sciendo Nordic Tax J. 2019; 1:41–55

Article

Jan Kellgren*, Eivind Furuseth, and Matti Kukkonen

The Decisive Moment(s or periods) in the Application of Income Tax Rules and the Importance of Events Thereafter – a Swedish, Norwegian and Finnish Perspective and Comparison

https://doi.org/10.1515/ntaxj-2019-0003
Received Sep 10, 2018; accepted Oct 28, 2018

Abstract: For a correct application of tax laws, it is central to know at what time or period the conditions of each case are to be tested against the respective tax rule. For example, in many questions, the conditions at the time of the transaction are decisive, but not seldom the tax rules take aim at the conditions at the end of the year – or some other time or period. It is also important to know what significance should be given to events after this time or period, not least when the income declaration is made and assessed. Here, these partly overlooked questions are presented and analyzed from the Swedish, Norwegian and Finnish income tax-perspectives.

1 Introduction

As most legal rules, the absolute majority of tax rules take aim at circumstances in the outer world, for example, transactions, financial positions, causalities, intentions, values or the probability of a loss. This aim may concern conditions at a certain point in time (for example, the value of a car at 2018-05-28) or over a period of time (for example, the nature of someone's services during a year in relation to a company in which he or she is a shareholder).

These circumstances have a history and a future, which may be of relevance for the assessment of the event or relationship to which the legal rules relate. However, it is usually insignificant if, for example, an asset's value was higher or lower before this decisive point in time. The rules, as mentioned, aim at the conditions at a certain time or period, hereinafter referred to as *the decisive moment*. Below, we use the expression 'the decisive moment', although this 'moment' sometimes, but rather rarely, can be a period. When, however, we specifically refer to a period, we will use the expression 'the decisive period'.

The circumstances at the decisive moment are decisive for the tax assessment of business events, and so on, when the declaration is to be established – basically, regardless of when the tax is assessed (which, for example, can take place long after a transaction). This moment is also of fundamental importance for evidential purposes, as evidence is supposed to shed light on the conditions at this particular moment. The evaluation of evidence is free, but should refer to the circumstances at the decisive moment. As we will explore below, this moment may differ, but often it is the transaction date or the last day of the tax year.

In most cases, it is easy, or even trivial, to determine where the decisive moment lies. However, this is not always the case. Tax rules may also require that the conditions on several times are investigated, even for a single transaction or valuation. So, for example, is the case of the Norwegian[1] and Finnish[2] group contribution rules. The same goes for, for instance, the application of the participation exemption method[3] and for CFC taxation[4] in Norway. The measures that we later on discuss under the headings

***Corresponding Author: Jan Kellgren:** Professor in Tax Law, Linköping University and Visiting Professor Örebro University; Email: jan.kellgren@liu.se
Eivind Furuseth: Associate Professor at BI Norwegian Business School; Email: eivind.furuseth@bi.no
Matti Kukkonen: Professor in Tax Law, Head of Subject (Commercial Law), Hanken School of Economics; Email: kukkonen@hanken.fi

1 Norwegian Tax Act §§ 10-2 flg.
2 Lag om koncernbidrag.
3 Norwegian Tax Act § 2-38 (6) letter c).
4 Norwegian Tax Act § 10-62.

Subsequent Verification (3.6) and Chains of Transactions (3.5) are also interesting in this context, as the purposes underlying the principle of the decisive moment might here be compromised. When it is difficult to determine where the decisive moment is located, legal certainty and effectiveness of taxation are jeopardized.

Furthermore, it may be difficult to determine what significance is to be given to events after the decisive moment. Even though tax rules, implicitly or explicitly, focus on the circumstances at a certain time or period, it may still be of importance what happens after this.[5] This issue is also of great significance for what investigations taxpayers need to carry out after the decisive moment, in order to be able to declare correctly.[6]

The questions of the location of the decisive moment and of the way in which events after this date are to be considered are fundamental in a tax system. At the same time, they seem to be quite overlooked, or at least underresearched, in all our three countries – both in legislation and in preliminary work, case-law and doctrine. Timing issues within taxation are in no way new, but the actual decisive moment has, in our view, not been given enough attention and needs a structured analysis. It is fundamental not to mix the question of the decisive moment for each rule with the actual rules or principles for timing, as cash basis, date of sales and accrual rules. These questions are connected but concern different issues.

The purpose of this article is to properly present the questions of the location of the decisive moment and of the way in which events after this date are to be considered; their logic and significance, more closely, and to give a comparative overview of the legal situation and discourse in this regard, in our respective countries.

2 The Decisive Moment

2.1 Introduction

In many cases, the question of where the decisive moment lies has a more or less obvious answer. Sometimes, however, difficulties arise. Further, in some cases, the obvious answer *de lege lata* may not be the most materially appropriate *de lege ferenda*, for example, from the perspective of foreseeability. If, due to uncertainties regarding the decisive moment, it is not clear when something should or should not be the case, several significant problems arise. For example, changes over time – in the individual case or in legal rules – can cause changes in the conditions for, for example, the deduction for a certain kind of expense, and if the decisive moment is not clarified, taxation will be neither intellectually focused, nor foreseeable. But by clarity regarding this question, in each rule and case, the judicial review may focus on correct factors, in a manner that is more predictable than if the decisive moment is unclear. Such clarity is, of course, also central when it comes to evidence. Awareness of these issues also improves the prerequisites for the legislature to make rational choices, when decisive moments are to be determined and, perhaps, expressed in legal texts.

> An interesting Swedish case (from the Supreme Administrative Court) that illustrates part of these complexities is the Swedish RÅ 2000 ref. 64, 'Skåne-Gripen-case', which included the so-called anticipated dividends (*i.e.*, a dividend from subsidiaries recorded in the Parent Company already during the vesting year, but where the subsidiary only publishes the dividend in the following year when the Annual General Meeting decides on the profit allocation). Here, the question of what year's conditions that are relevant to the tax assessment came to be tested, in this case, regarding tax exemption for received dividends. Skåne-Gripen AB, which was a parent company in a group, acquired the majority stake in AB Järnbron in 1985. Järnbron owned shares in a number of other companies, but they were sold to Skåne-Gripen in 1986 against payment with a promissory note, with a significant profit. At the end of 1986, AB Järnbron reported as assets only receivables, government bonds and the like. At the annual meeting of shareholders in Järnbron 1987, decisions regarding dividends to the parent company Skåne-Gripen amounted to approximately SEK 350 million, corresponding to the profit generated by the shareholdings (and some other earnings). However, this dividend had already been raised (anticipated) by Skåne-Gripen in the 1986 financial statements – and the same year, the same amount was reported as a dividend in AB Järnbron. The dividend was paid in such a way that the dividend from AB Järnbron was offset against Järnbron's claim against Skåne-Gripen, due to the previous share acquisition.
> One of the questions in the case was whether the dividend would be tax-exempt. In order to answer that question, it was necessary to determine what tax year the dividend was to be attributed

5 We will not go into accounting rules and issues in this paper, even though they can be of importance for income tax purposes. Some of the cases that we highlight here concern such issues though, but we then only discuss the decisive moment with regard to taxation, not accounting law in itself. It is, however, worth mentioning that it is very interesting to compare the phenomenon events after the reporting period (see, for example, International Accounting Standards IAS 10 (Events after the Reporting Period), within accounting law, with its income tax parallel. See Kellgren, Tidsfrågor i skatterättstillämpningen: Om de avgörande tidpunkterna i redovisning och beskattning och om betydelsen av händelser därefter, Jure 2016, 144 pages and "IAS 10 Events after the Reporting Period Problematized – Some Questions Regarding the Standard's (Read by its Letter) Understandability", Skattenytt Academic Issue 2018 p. 3–35.

