”VAT carrousels” and commercial money laundering, etc.

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PREFACE

”VAT carrousels” and commercial money laundering, etc. is my translation into English of my book *”Momskaruseller” samt näringspenningtvätt, m.m.*, which corresponds with the following articles of mine as from 2018, which form part of the material to the courses that I am holding with the focus set on the questions from the articles.

In *Momsbedrägerier av så kallad karuselltyp och NJA 2018 s. 704* (VAT frauds of so-called carrousel type and NJA 2018 p. 704), I reason by setting out from the decision of the Supreme Court of Sweden (Sw., *Högsta domstolen*, abbreviated HD) in the case NJA 2018 p. 704 about fraud of a so-called carrousel type regarding accounting of value-added tax (VAT), where it is a matter of tax fraud (Sw., *skattebrott*) in a case of abusive practice (Sw., *förfarandemissbruk*).

In *Skenfaktura med momsdebitering – konsekvenser för skatt och redovisning* (Fictitious invoice with charging of VAT – consequences for tax and accounting), I account for the consequences for an issuer and a receiver of a fictitious invoice with charging of VAT, i.e. ”false VAT”. I state inter alia that in a case of VAT fraud by carrousel trading, where a fictitious enterprise exist in a chain of transactions, whereby such an enterprise is called a missing trader (or goalkeeper company or front enterprise), it issues an invoice with a false VAT and the receiver tries to exercise right of deduction by accounting the amount as input tax in a VAT return to the tax authority (Sw., *Skatteverket*, abbreviated SKV). If the receiver knew or should have known that the info on VAT was false, such an abusive practice *can* cause a criminal law responsibility for both the issuer and the receiver. I also state that the issuer of the invoice may be liable to mention the false VAT in the annual report, if the amount is substantial.

In *Näringspenningtvätt i momskarusell* (Commercial money laundering in VAT carrousel), I repeat my warning that abusive practice against the VAT system *can* lead to criminal responsibility, although such abuse ”in itself” does not cause responsibility for tax fraud, whereby I add a warning for criminal responsibility for commercial money laundering. I state that an intent of indifference (Sw., *likgiltighetsuppsåt*) can exist concerning money laundering, but not regarding commercial money laundering (also called Professional Money Laundering). Since the Economic Crime Authority (Sw., *Ekobrottsmyndigheten*, abbreviated EBM) nowadays not seldom claims responsibility for commercial money laundering together with a charge for tax fraud regarding ”VAT carrousels”, I consider that such a case should be tried by the HD for guidance of the application of law in precisely the matter of intent, especially since the question of intent regarding tax fraud was not comprised by the leave to appeal in NJA 2018 p. 704.

In *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) I come back to ”VAT carrousels” and missing trader and go inter alia through what the legislator has done since the year 2000 to suppress carrousel trading, by e.g. introducing reverse charge of VAT for certain trading. There, I once again mention commercial money laundering, and that a criminal law responsibility *can* exist in such a respect instead of a responsibility for tax fraud, where it is a matter of abusive practice.

In *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), I state that

such a lowering of the taxable amount for VAT that is not possible according to the general VAT rules instead can be carried through by application of the special rules on goods in certain warehouses, which were introduced in Swedish VAT law on 1 January, 1996 and are closest corresponded by articles 154-163 of the VAT Directive.

In *Aktuell utredning löser inte problemet med momsbedrägerier* (Current official report does not solve the problem with VAT frauds), I tie together the above-mentioned articles.

In *ANNEX 1* is to be found inter alia my comment to a commentary of my article first mentioned above.

In *ANNEX 2*, I continue on the theme from the second of my above-mentioned articles, and connect to a verdict in Svea Court of appeal of 2023-11-07, where convictions were decided regarding coarse tax fraud, coarse book-keeping crime and/or commercial money laundering, coarse crime.

In *ANNEX 3* is to be found an article where I emphasize the importance of an efficient registration control by the SKV to counteract VAT fraud.

In *ANNEX 4*, I mention a gap in the Customs Act that can cause a far too vast scope of the right of deduction for input tax, and describe a risk thereby existing for undesired arrangements. ANNEX 4 is an excerpt from a section of a book of mine, where I make a summary of my article *Lucka i tullagen öppnar för ej avsett momsavdrag på grund av två olika bestämningar av vem som är beskattningsbar person* (Gap in the customs act opening for unintended VAT deduction due to two different determinations of who is a taxable person). *Tidningen Balans fördjupningsbilaga* (The Periodical Balans Annex with advanced articles) 3/2018, pp. 17–19.

In *ANNEX 5* is to be found an article where the for VAT purposes special intermediation rule 6:7 has been replaced in the new VAT act of 2023 by rules on intermediation from the EU:s VAT Directive regarding goods and services, and that it should lead to consequences for the in the context complex question about licences in combination with goods like computers and mobile phones. Then, I come back to a lecture that I held in 2001, where I mentioned that 6:7 often was a question in connection with ”VAT carrousels”.

