VAT frauds of so-called carrousel type and NJA 2018 p. 704

[Translation of the article *Momsbedrägerier av så kallad karuselltyp och NJA 2018 s. 704*, by Björn Forssén, published in original in Svensk Skattetidning, SvSkT – Eng., Swedish Tax Journal. SvSkT 2/2022 pp. 118–130.]

In this article, Björn Forssén is reasoning setting out from the HD's decision in the case NJA 2018 p. 704 about fraud regarding the accounting of VAT, where cases of so-called carrousel type are concerned. In the first place, he compares the senior judge of appeal's perception of the question of coarse tax fraud with the HD's decision, where the question of abusive practice in relation to the criminal law principle of legality is concerned.

1 Introduction

In the Swedish VAT act, *mervärdesskattelagen (1994:200)*, abbreviated GML,[1] a so-called reverse charge of tax liability existed from the beginning, i.e. the value-added taxation of goods or services is made at the purchaser instead of at the vendor, regarding enterprises' purchases of certain services from enterprises in other EU Member States or in third countries.[2] At Sweden's EU-accession in 1995 was reverse charge introduced in the GML also for enterprises' intra-Community acquisitions (nowadays intra-Union acquisitions) of goods from enterprises in other EU Member States.[3] Since more services had come to be supplied from a distance, reverse charge was extended on 1 January, 2010 to the main rule in the GML for enterprises acquisitions of services from enterprises abroad.[4] For more than 22 years ago reverse charge was introduced in the GML also for *transactions within the country* between enterprises – regarding goods in the form of fine gold and investment gold.[5] Thereby was tax avoidance or evasion stopped in such cases, where the purchaser made a deduction in the VAT return to the SKV (*Skatteverket* – the tax authority) for charged input tax in the invoice from the vendor, whereas the vendor omitted to carry out his liability to account for the corresponding output tax to the SKV. This is basic for what is usually called carrousel trading in the field of VAT.[6] Later on has reverse charge been introduced in the GML for

[1] The GML was replaced on 1 July, 2023 by the VAT act, *mervärdesskattelagen (2023:200)*, abbreviated ML. See table for comparison of GML/ML, prop. 2022/23:46, *Ny mervärdesskattelag* (New VAT act) Appendix 5 (pp. 758-777). See also www.forssen.com, under Forskning/F10.

[2] See Ch. 1 sec. 2 first para no. 2 and sec. 1 first para no. 2, its wording when the GML came into power on 1 July, 1994. See also prop. 1993/94:99, *om ny mervärdesskattelag* (about a new VAT act).

[3] See Ch. 1 sec. 2 first para no. 5 and sec. 1 first para no. 2 of the GML, its wording according to SFS 1994:1798. See also prop. 1994/95:57, *Mervärdesskatten och EG* (The VAT and the EC).

[4] See Ch. 1 sec. 2 first para no. 2 of the GML, its wording according to SFS 2009:1333, which was introduced on 1 January, 2010 according to the regulation SFS 2009:1334. See also prop. 2009/10:15, *Nya mervärdesskatteregler om omsättningsland för tjänster, återbetalning till utländska företagare och periodisk sammanställning* (New VAT rules on the country of supply, refund to foreign entrepreneurs and recapitulative statement).

[5] See Ch. 1 sec. 2 first para no. 4 a of the GML, which was introduced on 1 January, 2000, by SFS 1999:640. See also prop. 1998/99:69, *Särskilda mervärdesskatteregler för investeringsguld* (Special VAT rules for investment gold).

[6] See a Danish *kandidatafhandling* submitted (*afleveret*) on 23 May, 2013 at Copenhagen Business School, *MOMSKARRUSELLER – REVISORS ROLLE* (VAT carrousels – the auditor's role), by Anita Holm Thorstensen

transactions within the country between enterprises also in other sectors, e.g. concerning trading with services in the form of emission rights for greenhouse gases.[7] On 1 April, 2021 reverse charge was introduced concerning transactions within the country between taxable persons regarding goods in the form of mobile phones, integrated circuit devices, gaming consoles, tablets and portable computers – provided that the taxable amount for the transaction of those goods in an invoice all in all exceeds 100,000 Swedish crowns and the registration liability for the purchaser is not only a consequence of the acquisition.[8]

