

UNIVERSITY OF COPENHAGEN



Separation of Powers

Questionnaire

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-- Questionnaire --

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1. Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

Does your Government have legislative competence on tax matters?

1.1. Does your Government draft tax bills proposals and present them to Parliament?

The legislative competence belongs to the King (the government) and the Danish Parliament (Folketinget) jointly pursuant to the Danish Constitution section 3. The Government has competence to introduce bills (government bills) according to section 21 in the Danish Constitution as have all other members of the Danish Parliament pursuant to the Danish Constitution section 41 (private bills). Almost all passed tax law bills are government bills due to the fact that the government secures a parliamentary majority for tax law bills before introduction for the Danish Parliament. During the last parliamentary year from October 1 2006 to September 30 2007 the Minister of Taxation introduced 25 tax law bills and 22 of these were passed. Other members of the parliament introduced 1 tax law bill that was passed.

The Danish Tax Ministry is divided into the Department (Departementet), the Danish Customs and Tax Administration (SKAT) and the National Danish Tax Tribunal (Landsskatteretten). As a rule the Department handles the preparatory work in connection with drafting of tax law bills, and the initiative for new legislation can come from the members of the government or from members of other political parties that support the government. On a regular basis tax law bills are introduced as a part of comprehensive political agreements, but more often the Department takes initiative to bill preparation because of the Department's law supervision which can call for changes due to flaws in the existing tax legislation.

The drafting of the tax law bills is most often handled by the Department and this is often done by setting up project groups to which relevant members of the Danish Customs and Tax Administration and if relevant representatives from other ministries, tax advisor organisations and universities etc. are appointed. Occasionally the Ministry of Taxation set up actual tax law commissions with an external chairman and these commissions may draft actual bills that the Government can choose to introduce for the Danish Parliament, revise or ignore.

The Government plays a very active role in the drafting of tax law bills in Denmark.

1.2. In case your answer to 1.1. and 1.2. is positive:

1.3.1 Does your Government usually exercise that competence?

Yes cf. remarks to question 1.1.

1.3.2 Does your Parliament passively accept the draft bills provided by tax authorities or does it discuss them in detail and introduce changes to them?

All bills introduced to the Danish Parliament are required to go through three parliamentary readings or debates as provided in the Danish Constitution section 41. At the first reading the principal aspects of the bills are discussed prior to the bills passing to the second reading. Between the first and second parliamentary reading tax law bills are referred to the Fiscal Affairs Committee which is composed of Members of the Parliament. The Fiscal Affairs Committee submits a report that often contains amendments to the original tax law bill and a minority in the committee has the opportunity to express political viewpoints concerning the tax law bill or parts of the bill in this report. During the second parliamentary reading the bill is discussed both in general and in detail and eventual amendments from the Fiscal Affairs Committee are also scrutinized. At the end of the second reading the amendments are put to the vote and subsequently the bill passes to the third reading unless it is decided to refer the bill to the Fiscal Affairs Committee a second time. In general the debate during the third reading of bills is limited, but it is possible to propose amendments to the bill and put these amendments to the vote. Finally the entire bill is put to the vote in the Parliament.

Even though the constitutional requirement for three parliamentary readings in Denmark can seem circumstantial the procedure ensures, that the members of parliament have the opportunity to discuss the tax law bills both in general and in detail. However, the complexity and level of detail of tax law bills particularly in recent years do raise the question if the members of parliament are in reality able to comprehend the many complex questions involved in new tax legislation. Some details are discussed during the three readings in the parliament, but most details of interpretation are based on the preparatory work by the Tax Ministry's Department.

The Parliament does not passively accept the tax law bills that are introduced by the Government. Tax law bills are discussed as thoroughly as possible in the Parliament, but it is a fact, that tax law bills are often so complicated and extensive, that the Parliament cannot in reality take all aspects of tax law bills into consideration.

1.3.How does the literature in your country and your domestic Courts interpret the situation as you described it in 1.3.?