I begin by giving an overview of examples of questions that can be raised set out from the chapters and annex of this book, which in the first place is intended to be a support for the students to seminar exercises on the topic, and finish with my concluding words from the lecture of 2001.

This book is intended also for practicians within the fields of VAT law and criminal law. I aim for it to function as a guidance on questions in those fields, where it in the first place is a matter of the phenomenon VAT frauds of a so-called carrousel type and connections in that respect to commercial money laundering, so that the legal certainty will be favoured in the taxation procedure as well as in the criminal case in such cases.

Stockholm in May 2024
Björn Forssén

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ABBREVIATIONS

ADP, Automatic Data Processing
B, (in case no.) criminal case
BEPS, base erosion and profit shifting
BFL, *bokföringslagen (1999:1078)*, the [Swedish] Book-keeping Act
BrB, *brottsbalken (1962:700)*, the [Swedish] Penal Code
C, *curia* (about the CJEU)
Ch., chapter
Cit., citat eller citeras
CJEU, the Court of Justice of the EU
DJ, *Dagens Juridik* (Today's Law)
dnr, day-book number
EBM, *Ekobrottsmyndigheten*, the [Swedish] Economic Crime Authority
EC, European Community
ECLI, European Case Law Identifier
EEA, European Economic Area
e.g., exempli gratia, for example
EPPO, European Public Prosecutor's Office
et al., et alii, and others
etc., etcetera
EU, the European Union or the Union
FML, finska mervärdesskattelagen (1501/1993), the Finnish VAT act
GAAP, Generally Accepted Accounting Principles (Sw., *god redovisningssed*)
GML, *mervärdesskattelagen (1994:200)*, the [Swedish] VAT act, replaced on 1 July, 2023 by the ML
GTuL, *tullagen (2000:1281)*, the [Swedish] Customs Act, replaced on 1 May, 2016 by the TuL
HD, *Högsta domstolen*, the [Swedish] Supreme Court
HFD, *Högsta förvaltningsdomstolen*, the [Swedish] Supreme Administrative Court
i.e., id est, that is
IL, *inkomstskattelagen (1999:1229)*, the [Swedish] Income Tax Act
JFT, *Tidskrift utgiven av Juridiska Föreningen i Finland* (The journal published by the Law Society of Finland)
Kronofogden, the [Swedish] Enforcement Authority
ML, *mervärdesskattelagen (2023:200)*, the [Swedish] VAT act
Moms, mervärdesskatt – VAT, value-added tax
NJA, *Nytt juridiskt arkiv, avdelning I*, the HD's yearbook
no., number
not., notice case (Sw., *notismål*)
OECD, Organisation for Economic Co-operation and Development/Sw., *Organisationen för ekonomiskt samarbete och utveckling*
OEM, Original Equipment Manufacturer
p./pp., page/pages
para, paragraph
PIF, Protection of the Union's Financial Interests [the PIF Directive: 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]
Prop., *regeringens proposition*, the [Swedish] Government's bill
RB, *rättegångsbalken (1942:740)*, the [Swedish] Code of Judicial Procedure
ref., reference case (Sw., *referatmål*)
RF, *regeringsformen (1974:152)*, the [Swedish] 1974 Instrument of Government

RÅ, *Regeringsrättens årsbok* (nowadays HFD), the HFD's yearbook
s., *sida*, page
SBL, *skattebrottslagen (1971:69)*, the [Swedish] Tax Fraud Act
sec., section
SEFI-direktivet, the PIF Directive in Swedish
sen., sentence
SEK, Swedish crowns
SFL, *skatteförfarandelagen (2011:1244)*, the [Swedish] Taxation Procedure Act
SFS, *svensk författningssamling*, Swedish Code of Statutes
SKV, *Skatteverket*, the [Swedish] tax authority
SOU, *statens offentliga utredningar*, the Swedish Government's official reports
SVT, *Sveriges television*, Swedish television
Sw., Swedish
TEU, the Treaty of European Union
TFEU, the Treaty on the Functioning of the European Union
The Implementation Regulation, the COUNCIL IMPLEMENTING REGULATION (EU) No 282/2011 on implementing measures for the VAT Directive
TuL, *tullagen (2016:253)*, the [Swedish] Customs Act,
UN, the United Nations
VAT, value-added tax
VoIP, Voice over Internet Protocol
www, world wide web
ÅRL, *årsredovisningslagen (1995:1554)*, the [Swedish] Annual Accounts Act

Overview of examples of questions that can be raised set out from the chapters and annex of this book

