

## TAXPAYERS' RIGHTS IN SWEDEN



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Taxpayers' rights in Sweden are largely settled in relation to assessment and appeal procedures. The current focus is the balance between the tax authorities' powers of investigation and the protection of taxpayers' integrity. This article examines the protection available to taxpayers under investigation and concludes that the system is effective. However, there are proposals to increase the powers of the tax authorities.

### Background to the Swedish tax system

As in most other countries there are a number of taxes in Sweden, including income tax, wealth tax, inheritance tax, gift tax, real estate tax and value added tax. The ordinary taxpayer is mainly concerned with income tax, while businesses, particularly companies, have to deal with a wide range of these taxes. The term "taxpayer" in this article relates to both categories. Most of the rules concerning investigation powers, procedures and so on are quite similar for different taxes, but examples from income taxation will be used.

Until 1991 income tax was assessed by committees of locally-elected laymen. During the first period of income taxation in Sweden (1862-1902) taxpayers did not have to file any income tax returns and assessments were more or less based on a discretionary decision. The substance of taxpayers' rights during this period was probably found more in the right to be assessed by fellow citizens and not by the government, than the right to seek redress through the administrative court system, which was part of the government administration. The dual position of the administrative courts disappeared during the twentieth century and now they are courts in the true sense alongside the ordinary court system.

In 1902 it became mandatory for all taxpayers to provide an income tax return, which then had to be taken into consideration in making the assessment. The importance of a return as a reliable statement has increased as a matter of evidence. This is because the scope for discretion in making an assessment is now limited, as taxpayers make a declaration as to the correctness of the content when they sign their return. The burden of proof is on the tax authority if it finds it reasonable to assess a taxpayer on a higher income than that stated in the return. On the other hand, it is the taxpayer's responsibility to prove any deductions and, if required, the taxpayer must provide the tax authorities with sufficient documents to support the deductions claimed.

Since 1991 the committees of laymen have been replaced by a regular administrative system where tax authorities assess the taxpayer.<sup>1</sup> Income tax returns must be filed before 31 March or, in certain simpler cases before 2 May, in the year after the income year. It is possible to get an extension of up to two months to lodge returns and accountancy firms do this on behalf of their clients. The assessment has to be decided by the tax authority before 30 November (in August for simpler cases). Taxpayers will then generally either have to pay additional tax or will receive an immediate refund, if they have paid too much in preliminary tax.

Taxpayers have a right to ask for a reassessment to their advantage during the following five years, if they discover new opportunities to claim a deduction or just want the assessment to be retried. If a taxpayer is not satisfied with the decision by the tax authority, he or she can appeal to the administrative courts. There are three levels of administrative courts, *Länsrätten* (the county court), *Kammarrätten* (the appeal court) and *Regeringsrätten* (the Supreme Administrative Court). Most cases will just be tried on two levels. To reach the Supreme Court, and sometimes even the appeal court, leave must be granted by the court. Leave is usually given if the court finds the case is of general importance (such as an important question of law). The proceedings are in writing, but the courts can allow oral hearings as well, which have to be allowed if the case involves a question of administrative penalties.<sup>2</sup>

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<sup>1</sup> The rules concerning the assessment procedures are collected in *Taxeringslagen* (1990:324).

<sup>2</sup> This was as a result of a case brought before the European Commission for Human Rights, relating to the protection under Article 6 of the European Convention on Human Rights.

Taxpayers' rights in Sweden used to be discussed mainly in relation to the proceedings in the assessment committees. Nowadays the discussion focuses more on the tax authorities' powers of investigation and the protection of taxpayers' integrity. Taxpayers' rights are treated as a special branch of human rights issues. It is often called *rättssäkerhet* (directly translated as "legal security" or "legal certainty") and takes at least two aspects into consideration: the protection of human rights in tax procedures and the legal issue of how to avoid giving discretionary powers to the authorities (the law should define the powers as precisely as possible). Accordingly, it is not only a problem to define which powers the authorities should have, but also under which circumstances and how this should be regulated in statutory law. Taxpayers need satisfactory remedies if, in their view, there has been an abuse of powers. The tax law must give appropriate legal tools to courts and other judicial bodies (ie, the *Justitieombudsman*) to review or even decide, in advance, the appropriate use of control powers.