The reason for the introduction of reverse charge for transactions within the country between in several areas is above all the frauds of so-called carrousel type in the field of VAT that exist inter alia in Sweden. I held a lecture for more than 20 years ago at *Svensk Juriststämma* (Swedish Law Meeting) about it,[9] and in this article I comment the standpoint of the Supreme Court of Sweden (*Högsta domstolen*, abbreviated HD) regarding the phenomenon at abusive practice, according to the case NJA 2018 p. 704. I compare the HD's conception on the question of coarse tax fraud according to sec. 4 of the Tax Fraud Act, *skattebrottslagen (1971:69)*, abbreviated SBL, with the perception of the senior judge of appeal at the Svea Court of appeal about abusive practice and the criminal law principle of legality established in Ch. 1 sec. 1 of *brottsbalken (1962:700)*, the Penal Code, abbreviated BrB.

The HD's case NJA 2018 p. 704 concerned trading with precious metals: gold, platinum and silver. Regarding goods in the form of gold the fineness was to low for it to be a question of fine gold or investment gold, and concerning platinum and silver reverse charge does not exist at all in the GML. Thus, the general rules on tax liability to VAT applied to all parts of the

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and Karina Skovgaard Svane, where the following is stated in section 2.7 ("*Hvordan opbygges en momskarrusel*"), How a VAT carrousel is built up: "*Momskarrusellerne fungerer grundlæggende på den måde, at det ene selskab i karrusellen får penge tilbage i moms, mens et andet selskab oparbejder en stor momsgæld for derefter at gå konkurs og aldrig indbetale momsen*." (The VAT carrousels work basically so that one company in the carrousel gets VAT-money back, whereas another company builds up a big VAT debt and thereafter files for bankruptcy and never pays the VAT). In another *kandidatafhandling* submitted on 7 May, 2015 at Copenhagen Business School, *EFFEKTERNE AF OMVENDT BETALINGSPLIGT*: *THE EFFECT OF REVERSE CHARGE*, by Jeanne Kierulff Nielsen and Yvonne Nygaard, it is stated, in section 5, "*Momskarruselsvig*" (VAT carrousel fraud), the following as typical for a VAT carrousel: "*Svindlernes formål med en momskarrusel er, at få genereret store momsbeløb, ved ikke at betale salgsmoms til SKAT. Svindlervirksomhederne udgiver sig for at mangle en betalingsevne, mens det i virkeligheden er en betalingsvilje de mangler.*" (The fraudster's objective with a VAT carrousel is to generate big VAT amounts, by not paying VAT on sales to the tax authority. The fraudster enterprises give themselves out as lacking possibility to pay, whereas it in reality is the will to pay that they are lacking.)

[7] See Ch. 1 sec. 2 first para no. 4 d of the GML, which was introduced on 1 January, 2011, by SFS 2010:1518. See also prop. 2010/11:16, *Omvänd skattskyldighet för mervärdesskatt vid handel med utsläppsrätter för växthusgaser* (Reverse charge liability for VAT at trading with emission rights for greenhouse gases).

[8] See Ch. 1 sec. 2 first para no. 4 f and seventh para of the GML, which was introduced on 1 April, 2021, by SFS 2020:1220 (and 1221). See also prop. 2020/21:20, *Omvänd skattskyldighet vid omsättning av vissa varor* (Reverse charge at supply of certain goods). Of interest is also that the government in the bill gave up its proposal of 2020-04-17 (Fi2020/01855/S2), which meant that reverse charge also would apply to services in the form of IP-telephony (VoIP, Voice over Internet Protocol). I note that since 2015, VoIP is mentioned in article 6a(1)(b) of the COUNCIL IMPLEMENTING REGULATION (EU) No 282/2011 as an example of telecommunications services according to article 24(2) of the VAT Directive (2006/112/EC).

[9] Lecture by Björn Forssén at *Svensk Juriststämma* (Swedish Law Meeting) 2001-11-14 (*Stockholmsmässan i Älvsjö*), *Moms och omsättningsbegreppet. Karusellen hos skatte- och ekobrottsmyndigheten (SKM och EBM)* – VAT and the transaction concept. The carrousel by the tax and economic crime authorities (abbreviated SKM and EBM). Arranger VJS. (Forssén 2001).

case,[10] i.e. a vendor is tax liable for a taxable transaction of good or services within the country also when it is made to another taxable person – not first for a sale to a consumer like at the application of the special rules on reverse charge.

