking to establish more generally the contents and reach of the rule. The review may furthermore include the concrete subsumption where the question is whether the actual, present situation may be related to the rule of law.

Broadly speaking the judicial review within the Administrative Law can be described in this way that the courts carry out a thorough review when an abstract interpretation of law is in question. Basically a similar review is made when a concrete subsumption is being carried out but so that the courts sometimes leave the public authorities a certain margin in relation to the more elastic provisions (compulsory opinion).

When reviewing the very imprecise rules it is no longer a question of the application of law but of the proper execution of discretion. The basis is here that the courts do not review the discretionary decisions of the administrative authorities. It is reviewed, though, whether the administrative authorities have carried out the discretion according to the general principles of Administrative

<sup>8</sup> See in detail on this matter, Mathiassen, J., *Forvaltningsret, Almindelige emner*, 3rd ed., 1997, at 291 ff.

<sup>9</sup> Cf. on this matter Christensen, Bent, *Forvaltningsret, Prøvelse*, at 47 f.

Law. Thus a review is carried out particularly concerning the fact whether non-objective considerations have been taken into account, whether the administrative authorities have illegally defined a regulation as a compensation for the discretion, whether infringements of the principle of equality have taken place, and whether the principle of proportionality has been taken into account.

When judging the intensity of the judicial review within the Administrative Law it is, however, important to note that different factors can actually result in caution or in an intensification of the review.

#### **4.1 Factors Which May Lead to Caution at the Judicial Review**

As mentioned previously the courts will – basically – not review the administrative authorities' discharge of discretion but only review whether the principles of Administrative Law have been complied with when discharging the discretion. Similarly, the courts may sometimes permit the administrative authorities a margin in cases involving indefinite and elastic rules.

A further caution concerning the judicial review might be based on the special expertise of the administrative authority.<sup>10</sup> Has the final administrative decision thus been made by a body consisting of expert members, e.g. The Patients' Complaints Board, the courts will often be inclined to exercise a certain caution of the review.

According to the circumstances, an established administrative practice may underlie a certain caution of the review. In a commentary to the decision U 1965.399 H in U 1965 B. 250 judge Spleth of the Supreme Court has expressed the situation with the words that if two understandings of the law are of almost equal relevance, the courts will choose the one followed by the administration.<sup>11</sup>

In addition to this, provisions on finiteness (which deprive the courts of the possibility of reviewing the public authorities' decisions) will indicate a modification of the judicial review.<sup>12</sup>

#### **4.2 Factors Which May Lead to an Intensification of the Judicial Review**

On the contrary, various factors may, however, specifically lead to the fact that the courts do intensify the review despite of caution of the review *prima facie*.

This will e.g. apply in cases where the authority for judicial review within the specific area of the law has been directly stated in the Constitution. The courts

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<sup>10</sup> Cf. Mathiassen, J., *Forvaltningsret, Almindelige emner*, 3rd ed., 1997, at 329 and at 377. See correspondingly Christensen, Bent, *Forvaltningsret, prøvelse*, 2nd ed., at 52.

<sup>11</sup> See on this matter Askholt, Steen, *Administrativ skattepraksis - nogle bemærkninger om skattepraksis som retskilde og om skatteydernes retsbeskyttelse*, at U 1977 B., at 313 ff., who is critical concerning the fact that some authors have deducted that the decision of the administration will only be overruled if it can be characterized as undoubtedly incorrect. As stated at p. 318 this fact provides the public authorities with an unfounded privileged position. In general Steen Askholt is in doubt as to whether an established administrative practice generally will institute caution within the judicial review concerning the Tax Law.

<sup>12</sup> Cf. on this matter Mathiassen, J., *Forvaltningsret, Almindelige emner*, 3rd ed. 1997, at 377 ff.

will thus in general carry out a thorough review within areas such as compulsory acquisition and detention, cf. on these matters § 73, sec. 3, and § 71, sec. 6, of the Constitution.

At the same time the status of the rule may motivate that the courts will intensify the review. This will be true especially where the rule concerns questions which the courts often review and therefore consider themselves competent to determine. As examples hereof may be mentioned the requirements of value stated in various sectors of the legislation.

If a substantial intervention is in question, this also speaks in favour of an intensified review. Interventions into rights of trade are thus a good example of an area where the courts will intensify the review in consequence of the importance of the intervention.