6 Se Kellgren 2016 (supra footnote 5).

to – that is, where the decisive moment was situated. The court found that, as the allocation of dividends was consistent with the company law, it could not be contrary to the generally accepted accounting principles. Therefore, it would also be accepted as taxable, which resulted in the right fiscal year being 1986.

Thereafter, the question was whether the assessment of the dividend's tax exemption was to be made on the basis of the conditions applicable for the tax year established recently or whether the rules regarding the qualification of the dividend as tax-exempt could be considered to regulate the accrual of the assessment. The letter of the law clearly did not regulate this explicitly. The court stated that 'In principle, unless otherwise regulated, the question of whether tax liability for an income is present or if deductions may be made for a tax shall be assessed on the basis of the circumstances prevailing in the tax year.' Hence, the tax liability for the ancillary dividend would be assessed in view of the circumstances in the year in which the dividend had been declared, not in the light of the circumstances in which it was decided by the annual meeting of shareholders.

A somehow similar situation may be illustrated by a decision from the Norwegian Supreme Court from 2009 (Rt. 2009 p. 1208). The question for the Norwegian Supreme Court was *when* a transaction was accomplished. An agreement regarding the purchase of shares in Nor-Cargo was signed on March 9, 2004, with a planned transfer of the shares on May 10, 2004. In the purchase agreement, two reservations were made. First, the transfer of the shares was dependent on acceptance from the Norwegian Competition Authority. Second, both contracting parties could terminate the contract due to the due diligence process.

On 26 March, a participation exemption system was implemented in the Norwegian Tax Act.[7] The Norwegian tax authorities argued that the gains from the sale of the shares were earned on the date when the contract was signed (*i.e.*, March 9, 2004), while the contracting parties (seller/purchaser) argued that the capital gain from the alienation of the shares was earned after the uncertainties related to the Norwegian Competition Authority and the due diligence process were clarified. Because of the introduction of the participation exemption rules on 26 March, if the taxpayer was right; the result would be that the gain from the alienation of the shares would be exempt taxation.

The Supreme Court concluded that the potential gain from the alienation of the shares was *not* determined at the time the contract was signed (March 9, 2004). At this time, there was uncertainty related to both the acceptance by the Norwegian Competent Authorities and the due diligence process, and the uncertainty was clarified after the introduction of the participation exemption rules in the Norwegian Tax Act. Hence, the capital gain from the alienation of the shares was tax exempt in Norway.

The problem of determining the decisive moment has been formulated well (from a Swedish perspective) by Bull & Sterzel. In connection with the discussion of the Swedish prohibition of retroactive taxation (retroactivity is not in focus in this article, but this discourse can shed light on the location of the decisive moment), Bull & Sterzel say that the decisive factor for the applicability of the provision is the question of when a tax or tax liability occurs. They also claim this is usually harder to determine than in penal law. They further note that tax liability can rely on a number of factors, such as when an agreement was made, when payment occurred or when a registration was taken or due to a combination of several such factors, and that the answers may look different in different areas of taxation.[8]

With regard to Norway, the principle of prohibition of retroactive taxation is given a restrictive interpretation when it comes to taxation. It is, however, important to notice that the income tax is calculated on a net income through an income period. In most situations, the income period is the calendar year. Thus, the question arises whether changes in tax legislation during an income period may be given effect for the whole period, or just for the remaining time of the income period. According to Prof. emeritus Frederik Zimmer, the new/amended tax rules may be applied on the net income from the present year.[9]

However, in the situations where the change in legislation is to the taxpayer's disadvantage, the new/amended legislation is normally only given effect from the time when the legislation is adopted (and not for the whole fiscal year). In the authors' view, the way of applying changes in tax legislation in Norway, and in some situation give new/amended rules retroactively, does not change the main principle about the decisive moment.

We lack statistical information, but it can be clearly said, regarding all our countries, that the question of the decisive moment is rarely directly regulated in the law or even commented on in the legislative process. In case of law, it is only commented on rarely. The doctrine is also brief on these questions, in all our countries (the question must *not* be mixed with the question of accrual, as the latter is depending on the former). This may seem strange, considering that this is one of the most fundamental principles of tax law! Perhaps the explanation is that in many cases, the *de lege lata* is obvious. However, as this article shows, this is not always the case.

7 Norwegian Tax Act § 2-38.

8 Bull & Sterzel, Regeringsformen – en kommentar, Studentlitteratur 2015 s. 78.

9 In Norwegian: «Inntektsskatten blir sett på som en skatt som utskrives på årets nettoinntekt, ikke på den enkelte inntektsskapende begivenhet. Og årets nettoinntekt kan ikke fastslås før ved årets utløp. [Skatte] Regelene antas derfor å kunne endres i løpet av inntektsåret, også med virkning for tidligere inntektsskapende begivenheter, uten at det anses som tilbakevirkende i strid med Grl. § 97 [som stadfester prinsippet om forbudet mot retroaktiv lovgivning].» Zimmer, Frederik. Lærebok i Skatterett, 2018, p. 35.

There is some case law in Sweden and Norway regarding the retroactivity of tax laws. These decisions, however, primarily concern rather trivial interpretations in terms of where the decisive moment lies, according to the tax rules in question. Said case law has hardly touched upon the decisive moment in, for example, different more complex corporate taxation issues. Further, as far as we have been able to find, the question in these cases has only concerned the decisive moment of the right to tax an income, which is just one of the many questions for which it is relevant to determine a decisive moment. Otherwise, the questions about the decisive moment of income taxation are thus sparsely highlighted (but, nota bene, always principally fundamental, albeit most often not hard) in case law. However, the issue has been highlighted recently with Kellgren's book 'Time Issues in Tax Law Application', from 2016.[10] This article is a further developed selection of this book, including a comparative survey. Referrals to the book are made mainly for reasoning not developed here.

In Norwegian literature, the term 'innvinning', which is the Norwegian translation of the 'decisive moment', was introduced by Magnus Aarbakke in his book 'Skatt på Inntekt' from 1968. Although the term was introduced by Aarbakke in 1968, the concept existed long before that. Although it is more than 50 years since the Aarbakke introduced the term 'innvinning' and the concept is one of the most fundamental principles in tax law, the decisive moment as a concept is only modestly discussed in Norway. The most comprehensive discussion in Norway is an article from 2013 by Anders Nordli.[11] The 'decisive moment' is also somewhat analyzed by Gjems-Onstad, Zimmer and Brudvik.[12]

In the authors' view, the reason why the concept of the 'decisive moment' is only modestly analyzed in Norway is the fact that in most cases, the question of the decisive moment does not create a separate problem.

In many cases, the decisive moment and accrual of the income are congruent. It is, however, important to be aware that these are two different concepts, and in some situations, it is of great importance to distinguish between them. The Norwegian Supreme Court decision from 2009 (Rt. 2009 p. 1208, as mentioned above) illustrates this.

