Current official report does not solve the problem with VAT frauds

[Translation of the article *Aktuell utredning löser inte problemet med momsbedrägerier*, by Björn Forssén, published in original in *Tidningen Balans fördjupning* (The Periodical Balans: Advanced articles) 2024, pp. 1–11. Translation into English by the author of this article, Björn Forssén.]

The official report Measures to suppress VAT frauds gave in August of 2023 a partly report, *The Protection of the EU's financial interests Alterations and completions in Swedish law (SOU 2023:49).* In this article the lawyer Björn Forssén closely analyses that report and especially the suggestion to revoke the exemption of verbal information as a prerequisite for tax fraud. The author also presents constructive proposals for the further investigation.

The European Union's (EU) Commission states in a notification that Sweden has omitted to correctly introduce in criminal law legislation the articles 3(2)(d)(i) and 3(2)(d)(iii) according to the Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (the so-called PIF Directive). Therefore, the official report Measures to suppress VAT frauds has been commissioned to submit a partly report with proposals on such measures, which has been made by SOU 2023:49. The Commission considers that Sweden has omitted to introduce in its legislation the articles 3(2)(d)(i) and 3(2)(d)(iii) of the PIF Directive regarding:

- criminalization of erroneous verbal information, and
- criminalization of correct information submitted for a certain purpose.

Regarding value-added tax (VAT), the PIF Directive is applied on serious crimes against the common VAT system in connection with two or more Member States of the EU and comprising a total damage for them of at least 10 million euro. According to recital 4 of the preamble to the PIF Directive it is aiming at the most serious forms of VAT fraud, especially carrousel fraud, VAT fraud via fictitious enterprises and VAT fraud committed within the frame of a criminal organization.[1]

The report states that the national regulation of the mentioned phenomena is to be found in sec. 2 of the Tax Fraud Act, *skattebrottslagen (1971:69)*, abbreviated SBL. According to that rule 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.[2]

Moreover, the report states that economic crime in the form of tax fraud aiming against the VAT system is in general denoted VAT fraud (Sw., *mervärdesskattebedrägeri*).[3] The report also states that there is no classification of a crime in Swedish law where the crime is classified as VAT fraud or tax fraud. Crimes denoted as VAT frauds are according to the report usually

[1] See SOU 2023:49, p. 9.

[2] See SOU 2023:49, p. 9.

[3] See SOU 2023:49, pp. 9 and 10.

to be judged as tax fraud according to SBL sec. 2, but the criminality can also comprise other classifications of the crime.[4]

Thus the report gives in the partly report SOU 2023:49 suggestions to alteration of rules in the SBL, to make it possible for also verbal information leading to criminal responsibility and a presentation of correct information for the purpose of fraudulent concealing an omitted payment or unfairly created right of reimbursement of VAT expressly comprised by the legislation.[5] According to the suggestion, the expression *in another way than orally* (Sw., ”*på annat sätt än muntligen*”) will be abolished inter alia in SBL sec. 2. Furthermore it is suggested that a new rule, sec. 2 a, will be introduced in SBL, where it is stated that *an information regarding VAT shall according to this act be considered erroneous if he or she who has submitted the information knew or should have known that the information regards a transaction which formed part of an avoidance of VAT even if the information in itself appears to be correct* (Sw., ”*En uppgift avseende mervärdesskatt ska enligt denna lag anses vara oriktig om den som lämnat uppgiften kände till eller borde ha känt till att uppgiften avser en transaktion som ingick som ett led i ett undandragande av mervärdesskatt även om uppgiften i sig framstår som korrekt*”).[6] In consideration of the rules on tax surcharge (Sw., *skattetillägg*) of the SBL and *skatteförfarandelagen (2011:1244)*, abbreviated SFL, being strongly connected, the report suggests that alterations corresponding to those suggested in the SBL will also be made in the SFL.[7] This means that the expression *in another way than orally* (Sw., ”*på annat sätt än muntligen*”) will be abolished from SFL Ch. 49 sec. 4 and that a new item, 3, will be added into SFL Ch. 49 sec. 5 with the same new case of erroneous information regarding VAT as according to the proposed new rule (sec. 2 a) of the SBL.[8] The new rules are suggested to come into force on 1 July, 2024.[9]

Set out from a number of articles which I have written regarding inter alia the phenomenon with VAT frauds by carrousel trading, I am going through in this article in the first place the proposal on revoking the exemption from verbal information as a prerequisite for tax fraud according to SBL sec. 2. If it does not work for purposes of legal certainty, I consider that neither what is suggested otherwise in SOU 2023:49 can be expected to do so to counteract arrangements (Sw., ”*upplägg*) by carrousel trading etc. To save space, I make a limitation to the tax fraud and the other topics from the articles.