- Abusive practice: see chapters I.-IV. and ANNEX 1. Is abusive practice criminalized at all or not criminal in itself on the theme of tax fraud? What applies in relation to commercial money laundering (professional money laundering)? Can a legal carrousel trading exist according to the special rules on goods in tax warehouses etc.? See Chapter V.
- Is an amount denoted as value-added tax (VAT) in an invoice, but where it is a case of fictitious invoicing, tax (Sw., ”*skatt*”) concerning tax fraud (see Chapter II. and ANNEX 2) and concerning personal responsibility of payment for a legal person’s VAT debt consisting of a too high excess input tax (see Chapter II., sections 6 and 8 and Chapter VI., section 4)?
- Prosecution often concerns both tax fraud and commercial money laundering. If prosecution in such cases does not concern book-keeping crime, the question is inter alia: what is demanded regarding precision of the deed description from the prosecutor? See inter alia Chapter I.; section 4.
- Can a more efficient registration control by the tax authority regarding VAT decrease the problems with carrousel trading? See ANNEX 3.
- Mention some problems for the judgment of VAT frauds by for example carrousel trading with the proposal in SOU 2023:49 about revoking the exemption from tax fraud for verbal information. See Chapter VI.
- If it is not already shown by accounting according to above, may also something be mentioned about the principle *ne bis in idem* (not twice about the same cause) and erroneous information in the rules on tax surcharge and tax fraud (see Chapter VI., section 4) and about the demand on double criminality and the risk prerequisite for tax fraud in Sweden (see Chapter VI., section 7).
- Mention something about whether Sweden’s participation in the European Public Prosecutor’s Office (EPPO) can be expected to lead to decreasing problems with carrousel trading. See Chapter VI., section 7.
- In ANNEX 4, I mention a gap in the Customs Act that can cause a far to vast scope of the right of deduction for input tax, and I describe a risk thereby existing of undesired arrangements. Think about this in relation to so-called *cross invoicing*, which is mentioned in Chapter IV., sections 4.2, 6 and 8.1. Is it sufficient with measures by the legislator regarding the VAT act? Is it also necessary with measures in the Customs Act or in the EU law to suppress the phenomenon with ”VAT carrousels”? Should the investigation SOU 2020:13, *Att kriminalisera överträdelser av EU-förordningar,* To criminalize transgressions of EU-regulations, be treated together with questions about ”VAT carrousels” and the proposal to revoke the exemption from tax fraud for verbal information? See Chapter IV., sections 4.2 and 8.2 and Chapter VI., section 5 and also Chapter I., section 4. In cases of ”VAT carrousels”, questions on *cross invoicing* often occur concerning acquisition of services in the form of VoIP (Voice over Internet Protocol). In Chapter IV., section 4.2, I bring up that Sweden, unlike Denmark, did not introduce reverse charge for VoIP. Discuss whether this may lead to an unwanted parallel current law concerning VAT and crime in the context.
- In ANNEX 5, I mention what the VAT act of 2023 can mean in the context of licences connected to goods like computers and mobile phones. Discuss somewhat about this.

I. VAT frauds of so-called carrousel type and NJA 2018 p. 704[1]

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

1 Introduction

In the Swedish VAT act, *mervärdesskattelagen (1994:200)*, abbreviated GML,[2] a so-called reverse charge of tax liability existed from the beginning, i.e. the value-added taxation of goods or services is made at the purchaser instead of at the vendor, regarding enterprises' purchases of certain services from enterprises in other EU Member States or in third countries.[3] At Sweden's EU-accession in 1995 was reverse charge introduced in the GML also for enterprises' intra-Community acquisitions (nowadays intra-Union acquisitions) of goods from enterprises in other EU Member States.[4] Since more services had come to be supplied from a distance, reverse charge was extended on 1 January, 2010 to the main rule in the GML for enterprises acquisitions of services from enterprises abroad.[5] For more than 22 years ago reverse charge was introduced in the GML also for *transactions within the country* between enterprises – regarding goods in the form of fine gold and investment gold.[6] Thereby was tax avoidance or evasion stopped in such cases, where the purchaser made a deduction in the VAT return to the SKV (*Skatteverket* – the tax authority) for charged input tax in the invoice from the vendor, whereas the vendor omitted to carry out his liability to account for the corresponding output tax to the SKV. This is basic for what is usually called carrousel trading in the field of VAT.[7] Later on has reverse charge been introduced in the GML for

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

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

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

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

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

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

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

transactions within the country between enterprises also in other sectors, e.g. concerning trading with services in the form of emission rights for greenhouse gases.[8] On 1 April, 2021 reverse charge was introduced concerning transactions within the country between taxable persons regarding goods in the form of mobile phones, integrated circuit devices, gaming consoles, tablets and portable computers – provided that the taxable amount for the transaction of those goods in an invoice all in all exceeds 100,000 Swedish crowns and the registration liability for the purchaser is not only a consequence of the acquisition.[9]

The reason for the introduction of reverse charge for transactions within the country between in several areas is above all the frauds of so-called carrousel type in the field of VAT that exist inter alia in Sweden. I held a lecture for more than 20 years ago at *Svensk Juriststämma* (Swedish Law Meeting) about it,[10] and in this article I comment the standpoint of the Supreme Court of Sweden (*Högsta domstolen*, abbreviated HD) regarding the phenomenon at abusive practice, according to the case NJA 2018 p. 704. I compare the HD's conception on the question of coarse tax fraud according to sec. 4 of the Tax Fraud Act, *skattebrottslagen (1971:69)*, abbreviated SBL, with the perception of the senior judge of appeal at the Svea Court of appeal about abusive practice and the criminal law principle of legality established in Ch. 1 sec. 1 of *brottsbalken (1962:700)*, the Penal Code, abbreviated BrB.

