1. Taxation of the development of intangibles

1.1. Deduction of costs incurred for the development of intangibles

1.1.1. General overview

In computing the taxable income, the general principle under the Swedish Income Tax Act is that all ordinary expenses incurred for acquiring and maintaining income are deductible. Costs incurred for acquiring or developing intangibles are mostly fully deductible. However the right to deduction is reinforced with a special rule for R&D-investments. Under the special rule R&D-costs that "is or might be of importance" for business purposes are deductible, and also costs incurred for information about such R&D-results. There are no other special rules for R&D-investments in the income tax legislation.

Concerning timing of costs there is an important difference between costs incurred for acquiring immaterial rights (a term somewhat vague) and costs incurred for research and development in order to produces such rights. In the first case the rules are mainly the same as for inventories. The costs must be capitalised and are deducted later under a depreciation of the acquired asset. However, the general rule is that intangible development costs (and other costs and incomes too, unless specially regulated in the income tax legislation) must be recognized in accordance with generally accepted accounting principles. This means that such costs may be treated differently depending, among other things, on the nature of the intangible, the nature of the industry, the development stage and the size of the company. Smaller companies nor-

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2. In the following this report describes the legal situation without special attention to tax treaties, unless otherwise explicitly told.
3. Chapter 16 § 1 Income Tax Act (Inkomstskattelag (1999:1229)).
5. Chapter 18, especially § 1 Income Tax Act.
mally deduct costs for developing immaterial assets right away while larger companies often capitalize development costs, but not research costs. Costs incurred to develop marketing intangibles are not capitalized.

The above is applicable irrespective of whether the costs are incurred by a resident company or a Swedish permanent establishment of a non-resident entity. An important assumption for the deductibility is that the costs are based on an arm’s length principle.

1.1.2. In-house or outsourcing of intangible development

As described there is a difference between in-house costs and costs incurred to third parties such as a contract researcher when it comes to timing. Also within general accounting principles there is such a difference, perhaps most obviously so in the IAS 38. The deductibility of costs incurred to develop intangibles, both operating costs and costs of development, however applies irrespective of whether the development and/or financing is performed in-house or outsourced to related parties or third parties.

Normally there is no difference between services provided by related and unrelated contract service providers, however transfer pricing rules may apply in the first case.6

1.1.3. Donations

No tax deduction is allowed for donations, not even to R&D-institutions.7 As previously described the right to deduction is reinforced with a special rule for R&D-investments, but this right does not go as far as to donations. A governmental investigation recently suggested a limited right to tax deduction for donations, but so far, no rules have been changed.8

1.1.4. Tax losses

Operating losses incurred in business are deductible from other income in the year in which they occur – both for resident companies and for non-resident companies with a permanent establishment in Sweden. Remaining losses may be carried forward indefinitely and set off against future profits.9 There are, however, rules denying carry-forward of losses in certain cases of change of

9. Chapter 40 § 2. See chapter 40 for some exceptions from this rule.
ownership or merger or de-merger of a company. There is no optional carry-back of losses. However tax credits can have a similar effect, when set off against later losses.\(^\text{10}\)

In Swedish tax law there is no group consolidation but income may, in many cases,\(^\text{11}\) be transferred between affiliated Swedish companies through group contributions. Group contributions are deductible for the paying company and taxable income for the receiving company. Group contributions may be used by the recipient company to offset tax losses which are otherwise available for carry-forward, or for other purposes.\(^\text{12}\)

The rules for group consolidation were not in line with the EU-case law and for that reason an extra set of rules were created (“koncernavdrag”), for special cross border transactions within the EU.\(^\text{13}\) According to these rules a Swedish company may deduct losses on liquidated foreign subsidiaries (within the EU). These rules are, however, very restrictive and it is uncertain if they fully meet the demands of the EU-law.\(^\text{14}\)

1.1.5. The intangible

The basic tax rules regarding cost for developing intangibles are the same as for all investments. All costs are normally fully deductible, provided that they are relevant for business purposes.\(^\text{15}\) However, the previously mentioned special rule for R&D-investments, somewhat expand the category of deductible costs.\(^\text{16}\)