10 Kellgren 2016 (supra footnote 5).

11 Anders Nordli. Det skatterettslige innvinningsbegrep – grunnleggende betraktninger, *Skatterett* 2013 s. 252-271.

12 Ole Gjems-Onstad m.fl. Norsk bedriftsskatterett, 2018 p. 88, Frederik Zimmer. Lærebok i Skatterett, 2018 p. 131 et seq. og Arthur J. Brudvik. Skatterett for næringsdrivende, 2017 s. 232 flg

In the case of Finland, it should generally be noted that there is a lack of in-depth analysis regarding any problems on the decisive moment of taxation. The issues of taxability and deductibility have been analyzed most in the tax literature. There are some general legal provisions and instructions regarding the timing of taxation in the Finnish tax acts and the tax authorities' instructions, which are nowadays reflecting the practical interpretation of tax law. A current detailed tax guidance document regarding accrual issues within personal taxation states the following (our translation):

'An established procedure for the accrual of income and expenses, as well as the main exceptions from this, have been entered in the IV department of the income tax act. The rules are not exhaustive, and therefore, the decisions in previous legal practices and taxation practices still have an impact on a decision concerning an individual accrual problem.'[13]

But what does an established procedure in the law mean? There are some special paragraphs regarding these issues, but otherwise, accrual is governed by the two following sections (ISL 110 §, 113 §, our translations):

> An income is considered to refer to the tax year during which it has been lifted or recorded on the taxpayer's account or under which the taxpayer may otherwise have disposed of it. Profit on transfers is considered income for the tax year during which the purchase, exchange or other transfer was made. (110 §)
> Such deductions from the income of the taxpayer that are based on the taxpayer's expenses shall, if there are no special reasons for another principle, be made for the tax year during which the payment was carried out. (113 §)

The Finnish Business Income Tax Act (BITA) is based on the performance principle and includes several more detailed rules regarding business income.

In the Finnish tax literature, the problem of the decisive moment is usually discussed either under the heading of accrual problems (capital gain realization problems) or 'which is the correct tax year'. There are, of course, some clear rules in accounting law that are utilized within taxation, and some rules in the tax act. The basic terminology here includes the performance principle (taxation linked to the transfer date) and the cash principle (taxation linked to payment). There are different case laws that mostly concern profit distributions as well as transfer of income (tax revenue) or late accrual of certain realized or unrealized expenses. However, no general clear and explicit principle for the decisive moment is to be found.

13 'Verohallinnon ohje', 4.3.2016, Diary No. A40 / 200/2014.

2.2 Decisive Moments in Nordic Income Taxation (Principal Level)

In none of our three countries is there a general rule that clarifies the decisive moment or period or on what principles the courts are to use when interpreting tax laws regarding this question. Nor would it be easy to formulate such a rule, inter alia, because it looks different in different cases. Thus, in legal practice, if the decisive moment has not been expressed in the very tax rule, which one is about to apply, it must instead be determined by interpretation, in principle by the respective individual rule. Typically, however, the decisive moment seems to be one of the six reported below. Here, we give examples of each sort of decisive moment, but the reasoning on these examples is developed later in this chapter (Section 2.6 et sec).

1) Events *before* a period begins. A Swedish example of this model is the time for the establishment of church tax and municipal taxes. A similar example is the situation for carry forward or loss and carry forward of foreign tax credit – this rule also takes aim at events that has taken place earlier. What should be done before the period begins may, in principle, be something that is of a momentary nature (the decisive moment lies before a period begins) or events, for example, during a period.
2) Many rules take aim at the situation when *a transaction is being made*. This principle often applies, for example, to deductions and for certain types of income, such as exchange revenue, where in Norway the time for the annual meeting of shareholders is decisive for when a dividend is received for tax purposes. In Sweden, the main rule, although not expressed in any general rule, is that decisions upon taxability of income and deductibility of costs are decided based on the situation at the time of a transaction. The same goes for capital gains. This is also the general principle in Finland, but in some cases, the actual transaction may not be considered a taxable sale event.

   For example, if any condition in the letter of purchase binds a possible increase in the purchase price to any uncertain circumstance in the future, the increase in case of the sale of company shares (HFD-1992 B 523[14]) has not been taken into account in the taxation for the transfer year. However, in a decision concerning the sale of an unbroken area of a property (HFD 1995 B 524), it was considered that the purchase price could be estimated on the basis of the information available when the tax was executed for the financial year. In Finland, cancellation of the sale (within capital gains realization) is normally considered a new realization event. A deal resolved through a voluntary agreement between the parties is in the taxation of the transfer profit generally considered as a new deal. However, if the dissolution of the transaction is due to the lack of legal capacity of the transferor, the disbursement of taxation has not been taken into account in the event that the legal resolution had been possible due to the absence of the necessary authorization or in some cases of the insolvency of the buyer or any other reason (including HFD 1980-B 573 and 574). Due to a deferred condition in the letter of purchase, ownership rights can be transferred, for example, only when the entire purchase price has been paid (= decisive moment). A transaction that has been dissolved prior to the transfer of ownership expires the original transaction. In this case, neither the transaction nor the dissolution of this is taxed as a transfer. A deal resolved through a voluntary agreement between the parties is generally considered a new deal, in the taxation of the transfer profit. However, if the dissolution of the transaction is due to the lack of legal capacity of the transferor, the disbursement of taxation has not been taken into account in the event that the legal resolution had been possible due to the absence of the necessary authorization or in some cases of the insolvency of the buyer or any other reason (including HFD 1980-B 573 and 574). By using a deferred condition in the purchase letter, ownership rights can be transferred, for example, first when the entire purchase price has been paid (= decisive moment). A transaction that has been dissolved prior to the transfer of ownership expires the original transaction. In this case, neither the transaction nor its dissolution is taxed as a transfer (according to the principle of HFD 18.3.2009 / 621).
3) *A period* (usually the calendar year) to be assessed in full. This principle is, for example, used in Finland for group contributions and in Sweden for the qualification of shares according to the 3:12 system.[15] Consideration of whether an entity in Norway performs business activity, is a tax resident in Norway or only liable for source taxation in Norway and various anti-avoidance rules are other examples of when a period can be a decisive moment.
4) *The last day of the (tax) year* is another very common decisive moment. This is most often the decisive moment for the accrual (not for capital gains though), including depreciation rules, but it is also used in numerous other contexts. In Norway, for example, the requirement of a definite ownership interest takes aim at the last day of the tax year in applying the group contribution rules,[16] and the same

14 The abbreviation in Finnish is KHO.

15 Swedish Income Tax Act Ch. 57.

16 Norwegian Tax Act § 10-4.

goes for the exception to the rule that 3% of the most tax-free income in some cases is taxable.[17] In tax issues governed by the accounting, which is the main rule in Sweden and Finland (although with many exceptions), the decisive moment is clearly the last day of the accounting period.

5) *After* the period of a tax year, a transaction or similar events or circumstances. So is, for example, the case of the Swedish rules on accrued income and the Norwegian rules regarding the fulfillment of the 10% ownership requirement under the participation exemption method, which may be fulfilled after a dividend is received. It may be argued that in many cases, conditions could be better assessed afterward, and that this would speak to postpone the decisive moment and, for example, open for the so-called subsequent verification (see 3.6). This is probably often true: ex-post assessment will often become more accurate. However, determining the conditions per (for example) day of the transaction does not exclude additional information to be taken into consideration to highlight the situation just today – as long as such information is used to shed light on the situation at the decisive moment.[18]
6) A rule can also relate to conditions at several different times or periods. In that case, one can say that the decisive moment has a *hybridal character*. So is, for example, the case of the Norwegian rules on group contributions.