2 The Svea Court of appeal's court findings

The case NJA 2018 p. 704 concerned in the first place a question about coarse tax fraud. According to sec. 2 of the SBL is he or she who in another way than orally – i.e. in writing – with intent gives an erroneous information to an authority or omits to submit a tax return, a statement for control purposes or another prescribed information to an authority, and thereby causing a risk of tax (Sw., *skatt*) being withheld the public or wrongly counted in or reimbursed to himself or herself or someone else, sentenced for tax fraud to prison (for two years at the most). Thus, there are three necessary criteria for responsibility for tax fraud, the prerequisites *intent* (Sw., *uppsåt*), *erroneous information* (Sw., *oriktig uppgift*) and *risk* (Sw., *fara*), which all must be fulfilled for a public court (Sw., *allmän domstol*) to find sufficient reason being at hand to sentence somebody for tax fraud. If a tax fraud is to be considered insignificant, the sentence will be a fine for tax offence (Sw., *skatteförseelse*) according to sec. 3 of the SBL, whereas the sentence will be prison for at least six months and six years at the most if it is a matter of coarse tax fraud. When judging if the tax fraud is coarse shall according to sec. 4 second para of the SBL especially be taken into consideration if it is a matter of a very high amount, if the perpetrator of the crime has used false documents or misleading book-keeping or if the procedure has formed part of a crime systematically exercised or of a larger scale or otherwise being of an extremely dangerous kind.

In NJA 2018 p. 704 the Svea Court of appeal stated in its court findings that the question on right of deduction for input tax when the transactions have been preceded by VAT fraud has been tried by the Court of Justice of the EU (CJEU), for example in the Joint cases C-439/04 and C-440/04 (Kittel and Recolta Recycling) which concerned VAT frauds of carrousel type.[11] The CJEU deems inter alia in that verdict that the national court shall dismiss deduction for input tax, if it with respect of objective circumstances comes out that the tax liable knew or should have known that VAT frauds existed previously in the chain of business. That is in my opinion nothing new from the CJEU, but a perception of the court also in other cases. Another example is the Joint cases C-354/03, C-355/03 and C-484/03 (Optigen et al.),[12] where the CJEU in item 55 considers that the right of deduction for input tax cannot be refused somebody for acquisitions made with the aim to make taxable transactions, only because someone before or after in the chain of delivery has made a with regard of VAT fraudulent transaction which the person in question did not know about and neither could have known about. If the entrepreneur knew or should have known about the existence of VAT frauds in previous links of the chain of business, he or she, thus, has not a right to deduct charged input tax in the invoice from a deliverer of goods or supplier of a service.

Moreover, the Svea Court of appeal states that the Supreme Administrative Court (*Högsta förvaltningsdomstolen*, abbreviated HFD), after the Joint cases C-439/04 and C-440/04 (Kittel and Recolta Recycling), has "established" in the case HFD 2013 ref. 12 that it at application

[10] See Ch. 1 sec. 2 first para no. 1 and sec. 1 first para no. 1 of the GML.

[11] Joint cases C-439/04 and C-440/04 (Kittel and Recolta Recycling), ECLI:EU:C:2006:446.

[12] Joint cases C-354/03, C-355/03 and C-484/03 (Optigen et al.), ECLI:EU:C:2006:16.