In a broader sense, one could also add the questions of how tax legislation should be drafted, how to interpret statutes and how to deal with tax avoidance, but I will not discuss these issues in this article. However, I will now briefly consider the question of certainty in the law.

Swedish tax authorities provide considerable information to taxpayers and there are few complaints in this area. It is also possible to get an advance ruling on a planned transaction, from an independent, central national board in Stockholm. If the ruling is favourable to the taxpayer, the tax authorities are bound by the decision.

Another protection for taxpayers is the constitutional prohibition against the retroactive effects of tax statutes.<sup>3</sup> The provision states that a tax statute must be passed before the circumstances that constitute a taxable transaction occur. However, it is possible for the government to send a proposal or a message to the Parliament with details of the changes. The proposed legislation can have effect from that date.

During the period 1950 to 1990, the effectiveness of the tax authorities' powers of investigation was in focus, but the focus now is on human right issues. In 1993 a parliamentary committee, *Rättssäkerhetskommittén* ("Taxpayers' Rights Committee"),

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<sup>3</sup> Chapter 2, para 10 Regeringsformen (the Swedish Constitution).

published a report with proposals to increase taxpayer's rights in tax investigations.<sup>4</sup> They were discussed extensively by Parliament and came into force on 1 July 1994.<sup>5</sup> Their introduction was opposed politically by the left wing parties. The more left wing social democrats returned to power in September 1994 and they asked for a review of these matters. The review resulted in a report published in 1996, but its outcome is still uncertain.<sup>6</sup>

### **Powers of investigation**

Most taxpayers only have to sign a tax return prepared by the tax authorities containing all details of their income. The information for the returns is provided to the tax authorities by employers, banks and some other institutions. Persons whose affairs are more complicated, however, must provide additional information concerning taxable transactions which are not subject to the obligatory information given by third parties and are not shown on the prepared tax return. They prepare their own returns for filing.

Individuals can be requested to provide receipts, contracts, invoices and other documents to prove the information given in the tax return. If satisfactory proof is not given, they are not considered to have discharged their burden of proof and it can lead to a higher assessment. The tax authority may also ask the court for a warrant to search the taxpayer's premises for relevant documents of importance for the assessment. A warrant will be granted if the taxpayer has not supplied the documents, if the court finds that the information is important and if such action is reasonably proportionate.

The powers of investigation are, however, of most importance in relation to business records. They are needed for an audit of the actual business, and they also contain information about other taxpayers' tax liabilities, such as salaries, interest received and dividends.

In 1928, the tax authorities were given the power to audit business bookkeeping. This has now developed into full powers to look into

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<sup>4</sup> I served as secretary to this committee. It conducted extensive investigations on taxpayers' rights. See SOU 1993:62, Rättssäkerheten vid beskattningen, betänkande av Rättssäkerhetskommittén.

<sup>5</sup> The government proposal (prop 1993/94:151) followed the committee report very closely.

<sup>6</sup> See SOU 1996:79, Översyn av revisionsreglerna, Delbetänkande av 1995 års skatteflyktskommitté.

all business records. In limited circumstances some records may fall outside the scope of the authorities' search powers and this is discussed below.

As in most countries, tax audits can be performed for the purpose of reviewing a company's assessment. If the tax authority concludes that the assessment was wrong, based on the result of the audit, it can reassess the company within five years. Accordingly, audits concerning recent years do not go back further than the last five years and often only relate to the past one or two years. If the company disagrees with the assessment, it may appeal to the court.

One main issue concerning the investigation powers has been the possibility of auditing for the purpose of looking for information about other taxpayers (often called a "third party audit", since the company then is a third party in relation to the taxpayer concerned). Before the taxpayers' rights reforms in 1994, an audit for this purpose was allowed. It is no longer permitted. However, the tax authorities may request specified information from a company, bank etc, about other taxpayers, if the information concerns a business relationship with those taxpayers. The information must be collected and handed over to the tax authority by the company. The authority may then, if necessary, check the relevant records to be certain that the information provided is correct. If the documents or information are not provided or are insufficient, the tax authority may ask the court for a warrant to search the premises for the relevant documents. It will be granted if the action is regarded as proportionate to the information required.