2.3 The Decisive Moment in the Individual Case

Thus, it is important to find clarity regarding the *principle* for the decisive moment, which often requires interpretation of the rule. However, this is not always enough to create full clarity regarding the decisive moment. It also has to be established what time follows from the principle *in the very situation* at hand – the decisive moment in the individual case. If, for example, the principle regarding the decisive moment points out the last day of the year, it is obvious that we are to look upon the situation at this day when applying the rule in the actual case. Here, things are simple. However, if the principle points out a day that is not obvious, the question of the decisive moment requires that this day is made clear – which must be carried out with regard to the individual case. A good example of this scenario is where the principle points out, as decisive, the time when a transaction, perhaps a sale, is being made or decided. Here, the *principle* regarding the decisive moment is clear, but it still has to be decided if and *when the actual transaction* was (to be seen as) finished (for tax purposes). This might be hard (for example, if the deal is entered into one step at a time) or easy to do, and the principle might give more or less precise information regarding how to establish the decisive moment in the individual case.

Thus, the decisive moment in the individual case does not automatically follow from the general principle regarding the decisive moment that is established by (the interpretation of) each tax rule. Thus, basically, *the decisive moment is established in two steps: first, the general level in the individual case, and then, the decisive date or period that follows from this principle in the individual case*.[19] This is important to keep in mind.

2.4 Explicit Rules

Sometimes, the principle for the decisive moment follows, more or less directly, from the very letter of the respective tax rule, or from its close context. An example of this is the Swedish inventory valuation, where 18 Ch. 13 § 2 paragraph 2 SITA clearly speaks of 'inventories acquired during the tax year and which, at the end of this period, still belong to business activities. By this rule, it is made clear that the application is based on the conditions at the balance sheet date.[20] Another example is the Norwegian depreciation rules. According to the Norwegian tax act, the owner of the asset December 31 may depreciate the asset for the whole year. The Finnish BITA [Näringsskattelagen] includes similar provisions.

In these cases, the question of the principle for locating the decisive moment is made clear, which, thus, makes this question simple. Note, however, that a clear general rule may still need to be interpreted in relation to the indi-

17 Norwegian Tax Act § 2-38 (6) letter c)).

18 See also Section 3.6 (Subsequent Verification).

19 This methodology is, for example, well shown in Krzymowska A, Skattepliktiga överlåtelser i inkomstslaget kapital, Jure, 2018. Here, firstly, the principle for the general decisive moment for certain capital gains is presented, and then, secondly, the decisive moment in more concrete, individual cases is analyzed.

20 A similar Swedish example where the decisive moment is clearly stated is the 3 § of Ch. 17 SITA, according to which the inventory's acquisition value is determined, 'shall the inventory assets remaining in the stock at the end of the tax year be considered as / … /'. Thus, the valuation of companies' inventory stocks is carried out according to the circumstances at a certain time, namely the last day of the tax year.

vidual case, and in practice, the application of the depreciation rules are not always simple. Also note that such explicit rules may be of importance in the context of interpreting other tax rules, in order to find their decisive moment. Often, though, as in many other cases of tax law interpretation, it is not self-evident whether a rule stating something (for example, explicitly expressing its decisive moment) is to be seen as indicative of a wider general principle (being based on, and expressing, this very principle) or if it is to be seen as an exception (deviating) from a general principle!

2.5 Aims and Purposes When Deciding Upon the Decisive Moment – in Interpretation or Lawmaking

When, as in the cases discussed above (2.4), it is clearly expressed where the decisive moment of the current rule lies, there is no need, nor room, for considering other decisive moments (except *de lege ferenda*). From a predictability and legality perspective, it is certainly an appealing legislative technique to clearly express where the decisive moment of each rule lies, as the decisive moment is of great importance. However, this usually does not happen. This is not necessarily problematic, though, as long as the decisive moment can be easily established through interpretation – although it may be discussed how well such legislation is in line with the principle of legality.

Where the decisive moment is best placed might (both *de lege lata* and *de lege ferenda*) be analyzed in the light of some fundamental purposes and, needless to say, in the view of what is to be *the factor triggering the respective tax effect* (it might, for example, be having a certain kind of income). What are the purposes at stake in the choice between different possible decisive moments? And, how are such purposes to be weighted and seen in relation to the purposes upon which each tax rule might be based?

On the one hand, there is much to be said for choosing a decisive moment that provides the highest degree of *predictability* for the taxpayers Certainty about a tax liability or a tax deduction may be a decisive factor for whether the taxpayer enters into a transaction or not – in this sense, it works as a transaction cost. When it comes to periodicity, predictability may not be quite as important, but is still highly desirable. Thus, from a predictability perspective, the decisive moment should be placed at the time of the transaction. Taking aim at the circumstances on another date than at the time of the transaction could also lead to companies having advantages or disadvantages in taxation that management has not been able to predict. If the taxpayer (or its management) can foresee the tax consequences before a transaction, taxation can also work as an efficient social instrument.[21]

In some cases, however, it may be considered to be sufficient that *the taxpayer is able to know in advance (prior to the complete transaction) which requirements must subsequently be met* for a certain tax effect to be achieved – even if requirements are not met already at the transaction, and so on. This can be said about many accrual issues: The decisive moment is here mostly placed long after the transaction day, which contradicts predictability, but it is often possible to either predict the accrual period or even, to some extent, affect it by arranging one's business for it to be as expected (for example, through careful property management in order to minimize the risk of need for write-downs).

Certain holdings, and so on, are also of such a long-lasting character that, in many cases, full predictability regarding every aspect of the business's income tax effects already at the first transaction (let us say when buying the asset) would lead to highly inexact taxation, compared to the actual economic situation over time in the company. Having decisive moments 'along the way' (the judgments are distributed over time, for example, at the end of each year) or simply taxing ex post (for example, when an asset is finally sold or eliminated), simply makes more sense in some cases.

> Predictability is highly desirable not only before a business decision but also when finishing the income declaration. This happens after both the transaction date and the last day of the tax year, though. Obviously, at this time, it is no longer possible for the taxpayer to act proactively, as the business decisions have already been taken. Therefore, this form of predictability has only a weak relation to the issue of the decisive moment and is not further discussed.

The proper placement of the decisive moment can also depend on *practical considerations*. Thus, for example, the Swedish church fee and the municipal tax rate are governed by the taxpayer's choice regarding membership and residence as per 1/11 the year before the tax year. This is a practical and predictable solution, although it accommodates no adaptation to the individual's situation on the respective day on which the tax is due.

It is also of relevance to take into account the specific purpose of each tax rule when it is to be determined where its decisive moment is. Some rules may work best (so that their purposes are realized) when interpreted so that the

21 Fuller, The Morality of Law, 1969 s. 60.

decisive moment is the balance sheet date, while other rules have a relevant effect if their decisive moment is the transaction date.[22]

2.6 More on Rules Relating to Time Spans

Tax rules can also relate to conditions over a period of time. That is the case, for example, in all our countries regarding the questions of whether an activity is to be classified as a business activity and, in international taxation, whether a person is fully taxable and whether a permanent establishment exists. Such classifications are, of course, often needed in order to correctly treat different transactions, and so on, which are of a momentary nature (*e.g.*, fees, dividends) and which themselves often have a momentary decisive moment (they are thus partly answered, but partly in the light of estimates of conditions over a period of time).

