

# WISTRAND

## MEMO

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**TO:** Hjelmco AB

**FROM:** Roger Persson Österman, Associate Professor

**DATE:** February 19, 2008

**RE:** **Consequences of not imposing tax on aviation fuel for private use**

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### **1 PREFACE**

Sweden intends to impose a general, high tax on aviation gasoline (AVGAS, see memo issued by the Department of Finance on January 15, 2008, "Beskattning av flygbränsle").

The background is that the EU Commission in "MEMO FROM THE COMMISSION TO THE COUNCIL under article 19.1 in Council Directive 2003/96EC (private pleasure flying)" COM/742/2006 final, describes why Sweden and a number of other countries cannot be granted an extension of the exception that have been applied to AVGAS for private use.

In a memo dated February 5, 2008, Wistrand has analyzed the Department of Finance's tax proposals and the conclusion is that it is indeed stated in the Directive on energy taxes that a general, high tax is allowed, but such a tax is probably in contravention of the ban on discrimination found in Community law and the EU convention on human rights. The reasons for this are as follows:

Under Community law, a general tax will burden also foreign air operators (e.g. Norwegian and Finnish ones) in need of refuelling AVGAS in Sweden. Hence these will be discriminated compared with Swedish and foreign air operators using JET A, in which case a violation of Community law is at hand.

In general, the EU Convention bans discrimination of tax subjects. The tax is obviously discriminating and the reasons do not have the weight required to make the discrimination acceptable.

### **2 CONCORDANCE BETWEEN THE DIRECTIVE AND THE CHICAGO CONVENTION**

There are good reasons to assume that the Directive on energy taxes is not in accord with the international aviation conventions.

### **3 REVIEW OF THE ENERGY TAX DIRECTIVE**

During 2008 a technical review of the Directive on energy taxes will take place. Furthermore, the Commission has initiated work to create possibilities for a sustainable future for general aviation and business aviation (notification from the Commission COM/2007/869 final). From the notification it can be concluded that the Commission grasps the great importance of aviation for the European

Union. It is also evident that aviation, as a sector of society, must be covered by the comprehensive environmental objectives. The measures must however be proportionate.

It can be noted that AVGAS is relatively more environmentally friendly than JET A. It can also be concluded that the most environmentally friendly AVGAS grade will be taxed too severely. There is also ongoing research and development work in order to make AVGAS even more environmentally friendly and research and development work on using gasoline-fuelled piston engines with such fuel also in scheduled traffic.

It appears to be a counter-productive policy to tax the more environmentally friendly alternative in a way that also may risk destroying a community sector appreciated by the EU.

The Swedish government should therefore point out to the EU Commission that the Directive on energy taxes should be reviewed with respect to the tax of aircraft traffic. Sweden should also bide its time before following the request of the Commission until increased clarity has been attained with respect to the design of the Directive on energy taxes.

#### **4 CONSEQUENCES OF OMITTING TO FOLLOW THE DECISION OF THE COMMISSION (COM/742/2006)**

The initial consequences, should Sweden decide to omit imposing tax on AVGAS for private pleasure flying, are factually very small. In principle they are non-existent.

In several cases, Sweden has omitted to implement or in other ways adjust the tax legislation in spite of having been requested by the EU Commission to do so. Sweden has also neglected to make adjustments of the fiscal laws in spite of the fact that the Court of Justice of the European Communities has found the rules to be in violation of Community law.

Examples are the income and value added tax treatment of non-profit organizations, the design of pension saving tax, and the rules on taxation of combines and restructuring of combines.

Individuals who lose their rights due to Community law can invoke direct effect or receive damages, in which case an inadequate fulfilment of Community law may bring costs to a government. This is not at hand in this case, as it concerns a tax on individuals. Omitted tax on AVGAS cannot bring down any sanctions on Sweden from individuals.

In the long run, however, the EC Commission may bring a treaty breach action on Sweden, and thereby sue Sweden to appear before the Court of Justice of the European Communities. Sweden may present arguments for the Court that the line chosen by Sweden is correct, thereby defending its cause. Such an action on breach of treaty is normally generated only after a long time of correspondence.

In the case Sweden is finally convicted by the Court of Justice of the European Communities for having omitted to correctly implement the Directive, this will not lead to any sanctions being imposed on Sweden.

Only if Sweden should, in spite of a conviction, omit to implement Community law, a sanction would be possible. For such a sanction, the Commission must prosecute an action in the Court of Justice of the European Communities.

Hence it is basically a political decision whether Sweden should follow the request of the EU Commission or if Sweden should defer the implementation until increased clarity has been gained.

Sweden has previously adduced weighty arguments to the Commission. There are no indications that these cases do not still carry heavy political weight.

(Translated by Madeleine Kamlin, [www.kamlin.com](http://www.kamlin.com). The Swedish version shall take precedence).