Questions on account of the final report Measures against VAT frauds

[Translation of the article *Frågor med anledning av slutbetänkandet Åtgärder mot mervärdesskattebedrägerier*, by Björn Forssén, published in original in *Tidningen Balans fördjupning* (The Periodical Balans: Advanced articles) on 9 May, 2025. Translation into English by the author of this article, Björn Forssén.]

The investigation on measures against VAT frauds has submitted to the Government the partly report Skyddet för EU:s finansiella intressen. Ändringar och kompletteringar i svensk rätt (SOU 2023:49), The Protection of the EU's financial interests Alterations and completions in Swedish law (SOU 2023:49), and the final report Åtgärder mot mervärdesskattebedrägerier (SOU 2024:32), Measures against VAT frauds (SOU 2024:32). In this article, the lawyer Björn Forssén brings up questions which he considers remain after SOU 2024:32.

In *Tidningen Balans* (The Periodical Balans), my articles of 2023-06-13 and 2024-05-06 were published, which are a part of the background to this article.[1] In Forssén 2023a, I gave an accountant of the consequences for the issuer as well as for the receiver of an invoice with a falsely charged value-added tax (VAT), which I denote a "false VAT". In Forssén 2024a, I also brought up my viewpoints on SOU 2023:49. Thereafter came the final report to that investigation, SOU 2024:32. *Sveriges advokatsamfund* (The Swedish Bar Association) has submitted to the Treasury its considerations over SOU 2024:32, which was done on 2024-11-15.[2] I took part in a group of three lawyers who worked with the considerations. In this article, I follow up Forssén 2023a and Forssén 2024a concerning some questions that I consider remain after SOU 2024:32 and which to save space were not mentioned in the Bar Association's considerations of 2024-11-15, inter alia a question about law trial of liability of payment for falsely charged VAT in cases of *missing trader*. Concerning law trial, I connect to yet another of my articles in *Tidningen Balans*, from 2018, and to my article in *Dagens Juridik* (Today's Law), published 2024-12-13.[3]

In Forssén 2024b, I state that a falsely charged VAT does not constitute VAT in a real sense, but if an amount is falsely denoted as VAT in an invoice a liability of payment of the amount exists. This follows by article 203 of the EU's VAT Directive (2006/112/EC), which was

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[1] See Björn Forssén, *Skenfaktura med momsdebitering – konsekvenser för skatt och redovisning* (Fictitious invoice with charging of VAT – consequences for tax and accounting), *Balans fördjupning* (Balans Advanced articles) 2023 pp. 1–9 (published 2023-06-13 on www.tidningenbalans.se), Forssén 2023a, and Björn Forssén, *Aktuell utredning löser inte problemet med momsbedrägerier* (Current official report does not solve the problem with VAT frauds), *Balans fördjupning* 2024 pp. 1–11 (published 2024-05-06 on www.tidningenbalans.se), Forssén 2024a. See also Björn Forssén, "*Felaktigt debiterad moms föranleder betalningsskyldighet – inte skattebrott – 'karusellen' går vidare*" (Falsely charged VAT causes liability of payment – not tax fraud – the 'carrousel' goes on), *Dagens Juridik (Debatt)*, Today's Law (Debate), published 2023-11-27, at 11.44, on www.dagensjuridik.se (Forssén 2023b).

[2] See www.advokatsamfundet.se: *Sveriges advokatsamfunds* (The Swedish Bar Association's) considerations of 2024-11-15 to the Treasury over the report *Åtgärder mot mervärdesskattebedrägerier (SOU 2024:32)*, Measures against VAT frauds (SOU 2024:32). R-2024/1201.

[3] See Björn Forssén, *Befrielse från skatt – en nåd att stilla bedja om hos Skatteverkets huvudkontor och regeringen eller rättspröva hos HFD* (Release from tax – a mercy to peacefully pray for at the SKV's head office and the Government or as a law trial by the HFD), *Balans fördjupningsbilaga* 3/2018 pp. 3–5 (published 2018-06-12 on www.tidningenbalans.se), Forssén 2018a, and Björn Forssén, "*Befrielse från felaktigt debiterad moms*" (Release from falsely charged VAT), *Dagens Juridik* (Opinion), published 2024-12-13, at 11.57, onwww.dagensjuridik.se (Forssén 2024b).

implemented into the Swedish VAT legislation on 1 January, 2008, by SFS 2007:1376, whereby the directive rule was incorporated in *mervärdesskattelagen (1994:200)*, the VAT act (abbreviated GML), more precisely in Ch. 1 sec. 1 third para and sec. 2 e of the GML. Since *mervärdesskattelagen (2023:200)*, the VAT act (abbreviated ML), replaced the GML on 1 July, 2023 the rule is to be found in Ch. 16 sec. 23 of the ML, which has the following wording (in my translation): *Any person who has falsely charged VAT in an invoice or similar document is liable of payment to the State for the amount*. The amount does not constitute VAT according to the general rules of the ML, but causes a liability of payment to *Skatteverket* (the tax authority), abbreviated SKV, for the issuer of the invoice, why I denote the amount false VAT.