One example that may illustrate this is the principle of worldwide taxation. To be liable for a worldwide income (WWI) taxation in Norway, for example, the taxpayer may be a tax resident in Norway and the consideration of whether the taxpayer is a tax resident in Norway under the current rules (which is based on the principle of effective place of management) must be determined based on a period of time (typically the fiscal year). Hence, if a company receives a royalty payment from abroad in January, the tax liability of the royalty income may be uncertain until it is determined whether the company is a tax resident in Norway or not. Similarly, to determine whether a company is a tax resident in a country under the permanent establishment rules in a tax treaty also requires that the consideration of the tax liability is evaluated over a period of time.

In looking closer at this question, one principally fundamental distinction must be made. It is fundamental whether the legal classification follows a division principle or an overall principle. In cases where the *division principle* applies, the classification is principally divided and basically answered each day (which may be very easy to do, if nothing of importance has changed). Thus, a certain tax status applies per day (*e.g.*, until a business ceases or a taxpayer moves), and basically, the decisive moment is every day when a change on legal status could take place. A tax status – let us say that an activity is to be classified as a business activity – can thus, practically, apply for a whole year, but actually, theoretically, it is rather answered the same way all day, all year.

However, if instead a 'true' *overall* assessment is to be done, following the overall principle, the assessment should refer to the relative importance of relevant circumstances over a period of time. While such overall assessments, for logical reasons, often have to be done *ex post*, the predictability is limited. The relevant circumstances cannot be fully assessed until the decisive period is over – and by then all transactions and the like are already carried out. However, these problems can sometimes be reduced through advance rulings or a Mutual Arrangement Procedure (MAP) under a tax treaty. The central method, however, is that the taxpayer tries to ensure that the requirements for the legal requirements he wishes to achieve are also actually achieved (for example, by not staying too long in a country, in order to avoid becoming an unlimited taxable person there).

Rules that require a true overall assessment of conditions over a longer period seem to be relatively rare. In Swedish tax law, the best example of such a rule may seem to be the rules for qualified shares in the so-called 3:12 system, regarding the tax rate for dividends from certain smaller companies.[23] Here, a significant amount of work, of a certain quality, during a sufficiently large part of the year will be governing for the whole year's taxation of dividends, regardless, for example, of whether the owner was actually working in the company at the beginning or by the end of the year. The significant effort must therefore not take place at any particular time or all year, as long as it is significant enough, during the relevant period.

2.7 Hybrid Decisive Moments

Some rules might be seen as being of a hybrid character, in the sense that their application requires looking at the situation at more than one moment or period. We will here exemplify and briefly comment upon such rules.

One such example from Norway is, as mentioned in Section 2.3, the group contribution rules[24] and the 3% clawback rule under the participation exemption rule.[25] According to the group contribution rules, first, the group contribution itself must be within the limitation that fol-

22 It should be noted that the decisive moment (thus, in the light of the purposes of the rule chosen), in its turn, will contribute to forming part of this very purpose of the rule – there is a partially circular relationship here.

23 See Ch. 57 SITA.

24 Norwegian Tax Act § 10-4.

25 Norwegian Tax Act § 2-38 (6) letter c).

lows from the limited liability act.[26] The limitations that follow from the limited liability act regards both the size of the group contribution and the formal requirements. A second requirement under the group contribution rules in the Norwegian tax act is a holding requirement. The holding requirement must be met on December 31 (but not at the actual day of receiving a group contribution). Hence, there are two requirements to be met at two different stages, to qualify under the Norwegian group contribution rules.

A second example from Norway is the 3% clawback rule under the participation exemption rule. As a starting point, a dividend received is taxable under the ordinary corporate income tax regime.[27] However, an income is tax exempt under the participation exemption rules provided that certain requirements are met. The evaluation of these requirements takes place at the time when the dividend is received. Although the dividend received is tax exempt, a 3% clawback rule applies (*i.e.*, 3% of the exempt income is considered as taxable income). However, the 3% clawback rule does not apply if the recipient of the dividend holds more than 90% of the shares of the distributing company. Hence, the consideration of whether the dividend is fully exempt from taxation must be considered in two different stages.

Also, in Finland, payments (legal term is here in Finnish 'konserniavustus', in Swedish 'koncernbidrag') can be paid between groups of companies, and the tax effect can therefore be effectively transferred between companies (according to Laki Konserniavustuksesta, Lag om koncernbidrag). There are many requirements for this possibility, which are partly based on different moments in time. There is also a very interesting case (HFD 2016/2915), which reflects the possibility of cancelling the payment decision. In this case, the cancellation of the group payment was considered valid even after the end of the relevant accounting period (tax year) because the actual tax decision considering the firm was not yet final. The company argued that they had misinterpreted the requirements in taxation. The tax authorities had inspected their requirements and informed the company (after the tax year's end) that the requirements of the tax law were not met. During that time, the final tax decision (and the tax documentation from the company) had to be finished (for companies) seven months after the end of the accounting period (tax year, if the accounting period is a normal year 1.1-31.12). Now, this system is in reform (see the later chapter about real-time taxation).

Note, however, that parts of a rule might also be seen as separate (single) rules, with a specific, single, decisive moment or period. It is therefore not given, that these examples are actually to be seen as examples of rules having a hybrid decisive moment. It would be possible, though, to imagine a single tax rule, stating more than one decisive moment (without being a rule relating to a time span).

3 Events after the Decisive Moment

3.1 Introduction – The Principle of the Primacy of the Decisive Moment

Obviously, it is common that new information (the term is, thus far, deliberately used in a general, slightly unprecise manner) is found after the decisive moment, that throws retroactive light on the situation at the decisive moment. The significance of such information is, in principle, dependent *on the extent to which the tax rules (should be interpreted so that they) are open to take account of them*. We want to – normatively and also claiming it is probably *de lege lata* – suggest a principle that *new information, in order to be relevant (for example, as evidence), must highlight the situation at the respective decisive moment* – the principle of '*the primacy of the decisive moment*'. If new information shows events or the state of affairs at a later date, this may instead be considered as new tax events. This principle is here to be further discussed with a focus on information emerging in between the decisive moment and the taxpayers' submission of the income declaration.

There are no explicit tax rules in any of our three Nordic countries that indicate what significance is to be attached to events after the decisive moment – at least there is no general such rule. We want to argue that basically, only the conditions at the decisive moment matter, but that information emerging after this can be used as evidence regarding the situation at the decisive moment. The reasons for this (suggested) principle are basically the same aims and purposes that were given above (2.5) as reasons for 'choosing' a relevant decisive moment.

Where the decisive moment is to be placed and to what degree information after this date should be considered are, in our view, two sides of the same coin: The determination of a decisive moment, simply expressed, makes information thereafter irrelevant, other than as the basis for the assessment of the situation at the decisive moment – or as a new separate tax event. Accordingly, those two po-

26 Norwegian Limited Liability Act (Aksjeloven, 13 June 1997 no. 44) § 8-5.
27 Norwegian Tax Act § 10-11.

sitions should in principle be answered in the light of the same arguments.

