Gap in the customs act opening for unintended VAT deduction due to two different determinations of who is a taxable person

[Translation of the article Lucka i tullagen öppnar för ej avsett momsavdrag på grund av två olika bestämningar av vem som är beskattningsbar person, by Björn Forssén, published in original in Tidningen Balans fördjupning (The Periodical Balans Annex with advanced articles) 3/2018, pp. 17–19. Translation into English by the author of this article, Björn Forssén.]

In this article, Björn Forssén is continuing to describe gaps in legislation concerning VAT. Here he brings up that it exists a possibility to arrangements meaning that importers can get VAT deduction on pure consumption without any commercial further sale of imported goods, depending on mervärdesskattelagen (1994:200), ML, the VAT act, containing two determinations of who is taxable person, which can be used for arrangements due to a gap in the Customs Act. Examples of such importers are holding companies, non-profit associations and registered religious communities.

In the article Exemption from tax – a mercy to make a quiet payer for at the tax authority's head office and the Government or try for legality at the Supreme Administrative Court (*Högsta förvaltningsdomstolen*) – in this no. of Balans fördjupning – I state that in the rule on possibility to exemption from certain taxes and fees in Ch. 60 sec. 1 of *skatteförfarandelagen (2011:1244)*, SFL, the Taxation Procedure Act, a paragraph is lacking corresponding to the second paragraph in the rule's predecessor, Ch. 13 sec. 1 of *skattebetalningslagen (1997:483)*, the tax payment act, so thar the institute of exemption could be applicable to such "import-VAT" which is not comprised by *tullagen (2016:253)*, the Customs Act, but by the SFL. That relationship is to the individual's disadvantage concerning legal certainty. In this article, I continue with another gap in the law which instead can open for arrangements meaning that for example a holding company, a non-profit association and a registered religious community can be entitled to deduction for "import-VAT", despite that goods are not sold further and leading to liability to account for output tax but used for pure consumption. The assumed gap exists in the Customs Act, and can be used in that way depending on that the ML contains two determinations of the concept *beskattningsbar person* (taxable person) – the general in Ch. 4 sec. 1 and the special in Ch. 5 sec. 4 which is used in connection with application of the rules in Ch. 5 of the ML that determine whether a supply of a service is made within or outside the country.[1]

Description of problem and judgment

If a taxable person or an ordinary private person (consumer) makes an import of goods to Sweden from a place outside the EU (third country) or from so-called third territory (that is the goods go into free supply here), the person shall pay VAT in Sweden on such an *import*, according to Ch. 1 sec. 2 first para no. 6 and sec. 19. By the way, as from 2015 applies that "import-VAT" is taken out by *Skatteverket* (SKV), the tax authority, for those VAT registered here, whereas *Tullverket*, the Customs, otherwise is still the taxation authority concerning imports (SFS 2014:50 and SFS 2014:51).

[1] See also sections 3.7.1 and 3.7.2 in *Ord och kontext i EU-skatterätten: En analys av svensk moms i ett law and language-perspektiv Andra upplagan*, Words and context in the EU tax law: An analysis of Swedish VAT in a law and language-perspective Second edition by Björn Forssén. Melker Förlag. Laholm 2017.

What is decisive for the SKV being such a taxation authority for ”import-VAT” is that the VAT registered is a taxable person acting in this capacity. To determine the latter, the SKV has – in co-operation with the Customs – issued a standpoint of 2014-11-21 (dnr 131 639684-14/111), where the SKV has expressed the following in summary regarding how the question should be handled:

> *The SKV considers that it can be presumed that a legal person who report his registration number to VAT to the Customs at the import is acting in his capacity of taxable person. The report can be made by invoking a so-called EORI-number which is connected to the importer's VAT registration number.*[2] *The result of that reference is that the VAT at the import shall be accounted to the SKV in a VAT return.*

Regarding SFS 2014:50, act on alteration in the ML, and SFS 2014:51, act on alteration in the Customs Act (2000:1281) – which by the way was replaced on 1 May, 2016 by the Customs Act (2016:253)[3] – there is a registered errand at the Treasury of 2014-12-12 (Dnr. Fi2014/4452), where I pointed out an assumed gap in the act regarding the rules about that the SKV on 1 January, 2015 took over the value-added taxation of a certain sort of imports from the Customs. I have described the problem as follows:

- In Ch. 5 sec. 11 a of the Customs Act, its wording according to SFS 2014:51, it was stipulated in no. 2, as one of the terms for VAT on imports to be taken out according to the SFL, that the person filing the return etcetera *is acting in the capacity of taxable person* (Sw., beskattningsbar person) *according to the VAT act at* (Sw., ”*vid*”) *the import*. (Note! My italicizing of the word *vid*.)