The discussion about these powers to audit a company concerns the question of the taxpayer's integrity. Audits that do not concern the company but rather another taxpayer, taxpayers in general, or which are just searching for information, are often regarded as "fishing expeditions" and are not allowed in criminal investigations. The purpose must be more specific. A question was raised, therefore, as to why it should be allowed under a tax investigation. The Taxpayers' Rights Committee and the Parliament thought that these investigation powers were disproportionately wide and decided to limit them, as mentioned above. The new committee appointed by the socialist government has now, however, proposed that the powers to collect information concerning taxpayers, through a tax audit of a third party, will be reinstated.<sup>7</sup> The outcome of the proposal is still uncertain, but the right and the left wing parties in

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<sup>7</sup> Ibid.

Parliament are divided into two groups, for and against the introduction of these powers.

A tax audit concerns all documents kept by the taxpayer (the company, bank etc), except for those documents expressly covered in a provision of the tax statute. The exception is two-fold. The first part excepts documents covered by professional privilege. This would include communications between a company and its lawyer and documents kept by doctors, ministers and psychiatrists. The second part excepts certain sensitive information, which may be kept out of the scope of an audit, if the documents are considered to require particular protection. Where the taxpayer and the tax authority cannot agree whether information or documents are covered by this provision, the court decides which interest has priority. In making the decision, the court will weigh up the importance of the information to the tax authority in its duty to ensure compliance with the tax laws and the importance to the taxpayer that the information remains completely secret.

The meaning of "sensitive information" includes technical information, such as product designs, business secrets, such as client lists, and the content of an advertising campaign. Tax advice on legal matters is also protected under this second part of the provision. It extends to all tax advisers, including accountants. The rationale is that any legal matter may subsequently be heard before a court and such information is of particular sensitivity.

#### Seizure of documents

Even if tax investigations and tax audits should be carried out in co-operation with the taxpayer and with respect to the taxpayer's integrity and need to run a business, some taxpayers are simply not willing to comply with the law and may even try to sabotage an investigation. Under special statutory provisions, the tax authorities may seize documents or other materials needed for tax investigations.<sup>8</sup>

Before the 1994 reforms to taxpayers' rights, the tax authority decided whether to use force to audit a business. The taxpayer could afterwards appeal to the court and ask for a decision as to whether the action was proportionate or not.

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<sup>8</sup> Lag (1994:466) om särskilda tvångsåtgärder i beskattningsförfarandet.

Since the 1994 reforms, the court has had to approve all such actions before they are enforced, to ensure that they are in accordance with the provisions of the law and proportionate to the importance of the action. Most of the provisions relate to the seizure of documents and other materials needed during a tax audit. But it is also possible to request an audit on the taxpayer's premises (if the audit can only effectively be performed there) and to request an unannounced audit, sometimes called a "dawn raid".

The general idea is that no taxpayer who runs a business should be able to refuse an audit or not comply with the tax law. If the documents or other materials under investigation are not properly handed over or, if needed, the audit cannot be performed on the taxpayer's premises, the court may give the tax authority the right to enforce the investigation. Documents can be searched for and seized on the taxpayer's business premises, but also elsewhere, if there is a reasonable suspicion that they are kept there. Even private persons' documents that are needed for an investigation relating to their assessment can be searched for and seized, if they are not properly handed over and the action is considered proportionate to the importance of the matter.

Tax audits are enforced when there is reason to believe that a request or a note in advance may result in the taxpayer destroying or hiding documents or other materials under investigation (often called sabotage). The court may then allow the tax authority to enforce the audit or search for and seize the documents without warning the taxpayer in advance. If necessary, force can be used. Normally, however, taxpayers do not resist the action when faced with a court order.

Clearly, the rationale in requiring the approval of the court before the tax authority takes any action is to allow an impartial body to decide on the matter before any harm is caused to the taxpayer. It is arguably easier and fairer to prevent such a search before it is implemented than subsequently discovering that the action of the authorities was wrong.

There is also a special provision that gives a tax authority the power to take action immediately, before the court has decided on the request, but it is only applicable if there is a substantial risk that sabotage will occur before the court could deliver a decision. Normally, the court takes only a day or even a few hours to make a decision, but sometimes the court proceedings can be delayed. Accordingly, the provision will only apply in rare cases.