If, during the review of a case, the court notices that the authorities have committed an error, for instance during the case administration, this may also lead to an intensified review.

Especially the preparation of the legal proceedings is of definitive importance to the intensity of the judicial review. With the correct preparation of the case the parties may obtain a more thorough review of the contested issues.<sup>13</sup>

## 5 The Judicial Review Within the Tax Law

Bearing in mind the analysis of the general situation for the Administrative Law review it is now interesting to examine how the judicial review of the Tax Law relates to the Administrative Law basis.

If the question concerns the application of law, the Tax Law must be said to harmonize well with the general Administrative Law. The courts carry out a thorough review to the extent which concerns the *abstract interpretation* of a tax rule. As an example hereof may be mentioned the TfS 1998.199 H concerning a loan free of interest granted by a major shareholder to the company controlled by him. In accordance with the practice of many years and authorized by § 4 of the State Tax Law the assessment authorities had taxed the major shareholder of a

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<sup>13</sup> As an example hereof see the so-called Frugtplantagedom (Orchard Judgment), cf. U 1958.455 Ø. The case concerned the owner of an orchard who by the local authorities had received a rejection of his application for exemption from rateable value. In the Act on Taxation of Orchards it was, firstly, stated that certain orchards were exempted from rateable value to the State. Furthermore it was stated that “the local district council is authorized to grant the property similar exemption from rateable value to the district”. The owner of the orchard claimed during the hearing that non-objective considerations had been given as three other owners of orchards living in the district had been granted exemption from tax. The owner of the orchard claimed that this fact was based strictly on their allegiance to the district qua their addresses. The district, however, stated to the contrary that the decisive factor concerning the judgment of the question concerning exemption from rateable value was whether the running of the orchard was the principal occupation of the owner or whether it was a question of hobby occupation. When this question had been fully elucidated the High Court carried out a thorough review and on the basis hereof reached the decision that the orchard-owner in question was to be considered a businessman and thus it was unwarranted that he had received a rejection of his application for exemption from rateable value to the district.

fixed interest income corresponding with the official discount rate plus 4%. During the case, however, the taxpayer claimed that in § 4 of the State Tax Law there is no authorization to tax non-realized incomes. Accordingly, the Supreme Court established that neither in § 4, sec. e, of the State Tax Law nor within the tax legislation at all has it been decided whether – and if so under which conditions – agreements on freedom of interest can be overruled, and therefore a taxation of the major shareholder had to be based on the condition that a circumvention of the tax legislation was intended by the dispositions performed. As the purchase prices in question in the case were not contested by the tax authorities, and as there was no basis for establishing that a capitalized return of the tax payer's amount owed to him had been allowed for in the purchase prices, the Supreme Court did not consider it authorized to overrule the agreement on exemption from interest. The same may apply for TfS 1998.397 H, where the question concerning the determination of the time of renunciation for a block of shares in connection with an insolvency was made topical, and where the Supreme Court carried out a thorough, abstract interpretation of the relevant provisions of the Capital Gains Tax Law then in force. In general a series of recent decisions show that the courts – perhaps to a higher extent than earlier – carry out a thorough review of the abstract interpretation of the law. In this connection one may refer to e.g. TfS 1996.654 H, TfS 1998.485 H and the series of sale-and-lease-back arrangements onto which the tax authorities have turned the spotlight throughout recent years and which has resulted in the specific decisions of the courts concerning the extent of SEL § 1, sec. 1.2.<sup>14</sup>

Also concerning the review of the tax authorities' *specific subsumption*, where the question more definitely is whether the facts of the case can be related to a certain tax rule, the courts seem apt to carry out a thorough review. Thus a series of decisions is found concerning the definitions of the concept of revenue expenditure within the field of tax legislation<sup>15</sup> just as the definitions of trading have caused problems within the field of tax legislation. In the decision of TfS 2001.755 H the Ministry of Taxation maintained during the case that two properties had been purchased by a company as part of its trading and therefore the Ministry wanted to impose trade tax on the company of the realized gains. During the case the company contested trading as the company in question had been operated in a way that a deliberate and clear difference had been maintained between what was "stocks" and thus property of trade, and what was fixed property. The Supreme Court carried out a thorough review of the question and decided on this basis that the company by the purchase of the properties was trading with real property and that the company had not brought forward the very conclusive evidence necessary in order to regard the purchase as having taken place only with a view to a fixed property purpose and not with a view to

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<sup>14</sup> Cf. e.g. TfS 2000.374 H, TfS 2000.1011 H, TfS 2001.731 V and most recently TfS 2002.258 Ø. In TfS 1998.137 the Ministry of Taxation has accounted for the Supreme Court judgments lost by the Ministry in 1996. One of the main conclusions is that the Supreme Court seems to have emphasized the demand for a clear authority of taxation in the legislation. See further Werlauff, Erik, *Let us pretend*, in TfS 1999.237.

