Sweden
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National Reporter
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1. The organisation of the Swedish securities market

The Swedish securities market consists of three separate trading markets. First, there is the market for Swedish government bonds, mortgage credit institution bonds and large loans made by industrial and utilities companies. Such securities are traded on an institutional telephone market. Large banks and security dealers act as market makers and constantly communicate purchasing and selling prices through an information system (PmI).

Second, at the Stockholm Stock Exchange (SSE) shares, convertible bonds, warrants, call options, bond loans, debenture loans, index bond loans, premium bonds, convertibles and other related financial instruments are traded between the exchange's members (banks and securities dealers). The SSE members submit offers to buy or sell a specified number of securities at a certain price to the computerised trading system (SAX 2000) which closes the deals automatically when two offers are compatible. (Any manual trading between the members is also reported to the system.) The loans are traded in a separate part of the system, called SOX.

Shares and other securities are generally dematerialised and represented by a registration in a computerised trading system maintained by the Swedish Central Securities Depository, VPC (*Värdepapperscentralen*), where shareholders or their representatives also have an account detailing ownership of the relevant securities. Companies registered with the SSE are required to have VPC-registered securities. For companies not listed on the SSE it is optional to register their shares at VPC or retain them in paper form. Shares in smaller companies may also be traded by a security dealer acting as market maker, which may result in regularly published security prices.

The third section of the securities market is the derivatives market, for which OM Stockholm Exchange AB is responsible. Stock options, interest options, share index options, stock futures and share index futures are examples of instruments traded on this market.[1] OM also ensures clearing and settlement of the trades.

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1 For a further description of these products, see Niclas Virin and Margareta Sahlström, Swedish national report in *Tax aspects of derivative financial instruments*, IFA vol. LXXXb 1995 pp. 527–48.

In addition banks, other security dealers, insurance companies, other companies and large investors maintain an OTC market in small series or tailor made financial contracts. Foreign investment banks also take part in this market.

2. Instruments traded on the Swedish securities market

A Swedish limited company raises equity by issuing shares on the primary market. Shares in a company must have voting power, which is measured on a scale from 1 to 10. It is possible to attach different rights to different series of shares with regard not only to voting power but also to the company's profit and equity, including preference for dividends. Accordingly, it is possible to issue preference shares as well as ordinary shares in the company. There may even be several series of preference shares and it is possible to set a time limit to the shareholders' preferential treatment. Another possibility, available under certain conditions, is to convert one type of share into another type of share. The latter are known as convertible shares and are presently quite rare on the Swedish market.

During the last century it has not been legal for Swedish companies to repurchase or in other ways acquire their own shares. In accordance with the EU Second Company Law Directive and as most EU countries already permit such trade of the company's own shares, the Swedish law has recently been amended to allow public limited companies, with listed shares, to repurchase a maximum of 10 per cent of their own shares.

When a company wants to borrow funds it can turn to a bank or issue bonds, notes or debentures on the securities market (in this report the word bond will be used for these kinds of securities). An ordinary bond may be short, medium or long term and is most commonly issued at its redemption value, with fixed periodical interest paid during the term to maturity. Alternatively, where periodical interest is not paid on the bond, it will be issued at a value lower than its redemption price, a so-called zero coupon bond. Bonds with a subordinated right to repayment in the event that the company goes bankrupt, so-called subordinated bonds, are also traded on the Swedish market.

Loans where the repayment is dependent on a certain percentage of the company's assets or calculated on the average market price of its shares, during a period prior to the termination of the loan or to the company's bankruptcy, are not permitted under current legislation. There is a proposal by the Company Law Committee, however, to make such loans possible.[2] A participating loan (or profit sharing loan) which pays the lender an interest rate related to the company's profit or dividends is already possible under Swedish law.

Convertible bonds are another option to attract capital at a lower interest rate. The loan agreement contains the terms and conditions applicable to the potential

[2] See SOU 1997:22 pp. 231–4 (p. 33 in the English summary).

conversion. Normally the interest rate is fixed or floating in relation to a certain interest rate index, but the convertible bond may also be constructed as a participating loan (called KVB). It is not unusual for the loan to be subordinated. Since only the bondholder may call for a conversion, not the company, it is highly uncertain for the company whether, and if so when, the loan will be converted into shares. The funds transferred to the company are treated as a loan until the conversion occurs, at which time the company regards it as equity.

Bonds with an option to buy shares have similarities to convertible bonds, but are different as there is only a right to buy shares at a certain price at a certain time or period of time in the future, as opposed to converting a loan into equity. Swedish law does not permit a company to issue call options for shares alone. Such options must be connected to the issuing of bonds. It is, however, normally possible to detach options from issued bonds and trade the options separately. Other instruments traded on the SSE are premium bonds, subscription rights and warrants.

A Swedish company may repurchase its issued convertible bonds and bonds with an option to acquire new shares. It is unclear, however, whether the company may then resell the same securities again, but it would seem impossible, since the debt may have expired as there is no longer a relationship between the lender and borrower. The Company Law Committee proposes this to be expressly regulated in the Company Act.[3] If the company wants to resell the convertible bonds or option loans to the market, it must follow the procedure for issuing new such loans.

Shareholders may make contributions to a limited company and agree that such contributions are repaid when the company's economic situation permits. Such agreements are made between the shareholders themselves and the company is not bound by the agreement. The difference between a loan and a contribution is accordingly if there is an obligation for the company to repay the loan or if a decision is required at the general meeting of shareholders. According to the Company Act a decision regarding the repayment of a contribution follows the same rules as for dividends. A shareholder contribution may follow an oral or written contract, although the latter is recommended. There is no regular securities market for shareholder contributions, but the right to repayment of a contribution is sometimes transferred to new shareholders.