Fictitious transactions are examples of cases of liability of payment for false VAT.[4] The receiver of an invoice with such a falsely charged VAT can be responsible of tax fraud according to sec. 2 of *skattebrottslagen (1971:69)*, the Tax Fraud Act (abbreviated SBL), if he or she in a VAT return claim deduction for the amount in question like for input tax, whereas the issuer will not suffer any other consequence than the liability of payment, which applies as long as he or she is not issuing a credit invoice (which follows by Ch. 7 sec. 50 first para of the ML). In Forssén 2024b, I state that this follows by the preparatory works to the reform of 2008, where the legislator states the following (in my translation): *To further stress that a falsely charged VAT shall not lead to anything else than a liability of payment for the person who has falsely charged the VAT it is however suggested that the liability of payment for this false amount is stipulated in a separate section, Ch. 1 sec. 2 e of the ML*.[5]

Assume that the issuer is in a situation of insolvency due to the SKV's demand of payment against the issuer of an invoice with a falsely charged VAT. Then, extraordinarily reasons are requested for the SKV to refrain from the demand of the issuing of a credit invoice, which follows by Ch. 7 sec. 50 second para of the ML. If the SKV does not deem extraordinarily reasons existing as a consequence of insolvency and this leads to bankruptcy for the issuer of the invoice the question is whether the institute of release in Ch. 60 sec. 1 of *skatteförfarandelagen (2011:1244)*, the Taxation Procedure Act (abbreviated SFL), may be applicable, if the issuer for instance carries out the activity in a limited company (Sw., *aktiebolag*) which is declared bankrupt due to the SKV's demand of payment.

The institute of release regarding withholding of tax, social fees, VAT or excise duties

In Forssén 2018a, I submitted certain legal certainty reflections over the so-called mercy errands on release from tax in Ch. 60 sec. 1 of the SFL and the law trial institute in *lag (2006:304) om rättsprövning av vissa regeringsbeslut* (the act on law trial of certain Government decisions). Here, I mention the institute of release and the law trial institute first concerning the possibilities to raise a question on release from liability of payment for "false VAT" by *Högsta förvaltningsdomstolen* (HFD), the Supreme Administrative Court.

If there are extraordinarily reasons, release can be granted fully or partly from withholding of tax, social fees, VAT, or excise duties (Ch. 60 sec. 1 first para nos. 1 and 2 of the SFL). An application for release can be submitted to the SKV that makes its decision according to Ch. 13 sec. 12 of *skatteförfarandeförordningen (2011:1261)*, the Taxation Procedure Regulation. The

[4] See prop. 2007/08:25, *Förlängd redovisningsperiod och vissa andra mervärdesskattefrågor* (Extended accounting period and certain other VAT issues), p. 91.
[5] See prop. 2007/08:25 p. 90.

decision can be appealed to the Government, if the SKV rejects the application for release (Ch. 67 sec. 6 second sen. of the SFL). The HFD tries applications for law trial, according to sec. 3 of the act on law trial of certain Government decisions. If a release is granted, it may also be given for a fee on delay, tax surcharge and interest (Ch. 60 sec. 1 second para of the SFL).

The problem that I bring up is in the first place that Ch. 60 sec. 1 of the SFL is not stipulating that release can regard an amount falsely denoted as VAT in an invoice and for which liability of payment to the SKV exists for the issuer as long as he or she is not issuing a credit invoice.

The institute of release should resolve the problem with the lack in Sweden of a general right to access to courts

I consider that the special institute of release regarding the liability of payment for certain taxes and fees nearest resemble the mercy institute according to Ch. 12 sec. 9 of *regeringsformen (1974:152)*, the 1974 Instrument of Government (abbreviated RF). The decision by the SKV in an errand on release according to Ch. 60 sec. 1 of the SFL can be appealed to the Government. If the Government makes a negative decision, the individual should be able to turn to the HFD with an application for a law trial according to sec. 1 of *lag (2006:304) om rättsprövning av vissa regeringsbeslut* (the act on law trial of certain Government decisions).

I Forssén 2018a, I mentioned that release from VAT according to Ch. 60 sec. 1 of the SFL only can regard output tax, not input tax where VAT is concerned. Thereby, there exists in my opinion in principle a ”gap” (Sw., “*lucka*”) in the field of VAT, where accessible legal remedies are concerned, since we do not have a general right of access to courts in Sweden.

I consider that the lack of a general right of access to courts conflicts with the very principle of access to courts according to article 6 of the European Convention on Human Rights (the European Convention). The problem could have been resolved along with the reform of the RF in 2010, but this was not done and a direct connection to the European Convention was dismissed. This has been mentioned by Professor Wiweka Warnling-Nerep (nowadays Warnling Conradsson).[6] I have mentioned the question on page 16 in my e-book *Nya förvaltningslagen och skatteförfarandet – studiematerial*.[7] I emphasize the principle of access to courts as a support for the HFD admitting an application for a law trial of a release errand according to Ch. 60 sec. 1 of the SFL. In that respect, I note that sec. 1 of the act on law trial of certain Government decisions is referring to article 6(1) of the European Convention. Then, the question is whether what I call false VAT can be comprised by the concept VAT according to the institute of release in Ch. 60 sec. 1 of the SFL. That too is a ”gap” that should be addressed by the legislator so that the legal certainty can be maintained concerning the individual’s possibilities to be granted release from liability of payment of an amount constituting false VAT, where the right of access to courts does not cover such a demand regardless of how absurdly it may seem.

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[6] See pages 31, 42 and 43 of *RÄTTSMEDEL: om- & överprövning av förvaltningsbeslut* (LEGAL REMEDIES: review and trial by appeal of administrative decisions), by Wiweka Warnling-Nerep. Jure Förlag AB, Stockholm 2015.

[7] See page 16 in *Nya förvaltningslagen och skatteförfarandet – studiematerial: Andra upplagan* (the new Administration Act and the tax procedure – study material: Second edition), by Björn Forssén (self-published 2019). See my website, www.forssen.com, and printed version at Kungliga biblioteket in Stockholm (the National Library of Sweden) and at Lund University Library.