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

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

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

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

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

case,[11] i.e. a vendor is tax liable for a taxable transaction of good or services within the country also when it is made to another taxable person – not first for a sale to a consumer like at the application of the special rules on reverse charge.

2 The Svea Court of appeal's court findings

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

In NJA 2018 p. 704 the Svea Court of appeal stated in its court findings that the question on right of deduction for input tax when the transactions have been preceded by VAT fraud has been tried by the Court of Justice of the EU (CJEU), for example in the Joint cases C-439/04 and C-440/04 (Kittel and Recolta Recycling) which concerned VAT frauds of carrousel type.[12] The CJEU deems inter alia in that verdict that the national court shall dismiss deduction for input tax, if it with respect of objective circumstances comes out that the tax liable knew or should have known that VAT frauds existed previously in the chain of business. That is in my opinion nothing new from the CJEU, but a perception of the court also in other cases. Another example is the Joint cases C-354/03, C-355/03 and C-484/03 (Optigen et al.),[13] where the CJEU in item 55 considers that the right of deduction for input tax cannot be refused somebody for acquisitions made with the aim to make taxable transactions, only because someone before or after in the chain of delivery has made a with regard of VAT fraudulent transaction which the person in question did not know about and neither could have known about. If the entrepreneur knew or should have known about the existence of VAT frauds in previous links of the chain of business, he or she, thus, has not a right to deduct charged input tax in the invoice from a deliverer of goods or supplier of a service.

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

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

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

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

of the GML's rules on right of deduction for input tax shall be regarded *the principle according to the CJEU for interpretation of the VAT Directive in cases of fraud*.[14] According to the Svea Court of appeal, this means that *the right of deduction is dependent on whether the tax liable knew or should have known that the company by its transactions took part in a VAT fraud*. I consider that this has led to the misunderstanding among the participants in cases of the present sort that the CJEU has established some kind of a "Kittel"-doctrine, when it is only a matter of the VAT system not being allowed to be used to commit frauds, by using VAT returns to unfairly appropriate to oneself money from the public treasuries in the EU's Member States. Then, a court should also be careful with stating that the CJEU has "established" anything at all, since the CJEU does not have the character of a constitutional court. In my opinion, that is the case at least as long as the EU does not have a supranational character, but for instance Sweden as a Member State has only conferred competence to the EU's institutions in certain fields, like with the VAT law, where the contents of the rules in the GML and in parts of the Taxation Procedure Act, *skatteförfarandelagen (2011:1244)*, abbreviated SFL, which concern VAT are governed in the first place by the EU's VAT Directive (2006/112/EC). Thus, the correct expression should be that the CJEU *considers*. Expressions like *consider* should also be used when the appliers of law express the HFD's or the HD's perception of a certain question. Although precedents is an important source of law in Swedish law, and of guidance for future decisions in the lower instances, it is in my opinion important to regard that it in principle does not exist precedent bound interpretation and application of the legislation in Sweden. Above all, this is shown in the field of taxation, by it following of Ch. 8 sec. 2 first para no. 2 of the 1974 Instrument of Government, *regeringsformen (1974:152)*, abbreviated RF, that a measure of taxation cannot be enforced against the individual's will in conflict with the wording of the written rule in question (the principle of legality for taxation measures).

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

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

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

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

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

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

The senior judge of appeal was dissentient, and wanted, unlike the majority in the Svea Court of appeal, to acquit the defendant. She mentioned the EU-case C-255/02 (Halifax et al.),[15] where the CJEU inter alia considers that if the transactions which are the basis of the right to make a deduction for input tax constitute abusive practice such a right does not exist according to the Sixth Directive, nowadays the VAT Directive.[16] To conclude that abusive practice exits it is according to the CJEU required that the present transactions, despite that they are formally correct, cause that a tax advantage is achieved which is in conflict with the purpose of the rules in the directive, and it shall also be evident by the objective circumstances that the main aim with the transactions is to achieve a tax advantage.[17] However, the senior judge of appeal stated inter alia *that the CJEU in C-255/02 Halifax et al. Expressed that the relationship that it is concluded that an abusive practice exists does not need to lead to any measure of sanction, which would demand a clear and unequivocal support in law, but instead reimbursement liability since the deduction has become unjustifiably (item 93).* Moreover, the senior judge of appeal stated that the criminal law principle of legality according to Ch. 1 sec. 1 of the BrB functions as guarantee of legal certainty, by it raising a demand on the legislation meaning that the individual must be able to foresee when he or she can be subject of criminal law intervention. The principle in question means inter alia a prescription demand (Sw., *föreskriftskrav*), a prohibition of analogy (Sw., *analogiförbud*) and a prohibition of indefiniteness (Sw., *obestämdhetsförbud*). Concerning the Joint cases c-439/04 and C-440/04 (Kittel and Recolta Recycling) and the case HFD 2013 ref. 12, the senior judge of appeal stated that an acceptance of the CJEU's application and interpretation of the VAT Directive with respect of tax law, which is confirmed by the HFD, would also have an effect in the material criminal law like the prosecutor had claimed meant

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

[16] See item 85 of the "Halifax et al."-case.