3.2 On Objective and Subjective Necessary Conditions in Relation to Subsequent Information

What significance events after the decisive moment have for the assessment of the situation at the decisive moment, and what events that are to be taken into account, may vary depending on what, according to the respective tax rules, should have been the case (the necessary conditions). Therefore, in order to win full precision in handling the temporal issues regarding tax law assessments discussed in this article, it is fundamental to clarify what the current rule aims at and refers to. In this section, we highlight a specific distinction between different kinds of (tax) rules, which have particular significance for the relevance of events after the decisive moment, namely the difference between subjective and objective necessary conditions.

To the extent that a rule relates to (mainly) *objective conditions* – such as ownership, a market value of an asset or some form of (more objectively-assessed) rationality – of course, such are the circumstances which the evidence should support (or not). If so, for example, the taxpayer's intentions and notions at the time of the decision are not what is to be determined – as what is to be proved here is something more objective (regardless of the taxpayer's intentions and notions). To the extent that a rule instead relies on *subjective circumstances* (for example, the taxpayer's intentions or assessments at the time of the transaction), the evidence should demonstrate the taxpayer's ideas, knowledge, intentions or similar at the decisive moment. In that case, the objective conditions, such as the actual value of an asset, are of little or no importance.[28]

Information obtained after the decisive moment can be used as evidence regarding both objective and subjective conditions, but of course, there can be a significant difference between evidence illustrating the fulfillment of objective or subjective conditions, respectively – although in both cases, evidence must be based in an external reality. In our opinion, it often does not follow clearly from the wording of tax rules whether they take aim at subjective or objective conditions. This does not necessarily imply that the legislation has failed, but it may complicate law enforcement (not least when it comes to evidence).

It goes beyond the purpose of this article to discuss what conditions tax rules ought to have. However, there often seems to be good reasons for giving (objectively) well-founded *subjective* perceptions of the taxpayers a significant role in such tax issues where the decisive moment is the *transaction date*. Here, predictability and management's need to be able to plan proactively are of great importance for the market economy. However, when assessments are made as per *the end of the fiscal year*, it seems more rational to let these be oriented mainly towards *objective* factors. In these cases, so to speak, the debt or the asset already exists, leaving less room for proactivity,[29] and it can, therefore, be considered natural that the measurement becomes as objectively correct as possible (quite similar to accounting, the estimates are carried out as per the balance day and, as far as is reasonable, objectively).

It should be mentioned that there is no conflict in relation to the principle of the decisive moment in letting a necessary condition be a (well-grounded) prognosis, carried out at the decisive moment (for example, regarding future cash flows or synergy effects). However, if the principle of the primacy of the decisive moment is to be upheld, it is important that what is subsequently examined is whether the prognosis was satisfactory at the decisive moment, not what the outcome turns out to be. However, the outcome may in some cases say something regarding how reasonable a prognosis made at the decisive moment actually was.

3.3 Subsequent Information as Evidence?

A situation can often be more precisely estimated in retrospect, not least because that makes it possible to take into account subsequent information (that has come to existence or merely has been found after the decisive moment). The principles of free production and evaluation of evidence do not preclude using subsequent information as evidence – given that it clarifies whether necessary condi-

28 See more about subjective conditions in taxation; Påhlsson, Skattebetalarens avsikter – Subjektiva rekvisit i skatterätten, Skattenytt 2017 s. 3 ff.

29 However, it should be noted that there may be reason for management to act proactively *also before the final day of the tax year*, for example, so that an asset is divested during the tax year because management believes that it provides a more favorable accrual effect than retaining the asset. Such a proactive approach is counteracted if business management does not know, and can compare, both the option of retaining the asset and the option to sell it. Against this background, it is not clear how strong the argument that 'assets and debts already exist' should be considered.

tions were fulfilled at the decisive period or moment. This may, for example, be the situation where it is necessary to make a valuation of an asset (*e.g.*, in an exit tax situation). Events after the date of recognition may be useful to perform a correct valuation or to make adjustments to a valuation. However, it is crucial that what is thus proved not only should have been the case at the right period or time but also that the evidence concerns the correct operative fact. This may seem obvious, but note, for example, the discussion above on objective and subjective conditions, where it is important to (through interpretation) initially determine whether what is to be clarified is a subjective or an objective condition. Subsequent information that clearly throws light on the situation at the decisive moment must not be used without sufficient attention being devoted to clarifying what is actually the necessary conditions of a rule.

Subsequent information can also be used as evidence concerning what the taxpayer should have done with regard to searching for, and later, in the declaration take into account of, information. Assume, for example, that it appears that it, before the declaration was finished, was relatively easy to find reliable information which, had it been found, would have given rise to changes in the company's declaration, compared to what was actually stated – but that the taxpayers did not find or use this information. This may lead to the declaration being considered defective and that sanctions may be brought into effect as a result of this.

We see no clear distinction between our respective countries in these issues, but want to note that these issues have not been subject to any focused and unified treatment, for example, in the doctrine.

3.4 Conditions Regarding Future Measures

Sometimes, all conditions for the application of a tax rule are not already met during the period for which the taxpayer wishes the rule to be applied. If so, the application of the rules might be open for, and for its' application indeed require, that those conditions are met later on, perhaps through a transaction at the beginning of the year after the year under which the rule is to be applied. In this section, we will discuss this phenomenon, here referred to as *conditions regarding future measures*.

In Norway, there are a number of examples of situations where the time of recognition of a transaction is undisputable, but where it is necessary to wait for a period of time, to be able to determine the effect of the transaction. This is, for example, the situation where a taxpayer in Norway receives dividends from a company tax resident in a country outside the European Economic Area. In these situations, the participation exemption only applies if the taxpayer has continuously for a period of two years that includes the date of recognition owned 10 percent or more of the capital and held 10 percent or more of the votes that can be cast in the general meeting.[30] Although a literal interpretation of the wording of the Norwegian participation exemption rules entails that the shareholder must have held the share for at least two years when she/he receives the dividends to claim the participation exemption, the Norwegian tax authorities have accepted that the two-year period may be fulfilled *after* the dividend is received. Hence, the effect of the recognition of the income, in certain situations, must wait until almost two years before the potential tax liability of the received dividend is determined.

In Finland, the problems of anticipated dividends have been considered by the Supreme Administrative Court (HFD), and there is also an official tax guidance document (Ennakkoosingot verotuksessa) for the practical tax issues related to anticipated dividends (pre dividends as they also are sometimes called in Finland). According to HFD 17.2.1999/254, the system of anticipated dividends is possible under certain conditions. The decision of the HFD is largely based on the Finnish Accounting Board's opinion on the case (1998/1542). According to the statement, the financial statements should give a true and accurate picture of the results of the accounting officer's business and its financial position (fair picture). In addition, when preparing the financial statements, caution should be exercised irrespective of the results of the accounting period. In its statement, the Accounting Board has five requirements, and when these are met, the anteceded dividend is bookable. These requirements focus on partly different decisive moments.