The Swedish Bar Association connects in its considerations to its viewpoints at the reform in 2008

In the reports SOU 2023:49 and SOU 2024:32 a central question concerns finding measures against VAT frauds of so-called carrousel type. Therefore, the Bar Association brings up in its considerations to the Treasury of 2024-11-15 whether falsely charged VAT is comprised by ”*skatt*” (tax) according to the SBL in relation to the reform of 2008 regarding liability of payment for falsely charged VAT in an invoice, where the problems in question concerns cases of so-called *missing trader*, that is of carrousel trading where the fraud quite simply consists of a trader disappearing.[8] In English, this is called *missing trader*.

The reform in 2008 meant that the State would not lose its demand against inter alia an issuer of a fictitious invoice. However, the Bar Association emphasized then that already the predecessor to article 203, that is article 21(1)(d) of the EC’s Sixth VAT Directive (77/388/EEC), should – as a mandatory directive rule – have been implemented into the GML at Sweden’s accession to the EU in 1995, not first in 2008 as a measure of fighting crime.[9] In its considerations of 2024-11-15 the Bar Association once again emphasized that a rule on fighting crime does not belong in the tax legislation and stated that the legal certainty demands that it already in the legislation work on account of SOU 2024:32 is clarified whether falsely charged VAT is comprised by ”*skatt*” (tax) according to the SBL. Regarding the VAT has, in pursuance of the principle of conferred competence, the Swedish Parliament conferred competence to the EU’s institutions (organs),[10] but the criminal law is a field where an in principle exclusive national competence applies.[11]

A fully covering right of access to courts motivates an amendment of the institute of release to comprise falsely charged VAT

Here, I focus first on that the legislator should clarify whether the concept *mervärdesskatt* (value-added tax) in the institute of release according to Ch. 60 sec. 1 of the SFL is comprising what I call false VAT. In the predecessor to the SFL, it was stipulated in the so-called principle of equality,[12] that amounts according to Ch. 1 sec. 1 third para of the GML, that is falsely charged VAT, were equal to “*skatt*” (tax). It is also stipulated in Ch. 3 sec. 12 that what is said about VAT in the SFL applies also to such an amount, despite that it does not constitute VAT according to Ch. 1 sec. 1 third para of the GML. This is stipulated also regarding VAT according to Ch. 16 sec. 23 of the ML. The rules on procedure regard real or false VAT, whereas the institute of release only regards real VAT in a material sense. Thereby, I deem that Ch. 60 sec. 1 of the SFL contains a “gap” concerning the application of the institute of release regarding false VAT.

With respect of the right of access to courts not being general in Sweden, I consider that legal certainty reasons motivate an amendment in Ch. 60 sec. 1 of the SFL so that the institute of

[8] See the Bar Association’s considerations under the headline *Problematiken med bestämningen av ”skatt” enligt skattebrottslagen och reformen år 2008 avseende betalningsskyldighet för felaktigt debiterad mervärdesskatt i faktura* (The problems with the determination of ”*skatt*” (tax) according to the Tax Fraud Act and the reform of 2008 regarding the liability of payment for falsely charged VAT in an invoice).
[9] See prop. 2007/08:25 p. 86.
[10] See Ch. 10 sec. 6 of the RF.
[11] See prop. 1994/95:19, *Sveriges medlemskap i Europeiska unionen* (Sweden’s membership of the European Union), Part 1 p. 472.
[12] See Ch. 1 sec. 4 second para no. 3 of *skattebetalningslagen (1997:483)*, the tax payment act.

release comprise falsely charged VAT, which is what I call false VAT. I connect to Forssén 2018a, where I state that it in the preparatory works to the then *skattebetalningslagen (1997:483)*, the tax payment act, was mentioned as an example of extraordinarily reasons for release that it would be a matter of a foreign entrepreneur, who is not registered to VAT in Sweden and who has paid VAT on imports here, but cannot be reimbursed by his or her Swedish customer due to that person being in bankruptcy.[13] I stated that the situation with respect of procedure should belong to Ch. 60 sec. 1 of the SFL and that it for legal certainty purposes is precarious that such a second paragraph like in Ch. 13 sec. 1 of *skattebetalningslagen* for the situation has not been incorporated in Ch. 60 sec. 1 of the SFL..

In the same way, it is precarious for legal certainty purposes that an insolvency situation would not be able to handle by application of the institute of release regarding a false VAT, only because the issuer of the invoice cannot issue a credit invoice due to lack of resolution over for instance a limited company (Sw., *aktiebolag*) by which the activity has been carried out and it has been declared bankrupt due to the SKV's claim of payment.

Especially about the book-keeping and false VAT

Examples of remaining questions after the investigation on measures against VAT frauds

Also, after the final report on measures against VAT frauds, SOU 2024:32, and the Bar Association's considerations to the Treasury of 2024-11-15 questions remain from Forssén 2023a and Forssén 2024a. Thus, I come back here to something about what I stated about book-keeping and false VAT in section 3 of Forssén 2023a and in section 4 of Forssén 2024a.

Remaining liability of payment should be mentioned in a note in the enterprise's annual report

In section 3 [*Bokföring av oäkta moms i skenfaktura* (Entering in the book-keeping of false VAT in a fictitious invoice)] of Forssén 2023a, I state that an enterprise which has issued a fictitious invoice with a false VAT is liable to account for the amount in question in a note in the annual report, if it is important for the judgment of the activities balance (Sw., *ställning*). I deem that it is – at least for non-unessential suchlike amounts – since the liability of payment to the State affects the liquidity of the enterprise and the prudence concept (Sw., *försiktighetsprincipen*) means that it must not be overvalued in the book-keeping. My motivation of this viewpoint is the following.