1 Missing trader – the most elementary version of carrousel trading according to SOU 2023:49

Since the PIF Directive is aimed against VAT frauds by carrousel trading and such frauds via fictitious enterprises and VAT frauds committed within the frame of a criminal organization, I comment what the measures against the frauds which are suggested by the report SOU 2023:49

[4] See SOU 2023:49, p. 10.

[5] See SOU 2023:49, p. 10.

[6] See SOU 2023:49, pp. 21 and 22.

[7] See SOU 2023:49, p. 10.

[8] See SOU 2023:49, p. 24.

[9] See SOU 2023:49, pp. 23 and 24.

can be expected to lead to concerning cases of so-called *missing trader*. In SOU 2023:49 is expressed in section 4.3, *Närmare om förfarandet vid mervärdesskattebedrägerier* (More closely about the procedure at VAT frauds), based on a memo by the tax authority (Sw., *Skatteverket*, abbreviated SKV) – *promemoria bilaga till* (memo appendix to) Dnr 1311 73843-17/113 – the according to the report simplest version of the procedure at carrousel frauds by an example of deliveries of goods where the enterprise A is situated in another EU Member State than Sweden and the enterprises B and C are situated in Sweden.[10] Instead of expressing the figure that the report is using, to describe the undesired profit that enterprises are making from the cash flow between them, I express below that description in words and set up simplified B and C's output tax, input tax and VAT to pay or being repaid, whereby I state what the SKV's and the Economic Crime Authority's (Sw., *Ekobrottsmyndigheten*, abbreviated EBM) investigations mean in a case of *missing trader*, if not only the criminal case in relationship to tax cases against each enterprise is regarded, but also what the SKV is stating against the enterprises and, if they are limited companies (Sw., *aktiebolag*), against one or more of their representatives regarding payment hedging (Sw., *betalningssäkring*) and personal liability of payment (Sw., *företrädaransvar*) according to SFL Ch. 59 sec:s 12-21.

The idea of the reports example is that a deliverer (A) in the other involved EU-state sells goods to a *missing trader* (B) in Sweden for 100,000 Swedish crowns. A is exempt from VAT, since it is a matter of an intra-Union delivery of goods and B sells thereafter goods on to his or her customer (C) in Sweden for 90,000 Swedish crowns whereby B charges VAT with 22,500 Swedish crowns (90,000 x the normal tax rate of 25 per cent). B has not the intention to account for and pay this output tax for the further sale of goods to C and can therefore be called a *missing trader*. B is doing a loss of 10,000 Swedish crowns (90,000 – 100,000), but covers it with a part of the unaccounted for VAT that B is receiving from C, and B is thereby doing a profit of 12,500 Swedish crowns (22,500 + 90,000 – 100,000). C in his or her turn gets back the VAT of 22,500 Swedish crowns, by making a deduction of it as input tax in the VAT return that C is submitting to the SKV. C is then selling the goods without VAT to A in the other EU-state for 95,000 Swedish crowns. Thereby, all of the three involved parties are making a profit on the trading at the expense of the Swedish State:

- A makes a profit of 5,000 Swedish crowns per round (100,000 – 95,000), in a "carrousel" in which the goods are included,
- B is making a profit of 12,500 Swedish crowns per round (22,500 + 90,000 – 100,000) and
- C makes a profit of 5,000 Swedish crowns per round [95,000 – (90,000 + 22,500) + 22,500].

The Swedish State loses VAT incomes of 22,500 Swedish crowns per round in the carrousel, corresponding to the output tax of the same amount that B omits to account for and pay to the SKV. The report states that by this procedure can the goods circulate around like in a carrousel and generate profit for the involved parties for each new round and an equally large loss for the Swedish state.[11]

[10] See SOU 2023:49, pp. 43 and 44.

[11] See SOU 2023:49, p. 44.

2 Missing trader – the connection to payment hedging and a representative's liability

The reports description of what it calls the simplest version of the procedure at carrousel frauds is correct, but to put in relation to the prerequisites for tax fraud in SBL sec. 2, I state that the profit that the three enterprises are making is liquid by nature. By that, I mean that the report's example does not say anything whether the procedure concerning the VAT is affecting the result in the enterprises. If C does not make any other sale than its intra-Union delivery of goods to A, without VAT, C's VAT return looks – stylistic – like this for the present accounting period:

Output tax	0 Swedish crowns
Input tax	22,500 Swedish crowns
VAT to get back (i.e. excess input tax)	22,500 Swedish crowns

If C makes real acquisitions and sales of goods and accounts for output tax on sales within the country in the same accounting period as that where acquisitions are made from a *missing trader* or in a previous or later period, it is not a matter of C – even in the case C knew that B was a *missing trader* being deemed causing a risk for the Swedish State losing an amount equivalent to that in the invoice from B charged input tax which C is deducting on the line for input tax (Sw., *Ingående moms*) in its VAT return. The Swedish State's loss equals in such a case not 22,500 Swedish crowns in input tax accounted by C, as if the whole amount was equal to the excess input tax. As a liquid will C not get such an amount out from the tax account, but accounted output tax regarding business without any connection to acquisitions from a *missing trader* decreases the risk of such a loss for the State in terms of amounts. Instead, it may be so that C for the present period or for that and other periods accounts for VAT to pay to the SKV – to cover tax debts regarding VAT and other taxes and fees which are accounted for and paid in the tax account system (Sw., *skattekontosystemet*).