of the GML's rules on right of deduction for input tax shall be regarded *the principle according to the CJEU for interpretation of the VAT Directive in cases of fraud*.[13] According to the Svea Court of appeal, this means that *the right of deduction is dependent on whether the tax liable knew or should have known that the company by its transactions took part in a VAT fraud*. I consider that this has led to the misunderstanding among the participants in cases of the present sort that the CJEU has established some kind of a "Kittel"-doctrine, when it is only a matter of the VAT system not being allowed to be used to commit frauds, by using VAT returns to unfairly appropriate to oneself money from the public treasuries in the EU's Member States. Then, a court should also be careful with stating that the CJEU has "established" anything at all, since the CJEU does not have the character of a constitutional court. In my opinion, that is the case at least as long as the EU does not have a supranational character, but for instance Sweden as a Member State has only conferred competence to the EU's institutions in certain fields, like with the VAT law, where the contents of the rules in the GML and in parts of the Taxation Procedure Act, *skatteförfarandelagen (2011:1244)*, abbreviated SFL, which concern VAT are governed in the first place by the EU's VAT Directive (2006/112/EC). Thus, the correct expression should be that the CJEU *considers*. Expressions like *consider* should also be used when the appliers of law express the HFD's or the HD's perception of a certain question. Although precedents is an important source of law in Swedish law, and of guidance for future decisions in the lower instances, it is in my opinion important to regard that it in principle does not exist precedent bound interpretation and application of the legislation in Sweden. Above all, this is shown in the field of taxation, by it following of Ch. 8 sec. 2 first para no. 2 of the 1974 Instrument of Government, *regeringsformen (1974:152)*, abbreviated RF, that a measure of taxation cannot be enforced against the individual's will in conflict with the wording of the written rule in question (the principle of legality for taxation measures).

The Svea Court of appeal deemed itself to have made an in relation to the administration process independent judgment of whether the company's in question deduction claims for input tax referred to the present acquisitions of goods were to be considered as erroneous information. The Svea Court of appeal considered at a collected judgment of the circumstances that the information was erroneous and thereby that the objective circumstances for tax fraud were fulfilled. Then, the question was whether the defendant – the company's representative – had had intent of tax fraud or if he or she had acted with coarse carelessness, i.e. whether the deeds had had subjective coverage. The Svea Court of appeal stated that the trial of that question coincided in all essentials with the trial that must be done for tax purposes to decide whether the company had the right of deduction for the input tax on the acquisitions of the goods, whereby the court of appeal, however, noted that the demands of evidence in criminal cases is substantially higher (for the prosecutor) than (for the SKV and the tax liable) in taxation cases.

Concerning the question of intent, the court of appeal considered that the company's representative, at least after some time, had realized that a considerable risk existed for the present goods to have been subject for VAT frauds in previous links of the chain of business. Thus, this means that the company's VAT returns thereafter contained erroneous information. According to the court of appeal's opinion the representative was also indifferent before that

[13] The VAT Directive: The EU's VAT Directive (2006/112/EC). Complete title: COUNCIL DIRECTIVE 2006/112/EC of 28 November 2006 on the common system of value added tax. The VAT Directive replaced on 1 January, 2007 the EC's First VAT Directive (67/227/EEC), The First Directive, and the EC's Sixth VAT Directive (77/388/EEC), The Sixth Directive.

risk and also stated that the knowledge of the effect of the erroneous information had not restrained the representative from submitting the erroneous information in the company's VAT returns. Considering that background, the appeal court could not come to another conclusion than that the representative had had necessary *intent* to give *erroneous information* causing a *risk* of tax evasion in a way required for responsibility of tax fraud, whereby the court of appeal also stated that there is no demand in addition thereto that the representative had a precise knowledge of how the VAT frauds were made.

The court of appeal sentenced the representative of the company for ten cases of coarse tax fraud. The court of appeal regarded at the judgment of the penalty value that the tax evasion had concerned very high amounts, but that the representative had not had any closer knowledge about the criminality in the previous links of the chain of business. Therefore, the court of appeal considered that the collected criminality had a penalty value corresponding to two years in prison. It may be compared with that coarse tax fraud can lead to prison for six years. With regard of the person in question also being imposed a trading prohibition, the court of appeal that the length of the prison penalty would be determined to one year and six months. With respect of the character of the criminality and its high penalty value, another penalty than prison was out of the question.