The problem regarding the complexity of tax law bills is widely acknowledged and the procedural regulation in the Danish Constitution related to the passing of law bills is not seen as a part of the problem. The Ministry of Taxation has initiated programs to simplify the Danish tax legislation, but different factors such as the internationalization of corporate taxation and the EU's community law and requirement for free movement challenge the Danish tax legislation. There have been quite a few examples of very complex tax law bills in recent years which presumably have been difficult for the Danish Parliament to relate to.

It is, however, almost always a part of the Department's drafting of tax law bills to submit drafts to a broad hearing including organizations with an interest in the relevant bill. This hearing takes place before the introduction of the bill to the Parliament. At the same time bills are uploaded at the Tax Ministry's homepage. Responses to the

hearing procedure are subsequently uploaded at the Tax Ministry's homepage and sent to the Fiscal Affairs Committee.

2. The meaning of legal indeterminacy in tax matters

2.1. Is your domestic tax legislation vague, when defining the tax object, tax subject and/or tax base, leaving a large margin for discretion, or, is it, on the contrary, very detailed, avoiding indeterminate concepts?

The level of detail and precision of the Danish tax legislation varies.

The basic elements in the Danish income tax system are found in sections 4-6 of the Danish State Tax Law, which originally was issued in 1903 and these three sections are undoubtedly vaguely phrased leaving a considerable margin for interpretation. The vague nature of these basic and important sections has led to a large number of cases amongst other things relating to income allocation and income fixation. While the advantage of this type of basic and vague legislation on one hand is the legislations flexibility and tenability, the obvious disadvantage on the other hand is an evident need for extensive secondary regulation and case law. In addition the taxpayer cannot at all rely on the Danish State Tax Law sections 4-6 when trying to clarify how a disposition i.e. the sale of an estate is taxed.

More recent tax legislation has an increasing tendency to be extensive, detailed and thorough presumably due to the wish to avoid indeterminate regulation and tax avoidance. The large number of cases brought before the Danish Courts of Law each year indicates, that very detailed tax legislation does not for that very reason solve the problem with tax avoidance.

In general Danish tax legislation can be considered relatively detailed and extensive and this tendency is confirmed by recent tax legislation.

2.2. How do you/does the literature in your country evaluate the use of both techniques in tax legislation?

Based on section 43 of the Danish Constitution according to which taxation must be based on legislation the majority of tax law theorists adduce that the extensive and detailed Danish tax legislation a necessary evil. It is also generally acknowledged that detailed tax legislation constitutes a problem for tax payers, tax advisors and tax authorities who find it difficult to see through the hundreds of tax law sections some of which cover several text book pages each. The extension of tax legislation has not decreased the requirement for other sources of law such as government orders; administrative notices from the State Customs and Tax Administration, Tax Assessment Guides and case law etc. Another problem in connection with detailed and extensive tax legislation is lack of flexibility and subsequent frequent changes to the legislation. Currently these disadvantages are well known and the Tax Ministry aspires to reduce them, but it is not expected that the extensive Danish tax law tradition will change in the near future.

The advantages and disadvantages related to vague and indeterminate tax legislation is mentioned above in section 2.1.

2.3. Are there independent domestic Courts obliged to control the constitutionality of tax legislation?

All tax cases must undergo a mandatory administrative complaints procedure ending at the National Tax Law Tribunal pursuant to the Tax Administration Act section 48. The taxpayer or the Ministry of Taxation can bring complaints lost at the National Tax Law Tribunal before the ordinary Danish Courts at City Court (byret) level according to the Tax Administration Act section 48 (3) and section 49. Due to the Danish two instance principle, the City Court's judgments in tax law cases can be appealed to the High Court (landsretten). The City Court can refer tax law cases of a principle nature to the High Court as first instance, and rulings in these cases can be appealed to the Danish Supreme Court. This is the consequence of a reform of the Danish court system that was put into effect in 2007. Before this reform all tax law cases were brought before the High Court as first instance.

The Danish courts regard themselves competent to control the constitutionality of tax legislation although the Danish Constitution contains no provisions regarding this competence. Both Government and Parliament have accepted this competence.

2.4. Is legal indeterminacy considered to be unconstitutional/ has a tax rule ever been declared unconstitutional due to legal indeterminacy?