<sup>15</sup> Cf. e.g. U 1965.648 H, U 1989.408 H and TfS 1994.878 H.

the possibility of gaining a profit by sale as well.<sup>16</sup> See furthermore the decision of TfS 1999.377 H concerning the in practice very relevant definition between self-employed business and employee conditions. The decision is further an example of the fact that the concrete subsumption has not necessarily a precedential value only in relation to a single tax rule but is also of importance in other connections where the definition in question is of a tax law relevance.

### 5.1 *The Assessment of Value*

The so-called assessment of value within the Tax Law differs from the ordinary discretion of legality within the Administrative Law by not relating to a rule of law but on the contrary to facts. The assessment of value is thus made topical in situations where – as a consequence of lack of evidence – there is no sufficient basis for assessing the income from the information available.<sup>17</sup> It follows from § 5, sec. 3, of the Tax Control Law that the assessment authorities are entitled to estimate the taxable income, if an income tax return has not been filed on time. Similarly it appears, for instance, from § 2 of the Tax Assessment Act that so-called controlled transactions only from a pure tax-related point of view will be accepted as being at arms-length-conditions, a fact which will also make an estimated assessment topical.<sup>18</sup> Thus the assessment of value replaces fact. It has been, and is continuously, debated how far the courts will go when reviewing the assessment of value carried out by the assessment authorities – that is the question on the intensity of the judicial review. Thus numerous decisions are found concerning the assessment of value within the tax law, among those several Supreme Court decisions. By means of a series of these decisions an attempt will be made below to illustrate how far the courts are entitled to and perhaps will go in their review of the assessment of value.

U 1980.746 H concerned a taxi driver whose taxable income by the assessment authorities had been raised on the grounds that his accounts had been considered so inadequate that it had been considered reasonable to estimate the income based at an assessment. Among other things the driver had not carried out daily cash balancing, and bookkeeping of the received tips as well as private transports had been omitted. The raise of the income was based on the fact that approximately 80% of the taxi driver's transports were empty transports so that part of the expenses paid had to be considered as private expenses. As an introduction the High Court stated that the bookkeeping was so deficient that it had to be considered justified estimating the income based on an assessment. The High Court, however, did not see any reasons for overruling the discretion

<sup>16</sup> See correspondingly U 1984.740 H, TfS 1994.364 H, TfS 2001.482 V, TfS 2001.546 Ø and TfS 2002.60 V.

<sup>17</sup> See correspondingly Christensen, Bent, *Forvaltningsret, prøvelse*, 2.ed., at 69, where it is stated that the tax assessment substitutes the evidence. Sometimes the assessment is actually considered an assessment of evidence. Thøger Nielsen states in TFR 1963, at 419, that the characteristic of the assessment of evidence is “that it must always seek a realistic and roughly “true” interpretation of a disputed fact in its concrete appearance”.

<sup>18</sup> The principle of arms-length was made statutory in 1998, *cf.* at rule no. 432 of 26th June 1998.



discharged by the tax authorities. Like the High Court the Supreme Court stated that the discharge of discretion had been justified but hereafter established that the empty transports assessed could not reasonably justify a raise of the size in question, whereupon the case was remitted to renewed examination with the assessment authorities.

The decision of U 1982.1115 H concerned a bricklayer who during his spare time had built a detached house for his own use. The value of his own work assessed to DKK 8,492 was stated in his income tax return according to the general practice in this field. This value was based on an assessment carried out by the bricklayer's union. The assessment authorities, however, obtained an expert opinion from a building consultant appointed by the local authorities who estimated the value to DKK 17,000. Whereas the union's assessment was based on the piecework system, the consultant's estimate had been based on the hourly system. During the case a survey and valuation was carried out. The expert opinion established that the statement of the value was to take place based on a piecework calculation with the result that the bricklayer's income tax return was to be raised by DKK 4,685. The High Court hereafter established that the assessment carried out by the assessment authorities was based on incorrect fundamentals, adding that as the matter concerned a major variance from the value stated in the expert opinion, the assessment authorities' valuation had to be overruled. Consequently the value was fixed according to the survey and valuation statement. To the Supreme Court the question was solely whether the case was to be remitted to renewed examination with the assessment authorities and to this question the Supreme Court gave an affirmative.

