How to comply with tax law provision on short selling?

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Short selling

- **General rule**
  - To lend fungible goods to someone is seen as transferring the ownership of the goods to the borrower.

  - To lend shares to someone is therefore for tax purposes seen as selling the shares and the lender will be taxed for any capital gain.

- **Special provision**
  - In the early 1990's a special provision was introduced in the Swedish Income Tax Law in order to facilitate short selling.

  - The provision states that the lending of shares with the purpose of short selling is not to be seen as selling the shares. The lender will therefore not be taxed for any capital gain.

- When does the special provision apply?
- How is it determined that the purpose of the loan is to use the shares for short selling?

- Judgment of the Swedish Supreme Administrative Court in May 2015.

- The Court had three possible approaches:

a) the lender must be able to prove that the shares were actually used for short selling, or

b) it has to be clear that the explicit purpose of the share lending is short selling, or

c) there is a possibility for the borrower to use the shares for short selling.

- The Court stated that in order to comply with the special provision it has to be clear that the explicit purpose of the share lending is short selling.
- Thus, the Court accepted that the special provision could be applicable even in the case were a lender could not prove that the shares had actually been used for short selling.
- Furthermore, it was established that a mere possibility for the borrower to use the shares for short selling does not meet the requirements in the special provision.

- **Conclusion**
  - In Swedish tax jurisdiction parties involved in lending shares transactions for the purpose of short selling have to make sure that there is a clear documentation stating the explicit purpose of the lending in order to make the special provision applicable.