In the ML, *beskattningsbar person* (taxable person) has two determinations that are of interest here, namely in Ch. 4 sec. 1 and Ch. 5 sec. 4. In Ch. 5 sec. 4 is with *beskattningsbar person* (taxable person) regarded not only persons that carry out economic activity etcetera, but also for example holding companies and non-profit associations and registered religious communities which do not have an economic activity according to Ch. 4 sec. 1 of the ML. The only definition regarding *beskattningsbar person* (taxable person) which is stated in the ML concerns foreign taxable person (*utländsk beskattningsbar person*) and is to be found in Ch. 1 sec. 15. Thus, comprising the reference in Ch. 5 sec. 11 a first para no. 2 to *beskattningsbar person* (taxable person) according to the ML also for example holding companies and the mentioned sorts of non-profit associations and registered religious communities.

Since the second demand for the SKV being the taxation authority according to Ch. 2 sec. 2 of *tullagen (2016:253)* is – like in the predecessor Ch. 5 sec. 11 a first para no. 1 of *tullagen (2000:1281)*, its wording according to SFS 2014:51 – that the person filing the return etcetera is VAT registered in Sweden, and Ch. 8 sec. 2 fourth para no. 2 of the ML stating that with input tax is also regarded tax pertaining to imports and tax liability occurring for imports according to Ch. 1 sec. 2 first para no. 6 of the ML, right of deduction for input tax corresponding with the VAT on the import emerges according to Ch. 8 sec. 3 first para of the ML for those subjects, regardless of whether they in their activities are supplying taxable goods or services. Thereby an apparent risk exists for so-called arrangements, where for example a non-profit association that acquires some service from abroad, and thereby is *beskattningsbar person* (taxable person) according to Ch. 5 sec. 4 of the ML, combines it by importing goods for pure consumption without any further sale being made on which output tax would be

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[2] EORI, Economic Operators Registration and Identification number.

[3] See also Ch. 1 sec. 2 first para no. 6 and fifth para of the ML, their wordings according to SFS 2016:261. In the fifth para is referred as from 1 May, 2016 to the Union Customs Code, regulation (EU) no. 952/2013, which then replaced the Community Customs Code (EEC) no. 2913/92.

accounted for, and still getting deduction for input tax on imports. The taxation for withdrawal of goods is nor possible in such a situation, since such taxation hits a *beskattningsbar person* (taxable person) according to Ch. 2 sec. 2 first para of the ML, and then it is a matter of *beskattningsbar person* (taxable person) according to Ch. 4 sec. 1 of the ML.

For the mentioned risk of arrangements being avoided should – in my opinion – Ch. 5 sec. 11 a first para nos. 1 and 2 of *tullagen (2000:1281)* in its wording according to SFS 2014:51 should have been altered so that no. 2 referred to *beskattningsbar person* (taxable person) according to the ML except in the special meaning given to the concept in Ch. 5 sec. 4 of the ML. The word ”*vid*” (at) in Ch. 5 sec. 11 a first para no. 2 of *tullagen (2000:1281)*, which still exists in Ch. 2 sec. 2 of *tullagen (2016:253)*, adds to the interpretation problem, and the expression *in connection with* (Sw., *i samband med*) should have replaced it. However, that problem should have been removed, if the first mentioned alteration had been made. Thus, the assumed gap in the act exists today in Ch. 2 sec. 2 of *tullagen (2016:253)* and may give an unjustified right to deduct input tax on imports according to Ch. 8 sec. 3 first para of the ML.

The Treasury gave the following answer by mail in the errand of 2014-12-16:

> *At present, the Government deems there is no reason to alter the VAT legislation about the handling at import of goods coming into force on 1 January, 2015. The rule in Ch. 5 sec. 4 of the VAT act (ML) is only used at the application of Ch. 5 sec:s 5–19, that is the special definition of* beskattningsbar person *(taxable person) that is stipulated in Ch. 5 sec. 4 of the ML is only applicable at supply of certain services within the country and not at imports. The Government will follow the application of the new import-VAT rules coming into force on 1 January, 2015. If the rules would prove to be defective, there might be a need for an overview of the rules in the future.*

When *tullagen (2016:253)*, the Customs Act, replaced *tullagen (2000:1281)*, the Customs Act, the legislator had an opportunity to alter the rule in question. However, the correspondence to Ch. 5 sec. 11 a, that is Ch. 2 sec. 2 of tullagen (2016:253), has only been completed with that not only *beskattningsbar person* (taxable person), but also a legal person which is not acting in a capacity of *beskattningsbar person* (taxable person) according to the ML and is not VAT registered is taxed for VAT on import by the SKV and not by the Customs. The legislator could rather easily have taken measures about the interpretation problem regarding the determination of *beskattningsbar person* (taxable person) in the context or al least have altered the word ”*vid*” (at) to the expression *i samband med* (in connection with). This did not happen, but the Government’s answer to come back if it would be proven that the rules are defective thus remains. In other words, it is the application of law and the future case-law that will prove if the risk of arrangements is justified. I express here (in translation) the wording of Ch. 2 sec. 2 first para of *tullagen (2016:253)*, the Customs Act:

> *Value-added tax according to sec. 1 first para shall not be taken out according to this act but in pursuance of* skatteförfarandelagen (2011:1244)*, the Taxation Procedure Act, if the person filing the return or, if the person filing the return is a representative, the person on whose account the representative is acting is registered to VAT in Sweden at the time for the decision on establishing customs and*
> 1. *is acting in the capacity of* beskattningsbar person *(taxable person) according to* mervärdesskattelagen (1994:200)*, the VAT act, ”vid” (at) the import or*
> 2. *is a legal person which is not acting in the capacity of beskattningsbar person (taxable person) according to the VAT act at the import*. (Note! My italicizing of the word *vid* in item 1.)