3 Comparison of the senior judge of appeal's perception with the HD's decision

The senior judge of appeal was dissentient, and wanted, unlike the majority in the Svea Court of appeal, to acquit the defendant. She mentioned the EU-case C-255/02 (Halifax et al.),[14] where the CJEU inter alia considers that if the transactions which are the basis of the right to make a deduction for input tax constitute abusive practice such a right does not exist according to the Sixth Directive, nowadays the VAT Directive.[15] To conclude that abusive practice exits it is according to the CJEU required that the present transactions, despite that they are formally correct, cause that a tax advantage is achieved which is in conflict with the purpose of the rules in the directive, and it shall also be evident by the objective circumstances that the main aim with the transactions is to achieve a tax advantage.[16] However, the senior judge of appeal stated inter alia *that the CJEU in C-255/02 Halifax et al. expressed that the relationship that it is concluded that an abusive practice exists does not need to lead to any measure of sanction, which would demand a clear and unequivocal support in law, but instead reimbursement liability since the deduction has become unjustifiably (item 93)*. Moreover, the senior judge of appeal stated that the criminal law principle of legality according to Ch. 1 sec. 1 of the BrB functions as guarantee of legal certainty, by it raising a demand on the legislation meaning that the individual must be able to foresee when he or she can be subject of criminal law intervention. The principle in question means inter alia a prescription demand (Sw., *föreskriftskrav*), a prohibition of analogy (Sw., *analogiförbud*) and a prohibition of indefiniteness (Sw., *obestämdhetsförbud*). Concerning the Joint cases c-439/04 and C-440/04 (Kittel and Recolta Recycling) and the case HFD 2013 ref. 12, the senior judge of appeal stated that an acceptance of the CJEU's application and interpretation of the VAT Directive with respect of tax law, which is confirmed by the HFD, would also have an effect in the material criminal law like the prosecutor had claimed meant

[14] The case C-255/02 (Halifax et al.), ECLI:EU:C:2006:121.

[15] See item 85 of the ”Halifax et al.”-case.

[16] See item 86 of the ”Halifax et al.”-case.

an expansion of the criminal law responsibility without support in any decision of guidance, why it could questioned whether such an interpretation and application of a directive is complying with the criminal law principle of legality. Due to that uncertainty, the senior judge of appeal considered, unlike the majority in the Svea Court of appeal, that the defendant would be acquitted from responsibility.

The senior judge of appeal's perception in NJA 2018 p. 704 can in my opinion be invoked as a support for the principle of legality for criminal law measures meaning that responsibility cannot be imposed only because a right of deduction for input tax is lacking as a consequence of abusive practice.

The defendant appealed the verdict of the Svea Court of appeal. The HD's verdict in NJA 2018 p. 704 was that the HD explained that the defendant, as representative of the company in question, would be considered giving erroneous information in the meaning of the SBL, by claiming deduction for input tax, despite that the company had no right of deduction for the present input tax in the case. The HD did not give a leave to appeal otherwise in the case, why the Svea Court of appeal's verdict was firm. I am comparing the senior judge of appeal's perception with the HD's reasoning by the grounds of its judgment as follows.

By starting out from what the Svea Court of appeal had found concerning the deeds, including that the company in question did not have a right of deduction for the present input tax in the case, the HD gave a leave to appeal in the question whether the defendant by exercising the right of deduction for input tax would be deemed giving erroneous information in the meaning according to the SBL. Otherwise, the question of leave to appeal regarding the case was declared resting.

In the HD's grounds of decision it is stated in item 24, with reference to the HFD's verdict HFD 2013 ref. 12, that the overall EU law principle on abuse means that fraudulent activities can be deemed important at the judgment of whether transaction of goods or services exists according to the GML. Such an interpretation of what is supposed to be a transaction according to the GML must according to the HD be within the frame of what the criminal law principle of legality allows regarding interpretation for the purpose of finding out the true meaning of the law. Thereby, the prohibition of analogy means according to the HD no obstacle against a claim of deduction for VAT being deemed as an erroneous information in the meaning of the SBL. Neither does the criminal law principle of legality otherwise prevent such a judgment.

However, the HD states in item 25 that it is something else that it for responsibility according to the SBL is requested a criminal law intent, where it is not enough with such a mala fide (Sw., *ond tro*) based on objective circumstances which is sufficient to disqualify the right of deduction. However, that question is not comprised by the HD's trial within the frame of the leave to appeal that was given.

The HD's verdict in NJA 2018 p. 704 was, according to item 26, that the HD declared that the defendant, as representative of the company in question, would be deemed to have given or to have let be given erroneous information in the meaning of the SBL by claiming right of deduction for input tax, despite that the company had no right of deduction for the present input tax in the case. The HD stated in item 27 that reasons were lacking to give a leave to appeal otherwise in the case, why the Svea Court of appeal's verdict was firm.