However, my experience is that the SKV in for example a case of *missing trader* is not only making a decision of refusing an enterprise like C deduction for input tax, but files also by the administrative court (Sw., *förvaltningsrätten*) for payment hedging against that enterprise and, if it is a limited company, against its owners according to SFL Ch. 46 sec. 5 and sues the owners at the administrative court for personal liability of payment (Sw., *företrädaransvar*) according to SFL Ch. 59 sec. 16, whereby the SKV makes claims in those respects against owners of the company corresponding to the whole input tax regarding acquisitions which the SKV states have been made from a *missing trader*. The question is then *how* has one or more representatives of company C been able to take out the total according to the SKV erroneous input tax from the tax account? If there is – which is common nowadays – no cash business in the company and there exists not only input tax to account for, and thus all is not constituting exceed input tax, should such a planning with a falsely enrichment of the owner show itself by the result in the company decreasing due to abnormal payments of salary or dividends to the owner (the representative) or by corrected annual reports.

Without the SKV being able to answer the latter mentioned question, regarding *how* it is supposed to have happened that C shall be deemed personally having appropriated from the Swedish State amounts corresponding to the whole of that in the VAT return accounted input tax regarding acquisitions from B as a *missing trader*, should the SKV not make any report on suspicion of tax fraud against representatives of C. However, the SKV is making reports on

suspicion of tax fraud already after a suggestion of a decision has been drawn up by the SKV on refusing C deduction of input tax.

Before the legislation procedure due to SOU 2023:49 continues, it should thus be taken into careful consideration what situation it is that the individual private person carrying out a business ends up in totally, when the State's whole investigation machinery with a number of measures in the form of suggestions of decisions, applications on payment hedging, suing for representative's liability and report on suspicion of crime is aimed against him or her. Otherwise, it will in the end be a situation which is lacking every ingredient of legal certainty for the individual. It is in such a case a matter of a procedure against the individual which is not compatible with the principle of fair trial and the presumption of innocence in article 6 of the European Convention on Human Rights.[12]

3 Missing trader – abusive practice and NJA 2018 p. 704

If B has made a delivery of goods within the country (Sweden) to C, B shall account for the in the invoice charged output tax of 22,500 Swedish crowns. An omitted accounting leads to B being deemed liable to tax fraud according to SBL sec. 2. If B accounts the output tax in a VAT return to the SKV but omits to pay it, B cannot be deemed submitting an erroneous information and B's VAT debt will in time be transferred to the Enforcement Authority (Sw., *Kronofogden*) for collection measures. By the tax account system being introduced by *skattebetalningslagen (1997:483)*, the tax payment act, on 1 November, 1997 there is no payment crime (Sw., *betalbrott*), and tax fraud is an accounting crime.[13]

If C knew or should have known that B would not account to the SKV for the output tax in the invoice that C is receiving regarding the delivery of good, may C have committed tax fraud according to SBL sec. 2. SOU 2023:49 mentions a decision by *Högsta domstolen*, the Supreme Court, abbreviated HD, NJA 2018 p. 704, where the HD considered that a claim for deduction of input tax could be deemed an erroneous information in the SBL's sense if right of deduction has not existed due to the purchaser's mala fide (Sw., *onda tro*).[14] I have commented NJA 2018 p. 704 in an article in *Svensk Skattetidning* during 2022.[15] I do not express everything from that article, but only that a concluding viewpoint was that I considered that NJA 2018 p. 704 cannot be deemed meaning that it is a given thing that a case of abusive practice regarding the VAT *in itself* causes criminal responsibility. That would be taking the interpretation of the prerequisites of erroneous information (Sw., *oriktig uppgift*) and intent (Sw., *uppsåt*) too far concerning the tax fraud.[16]

---

[12] The complete title of the European Convention on Human Rights is: The Convention for the Protection of Human Rights and Fundamental Freedoms. It was signed in Rome on 4 November 1950 and came into force on 3 September 1953.

[13] See prop. 1996/97:100, *Ett nytt system för skattebetalningar, m.m.* (A new system for tax payment etc.) Part 1, p. 450; *skattebetalningslagen (1997:483)*, the tax payment act, which was replaced on 1 January, 2012 by the SFL.

[14] See SOU 2023:49, p. 49.

