CIVIL AND CRIMINAL LIABILITY FOR ADVICE PERTAINING TO ISSUES OF TAXATION

BY

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I. INTRODUCTION

During recent decades advice pertaining to issues of taxation has expanded tremendously. There are obvious reasons for this: the burden of taxation has increased tremendously. In the Nordic countries taxation on personal income may be as high as 80%. But indirect taxation has also increased considerably in the form of VAT (value added tax), excise taxes and other taxes. Further, tax legislation itself has grown beyond all bounds and has been marked by extensive uncertainty which, frequently, can be clarified only by means of judicial decision. On the whole, legislative provisions have become exceedingly complex and incalculable. As the need for professional advice has steadily increased, so has the risk of error in the advice given, and this leads us to the subject of liability discussed in this paper. The following presents a basis for discussion built upon *Danish law*.

The discussion will concern only professional tax advice; in other words advice proffered by a person as part of his professional expertise. The groups of primary interest are professionally qualified accountants and lawyers, who traditionally have been engaged in this type of advisory service. But in recent years other groups have been offering professional tax advice, and these include estate agents, insurance companies, banks, savings and loan associations and investment firms.

The section of this paper on civil liability is by Anders Vinding Kruse, and the section on criminal liability is by Jesper Lett.

II. CIVIL LIABILITY FOR TAX ADVICE

A. *The Basis for Liability*

No provisions in Danish law deal directly with the issue of liability for erroneous advice. Liability is based upon judicial practice, which has applied the principle of fault in contractual relations. A professional adviser will, however, be subject to strict liability for faults committed by his employees in accordance with the old provision in 3-19-2 of the Danish Code of 1683.

As mentioned above, several business groups offer professional tax advice nowadays. In all essentials judicial practice has, however, dealt with the liability of accountants and lawyers only. It appears, however, quite clear that, at least as a basic principle, the rules on civil liability should be identical for all types of professional tax adviser. In other words, it would not be reasonable if a man engaging in tax advice should be subject to rules of liability other than, for instance milder than, those applicable to lawyers and accountants. In offering its assistance, a bank has conveyed a justified expectation that it musters the same professional insight as an accountant or a lawyer, and it should not be allowed to invoke such mitigating circumstances as the fact that its employees have less extensive training.

Judicial practice is based upon a rule of fault, and in the present context this means that the assessment of liability for loss inflicted by erroneous advice is based upon a *special professional standard*, where the decisive element is whether the adviser in the specific situation has exercised such diligence and professional efficiency as one could reasonably demand from a person in his profession. As is the case with the traditional rule of fault one must first bear in mind what would be considered an appropriate procedure within the relevant professional group (for instance the General Council of the Bar) in a given situation. Clearly, however, this standard could not prevent the courts from ruling that following a traditional and normal procedure within the professional group does not suffice to escape liability. Conversely, there are several cases where no particular traditional procedure has emerged; in the case of lawyers reference may, for instance, be made to the opinion given by the General Council of the Bar reported in a Supreme Court ruling (1958 UfR 510) that "one cannot point to a firm practice or usage in the area under discussion; but the extent to which a lawyer is obliged to investigate the validity of a mortgage deed must, in the Council's opinion, depend upon an individual assessment in each and every case".

Thus, although the standard of assessment of liability for advice is of course clear in theory, the application of the standard in specific situations may lead to results of considerable divergence. Further, no clear picture of the consequences of the rule of fault in specific instances is possible until the relevant duties incumbent upon the expert in question have been established.

Regarding tax advice, this means that great importance must be attached to exactly what duties the adviser has undertaken in the specific case—or what duties should reasonably be imposed upon him given

the nature of the case. If it is assumed that the advice given in an individual case has been appropriate, the adviser does not become liable even if the advice does not lead to any positive results, or even results in losses: the adviser will still be entitled to his normal fee.

Tax advice may occur in various forms depending upon circumstances. The simplest form is where a client asks what provisions of tax law are applicable to a given situation, for instance whether the sale of a piece of real estate or a business will be subject to taxation, or whether a specifically defined cost constitutes an item deductible from taxable income, or whether a percentage depreciation applies to a piece of inventory. But advice may also occur in a more indirect manner. It is obvious that an accountant who undertakes to draft a tax return for a client must be assumed to do so in accordance with tax legislation, whereas such an assumption would not obtain in relation to the drafting of yearly accounts which are not directly applicable in relation to tax authorities. Yearly accounts may often be drafted for different purposes. It is also evident that an insurance company that urges a person to take out a life insurance by arguing, among other things, that the premium is tax-deductible must be liable for incorrect information. A similar rule applies to information provided by an investment company regarding tax advantages in subscribing for shares in an investment project.

Other situations may give rise to great discussion: one is where a lawyer has been engaged to draft a contract regarding the sale of certain industrial machinery by one businessman to another, but where he was not also required to advise on the taxation consequences of the sale. Even greater doubt arises in situations where a lawyer has been given the task of selling a piece of real property, for instance, from the estate of a deceased person or in connection with a divorce. Is he obliged to devise a sale procedure which results in the smallest possible taxation, and does he become liable should he fail to do so? This problem, which could be designated *liability for failure to speculate in terms of taxation*, has come much into focus in Denmark in the light of recent court decisions. The problem will be dealt with separately in section B below.

As for the main problem of liability for erroneous tax advice one would be prone to imagine that clear-cut legal issues are always involved, but this is far from always the case. Frequently, the client may also wish for more general business advice. If, for instance, he is considering buying an apartment house, he may seek the assistance of his solicitor not only with the legal aspects, but also concerning the business appropriateness of the deal. Against the background of the

lawyer's often extensive business experience, the client may get valuable guidance in this respect also. Clearly, however, while one cannot in advance exempt a lawyer from liability for business advice, any assessment of his liability must differ from (in practice be milder than) his liability for strictly legal advice given in his professional capacity. Identical considerations may apply to an accountant. As well as giving these types of help a lawyer or an accountant will often advise his client in purely personal matters. Here also, he may, in the light of his experience, be in a position to render purely human guidance. But only in rare circumstances, for instance if a piece of advice may be designated as disloyal, can the issue of civil liability be raised.

Schematically, then, advisory service may be divided into the three categories exemplified above: professional legal advice, more general business advice and purely personal advice. In practice these may overlap, but in terms of civil liability each must be assessed separately.

In establishing liability, a distinction must be made between complex legal problems on the one hand and unambiguous legal rules leaving no reasonable doubt on the other. Where faulty advice inflicts a manifest loss upon a client, the adviser will normally become liable, if the advice given deals with clear and simple issues; that is, legal issues which would not lead any careful lawyer or accountant to any reasonable doubt. Examples might be the significance of a deed being registered, or the amount of death duties to be paid by a deceased person's issue. If, on the other hand, doubtful legal issues are involved the adviser will normally not become liable for faulty advice. This applies also to business advice, where the assessment is even more uncertain.

The liability for faults regarding clear legal issues approximates the liability for purely procedural errors such as non-payment of an instalment which the lawyer/accountant/estate agent has undertaken to pay. Where a lawyer for instance has undertaken to arrange a real estate transaction, it makes no difference in terms of liability whether his failure to arrange succession of debt is based upon the point having been overlooked or upon a misinterpretation of the provisions of art. 39 of the Land Registration Act.

The basic distinction between unambiguous rules and complex legal problems does, however, give rise to various difficulties.

In the first place the distinction between the two is not always easy to establish. Where the interpretation of a legal provision may give rise to reasonable doubts, the adviser's faulty interpretation should normally not be subject to liability. One may almost rely upon the old axiom that the adviser should have the benefit of any reasonable doubt. On the

other hand one cannot exclude the possibility that a faulty interpretation is so much amiss that it must result in liability.

One should also be aware of the problems involved in a clear limitation of the task entrusted to the adviser and its implication for liability, since liability must depend upon the obligations which the adviser has undertaken. In numerous cases tradition will decide the issue, but if in doubt the careful adviser should outline in writing what tasks he has undertaken.

As mentioned above there is no doubt that the main rule in Danish law is that a tax adviser is liable for faults regarding a clear legal provision, irrespective of whether the fault stems from a mistaken belief that the rule is subject to interpretation or whether the adviser is ignorant of the rule in question.

If, however, a lawyer or an accountant is consulted on uncertain legal issues which can be solved only on the basis of uncertain interpretations of statutory provisions or judicial practice, the adviser will normally not become liable although application of the norm of fault may give rise to certain difficulties. This is also true where the issue involves the lawyer's assessment of the factual circumstances of a case with a view to evaluating the appropriateness of bringing a court action.