This topic has been discussed intensively in later years in Danish tax law theory. The discussion has been based on an interpretation of the Danish Constitution section 43 and as stated above this constitutional provision is considered the main reason why Danish tax legislation is in principle so extensive and detailed. There have been several cases regarding the constitutionality of tax legislation, but tax legislation has never been declared unconstitutional.¹

It must be concluded that possible legal indeterminacy in tax legislation is not considered unconstitutional according to Danish law. Even though it can be criticized that tax regulation is in some extent decided by interpretation and administrative practice it is acknowledged, that it would not be possible for the legislator to regulate all details. Tax regulation requires flexibility amongst other things to avoid tax evasion.

Generally it is accepted, that the legislator establishes the necessary legal foundation for taxation whereas the tax administration and the courts of law supplement the tax legislation by interpretation.

3. The consequences of legal indeterminacy in tax matters

3.1. In case of legal indeterminacy not considered to be unconstitutional, who has the final word regarding the interpretation of the rule – the tax authorities or the domestic Courts?

The domestic courts have the final word.

¹. Cf. SO 1971, p. 353 ff., SO 1972, p. 2 ff., UfR 1977.31 H, UfR 1977.37 H, TfS 1993, 368 H and TfS 2001, 290 H.

3.2. Is there a constitutional basis for either the tax authorities or the domestic Courts having the final word on interpretation of indeterminate legal rules?

As stated in connection with question 2.4. above the domestic court's competence to examine the constitutionality of tax legislation is not established directly in the Danish Constitution. However, the competence can probably be considered a constitutional customary law.

3.3. Is legal indeterminacy normally fulfilled by regulations, administrative rulings and/or case law?

Although the judicial basis of all taxation in Denmark must be ascribed to legislation according to the Danish Constitution section 43, a wide variety of other sources of law are available for the applicator of law. These sources of law supplement legislation to fill out eventual indeterminacy. Some of these are written sources such as government orders, administrative notices and circulars, administrative assessment guides, while other sources of law are constituted by case law from the administration or from the domestic courts. Even customary law can be included in a legal argumentation i.e. regarding assessment of goodwill although this is more seldom because of the requirement for legislation pursuant to the Danish Constitution section 43.

It is of course important to accentuate that international sources of law can be decisive. This can often be the case with supranational Community law. Double taxation agreements can also be of great importance as sources of law in a specific case along with other types of international law such as Human Rights.

3.4. Are administrative rulings binding to the taxpayer and/or the Courts?

This question is considered very difficult to provide an unambiguous answer for in Danish tax law.

The first part of the question concerns administrative ruling's binding effect to the taxpayer and this question is in reality related to the binding effect of administrative rulings for the tax administration itself. If the tax administration is bound by prior rulings in similar cases then administrative tax rulings must be considered binding for the taxpayer. Secondly the question involves the binding effect for the tax administration's rulings to the courts.

The taxpayer could choose to ignore administrative rulings but will then most certainly face legal proceedings and the risk of having his or her property seized by the tax administration. If the tax payer disagrees with the tax administration the tax payer has to dispute the ruling by filing an administrative complaint unless it is possible to induce the administration to reassume the administrative tax assessment pursuant to the Tax Administration Act sections 26 and 27. Administrative tax law rulings can de facto be considered binding for tax payers although these rulings cannot be considered binding for the domestic courts.

In Danish administrative law the principle of equality ensures that subsidiary authorities are bound by administrative rulings made by superior authorities. For example rulings

made by the National Tax Law Tribunal are binding to the Customs and Tax Administration. Furthermore the Danish Customs and Tax Administration consider itself bound by the administration's own rulings. The administration is however newer bound by rulings that do not have the necessary legislative foundation.

Relating to the binding effect of administrative rulings for the courts there can be no doubt, that these rulings are important sources of law for the courts. This is especially the case with rulings from the National Tax Tribunal. In principle the courts are not bound by administrative rulings, but in Danish tax law theory it is presumed that the courts will comply with a continuous administrative practice in case of uncertainty pertaining to interpretation of tax legislation. For a tax payer in litigation against the tax administration this can be described as a heavy burden of proof against an interpretation that is in accordance with a continuous administrative practice.