[15] See Björn Forssén, *Momsbedrägerier av så kallad karuselltyp och NJA 2018 s. 704* (VAT frauds of so-called carrousel type and NJA 2018 p. 704), *Svensk Skattetidning* (Swedish Tax Journal) 2022, p. 118–130 (Forssén 2022).

[16] See Forssén 2022, p. 125.

Stig von Bahr, formerly judge in the Supreme Administrative Court (*Högsta förvaltningsdomstolen*, abbreviated HFD) and the Court of Justice of the EU (CJEU), wrote a completing article in Swedish Tax Journal during 2022.[17] There he dismissed categorically my warning for abusive practice on the theme of criminal law sanctions by stating that *the reader of BF's article* (i.e. my article*) may get the impression that both abusive practice and frauds can cause criminal law sanctions*, whereby he states that *the principle of abusive practice is lacking importance when the HD was trying the present VAT fraud* (Sw., "*principen om förfarandemissbruk saknar betydelse när HD skulle pröva det aktuella momsbedrägeriet*") in NJA 2018 p. 704.[18] In two articles in Dagens Juridik, I state like in Forssén 2022 that abusive practice *in itself* (Sw., "*i sig*") cannot cause responsibility for tax fraud, but that a warning for criminal law consequences is relevant, whereby I in the latter of the two articles added a warning for criminal responsibility for commercial money laundering.[19] SOU 2023:49 contains nothing about either my interpretation in Forssén 2022 or the interpretation in von Bahr 2022 of NJA 2018 p. 704.[20] The report should at least have observed from Forssén 2023d the difference in opinion existing between me and Stig von Bahr, and my latest suggestion on the matter in Forssén 2023b should be regarded in the continuing legislative procedure following due to, since it in the deed descriptions from prosecutors exist both suspicion of tax fraud and suspicion of commercial money laundering regarding representatives of limited companies in cases similar to that concerning C in the report's example of the simplest version of the procedure at carrousel frauds. I come back to this in the ending of this article and stay until then with emphasizing that it should be properly examined what rules in cases of abusive practice, before the legislation procedure continue, and ends with the expression *in another way than orally* (Sw., "*på annat sätt än muntligen*") being abolished inter alia from SBL sec. 2 so that also verbal information can lead to criminal responsibility.

4 Missing trader – erroneously charged VAT and the book-keeping

Concerning NJA 2018 p. 704, the report emphasizes that the HD in that case has deemed that a claim of deduction for input tax regarding a real acquisition was to be judged as an erroneous information.[21] However, the report does not at all go into what rules according to the SBL or other criminal law legislation if it is a matter of issuing a fictitious invoice where an amount quite simply is denoted value-added tax or VAT without any real delivery of goods or real supply of service actually taking place, that is like when it in the report's example of the simplest version of the procedure at carrousel frauds would be a matter of falsely charged VAT of 22,500 Swedish crowns in the invoice from B to C. Therefore, I account for in short what I

[17] See Stig von Bahr, *Mer om missbruk och momsbedrägeri* (More about abuse and VAT frauds), *Svensk Skattetidning* (Swedish Tax Journal) 2022 pp. 498–504 (von Bahr 2022).

[18] See von Bahr 2022, p. 499.

[19] See Björn Forssén, "*Livsmedelspriserna föranleder lagändringar och planering avseende indirekta skatter*" (The prices of foodstuffs cause law alterations and planning regarding indirect taxes), *Dagens Juridik* (*Debatt*), Today's Law (Debate), published 2023-03-15, at 11.51, on www.dagensjuridik.se (Forssén 2023d); and Björn Forssén, "*Näringspenningtvätt i momskarusell*" (Commercial money laundering in VAT carrousel), *Dagens Juridik (Debatt)*, Today's Law (Debate), published 2023-10-02, at 11.12, on www.dagensjuridik.se (Forssén 2023b). I mention both DJ-articles also in my DJ-article in *ANNEX 2*.

[20] See e.g. section 5.1.4 in SOU 2023:49.

[21] See SOU 2023:49, p. 56.

in that respect has stated in *Balans fördjupning* (The Periodical Balans Annex with advanced articles) during 2023.

In *Balans fördjupning*, I have during 2023 accounted for the consequences of an enterprise issuing a fictitious invoice with an amount that is falsely entered as VAT and how the amount should be booked.[22] These questions are not mentioned in SOU 2023:49. According to article 203 of the EU's VAT Directive (2006/112/EC) *VAT shall be payable by any person who enters the VAT on an invoice*. The rule was implemented on 1 January, 2008 in Ch. 1 sec. 1 third para and sec. 2 e *mervärdesskattelagen (1994:200)*, the VAT act, abbreviated GML, by SFS 2007:1376. The GML was replaced on 1 July, 2023 by *mervärdesskattelagen (2023:200)*, the VAT act, abbreviated ML, and there is to be found the corresponding rule in ML Ch. 16 sec. 23, where it is stated that *who falsely charges value-added tax in an invoice or similar document is liable of payment to the State for the amount*.