Derivative financial instruments (DFIs) have been undergoing significant development on the Swedish securities market in the last decade and some derivative instruments may cause similar classification problems as the hybrids discussed in this report. DFIs are however not dealt with in this report.[4]

Securitisation via a special purpose vehicle (SPV) is also outside the scope of this report, but it should be mentioned that such arrangements are quite rare in Sweden and that domestic legislation makes it difficult to arrange SPVs with securities as assets. House loans, leasing contracts, receivables, etc., are, how-

3 See SOU 1997:22 pp. 253–5.

4 The tax treatment of DFIs was the subject of the IFA Congress in 1995; see Virin and Sahlström, *op. cit.*

ever, to some extent transferred to SPVs outside Sweden, generally located in Ireland and the Channel Islands.

3. Some general income tax issues

Swedish income tax legislation was originally based on a narrow income concept, the source theory and the national income theory. Consequently, the dichotomy between income and capital gain exists. Capital transactions were originally not taxable under the income tax law. Accordingly, for capital gains and profit from temporary work, it had to be established whether there had been a profit-making intention. This impractical principle for determining capital gains was overruled by legislation in 1910 and since then capital gains have been governed by special rules for various kinds of property. The inconsistencies previously existing in the legislation led to tax planning and schemes to avoid or reduce tax on capital gains. This was one of the main reasons for the changes in 1991. The distinction between classical income from capital, as dividends and interest, and capital gain will, however, still be of importance since the income tax treatment in some respects is different for the two types.

Individuals may derive income from three sources, namely employment income (including pensions and income from temporary work), business income and capital income. The two former sources are subject to both municipal tax (around 30 per cent) and national tax (at 20 per cent on the part of yearly income exceeding approximately SEK 232,000; increased to 25 per cent above SEK 374,000). An additional national pension tax is also imposed. All income from capital, including interest, dividends and capital gains, is taxed at a flat rate of 30 per cent as of 1991. Interest expenses are deductible, even where the loan is for personal use, and capital losses are deductible against gains and other income. In certain circumstances the deduction is reduced to 70 per cent of the loss (see below). A net loss on income of capital entitles the taxpayer to a reduction of tax by 30 per cent against other income tax. The tax reduction is only 21 per cent of the total loss exceeding SEK 100,000.

Tax returns are lodged and tax assessments are made in the year after the fiscal year. Interest and dividends are taxable the year received. Interest expenses are deductible the year paid. Capital gains are taxable the year the property is sold, even if the sale proceeds are received in a later year. Capital losses have to be final to be deductible. If whole or part of the income is contingent on the occurrence of a future event, and therefore uncertain, the gain or additional gain may be taxed in a later year.

Capital gains and losses are divided into different categories with special rules for each category. For shares, convertible bonds, participating debentures and other shares or share index related financial instruments, there is a special method used for accounting the acquisition cost, namely the average acquisition cost method. Under this method the acquisition cost for all instruments of the same kind and type, held by a person, are summed and then divided by the number of

instruments, to give an average acquisition cost. On the sale of instruments, the capital gain is calculated as the difference between the selling price and the average acquisition cost. If new similar instruments are acquired, the average acquisition cost is recalculated and spread across all instruments held. Instruments listed on a stock exchange or traded on another market may as an alternative use 20 per cent of the selling price as the acquisition cost. Losses on such instruments are fully deductible against gains made on other market traded instruments. To the extent that losses have not been offset against gains only 70 per cent of the net loss is deductible. Losses on shares, not regularly traded on the market, are, however, fully deductible against capital gains on other shares and market traded share related instruments, before being reduced to 70 per cent.

If rights to subscribe for shares or participating bonds, convertible bonds, convertible participating bonds, options or futures are sold, a gain or loss will be calculated and taxed or deducted according to the rules described above. If those kinds of instruments are used to acquire shares or bonds, however, these transactions will not be regarded as a realisation of a gain or loss and the acquisition costs for those instruments are added to the cost of the newly acquired instruments.

Gains and losses on receivables, bonds, debentures and other instruments related to receivables in Swedish currency are computed using the average acquisition cost method. For listed or other market traded instruments, other than premium bonds, gains and losses are treated as interest payments. Losses on other types of debt instruments are deductible up to 70 per cent. Gains or losses on the sale of foreign currency or receivables in foreign currency are calculated separately.

In respect of companies, the total income is taxed at a flat rate of 28 per cent. Unless expressly legislated to the contrary, business income is recognised on an accrual basis. For securities held for investment purposes (fixed assets) the tax treatment follows the same rules as for capital gains (above). Losses on shares or share related securities are, however, only deductible against gains on similar instruments. An undeducted loss can be carried forward and utilised against gains in future years. Other securities, held for trading purposes (current assets), follow the accrual principle. Consequently, securities held for trading purposes may be written down, whereas this is not possible for securities held as investments. Special accrual regulations exist for banks and other financial institutions which, in certain cases, lead to differences in accounting methods and taxation for these institutions.

Dividends received from Swedish companies are not taxable where the Swedish recipient holds 25 per cent or more of the voting power, or, if the voting power held is lower, the shares are held solely for organisational purposes. Dividends from shares held as current assets and from portfolio shares are fully taxable, however.

Dividends from non-resident companies may also be exempt for the recipient Swedish company if the conditions detailed above for dividends on Swedish shares are met and the non-resident company is subject to foreign income tax comparable to the Swedish tax (officially described as an income tax rate of at least 15 per cent, computed in accordance with Swedish accounting and tax rules).