In Ch. 5 of *årsredovisningslagen (1995:1554)*, the Annual Accounts Act (abbreviated ÅRL), it is stipulated what shall be accounted for in notes in the annual report. Concerning the demand of notes for smaller and larger enterprises, I consider that what is mentioned regarding so-called contingent liabilities (Sw., *eventualförpliktelser*) in Ch. 5 sec. 15 of the ÅRL is of interest in the present context. There, it is stipulated that if an enterprise has warranty commitments, financial commitments or eventual obligations which are not accounted for in the balance sheet (contingent liabilities) it shall inform about the sum of these. Regardless of whether false VAT has been paid or not to the State the liability of payment remains onlý until a credit invoice has been issued by the enterprise. Thereby, I consider that it is a contingent

[13] See Forssén 2018a p. 4 and prop. 1996/97:100, *Ett nytt system för skattebetalningar, m.m.* (A new system for tax payments, etc.), Part 1 p. 596.

liability. The amount shall not be accounted for in the current recording.[14] However, I consider that a remaining liability of payment should be mentioned in a note to the enterprise's annual report, if the amount is essential.

Someone who issues an invoice with a falsely charged VAT is unlikely to mention this in a note to the annual report. However, demands to do so should be made so that it is not lying in the system that the responsibility for the situation only is placed on the receiver of the invoice. Furthermore, my example with fictitious transactions is only just an example of a case of liability of payment for false VAT. It may also be a case the issuer not having a clear knowledge of the VAT rules and just happened to charge VAT on goods or services comprised by exemption from VAT.[15] Then, this should be noted in the annual report, if there has not been time to issue a credit invoice before the year-end.

Falsely charged VAT and book-keeping crime

In section 4 [Missing trader – *felaktigt debiterad moms och bokföringen* (Missing trader – erroneously charged VAT and the book-keeping)] of Forssén 2024a, I state the following about book-keeping crime (Sw., *bokföringsbrott*) according to Ch. 11 sec. 5 first para of *brottsbalken (1962:700)*, the Penal Code (abbreviated BrB).

If the receiver of an invoice with a falsely charged VAT has booked the thus false VAT as input tax, he or she can also incur criminal law responsibility for erroneous information in the bookkeeping. Furthermore, a natural person who conducts activity under sole proprietorship or as a representative of a limited company (Sw., *aktiebolag*) can be deemed having incurred criminal law responsibility. In such a case it is a matter of the liability of payment for the contingent liability that the liability of payment to the State for the false VAT constitutes not being mentioned in a note in the enterprise's annual report and the balance of the business thereby cannot be judged on the whole at the issuer.[16]

The receiver in bankruptcy and the question about a credit invoice regarding falsely charged VAT

In the two last-mentioned sections, I state inter alia that if a falsely charged VAT in for instance a fictitious invoice had not been taken care of by issuing a credit invoice but the liability of payment for false VAT remains at the year-end the amount in question should be mentioned in a note in the enterprise's annal report, if it is essential. If a credit invoice is not issued the SKV's demand for payment of the amount against the issuer remains. That can lead to an insolvency situation and above I state that it is precarious for legal certainty purposes that an insolvency situation would not be able to handle by application of the institute of release regarding a false VAT, only because the issuer of the invoice cannot issue a credit invoice due to lack of resolution over for instance a limited company by which the activity has been carried out and it has been declared bankrupt due to the SKV's claim of payment. Before a question on release is brought for such a situation the question is what responsibility rests with the receiver in bankruptcy (Sw., *konkursförvaltaren*) to solve the situation.

[14] Since the result must not be undervalued for income tax purposes, I consider that the amount must neither be carried as an expense.
[15] See prop. 2007/08:25 p. 91
[16] See Forssén 2023a, sections 4 and 8.

If a credit invoice regarding the false VAT is issued the amount in question shall be altered.[17] By SFS 2003:1134 the Invoicing Directive 2001/115/EC was implemented on 1 January, 2004 into a new Ch. 11 of the GML, which nowadays is corresponded by Ch. 17 of the ML. By the preparatory works to that reform follows that there is no time limit for the issuing of an invoice.[18] Since the receiver in bankruptcy's main task is to act for as favourable a liquidation as possible of the bankrupt's estate from the viewpoint of the creditors, it has been considered that the receiver in bankruptcy should be active by representing concerning the debtor's accounting of VAT so that levied VAT will be reduced if it is possible and can be expected being of importance for dividends in the bankruptcy. This follows by *Riksskatteverkets* (nowadays the SKV's) *Moms vid konkurs* (VAT at bankruptcy) from 1984.[19] Of interest in the present context is that therein was also stated the following (in my translation): *The debtor and the receiver in bankruptcy should consult each other at the drawing up of their returns. If the debtor does not file a return it is to be desired that the receiver in bankruptcy, on the request from* länsstyrelsen*, the county administrative board (nowadays the SKV, my remark), submits suchlike information that* länsstyrelsen *still can make as correct a taxation decision as possible*.[20] As far as my experience goes, there is no routine by the collective of receivers in bankruptcy regarding measures that should be taken by a receiver in bankruptcy concerning the debtor's accounting of VAT.

In my opinion, legal certainty reasons should be deemed existing to impose on the receivers in bankruptcy such a responsibility for VAT at bankruptcy that I describe above, and which is equally as important nowadays as then. It shall for suchlike reasons not rest with the individual to apply for release from liability of payment for a false VAT only because he or she is lacking the resolution to issue a credit invoice due to the state of bankruptcy. Therefore, I consider that it once again should be developed routines for the receivers in bankruptcy regarding the mentioned questions on VAT at bankruptcy, which preferably can be made by the collective of receivers in bankruptcy and the SKV together, of course by the supervision of the Bar Association. These routines should apply as well for the liability of submitting ordinary VAT returns according to Ch. 26 sec. 21 of the SFL as for the liability to submit special tax returns regarding false VAT according to Ch. 26 sec. 7 of the SFL.