I put the senior judge of appeal's perception that the defendant should have been acquitted with regard of the criminal law principle of legality in relation to the HD's remark that the question of intent was not comprised by the leave to appeal. In my opinion, this means that, despite that the HD in NJA 2018 p. 704 confirmed the verdict of conviction by the majority of the Svea Court of appeal, it is not clear that abusive practice in itself means that criminal law responsibility exists. Furthermore, in the individual case it shall always be decided if also the risk prerequisite for tax fraud is fulfilled. I am reminding of this, since the HD did not treat the risk prerequisite within the frame of the given leave to appeal.

4 Concluding viewpoints

In my opinion, NJA 2018 p. 704 cannot mean that it is clear that a case of abusive practice regarding the VAT in itself causes penal liability. That is going too far at the interpretation of the prerequisites erroneous information and intent concerning the tax fraud. However, the trial of the penal responsibility should also be based on the risk prerequisite, so that all three prerequisites for tax fraud are put in the individual case in relation to the CJEU's case-law meaning that the right of deduction for input tax can be lost if it with regard of objective circumstances is proved that the tax liable person knew or should have known that he or she took part in a VAT fraud. I come back in that respect to the two examples of what the defence lawyer should think about in cases of VAT fraud of carrousel type which I brought up at the above-mentioned lecture at the Swedish Law Meeting more than 20 years ago, namely the following. The defence lawyer should point out already at the statement of fact (Sw., *sakframställan*) that the prosecutor shall state what he or she knows about the taxation question and in the the evidentiary part of the case (Sw., *bevisdelen i målet*) ask a question to the one or several of the tax auditors who the prosecutor invokes regarding whether the tax auditor deems that the defendant has in any sense made the tax control more difficult for the SKV.

Concerning the first mention question, I referred at my lecture to that Doctor of Laws Börje Liedhammar (nowadays lawyer as well as professor) stated in an article that a consultation (Sw., *samråd*) in the question of what is erroneous information should take place between prosecutor and defence lawyer, whereby he referred to sec. 15 second para of the SBL.[17] In that rule it is stipulated that the district court (Sw., *tingsrätten*) shall, in a case about crime according to the SBL that has a connection with a tax question which is pending at an administrative court (Sw., *förvaltningsdomstol*) or an administrative authority (Sw., *förvaltningsmyndighet*), consult with the administrative court or the administrative authority concerning the handling of the case, if it is not unnecessary. Börje Leidhammar motivated his advice with that the question on erroneous information under all circumstances must be decided by the guidance of the rules in the tax statute which in the individual case stipulates the tax liability, whereby he referred to page 91 in prop. 1995/96:170, *Översyn av skattebrottslagen* (Overview of the Tax Fraud Act). That bill constituted the preparatory works to the reform of the SBL on 1 July, 1996, by SFS 1996:658, which meant that tax fraud was altered from an effect crime to a risk crime and that evasion of tax inspection (Sw., *försvårande av skattekontroll*) also was altered in that way. I consider that a defence lawyer, in such a case that Börje Leidhammar brings up, should ask for a meeting with the prosecutor already before the preliminary investigation is finished, if a prosecution can come to apply to

[17] See *Skattenytt* (Tax news) 2000 pp. 405-417, the article *Om muntlig förhandling* (On oral proceedings), by Börje Leidhammar, p. 415.

a case of alleged abusive practice regarding the VAT. Hereby, I refer to Ch. 23 sec. 18 b *rättegångsbalken (1942:740)*, the Code of Judicial Procedure, abbreviated RB:

> *On the request of the suspected or the defence lawyer an inquiry or other investigation shall take place, if it is likely to be of importance for the preliminary investigation. If such a request is rejected the reason for that shall be stated*.
>
> *Before the prosecutor decide in the question on prosecution, he or she may hold a special meeting with the suspected or the defence lawyer, if it is likely to be of advantage for the decision on prosecution or otherwise for the further handling of the matter*.