First one must ask, how can it be established that the adviser has given inappropriate advice? In principle, this can be established only by means of a judicial decision, unless we are faced with a general and firm legal interpretation which legal writing has not brought under any serious doubt. But a firm legal interpretation normally constitutes an "unambiguous" legal issue which may result in liability. It is thereby underlined that, in objective terms, one must be faced with a dubious legal issue. The fact that the adviser is subjectively, and for no good reason, of the opinion that the rule in question is subject to interpretation cannot exempt him from liability in situations where any competent lawyer would characterize the rule as an unambiguous one.

On the other hand one should not hold the adviser liable for a "faulty assessment" of the interpretation of an unclear rule of law where his assessment is based upon careful examination of the statutory provision, the commentaries to the act, judicial practice if any, and legal writings, provided that his deductions from such sources are in accordance with, or at least do not clearly differ from, traditional theory on the sources of law. There is no question of fault here, and any liability imposed would be tantamount to a strict liability, which would be unreasonable and which, incidentally, would not be in the best interest of the client. Identical points of view must obviously apply in the case of a rule which has evolved in judicial practice.

In assessing the factual circumstances of a case with a view to evaluating the likely outcome of a court action, similar considerations will apply. Again, a lawyer cannot become liable if he has carefully delved into the factual circumstances of a case, and if his assessment is based upon a reasonable evaluation of the weight of evidence seen in the light of general experience regarding court actions.

The foregoing gives almost an ideal picture of advice regarding unclear legal issues, and the obvious point has been expressed that liability cannot be imposed for "faulty assessment". The problem now is, however, whether the demand upon the adviser's involvement and attention should not be lowered somewhat in everyday practical life. It would hardly be in the best interest of clients if an adviser were to precede his advice with a major jurisprudential investigation, since this would result in a corresponding increase in his fee without any guarantee that the advice would be "more qualified". The precise extent of detailed and careful examinations which the adviser should undertake would also have to depend, to no small extent, upon the specific circumstances of the case and the task involved, including the magnitude of the case and its significance to the client, the nature of the inquiry, the probable amount of work and remuneration, etc. However, not all difficulties in assessing the basis for liability have been overcome even if one has reached an equitable and fairly clear standard for assessing the time and diligence which the adviser should spend on the specific case, for even if the adviser's involvement in the case does not meet the traditional standard (he may perhaps even have been very negligent) it does not necessarily follow that his assessment and advice would have led to a different and more satisfactory result, had he taken more pains. In the last analysis we are faced with unclear legislation where divergent solutions may all be claimed to be "of equal validity". On the basis of traditional fundamental principles of the law of tort there is no basis for liability in situations of this type, so that the only remedy available to the authorities would be the application of disciplinary sanctions or, possibly, the reduction or waiving of the fee. It is, however, not easy to establish a general standard for the extent of lawyers' or accountants' commitment to a specific case. This fact may be illustrated by certain characteristic cases from judicial practice.

> 1946 UfR 205 reports the following case: The buyer of a piece of real estate had brought an action against the seller who was requested to pay compensation of DKK 15,000 because certain apartments on the top floor did not comply with the statutory provision, so that the total income of rent became less than had been promised. The seller rejected the claim on the ground

that he had acted in good faith, since the apartments in question had been built a long time ago and prior to his ownership. For various reasons the court action became a lengthy affair and the buyer's solicitor offered to settle the case against payment of DKK 3,500. The seller's solicitor recommended acceptance, and the case was consequently settled on this basis. Some time later the seller happened to learn from a supreme court barrister that, on the basis of judicial practice, the buyer could not have won the court action had the case been pursued. Consequently, the seller brought an action against his solicitor, during which the old case was reviewed and judicial practice as well as the liability of a real estate seller was discussed. The court did not take a position on the likely outcome of pursuing the original case, but held that there was no basis for blaming the lawyer for any negligence involving liability to his client simply because the lawyer, in the light of his experience and insight into the real estate market, had recommended a settlement without engaging in a detailed examination of legal writings and judicial practice in this particular case. The court attached importance to the fact that "the judicial practice invoked by the plaintiff cannot be considered to be of such an unambiguous nature as claimed by the plaintiff".

Clearly, making a precise distinction between unambiguous rules of law and the more ambiguous ones may occasion difficulties. As appears from the judgment just reported, an action for damages will compel the court to decide the issue on its merits but, in principle, the purpose will be merely to establish whether the issue is to be classified as unclear.[1]

The statement of the 1946 judgment on the problem of examining legal writings is significant. During the action the lawyer explained that he had always studied *Ugeskrift for Retsvæsen* (a Danish legal weekly gazette) but that he had not specifically examined legal writing and judicial practice in the light of the present case. His advice was based simply on his general legal knowledge and insight.

On the basis of the outcome one may apparently summarize judicial practice by saying that normally a consultant is not obliged to research extensively into legal writing and judicial practice every time he is requested to pronounce on a legal issue: he is entitled to rely simply upon his general judgment. If, however, major amounts are involved, or if the case is otherwise of major importance to the client, the consultant should apparently undertake special research.

Should an adviser render his advice with no attempt at research on

[1] See also the High Court judgment reported in *Sagførerbladet* 1939 A.75, the grounds of which stated, among other things: "Regardless of whether the position maintained by the defendant may be found to be the crucial one in deciding the issue at hand, it has at any rate been of such doubtful nature that no possible faulty assessment in this respect could result in the plaintiff becoming liable".

legal writings and judicial practice he should, depending on the specific circumstances, become liable where the court feels reasonably convinced that his advice has been based upon a wrongful legal conception, or at least one which the court would appear unlikely to accept. One must, however, recognize that it is difficult to delimit the "obvious" wrongful assessment.

An entirely different problem is whether an adviser should inform his client that the issue is a doubtful legal one. Normally, he should do so, since it is conceivable that the client would not wish to act on the basis of an unclear legal provision: such action could well become a costly affair should a client subsequently be involved in court actions or, at least, in cumbersome discussions with tax authorities occasioned by his acting on the basis of an uncertain assessment. Should the client, for instance, have inquired whether he was obliged to withhold tax at the source in making a payment and should he have been told that he had no such obligation, he runs the risk of the question turning out to be a controversial one and of becoming obliged to make a missing payment or to go to court. If the client had been advised that the question was a doubtful one, he might have preferred to withhold tax at the source, thereby avoiding any possible subsequent inconvenience. It is for the client alone to take this decision. Consequently, the adviser should not impede the client's decision by concealing the fact that the legal provision is unclear. Conversely, the adviser's faulty opinion that the problem leaves no doubt does not serve as a valid excuse.

A different problem lies in the question whether the adviser, on his own initiative, should propose to the client a procedure entailing a certain tax saving, despite a risk that the procedure would be set aside by the tax authorities as one giving rise to judicial doubt. We shall return to this difficult issue under the heading "failure to suggest favourable tax arrangements".

Here it must be repeated that in such situations advisers are obliged to inform a client of the risk. Further, if there is a risk that a procedure might even result in criminal liability it should at least be advised against.

A judgment rendered by the High Court for the Western district on June 20, 1986, illustrates the problem:

> A chartered accountant had established a partnership in Switzerland together with a Danish lawyer living in Switzerland. The partnership was to act as a sales office for a Danish limited company with one major shareholder. The partners were the main shareholder and a Swedish businessman. Under a contract of cooperation, the partnership was to take care of the

company's interest in central Europe, but in practice, since it lacked its own organization, it acted merely as a company issuing invoices pertaining to export to Sweden and Finland from the limited company. The partnership was subject to taxation in Switzerland. The Danish tax authorities, however, did not recognize this arrangement. They taxed the Danish company and its main shareholder on income stemming from Switzerland and rejected any mitigation of Danish taxes because of taxes paid in Switzerland. On this basis the main shareholder entered into a settlement with the tax authorities under which he paid major amounts of tax and accepted major tax fines. Subsequently the main shareholder and his company brought an action for damages against the accountant's firm of which the accountant was a partner. The total amount of damages was DKK 1,992,370, computed as follows:

Tax paid in Switzerland: DKK 1,158,307; fine imposed upon the Danish company and personally upon the main shareholder: DKK 700,000; and fee to advocates in connection with the action: DKK 134,063.

The High Court for the Western district held the accountant's firm liable in the amount of DKK 1,200,000. This decision was based upon the fact that the accountant, when the partnership was established, had acted as adviser to the main shareholder as well as to the company, and that the main shareholder had demanded that establishment should not entail any "tax advantages reached by circumventions of Danish tax legislation". Referring to the case 1960 UfR 535 (Supreme Court), the court stated that the accountant ought to have drawn attention to the special problems involved in spinning off an activity, particularly in view of where this spin off took place. The court also attached importance to the fact that the accountant had been thoroughly familiar with the running of the partnership and therefore should have made it clear that the mere issuance of invoices did not eliminate the obligation to pay taxes in Denmark.