In U 1984.177 H the assessment authorities had not accepted a factory owner's allowances for an amount paid to a woman with whom he had two children, but whom he did not live together with. In the income statement the amount was declared as payroll costs for various work which the woman had agreed to do for the factory owner. The woman herself had stated that the work, consisting among other things of hostess functions, telephone service, assistance as an interpreter and driver during stays abroad, had only been of a limited nature. According to an undated (!) employment contract, however, the woman had been employed to work 20 hours per week. The High Court established that considering the vague and evasive statements made concerning the extent of the woman's work it must be considered justified that the assessment authorities had estimated the extent according to which the amounts paid to the woman could be deducted from the income statement. Accordingly the High Court established that: "As there is no basis for establishing that the assessment has been carried out at an incorrect basis or has led to a clearly unreasonable result, the Court will sustain the defendant's primary claim." The Supreme Court upheld the High Court's decision – but not the reasons. As an introduction it is thus established that the assessment authorities had been justified in estimating whether the paid allowances could be considered deductible. Then, however, is stated: "As there is no basis for disregarding the estimate of the assessment authorities the judgment will hereafter be upheld".

From the three decisions it can firstly be deduced that the courts will review the lack of evidence – has it at all been justified to carry out an estimate in the concrete situation? Furthermore, there seems to be no doubt that the courts also

review whether the very basis for the estimate is correct. This appears especially from the decision U 1982.1115 H, where it was established – based on the survey and valuation reports existing – that the normal pay of a bricklayer had to be calculated on the basis of the piecework system and not the hourly pay system.<sup>19</sup> It can further be deduced from the decisions that on the judgment of the estimate carried out by the assessment authorities the courts show a certain caution. The courts thus allow the assessment authorities a margin for the discharge of discretion. The extent of this margin, however, seems difficult to determine. In U 1984.177 H the High Court thus upheld the assessment authorities' decision on the grounds that the estimate could not be considered as having led to a *clearly unreasonable* result. The Supreme Court, however, upheld the High Court's decision but changed the grounds indicating that there was considered to be no reasons for overruling the estimate of the assessment authorities. On this basis it seems justified to question whether the Supreme Court has thus indicated that the estimate may be overruled when it leads to an unreasonable result regardless of the fact that it cannot be characterized as being clearly unreasonable. An interpretation as mentioned seems to find a certain support in U 1980.746 H, where the Supreme Court overruled the estimate carried out by the assessment authorities for the reason that the mere reference to the relatively high part of empty transports could not *reasonably* cause a raise of the size in question. The estimate carried out by the assessment authorities was thus – it may be said – unreasonable. One seems hereafter to be able to credit the two Supreme Court decisions for the tendency of the Supreme Court to go further in its review of the estimates of the assessment authorities than the criterion clearly unreasonable which is sometimes stressed in connection with the “estimate of legality” within the administrative law,<sup>20</sup> and has thus established a smaller margin for the assessment authorities' discharge of discretion.<sup>21</sup> Before such a conclusion is made it must, however, be investigated how practice within recent years concerning the matter in question harmonizes with the Supreme Court decisions mentioned.

TfS 1999.248 H seems to be in line with the above mentioned. The decision dealt with the assessment of the land value of a real estate. The Assessment Committee had thus at the 19th general assessment of 1st January 1992 estimated the estate value to DKK 30,500,000, hereof the land value to DKK 10,480,000. The owner of the estate submitted that the estimate did not reflect the market value of the estate and alleged the estate value to be fixed at DKK 29,100,000, the land value hereof being DKK 6,900,000. On the background of,

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<sup>19</sup> See also U 1996.139 H, TfS 2000.560 H and TfS 2000.774 Ø.

<sup>20</sup> Cf. on this matter Garde, Jens, *Forvaltningsret, Almindelige emner*, 3. ed., 1997, at 221.