In case of uncertainty regarding a tax payer's legal position it is possible to obtain a so called binding statement according to the Tax Administration Act sections 21-25. This statement is binding for the tax administration but not for complaints committees, tribunals or courts.

4. Relationship between the Tax Administration and the Domestic Tax Courts:

4.1. Do your domestic Courts control application of tax law by your Tax Administration?

In case of litigation the domestic courts control the application of tax law by the tax administration pursuant to the Danish Constitution section 63.

4.2. Do your domestic Courts, in their case law, take into account rulings and binding information emerging from your Tax Administration?

Yes, cf. section 3.4. Administrative rulings are not legally binding for the courts of law, but they play an important role as a source of law especially if the tax legislation suffers from indeterminacy and vagueness. The domestic courts often refer to administrative rulings in the very phrasing of judgments.

4.3. Does your Tax Administration take into account the domestic courts case law and/or the ECJ case law when applying the law?

Case law from domestic courts and ECJ case law are binding to the tax administration in similar cases, so the tax administration is obliged to take judgments from these courts into account when applying the law. Where the application of judgments from domestic courts by the tax administration is considered very fundamental in Danish law it often takes longer time for ECJ case law to impact on the administration's ruling. Sometimes the tax administration has to adjust administrative practice as laid down in the Tax Assessment Guides because of new interpretation by the domestic courts. The same can be the case as a consequence of ECJ judgments, but the legal extent and importance of ECJ judgments require careful consideration which often takes time.

The Danish Customs and Tax Administration issues administrative notices (SKAT meddelelser) which amongst other things contain accounts of domestic court and ECJ judgments and their legal implications.

4.4. Is there a principle of reciprocal observation of the interpretation of tax law by the Tax Administration and domestic Courts?

It is not considered an actual legal principle in Danish law, but the effect is almost the same.

The Danish tax administration follows the judgments by the domestic courts of which many are published at the Customs and Tax Administrations homepage and in different tax law journals. All judgments regarding tax law cases passed by the City Courts, the High Courts or the Supreme Court are as mentioned above binding for the tax administration in similar cases, so the tax administration has to be attentive of new practice by the domestic courts. From time to time the tax administration issues notices concerning the administration's interpretation of controversial court judgments and this is often the case if the judgments give rise to doubt.

On the other hand domestic courts do not actively observe the tax administration's interpretation of tax legislation, but is an obligation for the court to involve relevant sources of law such as administrative practice in the cases brought before the courts. As mentioned above in section 3.4. a continuous administrative practice is very difficult for the tax payer to dispute in litigation against the tax administration.

Conclusively a principle of reciprocal in tax law or administrative law theory is not recognized, but in effect the tax administration and the domestic courts follow the interpretation by the other part closely even though this reciprocal observation takes place in different ways.

4.5. Is your Tax Administration legally bound to the decisions of supreme courts and/or the ECJ?

This can be confirmed and the subject is treated above in section 3.4. It is however a precondition, that the cases in question are similar.

4.6. Does your Tax Administration circumvent your domestic courts' case law?

Generally this is not the case. The Danish tax administration aim at implementing new case law loyally to the judgments. Below in section 3.5. e) it is adduced, that sometimes judgments are given lesser importance in the Tax Assessment Guides and administrative practice than tax law theorists and advisors deduce from the judgment in mention. However this approach by the tax administration to disputed new case law cannot be considered an actual circumvention.

II

Please answer the following questionnaire, which aims at confirming your answers in I

1. Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

1.1. Does your Parliament control tax authorities in an efficient way?
Yes, as efficiently as possible cf. sections 1.3. and 1.3.2. above.

1.2. Do tax authorities influence tax legislation to a major degree?

Yes, as the Tax Ministry's Department almost always drafts tax law bills on behalf of the Government before the bills are introduced to the Parliament.

1.3. Does your Parliament

a) usually accept the bills provided by tax authorities? Yes.

b) refuse the bills provided by tax authorities? Sometimes. Mostly tax law bills are accepted by the Parliament as the Government has assured parliamentary majority, before the bills are introduced. Sometimes tax law bills are refused by the Parliament due to discovery of flaws or unexpected consequences of the bill. In many of these cases the Government reintroduces the bill after revising it.

c) improve the bills provided by tax authorities? Often. Especially the Fiscal Affairs Committee proposes amendments to the original bill.