The new committee considering taxpayers' rights has proposed that, in certain circumstances, a tax authority should be able to make an unannounced audit, as opposed to an audit under the statutory provisions which requires court approval. The audit would still fall within the current law, as it would only be enforceable if a taxpayer first gives consent. However, a taxpayer subject to such an audit and aware of her or his rights may justifiably suggest that an unannounced audit impugns her or his integrity and ask the tax authority to return once it has given the appropriate advance notification.

### **Right to remain silent**

In criminal investigations the suspect has the right to remain silent - a protection against self-incrimination. The suspect cannot be compelled to deliver documents or other materials to the police authority or the prosecutor. During a tax investigation the same need of protection may arise. The main purposes of tax investigations are normally to make a correct assessment and to obtain the right amount of tax from the taxpayer. The investigation may also lead to administrative penalties or even charges of tax fraud. It is hard to distinguish between the assessment and punitive purposes.

In some countries the tax fraud investigation is performed by the tax authorities. In others this task is handed over to the police or criminal prosecutors. In Sweden the tax authorities have to turn the matter over to the prosecutor if they suspect a tax fraud. There is, in fact, no secrecy between the two authorities, which means that all information gathered during the tax investigation can be used in the criminal proceedings.

The Taxpayers' Rights Committee was concerned that the tax authorities could gather information to use in a criminal investigation, but without the ordinary protection for the suspect against self-incrimination. It was going to propose a co-ordination of these rules, so that the suspect at least had the same protection under the tax investigation, but at the same time the matter came before the European Court on Human Rights, the political situation changed and the committee was disbanded.

Sweden is a signatory to the European Convention on Human Rights ("the Convention"), which now has to be regarded as domestic



legislation.<sup>9</sup> In 1993 the European Court of Human Rights in Strasbourg delivered a judgment in *Funke v France* holding that Mr Funke, according to article 6 of the Convention, could not be compelled to hand over documents to the French Customs as he was charged with a criminal offence. The following year, 1994, the court developed this principle in a tax case, *Bendenoun v France*. More cases are now before the court and the pending judgment in *Saunders v United Kingdom* may well have an impact on European law in this area.

The developments have raised at least two questions. The first is whether the Swedish administrative penalties should be regarded as a criminal charge (an autonomous term in the Convention) or whether article 6 just applies to criminal investigations. The second question is what is the position when a tax investigation is also a part of the criminal investigation. The first question is of some importance to the second.

I prefer the view that the Swedish administrative penalties should be regarded as criminal charges under the Convention, but in a government investigation this year another view was taken.<sup>10</sup> Only tax investigations performed parallel with the ordinary criminal investigations will be treated as being protected by the Convention. However, the questions are now under consideration by a public hearing. Nonetheless, anyone has the right to bring an independent action before the European Court of Human Rights and receive an answer.

In my view, the question as to whether administrative penalties should be regarded as criminal charges is not really as important in this issue. This is because the prerequisites for an administrative penalty and a reassessment are the same as the objective prerequisites for tax fraud. They include the provision of incorrect information, for example in a tax return or other document provided to the tax authority. The search for evidence of the provision of incorrect information may also lead to charges of tax fraud, which is why the protection against self-incrimination should be applicable. The question here is whether the protection requires a formal notification to the prosecutor, or whether it should be taken into account in the tax investigation when the suspicion in fact arises.

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<sup>9</sup> Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna.

<sup>10</sup> See SOU 1996:116, Artikel 6 i Europakonventionen och skatteutredningen, Delbetänkande av Skattekontrollutredningen.

Clearly, the right to remain silent does not have any implications for the normal obligation to file a tax return, nor on routine controls. Where, however, the tax authorities start an investigation based on information that gives reason to believe that tax has been evaded, they have to have regard for the right to remain silent. Exactly where and under what circumstances this will occur may have to be developed on a case by case basis before the European Court, if the Swedish government applies a narrow interpretation.

A further question is whether this will have any real effect in slowing down tax investigations. It may well be found that almost everyone will co-operate with the tax authorities while they risk receiving an unfavourable assessment or even seizure of their documents.

### **Reimbursement of litigation costs**

Another part of the 1994 reforms to taxpayers' rights concerned reimbursement of litigation costs. If a taxpayer wins a case within the administrative system or before the courts, and this win is not dependent upon an earlier failure to provide information on the facts, the taxpayer is reimbursed for the costs of an outside lawyer. If a taxpayer wins only part of a case the court may allow reimbursement of a proportion of the costs.