The responsibility to develop the recently mentioned routines for VAT at bankruptcy should in my opinion not rest with *bokföringsnämnden*, the Accounting Standards Board (abbreviated BFN), since the VAT legislation constitutes a special legislation in relation to the civil law accounting law in the form of *bokföringslagen (1999:1078)*, the Book-keeping Act, as general legislation and the BFN thereby cannot be expected to issue *allmänna råd* (general advice) etc. for the treatment of VAT at bankruptcy. In the previous statement BFN U 90:2 was also a reservation made that it did not rest with the BFN to interpret the VAT legislation due precisely to its character as special legislation in relation to the civil law accounting law. On the other hand, the BFN should stipulate in for instance a general advice that the issuer of an

[17] See Ch. 7 sec. 50 first para of the ML, which is corresponding to the previous Ch. 13 sec. 28 first para of the GML.
[18] See prop. 2003/04:26, *Nya faktureringsregler när det gäller mervärdesskatt* (New invoicing rules concerning VAT), pp. 42, 48 and 84
[19] See *Riksskatteverkets* (the National Tax Board's) *Moms vid konkurs – information om hur man redovisar moms i samband med en konkurs* (VAT at bankruptcy – information on how to account for VAT in connection with bankruptcy), RSV 556 edit 1 (May 1984), under the headline *Behörighet att föra talan i skatteprocess* (Resolution to speak in tax proceedings), p. 13.
[20] See the mentioned *Riksskatteverkets Moms vid konkurs*, under the headline *Deklarationsskyldighet* (Liability to submit returns), p. 13.

invoice with falsely charged VAT should state in a note in the enterprise's annual report that lability of payment to the SKV exists regarding the amount of such a false VAT, if the amount in question remains at the year-end and can be deemed essential. This is in pursuance of what I state above about that it should not rest with the receiver of the invoice with a false VAT to maintain the control system.

False VAT in a fictitious invoice and personal liability of payment

If it in such a case where a fictitious invoice with a false VAT has been issued by a legal person, like concerning the limited company in the last-mentioned section and it would not be possible to use either release from liability of payment or to issue a credit invoice by the receiver in bankruptcy or with the approval from the receiver in bankruptcy by the issuer, the debtor, the question is if the SKV can claim personal liability of payment against one or several of the partners of the company by virtue of the rules on personal liability of payment (Sw., *företrädaransvar*) in Ch. 59 sec:s 12–21 of the SFL. Thus, I come back here in short to what I state especially about personal liability of payment regarding false VAT in a fictitious invoice in section 6 of Forssén 2023a.

Personal liability of payment according to the main rule in Ch. 59 sec. 13 of the SFL cannot apply to the representative of the limited company that has issued the invoice. The legislator states taken by itself in the preparatory works to the SFL that tax according to Ch. 59 of the SFL *is tax if the main responsibility regards tax*,[21] but an amount falsely denoted as VAT is not a real VAT but what I call a false VAT. Therefore, the main responsibility of the legal person which has issued the invoice does not regard *skatt* (tax) in a material respect, that is according to the ML. Legislation must not be made in the preparatory work itself, why I deem that it is not possible to impose the representative of the legal person a personal liability of payment according to Ch. 59 sec. 13 of the SFL, if the false VAT will not be paid by the legal person.

In the same way as I state above concerning the issue of tax fraud and that it is not possible for a prosecutor to carry through an indictment on that theme against the individual as long as it is not clarified whether falsely charged VAT is comprised by "*skatt*" (tax) according to the SBL, I consider that it is neither possible for the SKV to carry through the filing of a suit on personal liability of payment against a partner of a limited company that has issued an invoice with a falsely charged VAT, if it is not stipulated in the SBL that with *skatt* is also meant such a false VAT in a material sense. In that respect, I refer also to what I state above regarding the institute of release about it not being sufficient that it is stipulated in Ch. 3 sec. 12 of the SFL that what is said about VAT in the SFL also applies to such an amount, since it is only regards the rules on procedure and how a false VAT shall be accounted for, not the material imperative to act meaning that a personal liability of payment would exist for representatives of legal persons.

By the way, I state in section 4 of Forssén 2024a that the representative's liability is only mentioned in passing in SOU 2023:49 (on page 63) and then only concerning that there also exists in the SFL and the SBL 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, provided that 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

[21] See prop. 2010/11:165, *Skatteförfarandet* (the Taxation procedure) Part 2 p. 905.

already has been claimed against the same natural person. In my opinion, it is not sufficient on the theme of legal certainty for the individual that the investigation only mentions the representative's liability in relationship to the principle *ne bis in idem* (i.e. that the same thing shall not be tried twice) concerning tax surcharge. Therefore, I consider that it should be carefully considered in what sort of situation the individual private person at all can end up against the State in connection with investigations of carrousel trading before the legislation procedure on account of SOU 2023:49 continues.