<sup>21</sup> Mathiassen states in *Forvaltningsret, Almindelige emner*, 3. ed., 1997, at 388 f. that the courts will overrule the estimate of the assessment authorities if it differs to a large extent from what the courts regard as the correct one. See according to this Christensen, Bent, *Forvaltningsret, prøvelse*, 2. ed., at 71, and Thøger Nielsen in TfR 1963, at 442. According to Garde, Jens, *Forvaltningsret, Almindelige emner*, 3. ed., 1997, at 186, the estimate of value within the tax law is generally not overruled unless it may be characterized as being evidently wrong. In *Skatteretten* 3, 3. ed., 2000, at 641, Engholm Jacobsen, J.O., states that the courts will overrule the estimate of the assessment authorities if this leads to a more unreasonable result.

among other things, a comparison with other estates in the neighbourhood the High Court confirmed the estimate of the Assessment Committee. Thus the High Court did not find it proved neither that the value estimate had been carried out on an incorrect basis nor that it had led to an unreasonable result. The majority of the Supreme Court, however, remitted the case to renewed consideration with the assessment authorities on the grounds that the difference between the market value and the property valuation appeared to be so *considerable* that the assessment could not be regarded as meeting the demands of the Act of valuation § 6 concerning assessment on the basis of the going rate.<sup>22</sup>

Furthermore one may refer to the decision of TfS 2000.405 H concerning an estimated assessment of the income of a self-employed person. The taxpayer had not submitted income tax returns for the years of income dealt with in the case, and accordingly his income had been assessed by an estimate by the tax authorities. The High Court maintained the estimate of the assessment authorities establishing that the estimate had been carried out on a correct basis and furthermore that the estimate could not be characterized as being unreasonable. The Supreme Court upheld the High Court's decision based on the reasons stated by the High Court. The decision may be compared to the decision TfS 2001.980 H in which the assessment authorities had similarly made an estimated assessment of a self-employed person as the consequence of an estimated negative private consumption. In this case the High Court maintained the estimate of the assessment authorities on the grounds that the estimate was carried out neither on an incorrect basis nor could be characterized as being clearly unreasonable. Despite of the fact that the Supreme Court as well as the High Court maintained the estimate of the assessment authorities the reasons, however, were altered as it was established that no sufficient basis existed for overruling the estimate of the assessment authorities.

From more recent decisions one might finally refer to the Supreme Court judgement TfS 2001.728 H. In this case a farmer had purchased a heat-recovery machinery which was to be used for removing damp from a stable as well as for cooling down milk. The warm water derived from this procedure was piped through to the farmhouse and used for heating of the private house. On this background the assessment authorities found it unwarranted that the farmer had deducted the entire expenses for the consumption of electricity of the heat-recovery machinery and therefore an estimated division between private and business expenses had been carried out. The High Court established that the assessment authorities had been entitled to carry out an estimated division of the electricity expenses and that the estimate had not been carried out on an incorrect basis nor had caused an unreasonable result. The Supreme Court let the result stand but altered the reasons as the estimate was not found to differ substantially from the survey report prepared.

The tendency to go further within the judicial review is, however, not unambiguous. Thus the Supreme Court seems to be more reticent in the review when the question concerns the assessment of value of the use of a company car.

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<sup>22</sup> One judge did not find a basis for accepting that the Assessment Committee had exceeded the frames of its discretionary powers, and this judge therefore voted in favour of upholding the judgement of the High Court.

In the decision TfS 1997.82 H a taxpayer had been granted a company car as part of his employment. The taxpayer had not kept a driving account and the value of his company car had therefore been estimated on the basis of guidelines made by the former The Danish State Tax Directory and according to rates approved by the National Assessment Council, rates which were also stated in the guidelines on assessment. The High Court established that the result achieved on the basis of the estimate could not be regarded as clearly unreasonable and therefore the assessment authorities' decision was upheld. The Supreme Court upheld the decision based on the reasons stated by the High Court and because the facts stated by the taxpayer during the case did not imply that the assessment had to be considered as clearly unreasonable. A similar result was reached by the Supreme Court in U 1993.743 H where no basis was found for supposing that the tax authorities' application of the National Assessment Council rates had resulted in a clearly unreasonable result for the taxpayer. Concerning the decisions it must be noted that within the area of the valuation of the use of a company car some internal rules have been established concerning the carrying out of the estimate and to which the assessment authorities will generally be able to refer.<sup>23</sup>

Based on the above review of case law it seems just to maintain that the Supreme Court tends towards wishing to overrule the estimate of the assessment authorities to the extent that this will lead to unreasonable results.<sup>24</sup> The Supreme Court's practice is, however, not unambiguous. Concerning the valuation of the use of a company car the Supreme Court thus seems to allow a broader margin to the assessment authorities when carrying out their estimate, which probably must be seen in connection with the fact that internal rules for the estimate of value have been laid down within this area. On this background practice may be summarized to state that the courts must at least be expected to be wishing to overrule an estimate of value carried out by the assessment authorities to the extent that the estimate will lead to a clearly unreasonable result, and that the courts according to the conditions will wish to intensify the review of the estimate and also overrule it if it leads to an unreasonable result.