1.4. Is your Parliament able to discuss the bills thoroughly? Yes cf. sections 1.3. and 1.3.2. above.

1.5. Is there sufficient knowledge of tax law in Parliament? Yes and no cf. sections 1.2. and 1.3. above.

1.6. Are tax rules often so vague, that tax authorities have to fill the gaps themselves by administrative regulations? Often.

1.7. Have tax authorities the competence to typify and fill out the legal gaps without control by the Parliament? Often, though it can be necessary to introduce a bill to fill out legal gaps.

2. Relationship between the Parliament and the Domestic Tax Courts

2.1. Are there independent (Tax) Courts in your country entitled to control legislation? Yes, as tax law cases can be brought before the ordinary domestic courts that control the tax legislation.

2.2. If "yes", do they control tax legislation: 0 ex ante or X ex post?

The court judgments pertain to the state of the law at the time of the income years in question in the tax law cases. If the tax administration's view of state of the law in the case brought before the court is found to be contrary to the law, then the judgment constitutes a legal change ex post. All tax payers that have been assessed according to the illegal administrative practice can request for extraordinary resumption pursuant to the Tax Administration Act section 27 (1) (7).

2.3. Are Courts competent to clarify whether a specific written tax rule is compatible with constitutional standards? Yes.

2.4. If a high Court is convinced that a specific tax law violates constitutional standards, is the court in this case allowed to ignore the law? Yes, but it has never happened.

3. Relationship between the Tax Administration and the Domestic Tax Courts

3. 1. Are there independent (Tax) Courts in your country, obliged to control your Tax Administration?

Yes, cf. sections 3.4., 4.1. and 4.3.

3.2. Are your domestic Courts bound to administrative regulations/orders/rulings, which are issued by tax authorities? No

If "no", do the courts follow them in fact? Often, cf. section 3.4.

3.3. Are first instance Court decisions on a tax case, normally accepted by the Tax Administration (i.e. do they not try to appeal against the decision)?
Supposedly often, though it is difficult to answer the question with certainty as a reform of the Danish court system has changed the first instance court from the High Courts (landsretterne) to the City Courts (byretten) as of January 1 2007.

Please report statistics if available! No statistics are available yet.

3.4. Is a final judicial decision on a single tax case, followed by the Tax Administration not only in this case but also in all other similar cases? Very often cf. section 4.3.

3.5. How does the Tax Administration react when it is convinced that the final judicial decision is wrong or not "acceptable" because, e.g., it is too expensive for the public?

a) Does it accept the (from their point of view) wrong decision? Very often.

b) Does it try in another similar case to convince the Court to decide in a different way?
Sometimes. If the two cases are not identical the tax administration can decide to bring the new case before the courts to clarify the extent of the judgment in mention.

c) Does it try to influence the Parliament to change the law? Sometimes. The Tax Ministry's Department will often react if a tax law judgment is considered unacceptable by bringing the matter to the Minister of Taxation's attention. This has led to new legislation for instance regarding the transfer pricing regulation in the Tax Assessment Act section 2 that was a direct consequence of the Supreme Court's judgments as rendered in TfS 1996, 642 H and TfS 1998, 238 H.

d) Does it make sure that the Internal Revenue Service will not follow this decision in similar cases?
Never.

e) Does it try “to hide” such a decision, e.g., not publishing the decision with the result that the Internal Revenue Service does not know this decision?

Sometimes such a decision is perhaps not given the most obvious place or only mentioned en passant in the Tax Assessment Guides that many tax advisors and the tax administration often use. This is well known by tax advisors and acknowledged in tax law theory and consequently the applicator of tax legislation cannot only depend solely on the interpretation in the Tax Assessment Guides. In the introduction to the Tax Assessment Guides the tax administration points out, that the guides represent the tax administrations interpretation of the tax legislation. This interpretation includes the use or omission of (relevant) judgments in the Tax Assessment Guides.

If possible, please add statistics to the answers!