There is a rule of legal presumption for companies in countries with which Sweden has double tax treaties and a special rule for companies within the EEC (which qualify under the provisions of article 2 of the Council Directive of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, 90/435/EEC) where the Swedish company has ownership of 25 per cent or more of the capital. Companies in these countries are considered to be taxed comparably with Swedish companies.

Both individuals and companies may get tax relief for foreign taxes paid according to the tax credit method under domestic tax law. In relation to dividends received from non-resident companies, and where the Swedish recipient company is unable to show that a comparable income tax treatment was imposed on the non-resident company, a tax credit of 13 per cent of foreign taxable dividends received is available. As a general principle, tax treaties override domestic legislation where they are more favourable to the taxpayer and will accordingly be applied if according to treaty provisions income is exempt from Swedish tax or taxed at a lower level.

4. Tax treatment of non-resident individuals and corporations under domestic law

For non-resident individuals and companies, only certain types of income are taxable, in principle, income regarded to have its source in Sweden, including income from real property and income from a permanent establishment in Sweden. As mentioned above domestic legislation may be overruled by more favourable rules for non-resident taxpayers as stipulated in the double taxation treaties.

Non-resident individuals and companies are normally not taxed in Sweden on interest received from Sweden or capital gains on financial instruments. For individuals who are former residents of Sweden or with a former habitual abode in Sweden, gains from sales of shares in Swedish companies and other share related securities (i.e. convertible bonds, convertible participating loans, options and futures in shares) issued by Swedish companies are taxable within a period of 10 years from emigration. Even if the rule is protected in many Swedish double tax treaties the time period is often reduced.

Withholding tax is levied at 30 per cent on dividends paid to non-resident individuals and corporations, provided it is not treated as business income of a non-resident corporation with a permanent establishment in Sweden. No withholding tax is levied on interest payments and capital gains. Redemption of share capital and consideration provided by a company repurchasing its own shares is, however, treated as a dividend under the withholding tax legislation. There is a possibility to reclaim the withholding tax, only where the company has been liquidated within two years from the taxable event, to the extent that it represents a redemption of the acquisition cost of the shares (see however current discussion under tax treaty issues below).

The tax rate is in virtually all cases reduced by double taxation treaties. Furthermore, there is no withholding tax on dividends paid to corporations within the EEC, holding at least 25 per cent of the share capital and which qualify under the provisions of article 2 of the Council Directive of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (90/435/EEC). This rule has recently been extended by Sweden unilaterally to most non-resident corporations.

Accordingly, non-resident individuals and corporations may receive interest and, if not resident in Sweden within the last 10 years, gains on the sale of shares and other related securities without triggering Swedish tax consequences. Interest payments to a non-resident corporation with a permanent establishment in Sweden may, however, be taxed as business income in Sweden.

5. Tax treaty issues

Swedish double tax treaties normally follow the OECD model convention.[5] The definitions of the terms dividend and interest are identical or closely related to the corresponding definitions in the model convention (articles 10 and 11). According to information from Swedish tax treaty officials, there are no provisions dealing specifically with hybrid instruments, but it should be noted that the Swedish–German tax treaty has a special provision for income from German participating loans. Such income may be taxed in Germany.

The definitions of dividend in tax treaties are not exhaustive and normally contain a general formula of all income subject to the same taxation treatment as income from shares under the laws of the state in which the company making the distribution is a resident.[6] The distinction between dividend and interest under Swedish tax law will therefore normally be relevant even when the scope of the withholding tax on dividends has to be determined.

As mentioned above, the normal concept of the term dividend is extended in the Swedish withholding tax legislation, to include the redemption of share capital. Such treatment may seem odd, but there is an option to reclaim the withholding tax in the case of liquidation of the company. Formally this option is not available if only part of the share capital is repaid to the shareholders and where the company is still in existence. It seems, however, to be a turn in administrative practice. It has been argued that the OECD model convention only permits the difference between the redemption price and the par value of the shares to be treated as dividend or capital gain (see the commentary on article 13 paragraph 31 of the OECD model convention, compared with paragraph 28 of the commen-

5 The Swedish model for double tax treaties has recently been discussed by Peter Sundgren in a publication by Institutet för utländsk rätt AB (The Institute of Foreign Law Ltd), IUR-Information No. 16/99.

6 Compare Nils Mattsson, *Svensk skattetidning*, 1990, p. 157.

tary on article 10). Such a conclusion would make it impossible to levy withholding tax on the redemption of paid-up share capital.

For Swedish investors receiving payments from non-resident companies (and individuals) the application of treaty rules follows the general principles detailed in the domestic legislation enacted in 1996 (SFS 1996:161). The classification of income received follows Swedish tax law, rather than the law of the state where the issuer of the instrument is a resident or the income classification in the tax treaty. The definitions in the treaty are of importance only to the extent that the treaty limits or excludes certain income from Swedish tax and for the methods to be used to avoid international double taxation. This means that the distinctions between dividend, interest and capital gain made by Swedish tax law are also relevant to income received from non-resident issuers.

6. Interest or capital gain

The classic Swedish income concept itself, together with the increasing number of special rules concerning capital gains, has led to numerous classification problems.[7] Since 1991 classification has been of less importance, due to the 30 per cent flat tax rate imposed for all capital income, incorporating capital gains, interest and dividends. As previously mentioned there are still some inconsistencies in the tax system which make it necessary to have regard to the distinction between income and capital. The distinction between interest and capital gains has been discussed in recent cases.