Furthermore, in this connection it must be noted that the High Courts apparently are more restrictive in the review of the estimate of value within the

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<sup>23</sup> This point of view also agrees with another Supreme Court decision in this field, *cf.* TfS 1996.176 H. The case similarly concerned the fixing of the value of the use of a company car. Neither in this case had the tax payer kept a transport account nor had otherwise proved that the private transport differed substantially from the rules of the guidelines on assessment according to which the extent of private transport as a basis had to be assessed to 8,000 kms. The High Court maintained the assessment authorities' estimated assessment as the estimate could not be considered having led to an "unreasonable result". The Supreme Court upheld the High Court's decision mentioning that there was no reason for overruling the estimate of the assessment authorities. Thus the Supreme Court did not endorse the comment of the High Court according to which the estimate in this type of cases solely needs to be unreasonable in order to be overruled.

<sup>24</sup> *See* similarly Engholm Jacobsen, J.O., *Skatteretten* 3, 3.ed., 2000, at 641.

tax law, and therefore the above mentioned tendencies are not reflected in the practice of the High Courts to the same extent.<sup>25</sup>

### 5.1.1 The Courts' Pattern of Reaction

When the courts have reviewed the estimate carried out by the assessment authorities, the following three possibilities of reaction are available: 1) upholding of the assessment authorities' decision, 2) remand to renewed consideration with the assessment authorities or 3) altering of the assessment authorities' decision. A more thorough review of the practice concerning the question reveals that the pattern of reaction with partly the High Courts and partly the Supreme Court has to a certain extent been different. Whereas the High Courts thus in a series of cases have considered themselves competent to apply another decision instead of the one made by the assessment authorities,<sup>26</sup> no similar examples hereof seem to exist where the Supreme Court is concerned which apparently quite consistently remands the case to renewed consideration with the assessment authorities if the original estimate is not thought upholdable. Interesting in this connection is the decision U 1971.581 H which concerned an estimated assessment of the use of a telephone for professional purposes. The case concerned a maximum of DKK 1,760. All the same the majority of the Supreme Court found that the estimate ought to be carried out by the assessment authorities and therefore remanded the case. Two dissenting judges refer, among other things, to the small scale of the case and thereafter uphold the High Court's decision. Also the decision U 1982.1115 H must be considered as leading in this connection.<sup>27</sup> In the case the High Court thus found it justifiable to fix the value of the work in accordance with a survey report available in the case instead of remanding the case. Despite of the existing survey report the Supreme Court found, however, that the estimate ought to be carried out by the assessment authorities and remanded the case to renewed consideration.<sup>28</sup>

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<sup>25</sup> Cf. for instance TfS 1997.120 Ø, TfS 1997.121 Ø, TfS 1997.401 V, TfS 1997.416 V, TfS 1998.203 V, TfS 1998.449 V, TfS 1998.552 V, TfS 1998.609 Ø, TfS 1998.627 Ø, TfS 2000.63 V, TfS 2000.428 Ø, TfS 2001.83 V, TfS 2001.130 V, TfS 2001.436 Ø, TfS 2001.598 V, TfS 2001.766 V, TfS 2001.767 V, TfS 2001.878 V, TfS 2002.184 V and TfS 2002.489 Ø which all in their grounds state that the estimate carried out has not led to a clearly unreasonable result. Yet, *see also* TfS 1997.347 Ø which applies instead a criterion of importance, and the decisions TfS 1997.651 V (now TfS 1999.248 H), TfS 1998.156 V (now TfS 1999.404 H), TfS 1998.368 Ø (now TfS 2000.405 H), TfS 2001.856 V, TfS 2001.397 Ø, TfS 2000.405 H and TfS 2002.54 Ø, which all attach a decisive weight to the fact whether the estimate carried out can be considered reasonable. In TfS 1999.422 Ø the estimated assessment of the assessment authorities was maintained as it could not be characterized as neither unreasonable nor irrelevant.