Thus, I may in the last-mentioned context especially notice that the Bar Association in its considerations to the Treasury of 2024-11-15 over SOU 2024:32 brings up that the *ne bis in idem*-question also comes up when the SKV goes into the question of intent by stating in its proposal of a decision that mala fide rests with the partners of a legal person, for example a limited company (Sw., *aktiebolag*), regarding VAT fraud by carrousel trading, despite that a partner and the company is not the same person. That the SKV uses the concept VAT fraud in connection with the assertion of mala fide by the partners of a limited company regarding that their company would be part of transaction chain constituting carrousel trading with the purpose of appropriating money from the Swedish state means according to the Bar Association that the SKV makes itself into a prosecutor. The Bar Association states that the intent is not for the SKV to investigate and that the only subjective that the SKV shall investigate is instead whether grounds for exemption from tax surcharge apply.[22]

Reintroduction of auditing liability for small enterprises and increased registration control – alternatives to the suggestions in SOU 2023:49

Moreover, I state that what I mention in this article does not change my suggestions in Forssén 2024a, meaning that it should be considered whether the exemption from auditing liability for small enterprises shall remain, on account of the problems about the liability issue regarding false VAT for a *missing trader*.[23]

The Bar Association brings up in its considerations to the Treasury of 2024-11-15 that increased control of who is registered to VAT typically gives a more focused choice of investigation objects and concentrated errands and cases about tax fraud to counteract VAT frauds of all kinds – not only as a measure against carrousel trading.[24]

The Bar Association states that the overall purpose with the VAT system should be to make the collection of VAT from the enterprises work without letting frivolous persons into the system who only use the registration to appropriate money from the State. In the system of handling extensive information, it is typically better that problems concerning who is registered to VAT can be taken care of when the scope of them is to be compared with a brook (Sw., *bäck*), instead of having to handle a river (Sw., *flod*) of cases of cheating. If not the registration

[22] See the Bar Association's considerations under the headline *Betydelsen av uttrycken mervärdesskattebedrägeri och ond tro i Skatteverkets förslag till beslut för frågan om en rättvis rättegång för den enskilde* (The importance of the expressions VAT fraud and mala fide in the SKV's proposal for a decision for the question about fair trial for the individual).
[23] See Forssén 2024a, section 7, *Alternativ till förslagen i SOU 2023:49 för att motverka "momskaruseller"* (Alternatives to the suggestions in SOU 2023:49 to counteract 'VAT carrousels').
[24] See the Bar Association's considerations under the headline *Ökad kontroll av vilka som registreras till mervärdesskatt ger typiskt sett ett mera fokuserat urval av utredningsobjekt och koncentrerade ärenden och mål om skattebrott* (Increased control of who are registered to VAT is typically promoting a more focused selection of investigation objects and concentration of errands and cases on tax fraud).

function by the SKV is 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 (*skattekontosystemet*). Thus, the EU Commission stated, already in a green paper in 2010,[25] that the Commission had given up the standpoint that as many enterprises as possible should be comprised by the VAT system to instead recommend restraint so that priority instead is given to registration control and questions about collection. In an article in *Tidskrift utgiven av Juridiska Föreningen i Finland* (The journal published by the Law Society of Finland – abbreviated JFT), I state the same thing, whereby I express that instead of the tax auditors trying to handle a river of problems about the State losing VAT revenues can an efficient *gatekeeper* at the registration decrease the problems to mere trickles to investigate.[26]

Law trial in re-trial errands about the special 'VAT commission rule' after the ML

By the way, I mention in Forssén 2024c also inter alia that re-trial errands can come up about tax cases and tax fraud cases, if the special 'VAT commission rule' that the SKV and *Ekobrottsmyndigheten*, the Economic Crime Authority (abbreviated EBM), have invoked to claim that agents acting in his own name and receiving the payment from the customer shall be deemed an ordinary retailer, that is Ch. 6 sec. 7 of the GML, has been altered by Ch. 5 sec. 3 second para no. 3 of the ML insofar as it is no longer sufficient for the authorities to claim that doing business on a commission basis shall be considered existing for VAT purposes only because the mandator cannot be identified in the invoice issued to the customer and the agent is receiving the payment from the customer. Here, I come back to something of what I stated in that respect in the beginning of Forssén 2024c:

- The criterion about the middleman *receiving the payment for the goods or services*, which existed in Ch. 6 sec. 7 of the GML as well as in its predecessor, first para of item 3 of the instructions to sec. 2 of *lag (1968:430) om mervärdeskatt* (the VAT act of 1968), has not been transferred to Ch. 5 sec. 3 second para no. 3 and sec. 27 of the ML. The expression *in his own name*, which existed in Ch. 6 sec. 7 of the GML as well as in the predecessor of the VAT act of 1968, has neither been transferred Ch. 5 sec. 3 second para no. 3 of the ML. This is in compliance with article 14(2)(c) of the VAT Directive, where that expression does not exist concerning intermediary situations constituting commission trading of goods.

- Instead, the expression *in his own name* is to be found in article 28 of the VAT Directive concerning middleman situations regarding supply of services and in correspondence with that it has been retained in Ch. 5 sec. 27 of the ML.

[25] See 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.

[26] See Björn Forssén, *Mellanmän och frågor om karusellhandel respektive vinstmarginalbeskattning – en jämförelse av gamla och nya mervärdesskattelagen i Sverige* (Middlemen and questions about carrousel trading and profit margin taxation – a comparison of the old and the new VAT act in Sweden), JFT 4/2024 pp. 294–329, section 9. (Forssén 2024c). See also 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), JFT 4–6/2023 pp. 344–378, section (Forssén 2023c) and 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 2021).

- Thus, I consider it clarified by the ML that the Swedish VAT legislation no longer can be deemed containing a special 'VAT commission rule' that makes also ordinary agents commissioners for VAT purposes, despite that the agent has an ordinary agent agreement with the mandator and not any agreement on doing business on a commission basis.