In RÅ 1997 ref. 44 the Supreme Administrative Court considered this distinction to determine how zero coupon bonds should be taxed. Since banks are required to deduct and remit income tax on interest, but not on capital gains, the Court had to decide whether a gain on a bond, issued below the redemption price, with no rights to interest during the term to maturity, was considered interest or a capital gain under Swedish tax law. The Supreme Court noted that the term "interest" was not defined in the tax legislation. In a broad sense, the Court found interest to refer to the entire return on a claim. In a more narrow sense, interest is the return which reflects the time value of the money lent. Consistent with the

7 A classical study on the area in Swedish tax law is Leif Mutén, *Inkomst eller kapitalvinst* (Income or capital gain), Stockholm 1959, which contains a theoretical study of classification problems relating to taxation of bonds. In Nils Mattsson, *Aktiebolagens finansieringsformer* (Financing forms for limited companies), Stockholm 1977, capital gains tax on different instruments issued by companies is the subject of an exhaustive study. Newer works are Peter Melz, *Kapitalvinstbeskattningens problem* (The problems of capital gains taxation), Stockholm 1986 and Roger Persson Österman, *Kontinuitetsprincipen i den svenska inkomstbeskattningen* (The principle of basis carry-over in Swedish income taxation), Stockholm 1997, where some more general issues relating to income and capital gains are covered. For a handbook in the area, see Anne Rutberg, Johan Rutberg and Lars Molander, *Beskattning av värdepapper* (Taxation of securities), 2nd edn, Uppsala 1997.

general income theory, the Court stated that a capital gain is an unexpected return in contrast to an expected yield that should be characterised as interest.

The Court made a distinction between two cases, one where the bondholder had owned the zero coupon bond from the time of issue and one where the bondholder had bought it at some time during its life. In the first case the Court found it easy to characterise the difference between the redemption and emission prices as interest, since the latter had been decided in relation to the market interest rate. The risk for defaulting payment seemed in this case to be included in the interest rate.

In the second case, where the person who redeemed the bond had bought it on the market after it was issued, the Court characterised the difference between the purchase price and redemption price as interest, even though it may have been plausible to regard the difference, at least partly, as a capital gain.[8] Practical reasons were given to support not treating any part of the difference as a capital gain. (It is uncertain if the conclusions were coloured by the fact that the case concerned the obligations of the applicant, a bank, to deduct and remit tax on interest.)

Finally, the Court concluded that, if a zero coupon bond which had been held from the issue was sold before the redemption date, the difference between the acquisition cost and selling price, should be characterised as interest compensation, paid by the buyer to the seller. As such it is not regarded as interest in its true sense (to the loan issuer). It will however be treated as interest according to Swedish income tax law (3 §6 mom. SIL). Interest compensation received is taxable the year it is received (although there is no withholding at source), while interest compensation paid is deductible when the interest on the bond falls due or the bond is sold.

In an earlier case (RÅ 1995 ref. 71 III), regarding zero coupon bonds with a real rate of interest, it seems that the Supreme Administrative Court made a distinction between interest and capital gain. Under the terms of the bond there were no interest payments before maturity, but the bond was issued below the nominal value with regard to a real rate of interest and the redemption price was also dependent upon an inflation index:

> "For example, if the bond had a nominal value of MSEK 1, it would be issued for SEK 452 900 at a real rate of interest of 4,04 percent. The redemption price would be higher than MSEK 1 if the CPI increased and lower if there was deflation. At an inflation rate of 2,5 percent per year the redemption price would be MSEK 1,639 and only MSEK 0,818 if there were a deflation of 1 percent per year."

The Supreme Administrative Court found that the increase in value during the term to maturity, related to the real rate of interest and the inflation index, was to be regarded as interest. If a bond were sold before maturity, a calculated value based on these factors should be regarded as interest and other variations of the price should be considered a capital gain or loss.[9]

8 This view has been developed by Raymond Grankvist, *Svensk skattetidning*, 1997, pp. 674–5.

9 For commentaries on the interpretation of the case, see Niclas Virin, *Svensk skattetidning*, 1996, p. 84.

For corporations holding zero coupon bonds, their value accretion due to interest during the term of the bonds must, if the bonds are considered a current asset, be computed annually and treated as income, according to the Supreme Administrative Court in RÅ 1994 ref. 19 and RÅ 1995 ref. 71 I.

In a case (RÅ 1994 ref. 26) dealing with another type of bond, without interest during the term of maturity, but where the redemption price was the issue price multiplied by a factor of the Standard & Poor's 500 Composite Stock Price Index (a stock index bond), the Council for Advance Tax Rulings found the entire yield to be a capital gain. No part of the profit could be characterised as interest. This decision was confirmed by the Supreme Administrative Court. As a reason for the decision, the Council concluded that the change in value of the bond was not as foreseeable as to allow it to be characterised as interest. A similar judgment was delivered in RÅ 1986 ref. 51 where the redemption price was determined by reference to the international gold price and the USD/SEK exchange rate.

In RÅ 1994 ref. 26 II the Council for Advance Tax Rulings found that gains made on stock index bonds were to be regarded as capital gains even by corporations. This view was confirmed by the Supreme Administrative Court. Accordingly, the yield on this kind of instruments does not have to be accounted for as income until the instruments are sold or mature.

A relatively new product, not yet dealt with by the courts, is a bond, called a reverse convertible bond. There is no real conversion of the bond into shares, but there is a risk of reduced redemption related to falling prices on a number of specified shares. A one-year loan has a high fixed rate of interest (i.e. 21 per cent), payable on maturity, but the redemption price may be reduced if the prices of the specified shares fall during the term of maturity. One option is to treat the fixed interest as interest and a reduction of the redemption price as a capital loss, since it is unpredictable. Possibly only a reasonable market interest rate should be characterised as interest, as the interest rate seems to be about seven times higher than the normal interest rate. There are also arguments supporting the conclusion that all profits or losses would be characterised as capital gain or loss, as in the stock index bond case above. At present there is not sufficient case law to draw any definite conclusions.