According to the Finnish Accounting Board, dividend income and dividend payables can be taken into account already during the concurrent accounting periods (correlation between the accounting periods), for which the dividends are distributed if the following conditions are met:

- the recipient company is the parent company, or it has, on the basis of the joint ownership agreement or otherwise, the power of ownership of the dividend distribution company;
- the recipient company has notified the dividend company in writing that it will assume a certain size dividend at the Annual General Meeting;
- the dividend company's (extra) general meeting has already taken a preliminary decision on dividend distribution pursuant to Paragraph 2, during the accounting period for which the dividend has been distributed, and the decision is realistic;
- the dividend company's general meeting has, after the end of an accounting period referred to in Paragraph 3, made a decision on the dividend distribution corresponding to the provisional decision based on the established financial statements; and
- the dividend recipients have also been informed of the AGM decisions in accordance with Paragraphs 3 and 4 well in advance of the signing of the financial statements.

30 Norwegian Tax Act § 2-38 (3) letter d).

For the dividend distributing company, the tax year for the dividend remains the same in the system of anticipated dividends as it has been so far. For the recipient company, the provision in BITA Section 19 is applied, according to which, income is income for the tax year during which it was received in cash, in the form of a claim or as another benefit with monetary value. In the system of anticipated dividends, the dividend's tax year for the recipient company is thus a year earlier. The dividend is recognized as income and dividend receivable in the financial statements for the year for which the dividend is distributed. If the claims made by the Board of Directors in its statement are not fulfilled simultaneously, the dividend is applied according to regular accrual policy.

The final decision on dividends' distributed at the company's Annual General Meeting, according to the Board of Directors' opinion, shall correspond to the preliminary dividend distribution decision. The Finnish tax administration's view is that, therefore, it is not possible to allocate as an anticipated dividend a smaller amount than mentioned in the provisional decision. If the Annual General Meeting of the dividend company decides on a dividend distribution of a smaller amount than in the preliminary dividend distribution decision, the dividend amount that is to be distributed in its entirety, as a rule, is accrued as a whole. The provisional decision, on the other hand, does not prevent the company from distributing a dividend of a greater amount than mentioned in the provisional decision. It is, therefore, possible that a dividend distributed for a certain year is taxed in the recipient company for several tax years.

The phenomenon conditions regarding future measures give cause to reflect on the correct understanding of the principle of the primacy of the decisive moment. How can the prevalence of conditions regarding future measures be justified? First of all, if it is easy for the taxpayer first to understand that there *are* conditions regarding future measures and *what* those conditions are, and then, to *control the realization* of these, it may be considered perfectly acceptable that such conditions sometimes exist. Second, in some cases, a possible justification ground for such conditions might be that they are part of the rules offering tax benefits of a special character. In any case, it is crucial that the assessment is not changed in any other respect into an ex-post assessment based on future terms, so that transactions are reviewed in other respects.

3.5 Chains of Transaction

It is common ground in all our countries that compound transactions are assessed as a whole, which is referred to as transaction chain judgments.[31] A typical example of this is the case where there is a question of application of anti-avoidance rules (*e.g.*, should a round-trip transaction be accepted for tax purposes). It can be assumed that the fact that compound transactions are assessed as a whole follows from the ideas that the taxation should follow the true meaning of transactions and that this goal is best achieved through transaction chain assessments, rather than through a 'particulate' assessment of individual transactions. Here, we will discuss the relationship between transaction chain assessments and the principle of the primacy of the decisive moment. We have found no rules and no clear doctrine or case law regarding this aspect, so we will have to start 'from the bottom', in tax law logic, rather than in comparative law in the traditional and narrow sense.

It would seem that transaction chain assessments in principle would presuppose a departure from the principle of the primacy of the decisive moment, as this is an assessment that takes into account circumstances, including certain subsequent transactions, from after the first transaction. At the same time, the result of such a review seems to be a finding of something that the court would normally have thought to be the case already in the first transaction. It might actually be argued that the first transaction should be considered to be the first in a planned series of concerted transactions that have such strong mutual ties that it seems far-fetched to assess them individually. In general, this could be considered as anticipating an ambition of the taxpayer to circumvent the tax rules through the procedure, thereby reducing his tax burden. In this way, the review would be a result of something that, it might be argued, was already the case at the time of the first transaction. Possibly, in line with this, the later transactions in the chain could be seen as a form of evidence of an intention, and that would actually be deemed to have been preceded and planned, already when the first transaction was carried out. In that case, it is far from obvious that the assessment should be aimed solely at the circumstances visible at the time of the first transaction. Thus, the principle seems to need a level of modification when it comes to transaction chain assessments: An assessment of the real meaning of transactions may require that several compound transactions are seen as a whole.

3.6 Subsequent Verification

It is neither a common and thoroughly discussed, nor an entirely unknown, phenomenon within taxation to subsequently *investigate the outcome, how something actually went*, thus letting such an investigation guide the decision – rather than what was actually (or seemed to be) the case

31 See also the Swedish RÅ 2004 ref. 27.

at the time of, for example, a transaction or the last day of the tax year. We call this *subsequent verification*. Here, we do not refer to the method that, for example, a court in the manner discussed above (3.3) takes into account additional information as evidence in relation to the situation as to what is usually perceived as the decisive moment (for example, the time for entering into an agreement). That is a 'common use of evidence', based on a traditional decisive moment. In practice, however, it is not always easy to distinguish between subsequent verification (3.6) and common use of evidence (3.3). It may not always be important to do so either, but, in our view, it is important to be aware of the difference on a principal level.

If a subsequent verification is carried out, it could thus mean that an investment (for example, in a research and development project) subsequently fell well and that the outcome, the final result, may control the assessment regarding the right to deduction of the costs for the investment. At least from a practical point of view, subsequent verification, in our opinion, means a departure from the above (3.1) suggested principle of the *primacy of the decisive moment*. Consequently, subsequent verification does not benefit predictability in taxation but may be justified in certain cases.

> An example of a situation in which subsequent verification is used in the legislation is the Swedish rules on tax-exempt public foundations in Chapter 7 of the SITA. According to § 3, foundations meeting the requirements set out in § 4-6 are taxable only for certain kinds of income. Here, the requirements will be discussed based only on the question of the decisive moment. The activity requirement, which is contained in § 5, means that the foundation of the activities carried out during the tax year exclusively promotes one or more of the purposes specified in § 4. If the business requirement is not met during the tax year, consideration can be given to how the requirement has been met in the year before the tax year, in the tax year and in the next fiscal year. It was found in the RÅ 2001 ref. 17 (and similar RÅ 2001 ref. 65), by the Supreme Administrative Court, that the regulatory system provides a certain amount of space for taking into account in the completion assessment what has occurred after the tax year under review – hence, a case of subsequent verification.

Subsequent verification has only been discussed sparingly in Sweden, but there are some notifications about the phenomenon.[32] Recently, however, Kellgren has argued for significant restrictiveness regarding subsequent verification, mainly on the ground that it can create the effect of a transaction cost and radically hinder proactivity and predictability.[33] Nor in Norway has there been much discussion about this. However, in Norway, there has been some discussion about this issue in relation to transfer pricing. To what extent may subsequent transactions and so on, which invoke on the transfer price, be a valid argument for the tax authorities to reassess the price? Hence, if the tax authorities may use subsequent transactions and the like to determine or adjust the price of the transaction, the recognition of the income (or cost) is influenced by a subsequent verification.