Consequently, the accountant's firm was obliged to reimburse taxes paid in Switzerland and one half of the main shareholder's lawyer's fee, in total DKK 1,224,338. The fine imposed upon the main shareholder and the other half of the lawyer's fee, which presumably covered services relating to the fine, was not included in the computation of damages, since the main shareholder's acceptance of a fine was based upon his admission of gross negligence and thereby of contributory guilt of such gross nature that, under traditional rules on contributory negligence, any liability would have lapsed. An appeal to the Supreme Court has been filed against this judgment. Reference is also made to the Supreme Court judgment reported in 1986 UfR 662.

As will be seen the decision is also based upon the assumption that an adviser may likewise become liable for a client's fines.[2] The present author considers such liability risky, unless the client is in no way to blame because he assumed that the adviser would strictly follow tax legislation.

[2] See also 1922 UfR 921, 1924 UfR 56 (Supreme Court) and 1986 UfR 662 (Supreme Court).

As stated in the Introduction, Danish tax legislation is complex and lacks perspicuity. Statutory provisions have expanded considerably and a good many provisions give rise to unclear interpretation, particularly when compared with other provisions. Consequently, the fundamental distinction between unambiguous and doubtful rules of law often becomes a vague one. As already mentioned, liability should not be imposed as long as the interpretation of a rule of taxation gives rise to any reasonable doubt. But even where no doubt of interpretation arises, there may be situations in which it seems debatable whether liability should be imposed. As an example may be mentioned a case which is currently under consideration and which was reported in an issue of *Advokatbladet* (The Advocates Journal)[2a] under a heading which might be translated "The Foxtrap".

> In 1975 a businessman purchased premises where he established a business company. The company paid rent to the businessman, and in 1979 a major renovation and expansion took place. Value added tax to be paid to the contractors amounted to DKK 250,000, and the businessman who was the financially responsible builder and who was personally registered for value added taxation, deducted this amount. In 1982 the businessman sold the entire premises to a bank. Banks, however, are not subject to value added taxation and, consequently, cannot take into account the depreciation of a seller's value added tax obligation. This resulted in an obligation to pay additional value added tax, under art. 16 of the Value Added Tax Act (cf. art. 2 of Act no. 312 of May 16, 1978) and the businessman was consequently obliged to refund value added tax deducted in the amount of DKK 166,666.
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> In negotiating the sale the businessman had had as his advisers a lawyer and a chartered accountant. During the negotiations, neither of these advisers brought up the issue of value added tax. Consequently the businessman has now brought an action for damages against the two advisers on the grounds that their advice in this respect was negligent.

During the debate in 1982 in *Advokaten* on failure to advise, the present author proposed that the General Council of the Bar should draft a list of legal pitfalls. Having subsequently read the case referred to as "The Foxtrap" on this issue in relation to tax legislation considerable doubt remains whether such a list is at all feasible.

The Danish Code of 1683 included practically the entire legal system: criminal law, the administration of justice, the law of contract, ownership and tenancy, tort, agricultural law, canon law, etc. Even so the Code could cope with this within some 2,000 articles. During the ensuing 300 years legislation has increased dramatically. A recent yearly

[2a] 1985, p. 205.

issue of the law gazette contains the almost incredible number of some 12,000 articles. Admittedly, some of these articles may be but repetitions of previous legislation. None the less the number is tremendous and, in the view of the present author, entirely unacceptable. One is tempted to believe that our legislators assume that the greater the number of acts the better for the country. The preamble to the Jutland Code said: "Our land shall be based upon law", but this outspoken sentence presumably referred to the quality rather than to the quantity. Nowadays almost everything from birth to death is pervaded by legal articles. It means judicial work for lawyers, but in the long run it may mean a deterioration of respect for legislation and, if so, society's concept of the rule of law vanishes.

Returning to an adviser's liability for lack of legal knowledge, the issue arises whether such liability should always obtain. In this connection reference should be made to a new provision on mitigation (common to all Nordic countries) which has been inserted in the Danish Damages Liability Act (*Erstatningsansvarsloven*) of 1984. Article 24 reads as follows:

> Liability may be mitigated or lapse where liability would involve an unreasonable burden on the party liable or where various special circumstances otherwise make this reasonable. In deciding the issue, due regard should be had to the extent of damage, the type of liability, the situation of the tortfeasor, the interest of the injured person, existing insurance, and other circumstances.

This rule applies to all types of liability, in other words liability under the rule of fault as well as strict liability. Liability under contractual relations likewise falls under the scope of the rule. However, as is implied, the rule constitutes a limited rule of exception and may be designated a kind of "safety valve" on liability. It should apply in relation to an adviser's liability where such would appear unreasonably burdensome, for instance if far exceeding the maximum of liability insurance, where any negligence exercised is fairly limited, or where an adviser would become liable for an employee under art. 3-19-2 of the Danish Code. Further, the rule of mitigation is also applicable even if liability cannot be said to be unreasonably burdensome, "where various special circumstances otherwise make this reasonable".

As for the special rule of mitigation contained in art. 143 of the Limited Companies Act, reference may be made to section C below.

But even where the conditions of mitigation described by art. 24 of the Damages Liability Act are not fulfilled, the issue arises whether the rule of liability is not too strict in the case of tax legislation.

The issue is a difficult one, but there ought to be a possibility of modifying liability. Some decades ago it was normally possible for a competent adviser to establish which were the unambiguous legal rules covering a particular tax problem, and where legal provisions could give rise to doubt that could be settled only by means of a judicial decision. Such is no longer the case.

As already pointed out the solution to a tax problem often requires major research merely to find the necessary sources. The volume of tax acts issued by *Juristforbundet* (an association of Danish lawyers) comprises almost 13,000 pages, and since statutory provisions are amended at a constantly increasing rate, doubt will frequently arise as to whether a particular provision stands unamended. Add to this the issue of construction which may frequently necessitate detailed research on judicial practice (including that of the Tax Assessment Tribunal as well as the ordinary courts), and administrative decisions, for instance those of the Tax Assessment Board, etc.; and such decisions often have to be found in various published or unpublished material. Conceivably, extensive research may show the relevant rule to be unambiguous, but should this necessarily and automatically result in the adviser becoming liable?

One should carefully consider whether the adviser should not be exempt from liability where faulty advice is based upon lack of knowledge of very specific, particularly novel, legislative provisions; above all where they are unexpectedly "hidden" in a major legislative complex. Nowadays this is no rare phenomenon: even the careful and conscientious adviser may come up against an unpleasant "element of surprise". It may be unreasonable to demand that an adviser should be familiar with such a "hidden" provision.

This point of view may appear to be very provocative. Even in relation to the layman our legal system is still based upon the old axiom: *ignorantia juris semper nocet.* Against this background how could one venture to suggest modifications in relation to a professional adviser?

Yet it is inequitable that the state should implement such an axiom unmodified where the state has itself created a legal jungle. Our concern here is not the sociological reasons for the present statutory chaos: such however is the situation.

Admittedly, one may argue that the proposed exception may be difficult to handle in judicial practice. But this objection holds for many other provisions without this preventing the courts from applying the rules, and a rule such as the one advocated here seems to be a reasonable modification of liability within our current chaotic tax legislation.

One might also invoke sec. 84, subsec. 1, no. 3 of the Criminal Code under which a punishment may be reduced "where the perpetrator has acted in excusable ignorance or excusable misinterpretation of legal provisions prohibiting or prescribing a certain act". This provision, which however does not appear to have been of any major significance in criminal tax cases, ought to have a counterpart in the area of private law. One could object that an exemption as outlined would mean deterioration of trust in accountants and lawyers. However, the proper view would, rather, be a deterioration of trust in the legislation.

Support for the proposed rule may be found in a few judgments.[3] In this connection we shall also consider whether a rule of exemption as proposed above goes far enough. The argument that a tax adviser may relax since he is normally covered by a liability insurance does not appear to be particularly cogent: the adviser will normally be subject to a major risk himself as well as a maximum liability; also, the premiums, already extremely burdensome, may have been influenced by the damaging events.

B. *Liability for "failure to suggest favourable tax arrangements"*

Liability for failure to suggest favourable tax arrangements has concerned lawyers particularly. It has emerged in the way that a client asks a lawyer to handle the legal aspects of his case, for instance a separation. Where the lawyer is not specifically requested to recommend a solution favourable in terms of taxation, the question arises whether he should, on his own initiative, take the tax aspects into account and try to conduct the case in such a way that the client receives the smallest possible tax bill. This difference in the terms in which advice is sought should play no unimportant role in assessing liability.

However, this type of tax advice involves difficult problems regardless of the terms of the adviser's instructions. This is so particularly because transactions aiming at a solution which costs as little as possible in terms of taxes, frequently contain an inherent risk of being set aside as circumventions while, if the worst comes to the worst, there may even be a risk of both client and adviser incurring criminal liability.