7. Interest or dividend

Profits of Swedish limited companies are taxed twice, first by the company (at 28 per cent), and second by the shareholder when received (at 30 per cent). There have been limited opportunities for companies to claim dividends distributed as deductible, but as a general principle dividends are not deductible. Interest, on the other hand, is deductible since it is a normal business expense incurred on a loan. Both are taxable capital income to the recipient. The distinction between interest and dividends has often been discussed in terms of deductibility to the company.

Before the issue of participating loans (profit sharing loans) was regulated in the tax legislation of 1977 there was great uncertainty as to how interest on such loans should be treated by the company for tax purposes. On some loans it was regarded as a dividend, at least partly, and on others it was deductible as interest. When the loans were issued to the shareholders in relation to their shares there seems to have been a tendency to characterise the compensation as a deemed dividend. In other cases a deemed reasonable rate of interest was deductible and the excess regarded as a dividend.[10]

As discussed above, loans where the repayment depends on a certain percentage of the company's assets or calculated on the average market price of its shares during a period prior to the termination of the loan or the company's bankruptcy are not allowed under current law. They may be permitted in the future, however, at which time the legislator is expected to provide tax rules for these kinds of loans.

A loan, on which the interest rate is related to the company's profit or distributed dividends, is already possible. There is also a special tax rule governing the matter (2 §9 mom. SIL). A fixed rate of interest is deductible according to normal rules for the deductibility of costs. For loans with a floating rate of interest, however, there are certain requirements. Floating rates of interest on participating loans are deductible to the company only if the bonds have been offered to the public. Even if there are preferential rights attached to the loan, the interest is deductible if the loans are offered to non-shareholders, provided those shareholders are not related companies (an arm's length rule) or, if there are preferential rights to the shareholders to provide a loan in relation to their shares, the company is listed on a Swedish stock exchange or a similar stock market in Sweden.[11] In the latter case the company is taxable on the value of the loan transferred to the shareholders.[12] If, in any other case, the participating loan seems to be decided on an arm's length basis, the tax authority may permit deductibility for the interest, even where preferential rights for the shareholders attach to the loan. For closely held companies floating interest, paid to shareholders or related persons, is never deductible.

For the bondholder interest received on a participating loan may be treated as interest, even though it is not deductible to the company according to the special rules discussed above. This may be of importance to non-resident individuals and corporations.[13] Withholding tax would accordingly not be levied on such interest payments.

10 The development in case law on this matter is described in Mattsson, *op. cit.*, at pp. 185–92.

11 In RÅ 1991 not. 109 the rules were tried in an application for an advance ruling. The circumstances when the loan is issued are the relevant facts. It is not enough to become listed in the near future. On the other hand a connected contract to buy shares in the company which is issuing the loan may disqualify for deductibility.

12 If a right to subscribe for participating bonds is sold, it is taxed as capital gain. The acquisition price is nil. Otherwise the subscription right is not taxed separately (3 §7 mom. SIL).

13 Mattsson, *op. cit.*, at p. 197.

The use of participating bonds to avoid corporate double taxation was discussed in a recent advanced ruling case (RÅ 1998 not. 195). A company owned by a trust was going to issue convertible participating bonds on the open market. The bonds were to mature in the year 2096. The intention was to distribute the profit of the company to the bondholders with a floating rate of interest, dependent on the profit of the company. Arrangements were made to allow the bondholders to control the company by way of the trust. The Council for Advance Tax Rulings found the terms of the loan to be within the specific provisions of the income tax law, as described above. However, as a last resort the Council turned to the general anti-avoidance rule and found an assessment permitting deductibility of the interest to be contrary to the purpose of the relevant section. Deductions for interest expenses were thus denied. On appeal to the Supreme Administrative Court the Court came to the same conclusion. The decision lacks sufficient explanation as to why an assessment in accordance with the relevant section was contrary to the purpose of that section. The Supreme Administrative Court expressly mentioned that no consideration had been given to the legislation governing limited companies or trusts.[14]

Shareholder contributions to the company may also raise the question of the difference between equity and debt. Conditionally paid contributions may be repaid when so decided at the general meeting of shareholders. As those decisions follow the same rules as decisions for the distribution of dividends, the Supreme Administrative Court found that the repayment of contributions should also be taxed as dividends (RÅ 1983 1:42). This judgment was, however, overruled by the Court in RÅ 1985 1:10. The repayment of contributions should not be regarded as dividends, but rather as a repayment of a loan. In RÅ 1988 ref. 65 the Supreme Administrative Court allowed a repayment to a new shareholder, who had acquired the right to return of capital. The company may also deduct interest paid on a contribution for the time period from the decision of the general meeting of the shareholders to the actual repayment (see RÅ 1987 ref. 145 where the Supreme Administrative Court overruled the judgment in RÅ 1985 Aa 144).

For other loans it may be possible to treat interest payments, which are more favourable than at arm's length, at least partly as dividends, pursuant to the general doctrine of deemed dividends. Between related parties there is of course a greater risk for the recharacterising of interest as partially a deemed dividend. When loans are issued on the market the courts are more likely to regard the interest rates and other terms as being at arm's length.

[14] The constitutionality of the general anti-avoidance rule and its relation to the rule of law has been questioned by Anders Hultqvist, *Legalitetsprincipen vid inkomstbeskattningen* (The legality principle in income taxation), Stockholm 1995, Chapter 7, and it is also discussed in Leif Mutén, "The Swedish experiment with a general anti-avoidance rule", in *Tax Avoidance and the Rule of Law*, ed. by Graeme S. Cooper, IBFD Publications 1997, pp. 307–24.