<sup>26</sup> Cf. for instance U 1975.196 H, U 1978.660 H, TfS 1997.63 Ø, and TfS 1999.198 Ø.

<sup>27</sup> Cf. Mathiassen, J., *Forvaltningsret, Almindelige emner*, 3.ed., 1997, at 400.

<sup>28</sup> *See* similarly U 1978.660 H concerning the assessment of square meter-prices of a series of site areas. The High Court attached importance to a survey report made in the case and stated on this basis that a renewed estimate of the value of the site areas ought to be carried out. With reference to the "character" of the estimate and the information provided in the case the High Court carried out an independent fixing of the value of the sites. The Supreme Court,

### 5.1.2 The Background To the Reluctance

In theory it has been pointed out that the reluctance of the courts – when reviewing the estimate of value within the Tax Law – to a large extent is conditioned by history. Until 1989 the National Tax Tribunal was thus restricted in its review of the estimate of value within the tax law,<sup>29</sup> a fact that may be said to have had a rub-off effect with the courts. It must, however, be considered questionable whether the courts still feel restricted by former years' legal restrictions of the review of the National Tax Tribunal. Therefore it appears justified to consider instead whether the reservations of the courts might be founded in lack of expertise compared with the fact that the highest administrative authority of complaint within the tax law is a body of expertise.<sup>30</sup> This point of view, however, should probably not be exaggerated. Also concerning tax cases expertise may be introduced. For the majority of the tax cases which concern the assessment of the estimate of value within the tax law, surveyors have been provided with precisely the purpose of establishing the best possible basis for a decision in court. Finally it may be maintained that the courts' reservations are based on litigation economy considerations.<sup>31</sup> The number of tax cases brought before the courts thus reflect the character of mass-administration of the tax law, and in this light it may be maintained that the courts from administrative reasons have had to determine a limit to what they wish to deal with.

When evaluating the courts' reservations it must, however, be remembered that in connection with the assessment of compensation for expropriations the Supreme Court has not shown a similar reservation when reviewing. An important part of the explanation of this fact must probably be found in the fact that it appears directly from § 73 of the Constitution that any question on the

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however, remanded the question on the assessment of the value to the assessment authorities and in this connection laid down some guidelines for the valuation.

<sup>29</sup> Cf. Mathiassen, J., *Forvaltningsret, Almindelige emner*, 3.ed., 1997, at 386. As indicated by this author the first State Tax Law, cf. RT 1902/03, appendix C, column 1367, thus contained in § 33 an actual rule of conclusiveness from which the following appeared: "In so far as the taxation does not depend on factual information which may be verified, or on the proper understanding of the law but on an immediate estimate of the Tax Council, one must remain at this estimate unless the complainant states that he will put forward information according to which the Supreme Tax Council will be able to form an independent estimate". In the former Act on Tax Government, cf. Act no. 281 of 8 June 1977 valid until 1989, it was, furthermore, in § 24, sec. 2, stated: "To the extent that the assessment has been based on an estimate it can only be changed if the court - based on the information presented to it - is able to form an independent estimate".

<sup>30</sup> Cf. above section 1.4.1. where the administrative organ's special expertise is mentioned explicitly as a feature which may institute a certain reservation of the review. See further Sørensen, Max, *Kan domstolene efterprøve forvaltningens skønsmæssige afgørelser*, U 1950 B., at 286.

<sup>31</sup> See similarly Nielsen, Thøger, *Værdien af funktionærpolitik og domstolenes prøvelsesret på skattelovgivningens område*, *Juristen* 1963, at 49, where it is stated that a recreation of the courts into assessment authorities is hardly appropriate.

legality of the expropriation and the size of the compensation may be brought before the courts, a fact which institutes a thorough review.<sup>32</sup>

Generally speaking, a very reserved review of the estimation of value within the tax law may appear less well motivated. Especially concerning this type of cases we are not speaking of an estimate concerning the rules of law but of an estimate of facts on which – according to the circumstances – one is able to form a rather precise opinion.

Summarizing it must be concluded that the courts seem to have applied an actual limit to the review of the estimate of value within the tax law which may be both historically founded as well as caused by litigation economy considerations. In this light it is not so much a question of how far the courts *may* go in their review but rather a question of how far the courts *wish* to go.

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<sup>32</sup> Cf. above section 4.2.