Other possible problems associated with this type of tax advice, for instance ethical ones, will be elucidated in connection with recent judicial decisions on the issue.

[3] Reference is made to 1947 UfR 676 and 1977 UfR 50 (Supreme Court). 1985 UfR 589 reports the latest Supreme Court judgment, reference to which will be made below in connection with the issue of failure to suggest favourable tax arrangements.

For a long time scant attention was given to this problem within the legal writing on lawyers' liability until the appearance of an Eastern district High Court decision of March 1981. The judgment was reported in *Advokaten* and a major debate subsequently evolved.

The facts of the case were as follows.[4]

> In October 1976 Mrs Vibe Hald asked advocate Flink to assist her in a case of separation from her spouse, Valdemar Hansen. Advocate Flink proceeded with the separation case and on February 17, 1977, a separation judgment was rendered.
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> Prior to the separation the spouses had discussed the pending division of the estate with advocate Flink. The husband had a farm which had to be sold, and the spouses agreed that the proceeds should be divided equally between them. The advocate advised the spouses not to include the farm in a division of the estate, which he was to handle after the separation. The farm was sold on January 10, 1977. Advocate Flink was not involved: another solicitor and an estate agent arranged the transation as well as the administration. When the separation was completed advocate Flink drafted an agreement on the division of the estate and this was signed by both spouses on March 30, 1977. The agreement said among other things:
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> "The division of the estate does not include the proceeds derived from the sale of the farm in Slaglille since the lawyer who handled the transaction has handed over one half of the cash payment and of the securities to each party..."
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> Advocate Flink's fee for his assistance regarding the division of the estate amounted to DKK 700, of which Valdemar Hansen paid DKK 250.
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> Subsequently the spouses brought an action against advocate Flink, claiming that they had suffered a loss of DKK 20,300 because the sale of the farm had not been postponed until after the separation and had not been based upon an equal division of the proceeds thereof. Had the transaction been arranged in this way, the sale would not have been subject to special income taxation. The plaintiffs claimed that advocate Flink was liable for this loss since he had not advised them to proceed in the way outlined.
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> Flink disclaimed liability, stating in particular that he had nothing to do with the sale of the farm and that he had had no incentive to intervene. Prior to the separation he had represented only one of the two plaintiffs, Mrs Vibe Hald, and he was entitled to assume that the guidance necessary to Mr Hansen had been given by 1) the estate agent, 2) Valdemar Hansen's own lawyer or 3) the lawyer handling the sale.

The Town Court found that a loss had not been established, but, additionally, held that the lawyer was under no obligation to render advice regarding the taxation aspect of the case.

Appeal to the High Court, however, resulted in the following decision, which refers to a statement by the General Council of the Bar:

[4] With the modification that the names of the parties involved are fictitious.

> ... the Council states that a lawyer who advises spouses or one of two spouses regarding the division of a joint estate should, even if not so requested, examine the taxation consequences of a possible sale of the assets of the estate, and should inform the client of the possibility of reducing special income tax by dividing assets with one half to each spouse after the separation, and only then proceed to sell ... According to the information submitted to the High Court, attempts to have the amount of taxes refunded from the tax authorities have been without result.
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> The issue of liability for special income tax in selling a joint estate asset when the spouses are negotiating a separation is of such major importance that, having regard also to the correct balancing of the estate, a lawyer advising one of the parties regarding the division of the estate is obliged to draw attention to the problem as one of relevance to the estate; this is so even in a situation, as the present one, where the lawyer has been informed that a sale is being arranged by a third party. Apparently, the appellants are correct in arguing that reasonable possibilities obtained for arranging such formalities as were required with a view to avoiding taxation; consequently, the court is of the opinion that advocate Flink has had a part in the estate suffering a loss, and that he has been negligent in a way that renders him liable. Both spouses have a right to damages on account of this loss. For the reasons invoked by the lawyer the loss cannot be assessed to the amount paid in taxes but, in the discretion of the court, damages are fixed at an amount of DKK 10,000.[5]

The tendency emerging from the 1981 Eastern district High Court decision, reported above, has been adopted in a decision of March 7, 1983, by the High Court for the Western district:[6]

> A farmer died on December 31, 1976, leaving a widow and five children of age. On January 10 the widow bought a small house, and on January 21, 1977, she sold the farm. On February 2, 1977, the heirs appeared in the probate court and the widow was allowed to maintain an undivided estate.
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> When selling the farm, computation of special income tax had given rise to problems, since the farm was a result of a decision on land distribution involving problems in computing the precise purchase sum. The estate agent had assessed the amount to be paid as special income tax, but had reserved his position on this. The preliminary deed was therefore conditional upon a solicitor and a farmers' association approving the transaction. During the court case it appeared difficult to obtain precise information as to what had actually been said regarding the amount of special income tax, no guidance having been given on the possibility of completely avoiding

[5] Similar considerations are applied by our courts to chartered accountants, cf. *Tidsskrift for Skatteret* 1986, pp. 398 ff. (comment by I.A. Strobel). In most cases, however, the accountant becomes liable on account of his failure to warn his client of the risk that tax authorities will not accept a transaction or a business procedure. See among others the decision of June 20, 1986, by the Western district High Court, reported above, and 1986 UfR 662 (High Court).

[6] Reported by Georg Lett in *Revision og Regnskabsvæsen* 1986, pp. 253 ff.

> this. The estate agent was not held liable, among other things because he was not considered obliged to render advice on special income tax. The farmers' association and the solicitor became jointly liable in the amount of DKK 30,000, to be divided equally between them. The Lower Court and the High Court reached their result on the basis that both the farmers' association and the solicitor did have an obligation to render advice regarding special income tax.

The grounds of the High Court judgment included the following:

> Since the farm was sold as an immediate consequence of the demise of the husband, since the preliminary deed was conditional upon the approval of the farmers' association and of the solicitor, and since it should have been clear to them that the issue of special income tax was predominant in connection with the transaction, the defendants are held liable for neglect of their duties as solicitor and as accountant respectively through not advising the appellant on the results in regard to special income tax in connection with the probate. Computation of the loss which the widow suffered is very uncertain. The widow's computation is based upon a probate procedure which, at least at that time, could not be considered generally known and applied, and it appears uncertain what tax savings would have been involved had the estate been probated under a different procedure. For these reasons, and also having regard to the other arguments invoked in the case, the court upholds the amount of damages which have been fixed in a discretionary manner.

The 1981 decision as well as that of 1983 involved sales of real estate. The lawyers' normal fees for assistance with a real estate transaction include: "Additional advice regarding a transaction and its consequences in terms of taxation". In other words, rendering advice on the taxation problem has actually been made a duty imposed upon the lawyer. However, the precise extent of the advice required creates some doubt. It must, among other things, depend upon the specific circumstances of the case, for instance whether the transaction involves a home, business premises, a farm, etc. Also, the transaction has normally been concluded at a stage at which a deed has to be drafted. The General Council of the Bar apparently goes quite far in holding lawyers liable, cf. the 1981 decision and see further below.

Apparently it is the general rationale of the judgments as well as of the General Council of the Bar that lawyers and accountants should, as a general rule, not only raise such issues of taxation as that exemplified above, but should also evolve a procedure resulting in the lowest possible taxation. To some extent, the two judgments have been modified by a Supreme Court decision reported in 1985 UfR 489; but the precise scope of this judgment seems rather unclear. The facts of the case were as follows:

In November 1978, advocate A was approached by two sisters B and C appearing together with an accountant. The sisters requested the solicitor's assistance in handling the estate of their deceased mother. The main asset of the estate was a farm which B was to take over on December 31, 1978, on terms already agreed upon. The solicitor immediately drafted a deed conveying the farm to B but the closing date for the estate was stipulated as September 17, 1979, that is, 15 months after the mother's demise. Consequently, the transaction regarding the farm was subject to taxation in the estate. Later on another accountant drafted a memorandum from which it appeared that the tax imposed could have been avoided if the solicitor had arranged for B and C to take over the tax position of their deceased mother, each becoming liable for one half, and had subsequently had C transfer her half to B. In the light of this, C brought an action against the solicitor claiming damages for negligent advice, since the latter had given no information on the alternative procedure. Damages were claimed in the amount of DKK 32,000. The court of first instance held the solicitor liable and, in its discretion, fixed damages in the amount of DKK 20,000. However, the solicitor was not held liable by the High Court or by the Supreme Court.