8. Conclusions

The Swedish securities market has still not seen the entire extent of financial instruments, but the derivatives market has developed rapidly over the last decade. Derivatives are taxed in accordance with the rules that apply to the underlying assets and may cause interpretation problems, especially the tailor-made OTC instruments. It is uncertain whether such instruments are to be classified as financial instruments under the provisions of the income tax legislation. If the OTC instruments fall outside this definition, several questions of interpretation will occur. These issues are outside the scope of this report however.

The classical forms of financing a company are well covered in the tax law and work relatively efficiently. Since 1991 the Swedish tax legislation is relatively neutral and coherent which makes tax planning and tax avoidance schemes difficult and in many aspects perhaps impossible in the domestic market. The opportunity to exploit differences between tax systems and tax relief in double tax treaties may of course still exist, but this is an international harmonisation issue.

Many of the latest hybrid problems are related to the distinction between interest and capital gain. A bond with a floating rate of interest, related to some unexpected event, raises the question of the definition of the term "interest". In some of the recent cases in the Supreme Administrative Court one may find a tendency to regard the distinction between foreseeable and unforeseeable profit of a loan, the former being characterised as interest and the latter as a capital gain, but there are also arguments of a practical nature. The gold price index case and the stock index loan case clearly show that changes in values relating to such indices will be characterised as capital gains. On the other hand, the case of a zero coupon bond with a fixed rate of interest and even the case regarding a zero coupon bond with a real rate of interest and an inflation index, show the possibility of interest treatment when the profit is related to a fixed or inflation indexed percentage of the issue or redemption price. In the latter case the Court has indicated that other changes in value of a bond could be characterised as capital gains. Some authors have also interpreted the former case as indicating such a possibility. As discussed above, the question will arise even for other forms of index-related bonds, such as reverse convertible bonds.

The distinction between interest and capital gain is of importance in certain circumstances under domestic income tax law. For example a capital gain is calculated by using the average acquisition cost method. It is uncertain whether this method is available in practice for zero coupon bonds. Furthermore, interest is taxable when it is paid to the holder of the bond, while a capital gain or loss is taxable or deductible in the year the asset is sold. This may be of importance at the end of the fiscal year, but since interest compensation paid is deductible on maturity or when the bond is sold it appears to be of less importance in practice. Some losses are only deductible up to 70 per cent, while a lower interest, which reduces the tax base directly, or an interest deduction, makes interest treatment more favourable than capital gain treatment. This is of lesser importance for losses on listed or market traded bonds, however, since such losses are to be treated as interest payments, if they do not relate to a stock index.

The distinction between interest and dividend has been discussed mainly for participating loans (profit sharing loans) which are now regulated by the income tax legislation. Interest is deductible to the company on loans issued on the market or, in certain circumstances, to the shareholders. Accordingly, recipients will treat compensation received as interest. In other cases, where the distributed profit is not deductible to the company, the compensation may nevertheless be regarded as interest to the recipient. As we have seen in a recent case from the Supreme Administrative Court, the general anti-avoidance rule may be applied to reduce the opportunity for companies to deduct interest relating to a floating interest rate if such tax treatment would be regarded as contrary to the purpose of the legislation.

Interest on subordinated loans is normally treated as interest according to the tax law. As for other loan interest rates above what may be regarded as an arm's length interest rate, the general doctrine of deemed dividend may apply. For repayment of shareholder contributions an interest compensation calculated from the date of the shareholder general meeting will be deductible under the same circumstances.

For non-resident individuals and corporations it is of great importance whether a payment is regarded as dividend, since 30 per cent withholding tax is levied on the amount. Such payments are normally distributed through the Swedish Central Securities Depository (VPC) or a Swedish bank, which withholds and remits the tax. The tax rate is usually reduced by a tax treaty and there is no withholding tax for most non-resident companies owning 25 per cent or more of the share capital, or for a non-resident company with a permanent establishment in Sweden by which the dividend is treated as business income.

For interest and capital gains no withholding tax is imposed and such income is not normally taxable in Sweden. Redemption of share capital and consideration provided when a company repurchases its own shares is, however, regarded as dividend income under the withholding tax legislation. Furthermore capital gains on the sale of Swedish shares and other stock-related financial instruments are taxable if the seller is an individual and has been a resident of Sweden during the last 10 years. This rule is normally also part of double tax treaties, but the time period is often reduced.

Résumé

Le marché suédois des valeurs mobilières n'a pas encore saisi toute l'ampleur des instruments financiers, mais le marché des produits dérivés s'est développé rapidement au cours de la dernière décennie. Les modes de financement classiques d'une société sont bien couverts par la législation fiscale et fonctionnent efficacement. Depuis 1991, la législation fiscale suédoise est relativement neutre et compatible, ce qui complique la planification fiscale et les plans de lutte contre l'évasion fiscale, et les rend peut-être à bien des égards inapplicables sur le marché intérieur.

Nombre des problèmes hybrides les plus récents sont liés à la distinction entre intérêts et gains en capital. Cette distinction est importante dans certaines circonstances pour l'appli-

cation de la législation interne sur l'impôt sur le revenu, par exemple pour déterminer la matière imposable et la déductibilité des pertes. Une obligation à taux d'intérêt flottant, lié à quelqu'événement inattendu, soulève la question de la définition du terme "intérêts". Dans certains des cas récents soumis au Tribunal administratif suprême, on peut discerner une tendance à tenir compte de la distinction entre les profits prévisibles et les profits imprévisibles d'un prêt, les premiers étant caractérisés comme intérêts, et les seconds comme gain en capital; toutefois, il existe également des arguments de caractère pratique. D'un autre côté, les intérêts d'obligations pour lesquelles le taux d'intérêt dépend en partie d'un indice d'inflation ont été classés comme intérêts. Dans la pratique, il n'apparaît pas clairement si les fluctuations de prix d'une telle obligation pendant la période précédant l'échéance seront considérées comme gain (ou perte) en capital, ou comme un service d'intérêts.