If somebody is under suspicion for tax fraud, where it implied or explicit is a matter of abusive practice like at assertions from the SKV about carrousel trading, he or she should take up with his or her defence lawyer that a meeting should be requested according to Ch. 23 sec. 18 b of the RB with the prosecutor about the tax question and the question on tax fraud. If the prosecutor makes a decision that such a meeting shall not be held, the prosecutor must state the reasons for the rejection. This means that the prosecutor must include those in the protocol of the preliminary investigation, if the prosecutor is aiming to go further and decide to prosecute. Then increases, in my opinion, the defence lawyer's possibilities to successfully bring up in the statement of fact in the district court that the court according to sec. 15 first para of the SBL should declare the criminal case resting while awaiting the outcome of the taxation question regarding the VAT, regardless of whether it concerns output or input tax.

Concerning the question whether the tax auditor deems that the tax control has been made in any sense more difficult for the SKV, I make the following reflections, where the suspicion regards or might lead to a question on abusive practice regarding VAT like at VAT fraud of so-called carrousel type.

Although a case like NJA 2018 p. 704 concerns coarse tax fraud according to sec:s 2 and 4 of the SBL but is not about making the tax control more difficult according to sec. 10 first para of the SBL and neither about book-keeping crime according to Ch. 11 sec. 5 of the BrB, should the following question be put to the tax auditor, who is witnessing to support the prosecutor's prosecution and deed description. The question is whether the tax auditor has perceived that the defendant has made the tax control more difficult and how this relates to the assertions about erroneous information and the objective prerequisites for book-keeping crime according to Ch. 11 sec. 5 first para of the BrB. The objective prerequisites for book-keeping crime are that it as a main point shall not be possible to judge the course (Sw., *förlopp*), economic result (Sw., *ekonomiska resultat*) or balance (Sw., *ställning*) of the business with guidance of the book-keeping due to the defendant having omitted to book business transactions or maintain accounting material or by giving erroneous information in the book-keeping or in some other way.

To mention the relationship between making the tax control more difficult and book-keeping crime is in my opinion of interest especially when a tax case about VAT is based on or might be based on assertions from the SKV of abusive practice and that question can become mentioned in a tax fraud case which is essentially about the same circumstances as the tax case. If the prosecutor does not bring up either making the tax control more difficult or book-keeping crime, the prosecutor has solved a problem that arose in the criminal cases about tax by the reform of the SBL on 1 July, 1996, namely the competition of rules which thereby

came up between sec. 10 of the SBL, making the tax control more difficult, and Ch. 11 sec. 5 of the BrB, book-keeping crime. Thereby, making the tax control more difficult is no longer subsidiary in relation to the book-keeping crime, but normal competition of rules applies. The legislator presupposed that the problem with the competition of rules would be solved in practice by the prosecutor's formulation of the deed description.[18] The problem often is that the prosecutors' deed descriptions, like the SKV's reports, are fairly imprecise. Thus, the defence lawyers should, in my opinion, pay attention to this, and put questions to the tax auditor in his or her capacity of the prosecutor's witness on the theme of erroneous information regarding how the tax auditor, whose investigation also is the basis for the taxation decision, sets his or her assertion about erroneous information in the VAT return in relation to above all the question about erroneous information in the book-keeping and the question whether the defendant has made the tax control more difficult. It is the tax auditor's investigation that is the basis for the tax case and on which the prosecutor is basing the prosecution, and then I consider that an imprecise deed description from the prosecutor, with the possibility of adjustment for the prosecutor during the criminal case proceedings, cannot be in compliance with the individual's legitimate demand of a fair trial. In my opinion, the prosecutor shall not be assisted by the court to enforce a prosecution which only concerns tax fraud, coarse or according to the normal degree, if the prosecutor should have explained in a precise deed description why the prosecution does not regard also the making of the tax control more difficult, when the tax auditor thereafter in the witness inquiry is supporting the prosecutor with a reasoning that should be tried against making of the tax control more difficult or book-keeping crime.