In this case an opinion had likewise been requested by the General Council of the Bar:

1. Is a lawyer assisting the heirs in connection with a private probate obliged to offer independent advice on the tax consequences of transferring the assets of the estate with or without succession, it being assumed that such advice had already been given by the heirs' accountant?
Answer: Yes.
2. Does it make any difference whether the accountant referred to is
a) a chartered one
b) a registered one or
c) some other kind of accountant?
Answer: No—since the lawyer should give independent advice.
3. Should a lawyer handling an estate exclusively take into account considerations of taxation so that the tax to be paid by the heirs is limited as much as possible?
Answer: No, not always, since considerations other than those pertaining to tax may be relevant.
4. As an extension of question no. 3, the General Council of the Bar is asked to state whether it is always an error to recommend the transfer of assets without any succession, if it means that the estate becomes liable for taxes exceeding the tax obligation which would follow from transferring assets upon succession.
Answer: As 3.
5. Is a lawyer who renders advice and who handles an estate obliged to recommend transactions whose only purpose is to diminish the burden of taxation? As an example may be mentioned the transfer of assets to persons who do not desire the assets in question, but who receive them for the mere purpose of engaging in subsequent transfers?
Answer: The lawyer should state the possibilities of diminishing or avoiding special income tax.

In the case under discussion the lawyer claimed, in the first place, that he had no independent obligation to offer advice where the client had already received advice from an accountant. The Supreme Court as well as the General Council rejected this argument.

Secondly, it was argued that the solution suggested was not tenable in terms of taxation. The basic idea was that the sister not taking over the farm could feel secure under this alternative model only if she had an advance guarantee that the other sister would acquire the farm under terms previously agreed upon. Before the High Court she gave evidence that she was financially unable to take over one half of the farm. If, however, there existed a prior agreeement between the two sisters, verbal or written, by which one half of the farm should be transferred to the other sister under terms already agreed and on condition that the sister would run no financial risk, nor be subject to any financial consequences in connection with her ownership, then the transaction would have no effect for the sister other than the one stemming from the taxation aspect. However, in tax authority practice such a transaction would be set aside as invalid for taxation purposes.

Finally, it was argued that a lawyer could not become liable for not recommending an arrangement which was too close to the borderline of illegality.

In its grounds the High Court, among other things, stated the following:

"In choosing the type of taxation, it was evident that the sister of the defendant was eventually to own the farm. Transferring one half of the farm to the defendant, combined with a subsequent transfer of this half to the sister, would have been motivated exclusively by tax considerations. In the opinion of the High Court it is not necessary to assess whether a disposition of the type outlined could have the intended effect in terms of taxation, or whether it could be set aside, as alleged by the appellant. Even if the transaction could be maintained in terms of taxation, its nature was such that the appellant's failure to suggest such a procedure ought not to result in any liability for him."

This judgment was upheld by the Supreme Court, but with certain changes in the grounds:

"The defendant assisted the heirs in handling the estate under private probate and consequently had an independent duty to advise them on what procedure regarding transfer of the farm appeared to be the most advantageous, also in terms of taxation. The report given by Bent Madsen, chartered accountant, in his letter of July 4, 1980, on which the appellant bases her claim, did however presuppose application of a procedure for acquisition of the farm by the appellant's sister which could not naturally be derived from the Taxation at Source Act provisions on taxation of estates, together with the rule of the current Special Income Tax Act regarding taxation of profits on real estate sales. On the whole, this procedure cannot be assumed to have been so widely known that there was a duty to provide information thereon as a prerequisite to providing proper and exhaustive advice. In these circumstances no grounds are found for holding the defendant liable, and the judgment is consequently upheld."

As will be noted, the High Court, the Supreme Court and the General Council link the duty of a lawyer to give advice on taxation issues not to the rule referred to above on profits from real estate transactions, but to the settlement of an estate. It also follows from the rule on estate taxation that a lawyer should try to have various matters clarified during the winding-up of the estate where taxation aspects are involved. Should, for instance, an asset be subject to taxation in the estate or should one or more heirs take over the tax position of the estate and the deceased person? It is often difficult to decide. It depends among other things on whether the heirs are able to agree on the value of the particular asset, on whether the asset is to be sold immediately after the winding-up of the estate, on the cash position of the estate, and so on. However, even though the problems involved may be difficult to solve and often demand a good deal of diplomacy from the lawyer, the tax provisions are reasonably clear. The problems involved in the judgments reported are of a type which arises only in situations where more complex transactions present a possibility of incurring less tax than would be "normal".

As appears from the last-mentioned judgment, the basic position of the Supreme Court is that a lawyer handling an estate has a separate duty to render advice on the procedure which will be the least expensive one in terms of taxation. However, the grounds given in the judgment indicate that no such duty exists where the procedure involves particular difficulties as a consequence of the complexity of tax legislation, unless the particular procedure was common knowledge among lawyers and accountants. In this respect the judgment falls in line with the exception proposed in section A above. On the other hand the Supreme Court takes no position on whether the procedure in question would be approved by the tax authorities. The High Court touches upon this issue but merely states that, given the nature of the transaction, no liability should be imposed. One can only guess at the precise scope of this statement. Apparently the Supreme Court is of the opinion that the transaction was a legal one: Had the Court considered it illegal, the judgment would have had to reject damages on that basis.

Even assuming that the Supreme Court considered the transaction legal, the issue raises so much doubt that it is impossible for a lawyer or an accountant to establish in advance that the authorities would give their approval. What is involved constitutes a doubtful legal issue which cannot be finally clarified until decided by the authorities.

Should an accountant or a lawyer, on his own initiative, take up the issue whether a particular procedure would be appropriate, he is un-

doubtedly entitled to recommend, or to advise against, the procedure in accordance with his best assessment. If he recommends a particular procedure he should, however, inform the client of the legal doubt involved and the risk entailed, and he should probably also explain the possibility of obtaining a binding opinion from the tax authorities in accordance with Act no. 143 of April 13, 1983. Advisers should not assist in the transaction if they feel that there is a risk of the tax authorities considering the transaction tax evasion with all its consequences. And they should not be held liable if they refuse their participation.

In the judgment reported the issue is, however, somewhat different. Has an adviser a duty to take an initiative: to draw attention to a possible procedure involving less tax for the client, and to conclude that a particular procedure should either be recommended or warned against? In the 1981 High Court judgment reported above, the tax authorities would presumably have considered the transaction a circumvention if a preliminary deed had been signed prior to the closing of the estate but the transaction not concluded until afterwards. Also other considerations may, however, have to be taken into account. What is the position of a lawyer or an accountant if it later turns out that the real estate is difficult to sell (falling prices), or if one of the spouses or an heir later objects to a sale because the offers are unsatisfactory, etc. Similar problems of taxation may also arise in other situations.

Had the lawyer adopted the suggestions of the judgment, he could have safeguarded himself by demanding a written statement from the client to the effect that the lawyer would not be liable if 1) the real estate could not be sold at a later time at the price assumed, 2) disagreement should arise at a later stage on the sales conditions, and 3) the tax authorities should set aside the procedure as an evasion. However, disclaiming liability for professional advice is frowned upon, in fact it is occasionally invalid, and it is therefore understandable that lawyers and accountants prefer to avoid disclaimers. The optimal position is therefore the one where disclaiming liability is normally superfluous.

Many tax arrangements aiming at lower tax may give rise to legal doubt. Consequently, no liability should normally be imposed if, for instance, tax authorities set aside a transaction as invalid. Yet there will always be a risk of liability, and it is difficult to delimit the scope of liability. On the other hand, an objective liability for failure to give advice aiming at the lowest possible tax would actually compel the adviser to balance on the edge of legality, with the inherent risk of an accusation for tax evasion.

With the present complex tax legislation, it is obvious that an imaginative lawyer or accountant could evolve many presumably legal tax transactions leading to lower tax. But is it reasonable to impose liability for not having such a vivid imagination? It seems more appropriate to reproach the authorities for having created such a tax jungle where, to "save face", they will often try to set aside transactions for considerations of analogy, an intention to circumvent the rules, or as a perfunctory transaction, etc.

Certain obnoxious tax provisions actually invite transactions whose only purpose is to avoid taxation.

More examples may be found in the area of estate taxation, but another fairly simple example is gifts from parents to children. If the parents have complete community of property they may jointly make a gift of DKK 8,000 to each child without being subject to taxation; if they have complete separation of property each spouse may give DKK 8,000, in other words DKK 16,000 in total; and finally, if they have a combination of separate property and community of property, the parents may give each child DKK 24,000.

What is the actual purpose of these strange rules? A number of citizens are honest enough to refrain from this type of arrangement. It is tempting to ask whether the legislation no longer aims at promoting general honesty in the population. The only sensible and ethical arrangement would be a rule under which each parent may give each child, for instance, DKK 8,000 tax-free no matter whether the parents are married, have community of property, separate property or a combination of the two.

The present author has elsewhere[7] questioned whether the constant pursuit of smart tax gimmicks is actually in conformity with good traditions of lawyers and the strict probity rightly imposed upon them. The same goes for accountants.