La distinction entre intérêts et dividendes a été étudiée principalement pour les prêts de participation (prêts de participation aux bénéfices) qui sont aujourd'hui réglementés par la législation sur l'impôt sur le revenu. La société ou, dans certaines circonstances, les actionnaires, peuvent déduire les intérêts des emprunts émis sur le marché. En conséquence, les bénéficiaires traiteront le montant reçu comme des intérêts. Dans d'autres cas, lorsque les bénéfices distribués ne sont pas déductibles pour la société, ce montant peut néanmoins être considéré comme des intérêts pour le bénéficiaire. Ainsi qu'il ressort d'une récente affaire dont le Tribunal administratif suprême a été saisi, la règle générale de lutte contre l'évasion peut être appliquée afin de réduire la possibilité pour les sociétés de déduire les intérêts liés à un taux d'intérêt flottant au cas où un tel traitement fiscal serait considéré comme contraire aux fins de la législation.

Les intérêts sur les prêts subordonnés sont normalement traités comme des intérêts au sens de la législation fiscale. S'agissant des autres taux d'intérêts sur prêts visés plus haut, qui peuvent être considérés comme un taux d'intérêt fixé dans des conditions de pleine concurrence, la doctrine générale des dividendes réputés comme tels est applicable. Pour le remboursement des apports d'actionnaire, les intérêts calculés à partir de l'assemblée générale des actionnaires seront déductibles dans les mêmes circonstances.

Pour les personnes physiques et morales non-résidentes, il est essentiel de savoir si un paiement est considéré comme un dividende, comme des intérêts, ou comme un gain en capital, étant donné que la retenue à la source n'est opérée que sur les dividendes. Le taux de la retenue à la source est de 30 pour cent, mais il est normalement réduit par une convention fiscale. Toutefois, le rachat du capital-actions et le montant versé lorsqu'une société rachète ses propres actions sont traités comme dividendes en application de la législation sur les retenues à la source.

La plupart des sociétés non-résidentes possédant 25 pour cent ou plus du capital-actions et les sociétés non-résidentes ayant un établissement stable en Suède ne sont pas soumises à la retenue à la source; en pareil cas, le dividende représente un revenu industriel ou commercial.

Finalement, les gains en capital réalisés sur la vente d'actions suédoises et d'autres instruments financiers cotés en bourse sont imposables comme revenus si le vendeur est une personne physique et réside en Suède depuis les dix dernières années. Cette règle figure aussi normalement dans les conventions de double imposition, mais la durée de cette période est souvent réduite.

Zusammenfassung

Die schwedischen Wertpapiermärkte haben noch nicht das gesamte Spektrum möglicher Finanzierungsinstrumente entdeckt, aber der Markt für Derivate hat sich im letzten

Jahrzehnt rasch entwickelt. Die klassischen Formen der Finanzierung eines Unternehmens sind steuerrechtlich gut erfasst und funktionieren durchaus effizient. Seit 1991 sind die schwedischen Steuergesetze relativ neutral und einheitlich, wodurch eine Steuerplanung und eine Steuerumgehung im Inland schwierig und in vielfacher Hinsicht vielleicht sogar unmöglich gemacht wird.

Viele der jüngsten Probleme mit hybriden Papieren hängen mit der Differenzierung zwischen Zinsen und Kapitalgewinnen zusammen. Diese Differenzierung ist nach dem inländischen Einkommensteuerrecht in bestimmten Fällen ausserordentlich wichtig, beispielsweise zur Ermittlung des steuerpflichtigen Vorgangs und bei der Klärung der Frage, ob Verluste abzugsfähig sind. Eine Schuldverschreibung mit variablem Zinssatz, der von unvorhersehbaren Ereignissen abhängt, wirft die Frage einer genauen Definition des Begriffs "Zinsen" auf. Einige der jüngsten Entscheidungen des Obersten Verwaltungsgerichts lassen die Tendenz erkennen, zwischen vorhersehbaren und unvorhersehbaren Anleihegewinnen zu differenzieren, wobei die ersteren als Zinsen und die letzteren als Kapitalgewinne behandelt werden, doch gibt es darüber hinaus auch Argumente praktischer Natur. Andererseits werden inflationsgekoppelte Anleiheerträge im allgemeinen als Zinsen eingestuft. Unklar ist, ob Kursveränderungen solcher Anleihen während der Laufzeit als Kapitalgewinne (oder –verluste) oder als Zinserträge behandelt werden.

Die Differenzierung zwischen Zinsen und Dividenden spielte hauptsächlich im Zusammenhang mit partiarischen Darlehen (Gewinnschuldverschreibungen) eine Rolle, für die die Einkommensteuergesetze aber jetzt eine Regelung vorsehen. Ein Unternehmen kann die Zinsen für Anleihen abziehen, die am Markt oder unter bestimmten Umständen auch an die Aktionäre begeben werden. Dementsprechend sind die Erträge bei den Empfängern als Zinsen zu behandeln. In anderen Fällen, in denen das Unternehmen ausgeschüttete Gewinne nicht abziehen kann, können die betreffenden Erträge dennoch bei den Empfängern als Zinsen behandelt werden. Wie eine jüngste Entscheidung des Obersten Verwaltungsgerichts zeigt, kann die allgemeine Regel zur Vermeidung von Steuerumgehungen angewandt werden, um die Möglichkeiten der Unternehmen einzuschränken, Zinsen für variabel verzinsliche Anleihen abzuziehen, falls ein solcher Abzug im Widerspruch zum Sinn des Gesetzes stehen würde.