I have concluded that the consequences of issuing a fictitious invoice with – what I denote – false VAT is a liability of payment to the State for the amount in question for the enterprise that has issued the invoice. Since the issuer is not liable of payment according to the general VAT rules (previously tax liable) as for a real VAT, the receiver of the invoice is lacking right of deduction as for input tax for the amount in question.[23] Liability to register to VAT due to an issued fictitious invoice with a false VAT does not exist for the person who shall fulfil liability of payment for the amount to the State, which shall be made in a special tax return (SFL Ch. 26 sec. 7). It is only the person who shall account for real VAT in a VAT return (SFL Ch. 26 sec. 21) who shall register to VAT.[24] Concerning the criminal law consequences which can occur regarding false VAT in a fictitious invoice I come back to the following conclusions, which I put in relationship to the simplest version of carrousel trading according to the report SOU 2023:49:

- A natural person who carries out activity under sole proprietorship or as a representative for a limited company, and who is issuing an invoice with a false VAT, should not be considered committing tax fraud according to SBL sec. 2, since any erroneous information regarding *tax* (Sw., *skatt*) that shall be accounted for in a VAT return does not come up thereby. By false VAT not constituting tax for VAT purposes can neither tax surcharge be imposed on the amount in question. The only consequence is procedural and means that the liability of payment shall be fulfilled according to the SFL, by the false VAT being accounted for in a special tax return and paid.

- However, tax fraud – and/or tax surcharge – can be present for the receiver of the fictitious invoice, if he or she has given erroneous information in his or her VAT return, by accounting for the false VAT as input tax. In the example from the report, it would be wrong by C, since right of deduction is lacking regarding the amount due to B not being liable of payment according to the general VAT rules, but only liable of payment according to the special rule that was introduced in 2008. Thus, C can be deemed committing tax fraud due to the erroneous information, and B as issuer of the fictitious

[22] See Björn Forssén, *Skenfaktura med momsdebitering – konsekvenser för skatt och redovisning* (Fictitious invoice with charging of VAT – consequences for tax and accounting), *Balans fördjupning* 2023, pp. 1–9, published 2023-06-13 on www.tidningenbalans.se. (Forssén 2023a).

[23] See Forssén 2023a, sections 2 and 8.

[24] See Forssén 2023a, sections 5 and 8.

invoice can be imposed criminal law responsibility only for complicity in the tax fraud, according to Ch. 23 sec. 4 *brottsbalken (1962:700)*, the Penal Code, abbreviated BrB.

- On the theme book-keeping crime according to BrB Ch. 11 sec. 5 first para, I state partly that if the receiver of the invoice has booked the false VAT as input tax, he or she can also incur criminal law responsibility for erroneous information in the book-keeping, partly that a natural person who carries out activity under sole proprietorship or as a representative of a limited company can be deemed having incurred criminal law responsibility. In the latter case it is then a matter of the liability of payment for the contingent liability (Sw., *eventualförpliktelse*) which the liability of payment to the State for the false VAT constitutes is not mentioned in a note in the enterprise's annual report, and the balance of the business thereby cannot be judged on the whole.[25]

Thus, it should, before the legislation procedure due to SOU 2023:49 proceeds, also be carefully examined what applies concerning false VAT for criminal law purposes regarding the terminology in the SBL. I have also concluded that concerning the question on a representative's liability (Sw., *företrädaransvar*) regarding false VAT in a fictitious invoice. Concerning that question, I deem that a representative's liability according to the main rule in SFL Ch. 59 sec. 13 cannot comprise the representative of a legal person, for example a limited company (Sw., *aktiebolag*), which has issued the invoice, since the main responsibility by the legal person does not regard tax (Sw., *skatt*). However, I consider that it is possible to impose the representative for a limited company that receives the fictitious invoice a personal liability of payment in the form of a representative's liability according to the special rule on such responsibility in SFL Ch. 59 sec. 14 regarding too high accounted excess input tax, if the representative has given erroneous information in a VAT return for the company, by accounting the false VAT in the received fictitious invoice as an input tax.[26]

Representative's liability is only mentioned in passing in SOU 2023:49, by stating on page 63 that in the SFL and the SBL also exist rules on obstacles to applications of representative's liability concerning tax surcharge that regards a legal person and prosecution, penalty order or failure to prosecute, if the fault or passivity forming the base of the tax surcharge already is comprised by for example a prosecution regarding the same natural person and if responsibility already has been claimed against the same natural person. That the report thus only mentions representative's liability in relationship to the *ne bis in idem*-principle concerning tax surcharge is not sufficient on the theme of legal certainty for the individual. Therefore, I repeat my proposal according to above that it should be carefully considered in what situation the individual private person can end up in totally in relation to the State in the present respect, before the legislation procedure due to SOU 2023:49 continues.