There are, however, important differences in the timing as to when the costs are deductible. Some costs are amortized according to special tax rules, some follow generally accepted accounting principles. Generally accepted accounting principles give a variety of timing principles depending, for ex-

11. The most important prerequisites are that the owner share should be at least 90 % and that no taxable income is allowed to leave Sweden untaxed.
14. See opinions expressed by various bodies in their review of the draft bill.
ample, on the stage of the development of the intangible and on the size/category on the business/company in question.\(^\text{17}\)

It is worth pointing out that costs resulting in immaterial resources, such as knowledge, are not always treated as immaterial assets (or are deducted immediately). Depending on their nature they can, for example, be treated as (part of the) cost for self made inventories (egentillverkade anläggningstillgångar) or for a company acquisition.\(^\text{18}\)

1.1.6. The industry
The Income Tax Act makes no difference between development of intangibles in various industries. However, some differences might be found within generally accepted accounting principles for specific branches, which could affect tax periodization.

1.1.7. The location of the development activity
It makes no difference whether the intangible is developed domestically or abroad – the same rules apply, both in relation to the question of deductibility and the question of timing of the deduction.

1.1.8. The taxpayer
In general, the Swedish Income Tax Act makes no difference in the treatment of costs related to development of intangible assets – both the deductibility and the timing are the same for small and medium-sized enterprises and larger companies. However, there are differences within generally accepted accounting principles between smaller and larger enterprises which sometimes affect tax periodization.\(^\text{19}\) Intangible development costs incurred by a resident company and a non-resident company with a domestic permanent establishment are treated identically in the Swedish Income Tax Act.

\(^{17}\) See for example RR 15 (Immateriella tillgångar). See however the exception in RR 15 paragraph 92.

\(^{18}\) See Kellgren, Kunskapsutveckling och beskattning, Norstedts Juridik, 2005, del II.

\(^{19}\) See for example BFNAR 2008:1 paragraph 10.3 compared to RR 15 (Immateriella tillgångar) paragraph 45.
1.1.9. The owner of the taxpayer
The nationality or the legal status of the shareholder of the Swedish taxpayer does not influence on the deductibility of development costs incurred by a resident subsidiary.20

1.2. Deduction of royalty payments
1.2.1. General overview
As mentioned under section 1.1.1 the general principle under the Swedish Income Tax Act is that all ordinary expenses incurred for acquiring and maintaining taxable income are fully deductible. This also includes royalty payments for the right to use the intangible. The time for deduction follows general accounting principles. This normally means it will be deducted linearly over the contractual period (avtalsperiod).21

1.2.2. The intangible
For tax purposes it does not matter whether the payments relate to manufacturing and marketing intangibles or other types of intangibles or whether the payments relate to intangibles in different stages of development.

1.2.3. The industry
The Income Tax Act does not differentiate between various industries regarding deductibility of royalty payments.

1.2.4. The licensor
The entitlement to deductibility of a royalty payment applies irrespective of the residence of the licensor or whether the recipient of the royalty payment is subject to tax in Sweden.

1.2.5. The licensee
Royalty payments incurred by a resident company and a non-resident company with a domestic permanent establishment are treated equally under the Swedish Income Tax Act.

1.2.6. The owner of the licensee
Royalty payments incurred by a licensee of a resident company and a non-resident parent company, respectively, are equally treated under the Swedish

20. However, it is important that intra-group transactions are based on the arm’s length principle.
21. See for example BFNAR 2008:1 paragraph 6.25.
Income Tax Act. As a general rule, Swedish companies are taxed equally, regardless of ownership.

1.3. Depreciation of the purchase price of intangibles

1.3.1. General overview
Purchased intangible assets are normally depreciated by 30 percent or 20 percent each year (70 percent, 49 percent, 34.3 percent etc. or 80 percent, 60 percent, 40 percent etc.).\textsuperscript{22} Costs for commissioned works within an R & D-project should, however, probably be depreciated according to generally accepted accounting principles.\textsuperscript{23}

1.3.2. The intangible
The type of intangible is in principle not relevant to the question of depreciation. See however, 1.3.1.