There is also the possibility of reimbursement where there is a leading case that passes through all the courts and finally is to be heard by the Supreme Administrative Court. The objective of this provision is that the costs of a leading case should be shared by all taxpayers and therefore reimbursed by the Government.

Finally, the taxpayer may recover costs if there are very special reasons for reimbursement. For example, they may be reimbursed if the tax authority has been negligent, or nearly so, when auditing a company and has forced the taxpayer to pay a lawyer or accountant to defend itself against unreasonable tax charges. This provision is rarely applied.

The taxpayer never has to pay the tax authorities their litigation costs. On the other hand, taxpayers are not reimbursed for their own work or other internal costs in an action. This applies equally to the cost of using in-house lawyers.

### Extensions of time to pay additional tax

During the income year all taxpayers, individuals and companies, pay a preliminary tax related to their estimated income for the year. After assessment, they receive a tax refund if they have paid too much tax and they are charged additional tax to cover any shortfall. If the additional tax concerns an issue where the tax authority has increased the taxpayer's income and the taxpayer has asked for a reassessment or has appealed to the court, the taxpayer may be given an extension of time to pay the additional tax. This question also arises if the outcome of a tax audit results in additional income tax, VAT or another tax.

The taxpayer asks the local tax authority for an extension of time to pay. If it is granted by the authority, the extension is given until the tax authority has reviewed the taxpayer's assessment. Similar extensions for payment of additional tax can be granted during litigation in any court. If the tax authority does not grant the taxpayer an extension, the taxpayer may appeal to the administrative county court, which may change that decision. Under the present law, whether a taxpayer will get an extension of time to pay additional tax depends upon: (1) whether the outcome of the case is uncertain; or (2) if payment of the tax would lead to substantial damage for the taxpayer or would otherwise be unreasonable.

The provision has been criticised for leaving substantial room for discretion. Accordingly, it is difficult to regard it as a right for the taxpayer. It may also give rise to a problem because the tax authority must first decide to increase a taxpayer's tax by reassessment. To do this it must be certain that the tax is due. Yet, when the issue of extension of time to pay has to be decided, the tax authority has to grant it on the basis that the outcome of the tax issue is uncertain.

If the tax authority grants an extension of time to pay additional tax during the litigation of the tax issue, it may combine it with a demand for security, usually a bank guarantee. The taxpayer then has to decide if he or she is willing to pay that additional cost or not. If the taxpayer wins the case, the cost of the guarantee is refunded. Should the taxpayer lose, interest is payable on the additional tax charged.

The Taxpayers' Rights Committee proposed widening the opportunities for obtaining an extension of time for payment as long

as the tax issue in dispute had not been settled through a final judgment. The granting of an extension would be mandatory on request, unless it was obvious that the taxpayer would lose the case. On the other hand, interest on the additional tax in the event of an unsuccessful claim would be higher than the interest on a bank loan, or at least a similar amount, to prevent unreasonable tax appeals. There is, as yet, no sign that the proposal will be implemented.

### **Seizure of money and other assets**

Another aspect of paying tax is whether money can be seized before there has been a formal reassessment, but where there are strong indications that the taxpayer will not be able to meet a charge of additional tax. This may happen where a tax authority is auditing a company or has started an investigation to reassess a taxpayer, but has not yet concluded whether additional tax will be charged or how much tax is in question.

Under Swedish law, the tax authority asks the administrative county court for permission to seize money and other assets in accordance with the amount they expect will be charged when the audit or investigation is finished. The court may grant such a request if it is probable that there will be a claim for additional tax, the amount of tax is substantial and there is a substantial risk that the taxpayer will try to move the assets out of reach of the authorities. There are other relevant provisions, including that the action taken against the taxpayer must be in proportion to the damage it will cause both the taxpayer and anybody else concerned.

The action can be approved by the court before the taxpayer has been heard and be enforced before the taxpayer obtains a decision on the matter. Furthermore, the tax authority can, if a delay would cause too much risk, seize the taxpayer's assets even before it goes to court.