5 The legislator's measures to counteract VAT frauds by carrousel trading

In an article in the JFT, I am going through measures that the legislator has taken since 2000, to suppress VAT frauds by carrousel trading.[27] There, I criticize those measures. The

[25] See Forssén 2023a, sections 4 and 8.

[26] See Forssén 2023a, sections 6 and 8.

[27] See Björn Forssén, *Momsbedrägerier genom karusellhandel – erfarenheter i Sverige avseende mervärdesskatt, redovisning och straffrätt i förhållande till EU-rätten* (VAT fraud by carousel trading – experiences in Sweden regarding VAT, accounting and criminal law in relation to the EU law), *Tidskrift utgiven*

development has taken a direction where simplifications are made by SKV and the EBM to achieve a higher pace of taking legal proceedings regarding the frauds, but I consider that it is done at the expense of the legal certainty for the individual.

I consider that the for the entrepreneurs in terms of value most positive alteration by the ML replacing the GML is that the concepts *skattskyldig* (tax liable) and *skattskyldighet* (tax liability) have been abolished, so that the tax subject and the liability to pay VAT respectively are determined based on the VAT Directive's concepts *beskattningsbar person* (taxable person) and *betalningsskyldighet* (liability of payment) respectively. That alteration means that the determination of the emergence of the right of deduction is conform with the directive, and that the SKV no longer can state that the national Swedish legislation in the field means that taxable transactions must have occurred, before the right of deduction for input tax in received invoices emerges. In other words, the change that a newly started enterprise concerning the described situation no longer needs to expressly invoke the EU law in the field, to be able to exercise the right of deduction for input tax, means a big plus.

One thing about terminology that the legislator should have clarified, and which can be a structural problem concerning the application, is, however, that the liable of payment could be seen as a special concept distinguished from tax liable in the GML, when it is a matter of liability to pay an amount which falsely has been denoted as VAT in an invoice, which I have written about in Forssén 2023a. There I denote, as mentioned above, such an amount a false VAT. Such a distinction between real VAT and false VAT, I deem that it would be an advantage for the application of law, since the ML uses liability of payment for both categories. It is a minus for the application where structure is concerned that liability of payment thus is used in the ML both for what I denote as real VAT and false VAT.

Thus, I consider that the interpretation and application problems which are caused by the special liability of payment in 2008 should be examined thoroughly, before the suggestion on expanding the field of tax fraud is carried out based on what is stated in the report SOU 2023:49. The report does not mention the reform in 2008, and the question on falsely charged VAT in an invoice is as mentioned above in many cases decisive for the question whether carrousel trading exists. How shall the proposal that the expression *in another way than orally* (Sw., "*på annat sätt än muntligen*") will be abolished from SBL sec. 2 lead to criminal law measures being possible to direct against B or B's representative regarding the situation in itself that B is using the term value-added tax or VAT in an invoice which is not corresponded by a delivery of goods to C? According to what is stated on page 90 in prop. 2007/08:25, the reform of 2008 only leads to the consequence that B is liable of payment for the amount, if – in my opinion – B does not at the latest before the year-end issues a credit note to C. Why does the report not mention this question on the theme of book-keeping crime in B according to BrB Ch. 11 sec. 5 first para?

By the way, it is concerning the question on terminology equally remarkable that the report SOU 2023:49 does not await or at least mention the report "*Att kriminalisera överträdelser av EU-förordningar*" (To criminalize transgressions of EU-regulations), SOU 2020:13. That report is about a survey of what techniques of legislation that are used at criminalization of transgressions of EU-regulations within various fields in Sweden and a selection of other EU Member States. In Forssén 2022, I mention SOU 2020:13, and that the above-mentioned case

---

av Juridiska Föreningen i Finland (The journal published by the Law Society of Finland, abbreviated JFT), JFT 4–6/2023, pp. 344–378. (Forssén 2023c).

NJA 2018 p. 704 is mentioned on the pages 48 and 54 in that report, but that it does not give anything further for my interpretation of the case.[28] In Forssén 2023c, I state that it *can* be of interest in connection with investigations on carrousel trading to broaden the perspective above all on what is meant by *tjänst* (service), so that a distinction against goods can be made set out from other fields of law governed by the EU law, like the company law (Sw., *bolagsrätten*) and the intellectual property law (Sw., *immaterialrätten*) – which constitute examples of fields where rules are essential for the four freedoms to function. Set out from Forssén 2023c, I may, with respect of it according to SOU 2023:49 being deemed obvious that the legislator shall be able to carry out that report's proposals without mentioning the problems which are brought up in SOU 2020:13 about criminalizing transgressions of for instance the COUNCIL IMPLEMENTING REGULATION (EU) No 282/2011 on implementing measures for the VAT Directive (the so-called Implementation Regulation), mention the following.[29] That this attitude by the legislator would be allowed to prevail does obviously not favour the legal certainty for the individual. Otherwise, what is it that the report SOU 2023:49 knows that nobody else knows about today?