1.3.3. The industry
Within the Income Tax Act the type of industry is not relevant to the question of depreciation. However, if an intangible is depreciated according too generally accepted accounting principles (which is sometimes, but seldom, the case within this particular question), such aspects might be of relevance.

1.3.4. The transferor
The residence of the transferor does not impact on the question of depreciation of the intangible assets. Neither does it matter whether the transferor is subject to local taxation or not or whether the intangibles are purchased from a related or unrelated company (given that the costs are based on an arm’s length principle).

1.3.5. The transferee
The depreciation rules for intangible assets apply equally irrespective of whether the taxpayer is a resident company or a permanent establishment of a non-resident company.

1.3.6. The owner of the transferee
The purchase price is treated identically irrespective of who the seller is (given that the costs are based on an arm’s length principle).

\textsuperscript{22} Chapter 18 §§ 13 and 17 Income Tax Act.
\textsuperscript{23} See Kellgren, Kunskapsutveckling och beskattning, Norstedts Juridik, 2005 s. 88 ff.
2. Taxation of the exploitation of intangibles

2.1. Domestic exploitation

2.1.1. General overview

a) For corporate entities, income from exploitation of intangibles is taxed under the ordinary corporate income tax rate which is 26.3 percent – both for resident companies and non-resident companies with a domestic permanent establishment in Sweden. This tax rate applies to all these kinds of income.

b) The Swedish rules for tax credit are built on the overall-principle, thus all foreign taxes and all foreign income are considered in the same formula. The foreign tax credit is limited to the lesser of foreign tax paid and Swedish tax calculated on the foreign income. If all foreign tax is not credited for, credit can be given for another five years. Foreign tax on business income may be deducted as an alternative to using a tax credit.24

If intangibles (or other assets) are held by a subsidiary an alternative is to sell the stocks in the subsidiary which normally will not result in a taxable gain because of special rules for exemption (participating exemption). There are a number of possibilities and conditions for obtaining this benefit. Normally a 10 percent ownership share is sufficient (sometimes even less).25

d) Assets may under certain conditions be transferred between companies tax free (deferred taxation). There are a number of different legal systems/solutions for such transactions – and many complex conditions.26 The most important rules are found in Chapter 23 of the Income Tax Act ("Underprisöverlåtelser").27 These rules make it possible to sell assets between companies at a price equal deductible cost in order to avoid realization of a taxable gain. One important precondition, however, is that the company buying the asset/assets is subject to tax in Sweden. This precondition can of course, be questioned from an EU-law perspective. Another

26. See chapters 23 (underprisöverlåtelse), 37 (fusioner och fissioner), 38 (verksamhetsavyttring), 38a (partiella fissioner), 42 ("Lex Asea"), 48 (framskjuten beskattning vid andelsbyten), 49 (uppskovsgrundande andelsbyten) and 53 (överlåtelse av tillgångar till underpris).
27. See further Skatteverket, Handledning för beskattning av inkomst vid 2011 års taxering, 2011, s. 463 ff.
important precondition is that single assets (rather than a complete busi-
ness or branch of activity) may only be transferred if the two companies 
involved fulfill the prerequisites for group contributions.28

2.1.2. Tax incentives
There are no tax incentives relating to the taxation of intangible profits em-
bedded in sales revenues, royalties, or capital gains on intangibles.

2.1.3. Distortions
The Income Tax Act does not in any way seem to differentiate between in-
come from domestic or foreign sources, income from related and unrelated 
persons, different types of intangibles, the owner of the taxpayer, etc.

2.2. International exploitation
2.2.1. Permanent establishment
If a resident company has a foreign permanent establishment which is liable 
to tax unilaterally double taxation is relieved by way of credit.29 Foreign tax 
on business income may also be deducted as an alternative to taking a tax 
credit.30 In Swedish tax treaties, credit is the most common method for relief 
of double taxation.