Zinsen für nachrangige Anleihen werden nach dem Steuerrecht im allgemeinen als Zinsen behandelt. Bei anderen Zinssätzen, die über den marktüblichen Zinssätzen liegen, dürfte generell von einer angenommenen Dividende ausgegangen werden. Für die Rückzahlung von Gesellschafterbeiträgen ist unter den gleichen Umständen ein vom Zeitpunkt der Hauptversammlung an berechneter Zinsausgleich abzugsfähig.

Für nicht-ansässige natürliche und juristische Personen kommt es darauf an, ob eine Zahlung als Dividende, Zins oder Kapitalgewinn betrachtet wird, da eine Quellensteuer nur auf Dividenden erhoben wird. Der Quellensteuersatz beträgt 30 Prozent, liegt aber normalerweise aufgrund bestehender Doppelbesteuerungsabkommen niedriger. Die Rückzahlung von Aktienkapital und Erlöse, die erzielt werden, wenn ein Unternehmen seine eigenen Aktien zurückkauft, werden jedoch als Dividenden behandelt und unterliegen dementsprechend der Quellensteuer.

Die meisten nicht-ansässigen Unternehmen, die 25 Prozent oder mehr des Aktienkapitals halten, unterliegen ebensowenig einer Quellensteuer wie nicht-ansässige Unternehmen mit einer ständigen Niederlassung in Schweden, für die die Dividenden als Betriebseinkommen gelten.

Kapitalgewinne schliesslich, die bei der Veräusserung schwedischer Aktien oder anderer aktienähnlicher Finanzierungsinstrumente erzielt werden, werden als Einkommen besteuert, wenn der Veräusserer eine natürliche Person ist und in den letzten zehn Jahren in Schweden ansässig war. Diese Regel ist normalerweise auch in Doppelbesteuerungsabkommen vorgesehen, obwohl der Zeitraum hier häufig kürzer ist.

Resumen

El mercado sueco de valores mobiliarios no ha recogido aún toda la gama de los instrumentos financieros, si bien el de derivados se ha desarrollado rápidamente a lo largo del último decenio. Los clásicos modos de financiación de una sociedad están previstos por la legislación fiscal y funcionan con eficacia. La legislación tributaria sueca es, desde 1991, relativamente neutra y compatible, lo que complica la planificación fiscal y los planes de lucha contra la evasión fiscal, y los convierte en inaplicables quizás en el mercado interior.

Muchos de los problemas mixtos más recientes están ligados a la diferenciación entre intereses y plusvalías. Esta distinción es importante en determinadas circunstancias a la hora de aplicar la legislación interna del impuesto sobre la renta, p.e. para fijar el hecho imponible y deducir las pérdidas. Una obligación a tipo de interés flotante, ligado a cualquier acontecimiento inesperado, plantea la cuestión de la definición del término "interés". Puede observarse, en algunos recientes casos sometidos al Tribunal Supremo administrativo, una tendencia a considerar la distinción entre beneficios previsibles e imprevisibles de un préstamo; los primeros serían intereses, los segundos plusvalías, pero también existen argumentos desde el punto de vista de la práctica. Por otra parte, los intereses de obligaciones en que el tipo de interés depende en parte de un índice de inflación se consideran intereses. En la práctica no está muy claro si las fluctuaciones de precio de estas obligaciones durante el período precedente al vencimiento se considerarán plusvalías (o minusvalías) en capital o intereses.

La distinción entre intereses y dividendos se ha estudiado principalmente en los préstamos de participación (en los beneficios) actualmente regulados en la normativa del impuesto sobre la renta. La sociedad o, en determinadas circunstancias, los accionistas, pueden deducir los intereses de préstamos emitidos de cara al mercado; en consecuencia, los beneficiarios tratarán el importe recibido como intereses. En otros casos, cuando los beneficios distribuidos no puedan ser deducidos por la sociedad, el importe puede ser considerado como intereses por el beneficiario. Tal como se desprende de un reciente asunto en que intervino el Tribunal Supremo administrativo, puede invocarse la regla general de lucha contra la evasión para mermar las posibilidades de las sociedades de deducir los intereses vinculados a un tipo de interés variable cuando este tratamiento fiscal se considere contrario a la intención del legislador.

Los intereses de los préstamos subordinados se tratan normalmente como intereses en el sentido de la legislación tributaria. En otros tipos de interés vistos anteriormente, que puedan considerarse como fijados en condiciones de plena competencia, es aplicable la doctrina general sobre dividendos encubiertos. En el reembolso de las aportaciones del accionista serán deducibles, en las mismas circunstancias, los intereses calculados a partir de la junta general.

Es esencial, para las personas físicas y jurídicas no residentes, conocer si un pago se considera dividendo, intereses, o plusvalía, puesto que la retención en la fuente sólo opera sobre los dividendos. El tipo de retención en la fuente es del 30 por ciento, pero normalmente se reduce en virtud de un tratado fiscal. La recompra del capital-acciones y el importe pagado cuando una sociedad recompra sus propias acciones se tratan como dividendos en aplicación de la legislación sobre retenciones en la fuente.

La mayoría de las sociedades no residentes con un 25 por ciento o más del capital-acciones y las que tienen un establecimiento permanente en Suecia no están sujetas a la retención en la fuente; en este caso, el dividendo representa una renta industrial o comercial.

Por último, las plusvalías realizadas por la venta de acciones suecas y otros instrumentos financieros cotizados en bolsa sufren gravamen como rentas cuando el vendedor es una persona física que reside en Suecia durante los 10 últimos años. Esta regla figura también en los tratados de doble imposición, si bien con un menor período.