It can be deemed as unclear whether the SKV considers that such a special 'VAT commission rule' as the SKV (and the EBM) has invoked exists also after that the ML replaced the GML, since the SKV in its standpoint of 2020-09-25 only made an amendment of 2023-05-31 – before the introduction of the ML – meaning that its legal judgment remains.[27]

Here, I may just mention that the application for law trial can be brought up in connection with an errand on re-trial at the HFD and at *Högsta domstolen* (the Supreme Court), if the Government has dismissed an application for law trial according to Ch. 60 sec. 1 of the SFL and if the Government has dismissed an application for mercy regarding for instance a tax fraud case according to Ch. 12 sec. 9 of the RF. If the SKV and the EBM have been wrong about the VAT legislation containing a special 'VAT commission rule' that makes also ordinary agents into commissioners for VAT purposes, despite that a civil law commission agreement does not exist with the mandator, I consider that it is such a circumstance that should cause that a re-trial will be granted in the final court of appeal, at least for cases regarding the time after Sweden's EU-accession on 1 January, 1995, since support is lacking in the EU law in the field of VAT for the SKV's and the EBM's standpoint and it obviously has affected the outcome in several tax and tax fraud cases.

Application of the special 'VAT commission rule' according to the ML and the legal certainty

In Forssén 2024c, I finally bring up another legal certainty question than the re-trial errands which the administrative courts and general courts may have to judge according to what I state about the special 'VAT commission rule', which I come back to here briefly to give a more complete picture of the legal certainty issues that may be actual for the legislator to bring up concerning measures against VAT frauds, which must be made with respect of the individual's justifiable demand for legal certainty. Therefore, I come back here to the following in section 9 of Forssén 2024c:

- By sec. 5 second para. second sen. of *lag (1964:163) om införande av brottsbalken*, the 1964 act on introduction of the BrB (abbreviated BrP) follows that if another act applies *when verdict is announced that act shall be applied, if it leads to freedom from punishment or a mitigated punishment (with the exception for a deed which was punishable during a certain time due to then existing special reasons)*.

- In my opinion, that rule of the BrP means that regardless of whether the SKV and the EBM would be deemed having support for their standpoint about the existence of a special 'VAT commission rule' in older Swedish VAT law the VAT reform in 2023 has meant that any suchlike does not apply anymore, according to Ch. 5 sec. 3 second para no. 3 and sec. 27 of the ML.

[27] See Forssén 2024c, sections 2, 8 and 9.

- Based on that conclusion, I consider that if the EBM in an investigation concerning the time before 1 July, 2023 has invoked Ch. 6 sec. 7 of the GML as a 'rubber rule' regarding what is meant with commission, to comprise also situations not comprised by a civil law agreement on commission between agent and mandator, the general courts cannot pronounce sentence against the individual in such a case on 1 July, 2023 or later for tax fraud or coarse tax fraud according to sec. 2 or sec. 4 of the SBL. This is due to the law alteration that obviously took place when the ML replaced the GML on 1 July 2023 concerning the rule which the SKV and the EBM invoked as a special 'VAT commission rule'.

- Although, as I mention in the nearest previous section, it can be deemed as unclear whether the SKV still considers that a special 'VAT commission rule' would exist in the ML in the same way as the SKV stated regarding Ch. 6 sec. 7 of the GML an alteration of law has taken place by Ch. 5 sec. 3 second para no. 3 of the ML, like I am stating in Forssén 2024c and in the last-mentioned section of the present article. Since the SKV in its standpoint of 2020-09-25 only made an amendment of 2023-05-31 – before the introduction of the ML – meaning that its legal judgment remains – the SKV may thereby in my opinion be perceived as sticking to the perception of the existence of a special 'VAT commission rule' like the SKV has claimed also after the ML having replaced the GML.

Thus, I consider that the question arising regarding the general courts is whether they will be able to treat the change of current law in the respect of VAT in the present respect also concerning the principle of freedom from punishment that follows by sec. 5 second para. second sen. of the BrP, if the courts adopt my perception of current law in the present respect according to the ML and not that it would be unchanged regarding the question about the existence of a special 'VAT commission rule' like the SKV all the same may be perceived considering according to its amendment of 2023-05-31 in the standpoint of 2020-09-25.

Electronical products and taxable amount for VAT – a special problem

In Forssén 2024c, I chose VAT frauds by carrousel trading as the subject to problemize the question about the existence of a special 'VAT commission rule', whereby I connected especially to my article on that question in *Dagens Juridik* (Today's Law) concerning the treatment with respect of VAT in the SKV's and the EBM's investigations on carrousel trading of licences regarding operating systems in electronical products like computers and mobile phones.[28]

I iterate from Forssén 2024c that the mentioned question – as far as my experience goes – is not usually mentioned in such investigations but that this should be the case especially concerning the theme of composite transactions. In my opinion, it is important, regardless of whether the SKV, like I bring up above in this article, also after the ML having replaced the GML is sticking to its perception of the existence of a special 'VAT commission rule', that it will be noticed in the SKV's and the EBM's investigations that the mentioned products consist

[28] See Forssén 2024c, section 5 and the reference there to Björn Forssén, "*'Momskaruseller' och ändringen av den särskilda förmedlingsregeln*" ('VAT carrousels' and the alteration of the special intermediation rule), *Dagens Juridik (Debatt)*, Today's Law (Debate), published 2024-05-16, at 11.56, on www.dagensjuridik.se (Forssén 2024d).

of both for example the mobile phone (goods) and the operating system (the service). Otherwise, the investigations are misdirected from the beginning by the taxable amount for VAT regarding the service not being regarded but only VAT on the goods.

For more reading in the present respect, I refer to section 6 of Forssén 2024c, where I treat the problems with the determination of the taxable amount for VAT regarding carrousel trading when it is a matter of composite transactions concerning electronical products constituted of goods and a licence respectively regarding their operating systems.