At any rate a failure in this respect, a refusal to sail too close to the wind, should not immediately result in liability and, stretching a point, the grounds of the 1985 High Court judgment may be invoked in support of this point of view.

A classical view in the law of tort has not so far been taken into account in the debate on liability for tax advice, namely the old prerequisite that liability is conditional upon the damaged interest being worthy of the protection of the legal order. Thus an ethical point of view enters the law of tort. To be recognized, a claim for damages should not

[7] See Anders Vinding Kruse, *Advokatansvaret*, 5th ed. Copenhagen 1985, p. 93.

be conceived as immoral: by extension, not all interests should be protected through the rules on damages. This of course touches upon a serious problem. It has been said that there is nothing immoral in attempting to avoid taxes as long as the methods applied are legal or, as it has also been expressed: the fact that the purpose of an agreement, or some other transaction, is merely to avoid taxation does not *per se* make it illegal. This point of view is tenable up to a point. It does, however, appear from Danish judicial practice that such transactions may be set aside by the authorities, with the consequence that tax has nonetheless to be paid where the transaction is classified as an "evasion" of tax rules. One resorts to a procedure which does not directly fall within the scope of a tax provision, hoping thereby to evade the tax obligation.

Purely fictitious transactions are left aside here, since they do not normally create any major problems. Not binding between the parties, they naturally do not bind the tax authorities. The problem lies in divulging the fact that a transaction is actually merely a fictitious one. So doing may involve difficulties in terms of evidence.

Major problems do, however, occur where a transaction is to be set aside on the ground that it amounts to tax evasion.

Since the time of Julius Lassen and Ussing, Danish legal writing has, however, considered the rules on circumvention of the law a superfluous instrument. The issue involved is actually merely one of expansive construction of the statutory legal provisions and their applicability by way of analogy, so that a transaction is subsumed under a tax rule although it does not come under the actual wording of the provision. The basic idea, undoubtedly correct, is that the intention to avoid taxation should not in itself decide whether the transaction may be set aside. This point of view has been applied in several cases by lower courts, but the Supreme Court has never adopted it; on the contrary, the Supreme Court said the very opposite in the Glistrup case.[8]

Supreme Court judgment 1986 UfR 649 reports a dissenting opinion by a High Court judge, which stressed that the main purpose of the transactions involved was to "avoid payment of inheritance tax". The Supreme Court upheld the decision of the High Court, referring explicitly to "the grounds of the judgment", but this hardly constitutes endorsement of the dissenting opinion. The judgment is reported below.

There are several examples of the courts setting aside a transaction on the grounds that it could not be recognized in terms of taxation,

[8] See 1975 UfR 788, reported below.

although it was otherwise fully binding upon the parties. In other words, one cannot do away with the problem: it is merely a question of nomenclature.

The 1986 Supreme Court judgment just mentioned may serve as an example. Engineer D issued two promissory notes running over a 15-year period, one to his son in an amount of DKK 1,500,000 and one to his daughter in an amount of DKK 1,000,000. Interest and instalments were to be paid twice a year; the two children were obliged to pay yearly amounts of DKK 294,000 and DKK 196,000 respectively to D, who was 87 years old, and his wife, who was 82, for the rest of their lives. Upon the death of both spouses the remaining debt under the two promissory notes was DKK 1,270,000 and DKK 913,000 respectively. The difference between the nominal value of the promissory notes at the time they were issued and the capitalized value of the performance to be made by the two children had been paid in cash by them. The promissory notes could not be terminated by either party prior to their expiration (15 years).

In connection with the promissory note issued to the son, the father had provided full collateral by pledging securities.

On the demise of both parents, the balance of the estate was based upon deduction of the remaining debt under the promissory notes. The tax authorities refused to recognize this, and demanded that inheritance tax be paid without deduction of the promissory notes. Two of the three High Court judges said the following:

> The obligation of indebtedness undertaken by the deceased party through the issuance of promissory notes in relation to the defendants does not stem from a loan which has actually been given, and in the light of the age of the deceased party and his wife as well as his financial condition, it does not stand to reason that the overall arrangements, including the simultaneous agreements on support, have had an actual purpose of support. Consequently, the court upholds the position of the tax authorities to the effect that the remaining debt under the two promissory notes must be considered an asset of the estate to be included in the inheritance of the defendants, cf. sec. 16 of the Inheritance Tax Act.

The third judge stated the following:

> In the light of the specific circumstances connected with the agreement, including above all the high age of engineer D and his wife and their financial position as well as the consequences of the agreement in terms of income tax and capital tax, the defendants do not appear to have proven that the agreement had any other purpose than that of avoiding inheritance tax. For that reason the conclusion of the majority is subscribed to.

As mentioned above the Supreme Court upheld the decision of the High Court on the basis of "the grounds given in the judgment".

The arrangement had been conceived by an accountant and one might—somewhat maliciously—raise the point whether he could have been made liable if he had failed to propose it.[9]

It seems that the term "evasion" covers the situation well, as long as it is stressed that an intention of evasion does not constitute the decisive issue of the case. But what, then, *is* the decisive issue? The problem is a major and complex one, where the study of a number of judgments leaves an impression of something happenstance, perhaps even discretionary. Some transactions are upheld, others set aside. And faced with a new situation where evasion might be considered, even the most experienced tax expert might be mistaken in his assessment of the way in which tax authorities and courts would view the transaction.

Even apart from this the ethical aspect previously referred to should be taken into account. Transactions with an inherent possibility of being set aside as manifestations of evasion—or whatever else one might wish to call it—will still be considered by a good many citizens as smacking of dishonesty. This also applies to advisers in law and in accounting. Consequently, it would be unreasonable if such advisers were to become liable if they fail to advise, or advise against, such dubious transactions, even it it should later turn out that the transaction would not have been set aside. It seems fair to grant advisers a fairly broad margin in assessing whether there is a risk that a transaction could be considered an attempt to evade a tax rule.

It seems evident that a loss stemming from a failure to recommend dubious tax arrangements should be classified as a loss not protected by the law of tort. Where an accountant or a lawyer is asked for advice on a tax problem, he should be entitled to refrain from bringing dubious tax transactions into the picture, with no fear of consequences. In particular, such advisers can have no such obligations as part of their general service. Assuming adoption of this position, it makes no difference whether the adviser has been aware of the possibility of avoiding taxes through special bookkeeping procedures or by means of exceptional transactions.

> It seems appropriate finally to refer to the decisions concerning advocate Mogens Glistrup. The crucial Supreme Court decision dealing with the civil law aspect is reported in 1975 UfR 788. For the purpose of exploiting the tax rule on deductions and the statutory difference between taxation of

[9] In this connection reference is also made to 1986 UfR 576 VLD and ØLD, September 3, 1986 (11th division 196/1985, reported in *Skattepolitisk Oversigt* 1987).

individuals and of companies, Glistrup had evolved an extensive system of administration. He had created more than 2700 limited companies, and for a large number of clients he was the administrator of their financial affairs, so that the clients obtained loans from Glistrup and used them to buy limited companies which were administered by Glistrup under an unlimited authority to act on the clients' behalf. A client, A, owned various limited companies, and the transactions recorded consisted mainly of taking loans and thereafter lending money to other companies or persons whose affairs were likewise administered by Glistrup, so that loans and interest were entered into the accounts of the companies in Glistrup's records at times which he himself picked. The companies were not engaged in any other activity.

Under an agreement between A and Glistrup, A took a loan of DKK 250,000, paying yearly interest of 18%. Of the yearly interest DKK 45,000 A was to pay only a minor part, whereas the rest was to be made up through Glistrup's right to the administration of A's rights as a shareholder. This meant that each year A had to take a new loan, so that his constantly increasing debt was secured through the limited companies which apparently could not be sold outside the system, and the intrinsic value of which was completely uncertain.

The issue at stake during the court case was whether the client could disengage himself from this arrangement. The grounds of the Supreme Court judgment state that the fact that business transactions, wholly or in part, are established for a tax purpose does not generally result in their invalidity. The arrangement under discussion, the full nature and consequences of which had apparently not been clarified to A, consisted, however, of a series of transactions based upon entries in Glistrup's bookkeeping void of any business or financial reality. This arrangement was found to be of such a nature and to result in such long-term, far-reaching and nebulous consequences for A, particularly in relation to his constantly increasing indebtedness, that he was not bound by the arrangement in relation to Glistrup. Consequently, the court held that A was entitled to have delivered, at the time when he withdrew from the arrangement, a mortgage issued by him to Glistrup. The general clause of sec. 36 of the Contracts Act could most likely also have been applied, but it had not yet been enacted at the time when the agreement was entered into.