[17] See item 86 of the "Halifax et al."-case.

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

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

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

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

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

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

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

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

4 Concluding viewpoints

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

Concerning the first mention question, I referred at my lecture to that Doctor of Laws Börje Liedhammar (nowadays lawyer as well as professor) stated in an article that a consultation (Sw., *samråd*) in the question of what is erroneous information should take place between prosecutor and defence lawyer, whereby he referred to sec. 15 second para of the SBL.[18] In that rule it is stipulated that the district court (Sw., *tingsrätten*) shall, in a case about crime according to the SBL that has a connection with a tax question which is pending at an administrative court (Sw., *förvaltningsdomstol*) or an administrative authority (Sw., *förvaltningsmyndighet*), consult with the administrative court or the administrative authority concerning the handling of the case, if it is not unnecessary. Börje Leidhammar motivated his advice with that the question on erroneous information under all circumstances must be decided by the guidance of the rules in the tax statute which in the individual case stipulates the tax liability, whereby he referred to page 91 in prop. 1995/96:170, *Översyn av skattebrottslagen* (Overview of the Tax Fraud Act). That bill constituted the preparatory works to the reform of the SBL on 1 July, 1996, by SFS 1996:658, which meant that tax fraud was altered from an effect crime to a risk crime and that evasion of tax inspection (Sw., *försvårande av skattekontroll*) also was altered in that way. I consider that a defence lawyer, in such a case that Börje Leidhammar brings up, should ask for a meeting with the prosecutor already before the preliminary investigation is finished, if a prosecution can come to apply to

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

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

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

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

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

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

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

came up between sec. 10 of the SBL, making the tax control more difficult, and Ch. 11 sec. 5 of the BrB, book-keeping crime. Thereby, making the tax control more difficult is no longer subsidiary in relation to the book-keeping crime, but normal competition of rules applies. The legislator presupposed that the problem with the competition of rules would be solved in practice by the prosecutor's formulation of the deed description.[19] The problem often is that the prosecutors' deed descriptions, like the SKV's reports, are fairly imprecise. Thus, the defence lawyers should, in my opinion, pay attention to this, and put questions to the tax auditor in his or her capacity of the prosecutor's witness on the theme of erroneous information regarding how the tax auditor, whose investigation also is the basis for the taxation decision, sets his or her assertion about erroneous information in the VAT return in relation to above all the question about erroneous in the book-keeping and the question whether the defendant has made the tax control more difficult. It is the tax auditor's investigation that is the basis for the tax case and on which the prosecutor is basing the prosecution, and then I consider that an imprecise deed description from the prosecutor, with the possibility of adjustment for the prosecutor during the criminal case proceedings, cannot be in compliance with the individual's legitimate demand of a fair trial. In my opinion, the prosecutor shall not be assisted by the court to enforce a prosecution which only concerns tax fraud, coarse or according to the normal degree, if the prosecutor should have explained in a precise deed description why the prosecution does not regard also the making of the tax control more difficult, when the tax auditor thereafter in the witness inquiry is supporting the prosecutor with a reasoning that should be tried against making of the tax control more difficult or book-keeping crime.

Finally, I may remind of that there is no clear definition of what constitutes VAT fraud by carrousel trading.[20] I consider that it is a phenomenon where questions about both *the tax subject* and *the tax object* are tried starting out from the VAT principle which show itself by the basic principles for what is meant with VAT according to the EU law according to article 1(2) of the VAT Directive (previously article 2 of the First Directive), namely the principles about a general right of deduction, reciprocity and passing on the tax burden. In an ennobling chain of *tax subjects* – taxable persons (enterprises) – up to the consumer the VAT shall regarding taxable transactions within the country of goods or services be deducted and levied in all business links, so that the VAT on the total value-added in the end burdens the consumer as tax carrier. What is common for VAT frauds of carrousel type is that the principle of passing on the tax burden of the VAT to the consumer is not working due to frivolous tax subjects in the ennobling chain unfairly appropriate to themselves money from the State, by using the reciprocity principle and the principle of a general right of deduction insofar that an enterprise which receives an invoice deducts charged input tax in the invoice on incorrect grounds, since the other enterprise is lacking a will to pay regarding the corresponding output tax. It is by starting out from that attitude by the vendor that questions on intent, erroneous information and risk shall be asked in a criminal law respect, where it is a matter of whether an enterprise purchasing goods or services shall be deemed having known

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

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

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

By the way, sometimes there is a misunderstanding that VAT frauds of carrousel type is something that came here with Sweden's EU-accession in 1995. It is instead so that the tax authority investigated suchlike cases at least already in the 1980's, which I mention in a book.[21]

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

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

II. Fictitious invoice with charging of VAT – consequences for tax and accounting[22]

In the article the lawyer Björn Forssén accounts for the consequences for issuers as well as for receivers of a fictitious invoice with a VAT charge, that is "false VAT".