2.2.2. Subsidiary
Dividends from foreign subsidiaries are normally exempt from tax. Gain on 
the alienation of subsidiaries will in many cases be tax free. There are, how-
ever, two major limitations. Firstly, shell companies can’t be sold tax free. 
Secondly, listed shares must be held for one year, in order to be sold tax free. 
These rules make it possible to sell foreign subsidiaries tax free, in many cas-
es.31 Though it is not easy to transfer assets to foreign companies without tax 
consequences. In most cases, the rules won’t allow such transfers and if those 
rules are circumvented, it is likely that the tax evasion law might be applica-
ble.32

31. See chapters 24 and 25a and Skatteverket, Handledning för taxering 2011.
3. Anti-avoidance rules

3.1. Exit taxation
Transferring of assets (also intangibles) is normally subject to taxation. This exit tax is based on the market value of the transferred assets and the tax rate is, the ordinary (for companies) 26, 3 percent.

As previously described (2.1.1.) assets may under certain conditions be transferred between companies. The rules, however, aim at preventing the tax base from being transferred out of the country.

3.2. Transfer pricing
The arm’s length principle generally applies to all transactions between related parties. There are no detailed Swedish rules regarding the pricing – or indeed even very informative case law, preparatory works/travaux préparatoires or information from the Swedish Tax Agency. However, a common view is that importance should be paid to the OECD guidelines. In practice, the leading question seems to be what would have been the contractual terms and conditions between unrelated parties.

The correcting rule (korrigeringsregeln) is to be applied with restrictiveness and the burden of proof lies on the Swedish Tax Agency, that has to prove that the pricing has been erroneous. A relatively recent and illustrative transfer pricing case is the “Ferring-case” from 2009.

3.3. CFC taxation
Swedish CFC tax rules are complicated, but the main rules are that if a non-resident company in a low-tax country is owned or controlled, directly or indirectly, by 25 percent or more by resident taxpayers (corporate or individual), its profits, whether distributed or not, are attributed proportionately to its resident shareholders. A “low-tax country” is defined as a country where the general income tax rate on corporate profits is less than 55 percent of the Swedish rate which would apply if the company were resident in Sweden. In addition to that, there are two complementary rules, which can prevent the CFC-rules from being applicable. There are a couple of special rules for computing the income but no special rule for intangibles.

35. Länsrätten i Skåne län, case 6132-07.
3.4. Withholding taxes
In case Sweden (as a source state) has been given the right to tax royalty paid to a taxable person in another country that is part in the same tax treaty, the royalty is taxed as business income from a permanent establishment in Sweden, if it originates from a permanent establishment in Sweden. From this taxable income/royalty both Swedish and foreign costs are deductible. Should the recipient have a permanent establishment in Sweden, the royalty is treated as part of the income from this establishment, should the royalty originate from this. In chapter 6 a there is an exception from this rule for royalties paid within EU between connected parties.37

3.5. Other anti-avoidance rules
There are no special rules aimed at protecting the tax base from the migration of intangibles. However, some general tax rules might have such an effect and in some cases the tax evasion law might be applicable.

4. EU/EEA and tax treaties
In case of structural changes, such as when intangibles are migrated, some Swedish rules might be problematic from this perspective. For example, the exit tax on transferring assets abroad has been thoroughly discussed.38 The Swedish CFC-rules, which might be applicable when income from intangibles are placed in low tax companies, has also been questioned from an EU-law conformity perspective.39

5. Conclusion
It’s hard to see anything utterly alarming in the Swedish tax rules regarding intangibles. There are, however, uncertainties regarding the valuation of intangibles, both for transfer pricing purposes and for periodization purposes. To some extent, this might be inevitable because of the very nature of intangibles. These important problems are, or could be, reduced by the use of ad-

37. See chapter 6 a § 2 Income Tax Act.
vance rulings or some kind of standardized (schabloniserade) rules. Every uncertainty regarding the conformity between Swedish rules and EU-law is, needless to say, a problem – however hardly distinctive for intangibles.