Simultaneously a criminal case against Glistrup indicting him of tax fraud was pending. The Supreme Court rendered its judgment in 1983 (1983 UfR 705). The criminal action dealt with the same type of transaction as the civil case. The transactions described and other similar transactions were reported to the tax authorities, whereby Glistrup and his clients obtained, or tried to obtain, major deductions in their taxable

incomes from interest paid and from losses in selling shares. As mentioned, the bookkeeping was considered to be fictitious, and the information given the tax authorities was consequently considered incorrect. The court held that Glistrup had acted intentionally, and he was sentenced to three years imprisonment, a fine of DKK 1,000,000 and the loss of his authority to act as an advocate. The Glistrup case is unique, but it does bring into focus the approach that courts should be careful in holding a tax adviser liable merely on the ground that he has not advised his client to engage in transactions having nothing but a tax purpose. In the present author's opinion it would be inappropriate if the battle of private parties against tax authorities should always be transferred to the level of the law of tort, with the inherent possibility of repercussions for a tax adviser wishing to avoid any flavour of dishonest or incorrect behaviour.

Nor is it realistic to assume that a single accountant or lawyer can have knowledge of everything which may from time to time occur to the tax authorities, and furthermore muster sufficient imagination to piece this highly complex legal field together in a manner resulting in the lowest possible tax for the client. The rule proposed above on non-liability for lack of knowledge of complex or hidden special rules of law should be supplemented by a rule on liability being limited to situations where a tax limitation is 1) legal beyond all doubt, 2) generally known among tax advisers, and 3) without any risk of subsequent disagreement among clients or of losses as a result of price changes. If such a rule had been in force, the 1981 High Court judgment would have resulted in the adviser not being liable, already because condition 3) was not fulfilled. But it would also have been possible to invoke condition 1) and possibly condition 2). The Supreme Court judgment reported in 1985 UfR 489 did not hold the adviser liable under 2), but the judgment could, and probably should, have invoked 1) or possibly 3).

The limitation of liability should apply regardless of whether the advisers were explicitly consulted on tax rules or whether tax advice must be considered a traditional "service duty". In the latter respect, one should be reluctant to establish a duty. If, for instance, a client asks a lawyer to draft a will, how far should he go in terms of suggesting to his client different means of transferring assets to the next generation thereby obtaining a saving in taxes?

Needless to say, it is important to the body of lawyers, accountants and other tax advisers that their "level of service" in rendering tax advice should be a high one, but it is not reasonable to push liability to its ultimate limit merely for the purpose of ensuring that clients always

incur the lowest possible taxes. That is putting the cart before the horse; or punishing the innocent instead of the guilty. And in the present context the guilty party is the complex tax legislation which will always present temptations to the less scrupulous.

C. *Other Problems of Liability Stemming from Tax Advice*

Needless to say, traditional rules of the law of tort also apply in relation to liability for erroneous advice; as examples may be mentioned the rules on causality and foreseeability, the computation of loss, contributory negligence including an acceptance of risk, the joint liability of several tortfeasors, liability of an employer (3-19-2 of the Danish Code), disclaiming liability, etc. On such issues reference is made to legal writing on the law of torts. To a few of the points mentioned some remarks will be added.

Regarding computation of loss, faulty information on the amount of tax to be paid will not necessarily result in a loss. If, for instance, an accountant has computed a client's taxes on income and capital to a smaller amount, this fault will normally not result in any loss, since the client is anyway obliged to pay the full amount. The client may naturally claim that if he had known the correct amount, he would have undertaken a transaction which might have lowered the tax, for instance by taking out an annuity entitling him to deduct the premium paid. But even if the client may prove the likelihood of such a claim, one cannot immediately compute the loss as being equivalent to the amount of taxes which could have been saved through such a transaction. One must also take into account what the subsequent tax consequences of the transaction would have been when payments under the annuity were made or when dividends were paid on the interest in a vessel, since such amounts would then be liable to tax; depending upon the specific circumstances this may be quite a complex computation involving several elements of uncertainty. In case of the sale of an asset where the adviser has not correctly computed the tax to be paid out of the proceeds, one cannot normally hold the adviser liable for the difference. The amount of taxes would have to be paid at any rate. Again, the client may claim that had he known the correct amount of taxes, he would not have sold the asset. If such a claim appears plausible there will be a basis for a claim for damages but, here again, computation may involve difficulties, and the client carries the onus of proof regarding the computation of the loss.

The following may be said in relation to the client's contributory negligence (including the acceptance of risk) and the adviser's disclaim-

ing liability. In situations involving advice on questions for which the adviser, in the light of the foregoing, cannot normally be held liable, for instance advice regarding dubious legal problems or advice exclusively of a business nature, disclaiming liability will normally not appear inappropriate so much as superfluous, a reservation made merely for the record. This is not to say that an adviser should not draw his client's attention to the possibility of a wrongful assessment. On the contrary, as was mentioned in section B above, the proper procedure will often be to give the client loyal information on the uncertainty in connection with the assessment.

If, on the other hand, liability has been disclaimed in general on matters where the adviser's professional legal expertise is requested for the very purpose of protection against losses, i.e. advice regarding clear and simple legal matters and the purely technical handling of the case, such a disclaimer would obviously be considered inappropriate. In more serious cases a disclaimer could actually be set aside under secs. 31 or 36 of the Contracts Act, but even apart from this, many of the disclaimers under discussion will be contrary to good traditions of accountants and lawyers, on which basis it should be possible to declare them invalid under article 5-1-2 of the Danish Code, just as disciplinary sanctions and liability for losses, if any, would be possible consequences.

A disclaimer may, however, be appropriate if the adviser is faced with a dubious tax question and has informed his client of the risk that the tax authorities will set aside a transaction with which the client nonetheless wishes to proceed, himself taking the risk involved. Should the adviser even connive, he should ensure that all relevant facts are made available to the tax authorities. If the transaction is thereafter set aside, the adviser cannot be held liable, the client having undertaken the entire risk in relation to the tax authorities. Should the adviser consider that a transaction or a bookkeeping procedure in the accounts to be submitted to the authorities actually entails a risk of a criminal action, then he has not only a right but even a duty to refuse his participation.[10]

Where an accountant and a lawyer have given joint advice to a client, the general rule will be one of joint liability, but with a mutual right of recourse in accordance with the customary rule which, in the context under discussion, will normally lead to an equal division of liability.[11] It

[10] Cf. section A above, in particular the reference to the High Court judgment of June 20, 1986.

[11] On this point further reference is made to the statement by the General Council of the Bar reported in 1985 UfR 489 (cf. section B above).

will, however, be possible to agree upon some other division of liability, for instance the accountant having sole responsibility for problems of taxation, whereas the lawyer alone is to handle the drafting of the contract concerning which advice has been sought. Such a division of liability naturally presupposes the client's agreement.

Under sec. 25, subsec. 2, of the Damages Liability Act there is a possibility of mitigating the liability of an adviser who is jointly liable, where he has no liability insurance but the other adviser is fully covered by such insurance (apart from any possible self-risk).

Where an adviser has incurred liability in his capacity as a board member under the liability rules of the Limited Companies Act, liability may be mitigated to an extent greater than that of sec. 24 of the Damages Liability Act (see section B above).[12] Such rules of mitigation do, however, presuppose that the liability as a board member (and only as a board member) constitutes the issue involved. The rule on mitigation cannot be invoked by an adviser who is also a board member, if he has advised the company on taxation matters in his capacity as an adviser. A special rule of mitigation is, however, applicable to the accountants of a company.[13]

III. CRIMINAL LIABILITY FOR TAX ADVICE

As outlined in the Introduction to this paper, the increasing pressure of taxation has led to a corresponding increase in the interest in tax questions. Since the tax payment can be reduced considerably by clever but completely legal use of the tax laws, tax advice has become an important element of normal commercial counselling offered by the different kinds of advisers.

The complexity of our tax legislation and the fact that the same transaction may be taxed differently depending on the procedure used has led to the question of how far the tax adviser should act on his own initiative if he is to avoid liability for damages.

In criminal law the problem is a little different, even if there may be

[12] Cf. secs. 143 and 140 of the Limited Companies Act and corresponding provisions of the Private Companies Act.

[13] Cf. sec. 141 of the Limited Companies Act and sec. 111 of the Private Companies Act.

some connection. Where a tax adviser may become liable in damages unless he is very active and uses all the possible legal loopholes in tax law, this circumstance may have an impact on his penal liability as we approach the borderline of what is a criminal offence.

While taxpayers concentrate more on the question of whether their tax advisers are liable to damages for incorrect or inadequate advice, the Director of Public Prosecution concentrates on the question of whether the tax adviser is an accessory to criminal tax fraud.