When an enterprise issues a fictitious invoice with an amount that is falsely denoted as VAT it leads to consequences for both tax liability and accounting. Although the VAT is to be seen as false it causes a liability of payment for the person issuing the invoice. If the receiver of the invoice erroneously accounts the false VAT as input tax it can lead to the receiver becoming responsible for tax fraud and also for book-keeping crime. The author also notes that the issuer of the invoice can be responsible to mention the false VAT in the annual report, if the amount is substantial.

1 Introduction

Article 203 of the EU's VAT Directive (2006/112/EC) states that *VAT shall be payable by any person who enters the VAT on an invoice*. The rule was introduced on 1 January, 2008 in the VAT act, *mervärdesskattelagen (1994:200)*, abbreviated GML, by SFS 2007:1376.[23] This led to the introduction of Ch. 1 sec. 1 third para and sec. 2 e of the GML with the consequence that anyone who has falsely charged value-added tax (VAT) in an invoice is liable to payment (Sw., *betalningsskyldig*) to the State for the amount, despite it does not constitute VAT according to the GML. Such an amount, which I denote a false VAT, shall be accounted in the order that applies for accounting of output tax for a tax liable.[24] If the amount is not corresponding to a delivery of goods or a supply of a service, it shall be accounted for the accounting period during which the invoice was issued.[25] The liability of payment to the State for the false VAT remains until the accounting period during which the enterprise has issued a credit note, if the SKV does not waive the demand for a credit note due to special reasons (Sw., *särskilda skäl*).[26] The invoicing rules in Ch. 11 of the GML do not stipulate any time limit for the issuing of an invoice,[27] and thus neither for the issuing of a credit note (that is for a credit invoice).

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

[23] The GML was replaced on 1 July, 2023 by the VAT act, *mervärdesskattelagen (2023:200)*, abbreviated ML, which does not change the problems in the article.

[24] See Ch. 13 kap. sec. 27 first sen. of the GML.

[25] See Ch. 13 sec. 27 second sen. of the GML.

[26] See Ch 13 sec. 28 and Ch. 11 sec. 10 of the GML.

[27] See prop. 2003/04:26, *Nya faktureringsregler när det gäller mervärdesskatt* (New invoicing rules regarding VAT) pp. 42, 48 and 84.

There are various cases of false VAT according to the preparatory works to the reform of 2008, where the following examples of different examples of erroneously charged VAT in the present meaning are stated:

- a tax liable charging VAT on a from VAT exempted goods or service,
- a tax liable charging VAT on a payment which does not constitute consideration for goods or a service,
- someone who is not tax liable charging VAT on goods or a service,
- a tax liable charging VAT with an erroneous tax rate,
- a tax liable charging VAT in a situation where the acquirer is who is tax liable for the VAT, so-called reverse charge,
- a tax liable charging VAT on exempted transaction of goods transported to another EU Member State (intra-Community – nowadays intra-Union – transaction) or on export of goods to a third country,
- a person who is not tax liable due to him not fulfilling the demands on taxable person (Sw., *yrkesmässig verksamhet* – nowadays *beskattningsbar person*) has by mistake charged VAT on a transaction and
- a person *committing tax fraud by issuing invoices with VAT which is not corresponding to any real transaction (fictitious transactions)*.[28]

In this article I am setting out from that an enterprise issuing an invoice and falsely enter an amount therein as VAT, since it is a matter of a fictitious transaction, that is the latter of the cases mentioned above. The questions that I am treating are what consequences the falsely charged VAT can cause for the enterprise besides the liability of payment to the State for the amount and for the receiver of the invoice and if, and in that case how, the issuer shall account for the false VAT.

2 Consequences according to the GML of issuing of fictitious invoice with false VAT

Of the preparatory works to the reform in 2008 follow that the legislator deemed that it followed already by Ch. 8 sec. 2 first para of the GML that a falsely charged VAT does not constitute input tax, since the amount falsely denoted as VAT in a received fictitious invoice does not constitute VAT according to the GML, but is what I call a false VAT. By the liability to pay such a false VAT being stipulated in a separate rule, Ch. 1 sec. 2 e of the GML, the legislator emphasized that for the person falsely charging the VAT shall that measure not lead to anything else than a liability of payment.[29]

Thus, the issuing of the fictitious invoice leads to a liability to pay to the State for the enterprise which has issued it regarding the therein as VAT falsely denoted amount. Since it is not a matter of tax liability according to the GML for the issuer, the reciprocity principle is not fulfilled for the receiver, which thereby is not allowed to deduct the amount as an input tax.[30]

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

[29] See prop. 2007/08:25 p. 90.

[30] See Ch. 8 sec. 2 first and second paras and sec. 3 first para of the GML and article 167 of the VAT Directive.