Immediately after the assets are seized, the matter must be reviewed by the court, which must hear the taxpayer on the matter. If the action is still allowed, the tax authority has six months to continue the audit or its investigation and reach a decision on whether additional tax will be paid (usually by assessment or reassessment of the taxpayer). The seizure can be prolonged by the court, but only for three months, after which a new decision has to be made. The objective of this provision is to force the tax authority to give the investigation the highest priority. Prolongation of the seizure is more difficult to obtain, as the court requires stronger reasons every time it has to reconsider the matter.

During the 1980's, some investigations showed that the final tax claims were much lower than the value of the assets seized in about two thirds of the cases. Subsequent to the seizure many taxpayers made substantial losses, not only on the assets seized, but also because of the action taken against them. Banks, business associates and other creditors would no longer do business with them. However, even if the action of the tax authorities was sometimes decided on vague grounds, it was difficult to hold that the authorities had been negligent and therefore should pay damages. These investigations led to a change in the law. Now the action is taken under strict liability and the government has to pay all damages caused to the taxpayer because of the action, if the final tax claim is substantially lower than the amount seized. This reform has drastically reduced the applications for seizure of money or other assets.

### Conclusions

Taxpayers' rights issues earlier focused on the proceedings in the laymen assessment committees. They were carefully monitored by an ombudsman (*justitieombudsmannen*). The lay assessment committees were replaced in 1991 by the tax authorities, but the principles worked out by the ombudsman are still relevant. They are part of the general principles of administrative law and concern the way the authorities should treat taxpayers and how decisions should be made.

In general, the Swedish tax authorities have succeeded very well in providing information on tax issues to different categories of taxpayers. They normally also treat taxpayers with courtesy and respect their integrity. In some cases, as in other areas of the law, there are errors that cause disputes between taxpayers and the tax authorities. Taxpayers may then complain to the ombudsman, who will review the case. If the ombudsman finds that there is a case, he or she may prosecute the tax officer before the court. More often the ombudsman develops guidelines on how to treat similar cases in the future. Those guidelines are published in the *Ombudsman Yearbook* and constitute administrative practices that may be referred to as taxpayers' rights during administrative proceedings.

The question of a Taxpayers' Charter of Rights has not been raised in Sweden, probably because of the good work of the ombudsman. However, if all the ombudsman's guidelines were collected, they would form something similar to a charter of rights. The ombudsman's guidelines are also referred to in handbooks and in the tax authorities' manuals.

Swedish discussion of taxpayers' rights is concerned more with how far the tax authorities' investigation powers should go and how to provide the taxpayer with legal remedies to balance the powers of the tax authorities. In my view, the effectiveness of a legal system is shown in its treatment of exceptional cases.

In recent decades there has been a tendency all over the world to increase tax authorities' investigation powers, which, together with the powerful tool of computers, creates a conflict with protection of taxpayers' integrity. The protection against unreasonable searches and arrests derives from ideas developed during and after the French Revolution. It has since then become a part of many countries' legal systems. Legal systems and lawyers tend to regard old principles with respect, but it is a pity that new problems are often regarded as political issues.

Sometimes the investigation powers of tax authorities in tax matters go far beyond similar powers in criminal investigations. It may be explained as a special requirement for the enforcement of tax laws, but it can also be explained historically. The investigation powers of tax authorities are relatively recent phenomena and tax administrations appear to get whatever they ask for and meet little resistance. In some countries, however, the general protection against unreasonable searches and seizure does apply in tax matters.

In Sweden this discussion has accelerated over the last decade and has, as mentioned above, caused some political problems. At the moment, searches and seizures in ordinary tax cases have to be approved by a court. Since the 1994 reforms, there have been some 70 cases heard by the courts. The Supreme Administrative Court has heard one case which it decided in the tax authorities' favour.<sup>11</sup> But it is possible to proceed immediately if the delay in court procedure would cause sufficient damage to the investigation. As the courts usually make a decision within a day or so, this option has not yet been used by the tax authorities.

Even if the tax authorities would prefer to have unlimited enforcement powers, the current system works well and provides more legitimacy to the enforcement powers. The fact of having an independent third party review of the facts in each case before the powers are used gives a sufficient protection against unreasonable searches. The opponents of the reform of taxpayers' rights struggle

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<sup>11</sup> See RÅ 1995 ref 51.

to produce good arguments, beyond just suggesting that it would better suit the authorities to have unlimited powers.