Finally, I may remind of that there is no clear definition of what constitutes VAT fraud by carrousel trading.[19] I consider that it is a phenomenon where questions about both *the tax subject* and *the tax object* are tried starting out from the VAT principle which show itself by the basic principles for what is meant with VAT according to the EU law according to article 1(2) of the VAT Directive (previously article 2 of the First Directive), namely the principles about a general right of deduction, reciprocity and passing on the tax burden. In an ennobling chain of *tax subjects* – taxable persons (enterprises) – up to the consumer the VAT shall regarding taxable transactions within the country of goods or services be deducted and levied in all business links, so that the VAT on the total value-added in the end burdens the consumer as tax carrier. What is common for VAT frauds of carrousel type is that the principle of passing on the tax burden of the VAT to the consumer is not working due to frivolous tax subjects in the ennobling chain unfairly appropriate to themselves money from the State, by using the reciprocity principle and the principle of a general right of deduction insofar that an enterprise which receives an invoice deducts charged input tax in the invoice on incorrect grounds, since the other enterprise is lacking a will to pay regarding the corresponding output tax. It is by starting out from that attitude by the vendor that questions on intent, erroneous information and risk shall be asked in a criminal law respect, where it is a matter of whether an enterprise purchasing goods or services shall be deemed having known

[18] See prop. 1995/96:170 p. 137.

[19] In the above-mentioned Danish theses are inter alia mentioned an article by Christian Dresager at the Danish Customs and Tax Board (*Danmarks Told- og Skattestyrelse*) from 1999, *Moms-karruselsvig: en svigsmetode der eskalerer* (VAT carrousel fraud: an escalating method of fraud), *Revision og regnskabsvæsen*, 1999 *årgång* (annual volume) 68, no. 2, pp. 23-28. At my above-mentioned lecture at the Swedish Law Meeting, Forssén 2001, I mentioned that article, and that he (on p. 24) inter alia stated the following: *There is in no place in the legislation or literature a proper definition of VAT carrousel fraud*. Since this is still the situation today, I denote in this article VAT frauds of carrousel type, like in NJA 2018 p. 704, a phenomenon.

or should have known the lack of will to pay by the joint party and been at least indifferent before this. Thereafter may the responsibility question be judged for vendor or purchaser or, if they are legal persons, their representatives, where it is a matter of the State's loss of taxes at for example abusive practice. Reverse charge is a method which has come to be used more and more of the legislator to suppress improper activities of carrousel type, and is simply about removing the cash flow from the State, by the SKV, to the purchasing enterprise of excess input tax (Sw., *överskjutande ingående moms*), so that the vendor will not account output tax, but it is instead accounted as a calculated output tax by the purchasing enterprise that deducts the corresponding amount as input tax in the same VAT return.

By the way, sometimes there is a misunderstanding that VAT frauds of carrousel type is something that came here with Sweden's EU-accession in 1995. It is instead so that the tax authority investigated suchlike cases at least already in the 1980's, which I mention in a book.[20]

Concerning NJA 2018 p. 704, I may also mention that the case is mentioned in a Government's official report, SOU 2020:13 – "*Att kriminalisera överträdelser av EU-förordningar*" (To criminalize transgressions of EU-regulations), where the commission was to map which techniques of legislation are used at the criminalization at transgressions of EU-rules within various fields in Sweden and a choice of other EU Member States. The case is mentioned on pages 48 and 54 in SOU 2020:13, but without giving anything more for my interpretation of it. However, it is of interest that the report sets NJA 2018 p. 704 in a broader context than tax law, and that it already by the report's title follows that there are things to address in the field of criminal law where EU-regulations are concerned. NJA 2018 p. 704 concerned trading of goods, but there exist also business regarding services in cases on VAT frauds of carrousel type. Therefore, I come back to the above about the interesting with that the government before the alteration of the law on 1 April, 2021 gave up the proposal of introducing reverse charge also for services in the form of IP-telephony (VoIP), and not, as was finally done, only for goods in the form of mobile telephones etc. Since VoIP is mentioned in an EU-regulation as an example of telecommunications services according to article 24(2) of the VAT Directive, it is of interest also at analysing asserted VAT fraud of carrousel type to follow up if the legislation procedure, where it is a matter of criminal law and questions about transgression of EU-regulations, can be of guidance.

[20] See section 39, "*'Flygande mattor' och 'karuseller'*" ('Flying carpets' and 'carrousels'), in part 1 of my book *Skatt i skrattspegeln*, Tax in the distorting mirror (self-published 2021), Forssén 2021a, where I, like in the lecture Forssén 2001, also bring up the importance of the SKV making registration control in practice. In this book, I come back several times to the question of registration control.