3 Entering in the book-keeping of false VAT in a fictitious invoice

In that in the present article hypothetical example it is not a matter about real business transactions having occurred, but an issued invoice has been drawn up for the sake of appearances. According to the main rule in the GML a liability of accounting occurs when a business transaction, through which tax liability has occurred, has been booked or should have been booked according to Generally Accepted Accounting Principles (GAAP), Sw., *god redovisningssed*,[31] and the tax liability presupposes according to Ch. 1 sec. 1 first para no. 1 of the GML that a transaction of taxable goods or services has been made within the country by a taxable person, that is in principle by an entrepreneur. According to the main rule on invoicing liability in the GML shall each taxable person secure that an invoice is issued by the taxable person himself (or in his name and on his behalf by the purchaser or a third person), for an transaction of goods or services which is made to another taxable person,[32] that is although if the tax liability according to the GML does not occur. The rules on invoicing liability in the GML constitute special legislation in relation to the Book-keeping Act, *bokföringslagen (1999:1078)*, abbreviated BFL, as general legislation on accounting liability for a person required to maintain accounting records (Sw., *bokföringsskyldig*) regarding the person's business transactions. Of the general rules on definitions of certain concepts in the Annual Accounts Act, *årsredovisningslagen (1995:1554)*, abbreviated ÅRL, it follows by Ch. 1 sec. 3 first para no. 3 that with net sales (Sw., *nettoomsättning*) is meant in the ÅRL: income from sold goods and services made which are included in the enterprise's normal activity with deduction for discount given, *VAT and other tax which is directly connected to the transaction*. Thus, all in all is my judgment that without an underlying business transaction no transaction according to the GML occurs, and thereby neither any tax liability, accounting liability or invoicing liability according to the GML.

According to Ch. 1 sec. 2 first para no. 7 of the BFL business transaction means *all changes in dimension and composition of an enterprise's wealth which depends on the enterprise's economic relations with the surrounding world, like cash received and paid, claims and debts emerged and own contributions to and withdrawals from the activity of money, goods or something else*. A fictitious invoice shall in my opinion not be booked in the current recording, since it is not corresponding to any business transaction that affects the course, economic result or balance of the business. However, the enterprise which has issued the invoice is liable of payment to the State for the false VAT entered therein. The question is how that amount shall be accounted (besides in a special tax return).

According to Ch. 3 sec. 1 of the ÅRL shall the balance sheet in summary account for the enterprise's total assets, allocations and debts and equity on the balance sheet day. Since the false VAT in question does not constitute tax, it shall not be accounted for as any tax debt in the balance sheet or as postponed tax in a note in the annual report.[33] It does neither constitute any contingent liability (Sw., *eventualförpliktelse*) or any commitment which is comprised by the rules in the ÅRL about off-balance sheet items. Although a commitment does not

[31] See Ch. 13 sec. 6 no. 1 of the GML and prop. 1993/94:99, *om ny mervärdesskattelag* (about a new VAT act) p. 234.

[32] See Ch. 11 sec. 1 first para of the GML.

[33] See Ch. 5 sec. 36 of the ÅRL about that a big enterprise shall inform in a note in the annual report regarding postponed tax.

constitute an off-balance sheet item, it can, however, be appropriate to mention in a note or in the administration report.[34]

I consider that an enterprise which has issued a fictitious invoice with a false VAT therein is liable to account for the amount in question in a note in the annual report, if it is of importance for the judgment of the *balance* of the business, which I deem that it is – at least concerning not insignificant suchlike amounts – due to the liability of payment to the State affecting the liquidity of the enterprise and the prudence concept meaning that the enterprise must not be overvalued in the accounting. In Ch. 5 of the ÅRL it is stated what shall be entered in notes in the annual report. Concerning the demand of notes for smaller and bigger enterprises is in my opinion what is stated regarding so-called contingent liabilities (Sw., *eventualförpliktelser*) in Ch. 5 sec. 15 of the ÅRL of interest in the present context. There it is stipulated that if an enterprise has guarantee commitments, economic commitments or contingent liabilities which shall not be entered in the balance sheet (contingent liabilities), it shall inform about the sum of those. Regardless of whether a false VAT has been paid or not to the State, *the liability of payment* remains only until a credit note has been issued by the enterprise, why I consider that it constitutes a contingent liability. The amount shall not be accounted for in the current recording,[35] but I deem that a remaining liability of payment should be mentioned in a note in the enterprise's annual report.

4 Criminal law consequences about false VAT in a fictitious invoice

The Tax Fraud Act, *skattebrottslagen (1971:69)*, abbreviated SBL, was altered on 1 July, 1996, by SFS 1996:658, so that the effect crime *skattebedrägeri* nowadays constitutes a risk crime, called *skattebrott* (both expressions read tax fraud in English). This means that the criminal cases can be decided without awaiting legally binding decisions in the tax courts. However, what is erroneous information must – regardless of the construction otherwise – still be decided with guidance of the tax rules, so that the connection between the criminal tax case and the taxation question will not be broken.[36] The tax fraud is described as follows in sec. 2 of the SBL:

He or she who in another way than orally 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 being withheld the public or wrongly counted in or reimbursed to himself or herself or someone else, is sentenced for tax fraud to prison for two years at the most.