4 Finland's future? Towards Real-time Taxation

In Finland, the so-called Valmis (= Ready) project, which entails comprehensive information system reform at the Tax Administration, has been initiated. The goal of this reform is to, together with the development of the business processes and legislative reforms relating to the taxation process, save as much management costs as possible before 2022. The planned reforms are supposed to unify and simplify taxation procedures and tax collection.

Real-time taxation is being promoted and taxation systems are being developed. Within business taxation of companies, this means a closer contact and co-operation between the tax administration and the firms. The possible problem areas or points are discussed in advance with the tax authorities. In essence, the advance tax planning also involves the government. If this becomes a basic concept with business taxation, the decisive moment (= tax decision in practice) of taxation can in principle, and also in practice, take place long before the formal/actual moment of taxation. This means that the tax interpretation has been made in advance based on co-operation between tax authorities and the taxpayer (firm). This erases the risk of a negative tax decision in the future yearly taxation. In essence, the tax decisions are made continuously.

At the same time, the government's 'Cutting-edge' project for the settlement of standards is being implemented. Income taxation and property taxation make use of the completion of taxation for individual taxpayers. Taxation of individual taxpayers can still be completed at different times and earlier than at present. This brings forward both the payment of tax returns and the reporting of residual tax and property taxes to the taxpayers.

32 See, for example, Påhlsson R, Sponsring, Jure 2008 s. 36, 81, 89 och 125.

33 Kellgren J 2016 (supra footnote 5) s. 128-131.

The obligation to review a pre-tax declaration of taxation and the obligation to submit tax returns remains unchanged. Taxpayers shall provide this information on their tax returns either through an e-service or by special forms for the relevant information. Within the area of tax on sales, tax returns are extended to property transfers.

For income and property taxation, supplementary taxation decisions are introduced as a new procedure. Within this procedure, the tax administration makes a tax decision based on new information that the taxpayer announced after the taxation was completed at the start of the year. The procedure is meant to clarify the boundary between taxation and reconsideration, improve the legal protection of taxpayers and shorten processing times.

An income register updated in real time provides a basis for coordinating labor income and social benefits. The project thus creates a register of citizens' incomes (income register, in Finnish tulorekisteri), which can subsequently be utilized by the tax administration, employment pension institutions, FPA and other essential parties who need the information in question. The intention is that revenue data is transferred digitally to the registry directly from payroll management systems and other information-producing systems through the development of the new national service channel.

From November 2018, the Finnish corporations must file their income tax returns online. This becomes the basic model for all the taxpayers in 2020. The individuals will file their tax returns via My Tax (OmaVero)-system. Filing tax returns and other notifications online has already been mandatory for self-assessed taxes – such as value-added tax and employer contributions – since 1.1.2017. A total of 80% of corporations already file their income tax returns online.

These new practices for tax filing and additional reform plans mean a very significant change in the Finnish taxation technology, which is difficult to fully overlook in advance. Basically, of course, most tax rules will continue to relate to events or conditions in an outer world. These conditions must, as described earlier in this article, be assessed at a decisive moment or period. In *that* sense, it is difficult to see that the above-mentioned development would change dramatically.

However, an overall reflection is that the more 'real time' taxation is to be, the lesser the (time)space there would be to determine conditions for a period (moments are often closer to 'real time' than periods). There should also be less room for taking into account events after the crucial date since taxation is to be determined immediately. This new era of taxation will also include the cooperation of taxpayers and tax authorities in advance making the actual (real) tax decision in principle a continuous act.

It may, therefore, be considered important to allow adjustments of already established taxation due to events and information that could have been taken into consideration by traditional taxation technology. Not least, accruals seem to be labor-intensive and complicated to handle, so to speak, in every moment. The same can be said of such boundaries that, in practice, refer to and require an overview of a period, for example, relating to tax settlement. Such changes may conflict with the Finnish confidence protection in the taxation procedure, which limits the tax authority's right to unilaterally and retroactively change tax decisions. However, we want to emphasize that these reflections are based only on a vague and preliminary picture of the future of Finnish taxation technology. It will certainly be interesting to monitor this development.

5 Final Reflections

The purpose of this study was to present these questions, their logic and significance, and to give a comparative overview of the legal situation and discourse in this regard, in our respective countries. Starting at the comparative end of the study, what we have seen indicates a high level of similarity between our countries, in terms of what questions, solutions, models and problems that are used/occur, regarding the questions of where the decisive moment is placed (or is to be placed) and regarding the importance of events thereafter.

It has also been interesting to see the question of the decisive moment in relation to the question of retroactivity, and maybe especially in relation to Norway. As mentioned above, in Norway (and in most other countries), the income tax is calculated on a net income during an income period. When the Norwegian Parliament changes the tax legislation during an income period, the tax authorities must determine whether the change in legislation should be given effect for the whole period, or just for the remaining time of the income period. It seems to be a common understanding that new/amended tax rules may be applied on the net income from the whole period of income. However, if the change in legislation is to the taxpayer's disadvantage, the new/amended legislation is normally not applied to the pre-period of the new/amended legislation. This does not, however, change the fact that the question of the decisive moment and the question of retroactivity are two fundamentally different things.

The recent Finnish changes and future plans regarding 'real-time taxation' are highly interesting and may result in important changes and country-specific methods, but this is yet so early in the process that we will have to await for a more elaborated outline before any certain conclusions can be drawn.

If we are right regarding these similarities (a more thorough investigation would give a safer basis for conclusions), perhaps this is a sign that these are *somewhat archetypical questions, solutions, models and problems*. In that case, that is very interesting. If so, does this indicate that we have little to learn from our respective countries within this field and that there is no or little call for analysis *de lege ferenda*? We do not think so. From a constitutional perspective, these questions are fundamental, not least within the field of taxation – and they basically concern every rule that relates to the situation in the world outside (past, present or future). They have strong connotations to predictability, legality, economic life and many procedural issues. In all our countries, the doctrine regarding these issues must be said to be quite underdeveloped. We do not say that the state of affairs in legal practice is 'bad' in these areas, but the lack of doctrine and explicit principles, and even a fully developed nomenclature for structured analysis of this field, strongly suggest that more attention needs to be paid to these questions. Cooperation is probably a good way to go.

In this article, we have tried to present these tricky questions, their logic and significance – and along the way, a tentative nomenclature has taken shape. Hopefully, this was only a starting point. These are, needless to say, questions for tax law experts to look into – especially, perhaps, from a legislator perspective.

The legislator has to really think through, where to place the decisive moment, and why, and how to make each new tax rule clear with regard to its decisive moment (it does not have to be expressly stated though, as long as it is clear). In our opinion, there seems to be good reasons for letting well-founded subjective perceptions of the taxpayers at the transaction date play a significant role in most tax rules, but to give more emphasis on objective factors when it comes to the assessments that are better made at the end of the fiscal year. From a predictability perspective, the decisive moment should be placed at the time of the transaction.

These questions are, however, not to be answered by politicians or tax law scholars alone. Instead, in order to discuss and handle these questions in the best way, there is good reason to involve philosophers, economists, tax law practitioners, accountancy specialists (not least their experiences from what is referred to as events after the reporting period[34]) and experts on constitutional law. We think much is yet to be done – and won.

34 Kellgren, J, IAS 10 Events after the Reporting Period Problematized – Some Questions Regarding the Standard's (Read by its Letter) Understandability", Skattenytt academic Issue 2018 pp. 3-35 and 2016 (supra footnote 5) Chapter 2.