6 The proposals according to SOU 2023:49 are not tried with respect of the principle of legality

Concerning the field of VAT has, in pursuance of the principle of conferred competence, the Swedish parliament conferred to the EU's institution competence in that field, according to Ch. 10 sec. 6 of *regeringsformen (1974:152)*, the 1974 Instrument of Government, abbreviated RF.[30] The criminal law is, however, another example of a field where in principle an exclusive national competence prevails.[31] Regarding the report's proposals in relationship to the RF it is only stated briefly in SOU 2023:49 that *the report's suggestions must be in compliance with basic principles of the RF. According to the report, the suggestions are neither deemed to give rise to any limitation in conflict with the EU law* (Sw., "*utredningens förslag bedöms vara förenliga med grundläggande principer i regeringsformen. Förslagen bedöms enligt utredningen inte heller ge upphov till någon inskränkning som står i strid med EU-rätten*".[32] In SOU 2023:49 there is no reasoning concerning the principle of conferred competence – which is also named the principle of legality.[33]

---

[28] See Forssén 2022, p. 129.

[29] See Forssén 2023c, p. 349. I also state there that regarding company law and intellectual property law, the adaptation of Swedish rules to the EU law had come far already by the EEA-treaty, that is already a year before Sweden's EU-accession in 1995 See prop. 1994/95:19, *Sveriges medlemskap i Europeiska unionen* (Sweden's membership of the European Union) Part 1, pp. 157 and 158.

[30] See prop. 1994/95:19 Part 1, pp. 501 and 522. Note! Ch. 10 sec. 6 was previously RF Ch. 10 sec. 5 – see SFS 2010:1408.

[31] See prop. 1994/95:19 Part 1, p. 472.

[32] See SOU 2023:49, p. 107.

[33] See e.g. sections 1.1.3 and 1.2.3 in *Skatt- och betalningsskyldighet för moms i enkla bolag och partrederier* (Tax and payment liability to VAT in joint ventures and shipping partnerships), Örebro Studies in Law 4 2013 (Forssén 2013), where I inter alia mention the principle of conferred competence according to RF Ch. 10 sec. 6 and the articles 4.1 and 5.2 in the Treaty on European Union and thereby refer inter alia to prop. 1994/95:19 Part 1, pp. 111, 470, 471 and 507. Forssén 2013 is available in the data base DiVA (www.diva-portal.org).

7 Alternative to the proposals in SOU 2023:49 to counteract ”VAT carrousels”

I consider that I have shown by this article that the proposals according to SOU 2023:49 on alteration of rules and a new rule in the SBL and the SFL respectively cannot be expected to counteract arrangements by carrousel trading and similar concerning the VAT (”VAT carrousels”), but are obviously leading to an increased legal uncertainty for the individual by the distinction between the taxation procedure and the tax proceedings being broken if also verbal information shall become comprised by criminal law measures in the form of tax fraud. It would lead to an improved legal certainty if instead the liability of payment regarding VAT, regardless of thereby meaning real or false VAT, was exempted, by alteration of the law or in practice, from the SBL, and that criminal procedures against the tax account system especially regarding VAT would be tried by legal proceedings according to the general rule against frauds, BrB Ch. 9 sec. 1. I suggest this in the end of Forssén 2023c,[34] and repeat it here with a further commentary:

- I state that there should not be any difference of an attack directed against the tax account system and a so-called fraud against a health or social insurance office (Sw., *sjukkassebedrägeri*). With an expression sometimes used by the SKV, it is, in my opinion, in both cases a matter of somebody *unfairly appropriating money from the Swedish State* (Sw., *tillskansar sig pengar från svenska staten*). I conclude in the end of Forssén 2023c that if the registration function by the SKV is not prioritized, it does not matter which measures of legislation that is taken against for example VAT frauds by carrousel trading. It is first by the registration that he or she who is aiming to cheat can get hold of the public treasury in the form of the tax account system. In that respect, I repeated from Forssén 2023a that it is only a person who shall account for real VAT in VAT returns that shall register to VAT, whereby I also brought up that I mention in Forssén 2013 that the EU Commission already at the time had given up the standpoint that as many enterprises as possible should be comprised by the VAT system to recommend restraint so that priority instead is given to registration control and questions about collection.[35] The focus should be set on the registration control where VAT is concerned, which I thus stated in Forssén 2013, and has repeated in Forssén 2023a and Forssén 2023c and in recent years also in Forssén 2021b.[36] I reiterate this here with the addition of the following commentary.