Especially about commercial money laundering in connection with investigations about 'VAT carrousels'

In connection with investigations concerning VAT frauds, it is not unusual that the EBM brings up questions about commercial money laundering (which is also called professional money laundering) according to sec. 7 of *lagen (2014:307) om straff för penningtvättsbrott* (the Act on Punishment for Money Laundering). In Forssén 2023c and Forssén 2024a, I mention commercial money laundering,[29] but I do not make any deep analysis of that question in this article. However, I may mention the following about the connection between the crime commercial money laundering and especially regarding tax fraud, since it is occurring that the EBM in its investigations only focus on these two crimes and leaves questions about book-keeping crime open:

- If the question about tax fraud is failing in the mentioned situations it can at least not be deemed constituting a so-called for crime (Sw., *förbrott*) in a prosecutor's deed description on the theme of commercial money laundering. Thereby, the circumstance in the Bar Association's considerations to the Treasury of 2024-11-15, meaning that the connection between erroneous information according to the SBL and the tax rules cannot be disrupted, is important also at the trial of the question about commercial money laundering.[30]

- Thus, if the tax fraud is failing it cannot be a for crime to commercial money laundering and if the prosecutor cannot present anything else on the theme of money laundering against for instance the partners of a limited company the crime of commercial money laundering is also failing.

- However, in the last-mentioned case can criminal responsibility exist for abusive practice (Sw., *förfarandemissbruk*) instead of regarding tax fraud. I consider that it is not to be taken for granted that abusive practice *in itself* leads to criminal responsibility and commercial money laundering is unlike tax fraud an effect crime, not a risk crime, but I may emphasize that commercial money laundering is lying near at hand to abusive

[29] See Forssén 2023c, sections 5.4, 7.2 and 8.2 and Forssén 2024a, sections 3 and 7. See also 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 2023d).
[30] See the Bar Association's considerations under the headline *Betydelsen för en rättvis rättegång för den enskilde av beskrivningen av skattefrågan i Skatteverkets förslag till beslut samt frågan om verket ska återgå till att avfatta slutresultatet av skatterevisionen i en revisionspromemoria* (The importance for a fair trial for the individual of the description of the tax question in the SKV's proposal of decision and the question whether the SKV shall go back to drawing up the final result of the tax audit in an auditing memo).

> practice concerning VAT, by the suspected taking part in a measure to hide that for example money originates from crime or criminal activity.[31]

I stay at these viewpoints on the question about commercial money laundering but refer also to Forssén 2024a. There, I reason about the legal certainty principle on double criminality (Sw., *dubbel straffbarhet*) in Ch. 2 sec. 2 second para of the BrB. Then, the question concerns whether commercial money laundering comes up if tax fraud in Sweden shall be deemed a for crime in relation to commercial money laundering in another involved EU Member State, where tax fraud is not determined as a risk crime but as an effect crime.[32]

Research and education on 'VAT carrousels' and commercial money laundering

In November 2024, I held a lecture and seminar for the tenth year in a row on The Master's programme in European Legal Studies at Södertörn University (Stockholm), Sh, where the subject is *Good governance* (Sw., *god förvaltning*) – contact person is Docent Patricia Jonason. Then, the topic for my effort was *"Momskaruseller" samt näringspenningtvätt* ('VAT carrousels' and commercial money laundering), and since the lecture and the seminar were in English the students received my material in both Swedish and English, where most of my articles were to be found in my e-books *"Momskaruseller" samt näringspenningtvätt, m.m.* and "VAT carrousels" and commercial laundering etc., both self-published 2024.[33] In these books you find collected my articles mentioned in this article, except Forssén 2018a and Forssén 2024b. The e-books together with Forssén 2024c and the Bar Association's considerations to the Treasury of 2024-11-15 over SOU 2024:32 formed part of the material to my lecture and seminar – together with my translations into English also of Forssén 2024c and the Bar Association's considerations.[34]

The material was laid out on the study web at Sh by Patricia Jonason and if I may continue with my efforts at The Master's programme in European Legal Studies it will be extended in 2025 with regard of the question of the institute of release in Ch. 60 sec. 1 of the SFL ought to be expanded to comprise what I call false VAT. If so, to the material will be added this article and Forssén 2018a and Forssén 2024b. Concerning my research and education project on 'VAT carrousels' and commercial money laundering: see

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[31] See Forssén 2023, section 5.4. See also 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 pp. 118–130 (Forssén 2022), 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 2023e) and Björn Forssén, *Konkurrensfördelar med varuomsättningar efter momsfria omsättningar av varor i vissa lager och av finansiella tjänster* (Competition advantages with transactions of goods after VAT free transactions of goods in certain warehouses and of financial services), *Balans fördjupningsbilaga* 1/2018 pp. 3–10 (published 2018-01-18 on www.tidningenbalans.se), Forssén 2018b.

[32] See Forssén 2024a, section 7.

[33] See my website, www.forssen.com, where the two books are available to be downloaded under PFS Böcker (code 046Blå for the Swedish language version and code 047Blå for my translation into English). Furthermore, printed versions of the books are to be found at Kungliga biblioteket in Stockholm (the National Library of Sweden) and at Lund University Library.

[34] See www.forssen.com, where my translations into English of Forssén 2024c and the Bar Assocation's considerations to the Treasury of 2024-11-15 are to be found under Forskning/F13. The title of the Bar Association's considerations I translate as follows: The Swedish Bar Association's considerations over the Government's report *Åtgärder mot mervärdesskattebedrägerier* (SOU 2024:32), Measures against VAT frauds (SOU 2024:32).

https://www.forssen.com/forskning/f10/f13/. There is also to be found my tip-offs to the students at the lecture on preparations before the seminar, which the appliers amongst the readers of *Tidningen Balans* (The Periodical Balans) also can make use of when they are assisting enterprises subject to investigations about VAT frauds by carrousel trading and/or commercial money laundering. Those tips also follow from page 12 of both my books on VAT carrousels and commercial money laundering, where I give an overview of examples on questions which might come up in pursuance of what I state in the chapters and sections of the books.

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