A criminal case on tax evasion is different from a "normal" criminal case. Often the facts are very complicated. Further, the tax regulations are very complicated and confusing, as can be seen for instance in the very large number of civil tax cases concerning assessment that are taken to court. Further, it is not infrequent that taxpayers' understanding of the legislation is not accepted until they go to court. And it is not rare for the Supreme Court to reach a different decision than the High Court. These facts underline the uncertainty regarding the right construction of the tax laws. The complicated facts and the complicated tax laws must then in a criminal case be combined with criminal law, normally the section dealing with fraud. The correct decision in a criminal case on tax evasion can only be reached if the court, before sentence is passed, has a general knowledge of tax legislation and of what is accepted as a, fiscally speaking, normal and legal transaction.

The procedure for assessment of taxes, including court cases, differs greatly from the way the legal system deals with liability for damages resulting from advice on tax questions, and this again is quite different from how a criminal case on tax evasion is dealt with.

The assessment of taxes is started by an income tax commissioner. The taxpayer can appeal to another commission. Further he can appeal to an administrative tax court. From there the taxpayer can appeal to the High Court, and in the last instance to the Supreme Court.

A case on liability for damages, for instance for bad advice on a tax question, will start in the City Court, with the possibility of appeal to the High Court. If a plaintiff claims damages for more than DKK 500,000, the case can start in the High Court, with the possibility of appeal to the Supreme Court.

A criminal case on evasion of tax will normally start in the City Court, but here there will be one judge and two jurymen, and the sentence can be appealed to the High Court, before three judges and three jurymen.

In what follows, attention will be drawn to some facts of importance for a criminal tax evasion case. We shall then examine whether the way criminal cases on tax evasion takes place is appropriate in these very

special kinds of criminal case, considering that the jury system was created for "normal" criminal cases.

The issue of a tax adviser's liability to punishment could be studied in connection either with positive advice, where the adviser suggests or recommends a criminal transaction, or with an adviser's passivity over a criminal transaction made by his client. These two circumstances form, of course, opposite ends of a scale.

In connection with tax advising, there is a difference in principle between liability to damages and liability to punishment. Concerning liability to damages for advice or lack thereof, the question is whether the tax adviser ought to know better, or how great the requirements on his knowledge of the legislation are. For liability to punishment, the main question becomes whether the fraudulent tax evasion is deliberate. The client's awareness of the criminal nature of an arrangement and whether a reduction is subsequently obtained through it, are less important. The tax adviser is not liable to damages if he makes his client fully aware of the doubt as to whether tax will be reduced by a proposed arrangement. If he then assists his client in establishing the arrangement in question, he is not liable to damages if it later on turns out that the tax will not be reduced. If the tax adviser has proposed an arrangement that could incur criminal liability, telling the client this will not help him if he then assists the client, actively or passively, to carry it out.

When the special legislation on tax matters contains a penalty clause it is perhaps a moot point whether the old doctrine of *ignorantia juris semper nocet* should still be valid.

Specially regarding the complexity of today's tax laws, it seems unreasonable to uphold the old doctrine when even specialists among tax advisers can be in error.

The courts have already demonstrated that they accept, for instance, that no lawyer can be expected to have full knowledge of the tax legislation. The Supreme Court recently found a lawyer not liable to damages, even though a specialist with knowledge of the rule in question could have saved his client a large tax payment. The rule was not common knowledge.

The same view is expressed in the Criminal Code, sec. 84, subsec. 1, no. 3, which states that punishment may be withheld, even where guilt is established, if the accused has misunderstood the laws, or if his ignorance of the law could be excused. It must be conceded that this provision deals only with the punishment, not with the guilt; secondly, the provision is seldom used.

Court practice has shown that the fact that the client is liable to

punishment does not automatically lead to the adviser being liable also. Though this seems natural, it has sometimes occasioned court cases, since the Director of Public Prosecution seems to hold that a lawyer or an accountant is liable to punishment if his client is liable to punishment for fraudulent tax evasion. A recent Danish Supreme Court sentence has clearly stated that the courts shall examine individually the liability for different persons involved. Thus the Supreme Court in an actual case has found it necessary to underline this not surprising standpoint.

For, clearly, there could be a large gap between the client's knowledge of the facts of a case and the tax adviser's. All too often, the client tells his adviser only what he thinks is essential for him to know. Further, there could often be a great difference between the actions for which the client and the adviser, respectively, are liable to punishment. In the Supreme Court case mentioned, a limited company in Denmark paid some amount to the owner of the company, who claimed that he should not be taxed in Denmark since he did not live in Denmark and he consequently did not file a tax return to the Danish tax authorities. He claimed that the amount received was for his sales activity outside Denmark on behalf of the company and the amount was treated as an expense for the company. The court found that the owner was liable to tax in Denmark. The court further concluded that he had not in fact engaged in company sales activity outside Denmark. The fraud consisted of the minimizing of the company's taxes by treating the amount received as payment for sales activity abroad. After the owner's conviction, a criminal case was started against the company auditor as being accessory to fraud in the tax evasion. This was based on his acceptance of the payments as allowable company expenses. When the auditor appealed to the Supreme Court, the tax authorities, far from changing the assessment of the company as a consequence of the court sentence against the owner, had accepted the company's tax return. The auditor claimed in the Supreme Court that the owner's conviction, and the fact that the payment to the owner did not represent the alleged payment for sales activity outside Denmark, did not automatically mean that the payments were not deductible in the company tax return for some other reasons. Consequently, he could not accept automatic criminal liability as the company's auditor. The auditor was convicted in the City Court and in the High Court, but was found not guilty by the Supreme Court. The sentence from the Supreme Court ruling gives the following ground:

> The fact that the owner of the company was not doing sales activity outside Denmark does not mean automatically that the payment to him should be

> looked upon as a dividend, and not as a deductible expense for the company. If for instance the owner—as the defence declares—had worked for the company in Denmark, the payment would have been deductible from company income, partly or wholly ... In the sentence (the owner's conviction) the only question dealt with was whether the owner had worked and performed sales activities outside Denmark.
>
> Taking this into account, the fact found proven by the City Court and the High Court cannot lead to conviction under the section mentioned in the indictment.[14]

The above-mentioned Supreme Court case underlines another problem for courts in criminal cases dealing with tax questions. It seems that the City Courts and the High Courts do not deal too much with the tax question itself, and do not look very closely into whether expenses are deductable or not, although this is the main question. The Supreme Court sentence shows that the criminal court shall deal in detail with an evaluation of the tax question, and shall look into every aspect of the tax question before concluding that penal liability obtains.

This circumstance brings us back to the question of what forum would be the right one to deal with fraudulent tax evasion.

The present forum, which is the same as for any other criminal court case, is not acceptable. A complicated transaction and complicated tax rules cannot be dealt with properly by a jury. Further there is, in Denmark, an additional difficulty. Most cases will start in the City Courts, whose judges necessarily lack experience in taxation matters, since all civil court cases of this nature start in the High Court. It will be difficult for the City Court judge to have a balanced view on tax matters if he examines them only in criminal court cases and never in civil cases.

The problem is, however, much more serious as far as the jury is concerned. The tax laws and their construction have now reached a point where many entirely legal transactions seem to "normal" people too smart. Consequently, it would be difficult for a jury to view these transactions objectively, and jurymen will normally have no knowledge of tax questions.

One solution could be to combine the fora for court cases on liability to damages, for civil tax cases and for criminal court cases. It does not seem satisfactory that a criminal court case on a tax question takes place before the tax question itself has been dealt with by the normal tax authorities.

The above-mentioned Supreme Court case underlines the difficulty in a criminal court case involving a tax question that has not been dealt

[14] 1986 UfR 682.

with by the normal tax authorities. Of course there is no problem if the crime is obvious, but if the tax question is complicated, it is not satisfactory that it is dealt with only in the criminal case and by a jury. Further it seems today coincidental whether a case starts as a civil tax case or as a criminal court case.

The assessment of tax is dealt with by authorities with special knowledge in tax questions. Consequently it is not satisfactory that a complicated tax question in a criminal case is not judged by authorities specialized in tax questions, but only by a court consisting of one judge and two jurymen. Postponement of the criminal case until the normal assessment has taken place would often mean an extremely long delay in the criminal court case, and this is not satisfactory either. A compromise could be that criminal cases on complicated tax questions should not start in the City Courts but in the High Courts, where civil tax cases also start.

Further, it would probably be an improvement if the jurymen were business people, for instance elected among those normally elected to assist in cases in the Maritime and Commercial Court. If jurymen in a criminal court case are to be of any help and to secure fair sentence, it is necessary that they have at least some knowledge of the subject, and have knowledge of what is normally accepted and legal.

At present, the court normally asks the tax authority bringing the action what the normal understanding of the tax law, and the normal practice, would be. This is unacceptable, since it frequently happens that a civil tax case is won by a taxpayer when he takes it to court.

A possible consequence in dealing with an issue of taxation could be that not only the forum for the criminal court case would be reconsidered, but the forum for the civil court case too.