- With regard of it, as mentioned, is existing in deed descriptions from prosecutors both suspicion of tax fraud and suspicion of commercial money laundering regarding representatives of limited companies in cases similar to the report’s example of the simplest version of carrousel trading is also the demand in the Member States’

[34] See Forssén 2023c, section 8.2 (Concluding viewpoints).

[35] See Forssén 2023c, section 8.2 with reference to Forssén 2023a, section 5, and the reference to Forssén 2013, p. 76, where I refer to section 5.4.1, *Översyn av uppbörden av mervärdesskatt* (Overview of the collection of VAT), in the EU Commission’s green paper *KOM(2010) 695 slutlig* [COM(2010) 695 final] and the EU Commission’s follow-up to the green paper, COM(2011) 851 final p. 6.

[36] See Björn Forssén, ”*Rätt resurs på rätt ställe minskar momsbedrägerierna*” (The right resource on the right place decreases the VAT frauds), *Dagens Juridik* (*Debatt*), Today’s Law (Debate), published 2021-05-05, at 11.07, on www.dagensjuridik.se. (Forssén 2021b).

legislations on double criminality of interest.[37] Sweden is diverging in its criminal law in the field of taxation, by tax fraud etc. according to the SBL being a risk crime, not an effect crime which normally is the case in comparable countries, which applies since the reform of the SBL on 1 July, 1996, by SFS 1996:658. If enterprise A in the example is situated in another EU Member State where tax fraud is not a risk crime, but an effect crime, will tax fraud in Sweden not constitute a so-called for crime (Sw., *förbrott*) causing criminal law responsibility in that state for money laundering or commercial money laundering.[38] It is another matter that double criminality normally is not constituting foundation for an EU Member State to refuse co-operation (aid) in the field in relation to another Member State.[39] The question on double criminality in the context is another example of what should have been mentioned in SOU 2023:49, and I state that it constitutes further support for the purpose with the PIF Directive, on especially suppressing ”VAT carrousels” etc., probably being better achieved by a criminal procedure against the tax account system especially regarding VAT being subject to taking legal proceedings according to the general rule against frauds, BrB Ch. 9 sec. 1, whereby the tax fraud is tried as an effect crime and demands on double criminality will not prevent legal proceedings being taken in other EU Member States regarding commercial money laundering. By not solving the question on double criminality regarding for crimes at trials of commercial money laundering Sweden is setting aside a convention from the United Nations (UN) which Sweden has accessed – The UN’s convention against Transnational Organized Crime of 15 November 2000. According to that, it is possible to prescribe that money laundering measures taken by the person who has committed the for crime (self-washing – Sw., *självtvätt*) shall not be criminalized, but Sweden shall act for money laundering in relation to as many for crimes as possible is criminalized (and nor has Sweden prescribed the recently mentioned).[40] In the context, it may be mentioned that it is suggested in the Government’s bill 2023/24:87 that Sweden shall participate in the European Public Prosecutor’s Office (EPPO). Examples of crimes which can be referred under the EPPO’s authority are money laundering and cross-border tax crimes regarding VAT.

By the way should it, with respect of the question on responsibility regarding false VAT for a *missing trader* (compare enterprise B in the mentioned example), be considered whether the exemption from auditing liability for smaller enterprises shall remain. That exemption was mentioned under the section *Yrkesvardag* (Working day) in *Balans* 2022-05-05, by Sofia Hadjipetri Glantz in the article *Revisionsplikt – så tycker branschen* (Auditing liability – the opinion of the professionals), and I consider that it should continuously be brought up also in the legislation work against ”VAT carrousels”. The interest by the members of parliament is, however, weakly, which is

[37] See regarding the principle on double criminality (Sw., *dubbel straffbarhet*) in Swedish criminal law: BrB Ch. 2 sec. 2 second para.

[38] See regarding rules against money laundering and commercial money laundering in Sweden: *lagen (2014:307) om straff för penningtvättsbrott* (the Act on Punishment for Money Laundering); and prop. 2013/14:121, *En effektivare kriminalisering av penningtvätt* (A more effective criminalization of money laundering). Money laundering is only mentioned in passing in SOU 2023:49 (p. 30). I mention, as mentioned, commercial money laundering in Forssén 2023b.

[39] See prop. 2013/14:121, p. 95.

[40] See prop. 2013/14:121, p. 24 and also recital 7 in the preamble to the PIF Directive and article 4(1) in that directive.

mentioned under *Yrkesvardag* in *Balans* 2024-02-22, by Eric Widegren in the article *Majoritet säger nej till revisionsplikt* (Majority says no to auditing liability), wherein it is stated that inquiry by the periodical *Balans* shows that the majority of the parties in the parliament says no to a reintroduction of auditing liability for the smallest enterprises.

BJÖRN FORSSÉN *Doctor of Laws and lawyer in his own law firm in Stockholm*.