For the context of cross-border trading within the EU, it is reminded here that the mentioned risk of arrangements is also apparent concerning holding companies. The assumed gap in the Customs Act can for example mean the following:

> An *aktiebolag* (AB), limited company, which is a holding company, acquires a service from abroad and constitutes thereby a *beskattningsbar person* (taxable person) according to Ch. 5 sec. 4 of the ML. The AB combines that with import of goods from another EU Member State. Then, the AB is tax liable for a intra-Union acquisition (IUA) according to Ch. 1 sec. 2 first para no. 5 (compared with Ch. 2 a sec. 3) of the ML and shall account for calculated output tax on such an IUA, but since such an amount also constitutes input tax according to Ch. 8 sec. 2 second para of the ML right of deduction for input tax according to Ch. 8 sec. 3 first para of the ML emerges. An amount equivalent to calculated output tax becomes deductible as input tax. It does not occur any value-added taxation for pure consumption of acquired goods, despite that the AB as a holding company is lacking an activity with taxable transactions, since the AB is not a *beskattningsbar person* (taxable person) according to Ch. 4 sec. 1 of the ML and taxation for withdrawal thereby does not occur according to Ch. 2 sec. 2 first para of the ML.

Conclusions

I have pointed out to the Treasury the existence of a risk for arrangements, since Ch. 5 sec. 11 a first para nos. 1 and 2 of *tullagen (2000:1281)*, the Customs Act, had not been changed so that no. 2 referred to *beskattningsbar person* (taxable person) according to the ML *except in the special meaning the concept is given in Ch. 5 sec. 4 of the ML* (Sw., *utom i den särskilda betydelse begreppet ges i 5 kap. 4 § ML*). That the expression is still lacking in Ch. 2 sec. 2 first para of *tullagen (2016:253)*, the Customs Act, means in my opinion there is a gap in the law, namely a gap in the Customs Act. The assumed gap *can* give an unjustified right of deduction for input tax on import according to Ch. 8 sec. 3 first para of the ML. There exists in my opinion an apparent risk for the following arrangement:

> For example, a non-profit association or a holding company which acquires some service from abroad thereby becomes a *beskattningsbar person* (taxable person) according to Ch. 5 sec. 4 of the ML, and if the non-profit association or the holding company combines that with an import of goods for pure consumption a right of deduction according to Ch. 8 sec. 3 first para of the ML can arise corresponding with the VAT on the import for those subjects, regardless of whether they are supplying taxable goods or services in their activities.

Thus, the interpretation problem here is about the *subject question* and that there are two relevant determinations of *beskattningsbar person* (taxable person) in the ML to which the present rule in *tullagen (2016:253)*, the Customs Act, can be deemed referring, namely Ch. 4 sec. 1 and Ch. 5 sec. 4. In Ch. 5 sec. 4 is with *beskattningsbar person* (taxable person) not only regarded a person carrying out economic activity etcetera, but also for example holding companies and non-profit associations and registered religious communities that do not have an economic activity according to Ch. 4 sec. 1 of the ML.

I pointed out to the Treasury the thus presumed gap in the Customs Act on 2014-12-12 and the Treasury answered on 2014-12-16 (Dnr. Fi2014/4452). What is in my opinion precarious is that the Government referred to await the case-law rather than making my suggested alterations of the present rule in the Customs Act to reduce the risk of undesired arrangements regarding

VAT due to the presumed gap in the act. The legislator had the opportunity to easily rectify the gap, when tullagen (2016:253), the Customs Act, replaced tullagen (2000:1281), the Customs Act, on 1 May, 2016.

By the way, I may mention that since there is no Swedish rules on either thin capitalization or holding companies, the difference between *beskattningsbar person* (taxable person) according to Ch. 4 sec. 1 and according to Ch. 5 sec. 4 respectively in the ML can be of interest in connection with the judgment whether an arrangement is comprised by the EU law principle of prohibition of abusive practice for VAT purposes. Of interest in that respect might inter alia reflections that I made in my doctor's thesis about holding companies in connection with certain EU-cases be, inter alia item 28 in C-142-99 (*Floridienne*), etcetera.[4]

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[4] See *Skatt- och betalningsskyldighet för moms i enkla bolag och partrederier* (Tax and payment liability to VAT in joint ventures and shipping partnerships), by Björn Forssén, pp. 25 and 26. Örebro Studies in Law 4. Örebro 2013. The book (and my translation of it into English) is to be found as an open document on www.diva-portal.org and on www.forssen.com, under *Böcker m.m.*