Thus, it shall be a matter of an *erroneous information* in writing given with *intent* in a tax return etc. and that a *risk* shall emerge for *tax* (Sw., *skatt*) to be withheld from the State or wrongly counted in or reimbursed to the person filing the tax return etc. Thereby, the tax fraud concerns wrongly or omitted accounting of tax, that is it constitutes an accounting crime, why no payment crime in itself exists concerning the tax account system (Sw., *skattekontosystemet*), which was introduced on 1 November, 1997, whereby the so-called

[34] See prop. 1998/99:130, *Ny bokföringslag m.m.* (New book-keeping act etc.) Part 1, p. 303.

[35] Then the result must not be undervalued for income tax purposes, I consider that the amount shall neither be written off.

[36] See prop. 1995/96:170 p. 91.

collection crime (Sw., *uppbördsbrottet*) was abolished regarding tax deduction at source (Sw., *källskatteavdrag*).[37]

If an enterprise, for example a natural person (sole proprietorship) or a legal person like a limited company (Sw., *aktiebolag*), has issued an invoice wherein an amount falsely is denoted as VAT, the amount shall as a false VAT be accounted for in a special tax return (Ch. 26 sec. 7 of the SFL) and not as a real VAT in a VAT return (Ch. 26 sec. 21 of the SFL). That the amount denoted falsely as VAT is not VAT according to the GML may be meaning that the issuer of the invoice has not committed a crime regarding *skatt* (tax), that is tax fraud according to sec. 2 of the SBL. For that it would take a clarification in the SBL meaning that with *skatt* (tax) is also meant an amount falsely denoted as VAT in an invoice. In Ch. 3 sec. 12 of the SFL it is stipulated that *what is said about VAT* also applies to amounts falsely denoted as VAT in an invoice and that *what is said about tax liable according to the VAT act also applies to a person who is liable to pay such an* amount. However, it is according to Ch. 3 sec. 1 first para first sen. of the SBL only a matter of the usage of certain terms and expressions in the SFL itself. An amount which is regarded here may thereby be deemed as *skatt* (tax) only concerning the procedure for its accounting, not materially according to the GML. To determine what is *skatt* (tax) materially by a procedure rule in the SFL is in conflict with the principle of legality for taxation measures in Ch. 8 sec. 2 first para no. 2 of the 1974 Instrument of Government, *regeringsformen (1974:152)*, abbreviated RF. Thus, a natural person who carries out activity under a sole proprietorship or as a representative of a limited company, and who is issuing an invoice with a false VAT, should thereby not be deemed committing tax fraud according to the SBL, since an erroneous information regarding *skatt* (tax) which shall be accounted for in a VAT return do not come up. Tax surcharge (Sw., *skattetillägg*), which by the way also is considered a criminal charge,[38] can neither be imposed on false VAT, since the sanction tax surcharge is imposed on *skatter* (taxes) which are comprised by the SFL,[39] and an amount in the form of a false VAT is not *skatt* (tax) in a material respect. The only consequence is procedural and regards the liability of payment, that is the sole proprietorship, or the limited company shall account for an amount that constitutes a false VAT in a special tax return and pay it.

However, tax fraud can come up for an entrepreneur who has received the invoice and tries to exercise right of deduction for the falsely charged VAT in a VAT return, since the enterprise lacks right of deduction like for input tax regarding the amount in question, according to Ch. 8 sec:s 2 and 3 of the GML. In such a case can criminal law responsibility, be of interest also for he or she who has issued the invoice with the false VAT, namely according to Ch. 23 sec. 4 of the BrB for complicity in the tax fraud that the receiver of the invoice can be deemed to have committed by trying to make a deduction of the amount. That situation can be subject of

[37] See prop. 1996/97:100, *Ett nytt system för skattebetalningar, m.m.* (A new system for tax payment etc.) Part 1 p. 450; the [Swedish] tax payment act, *skattebetalningslagen (1997:483)*, which was replaced on 1 January, 2012 by the Taxation Procedure Act, *skatteförfarandelagen (2011:1244)*, abbreviated SFL.

[38] The Swedish tax surcharge is according to the European Court of Justice comparable with *a criminal charge* according to article 6 of the European Convention. See the European Court of Justice's verdicts on 23 July, 2002: Janosevic v. Sweden, Application no. 34619/97, item 71; and Västberga Taxi Aktiebolag and Vulic v. Sweden, Application no. 36985/97, item 82. Thereby, the legislator confirmed that tax surcharge is to be considered a sanction comparable with a criminal charge according to the European Convention. See prop. 2002/03:106, *Administrativa avgifter på skatte- och tullområdet, m.m.* (Administrative charges in the fields of tax and customs etc.) p. 245.

[39] See Ch. 49 sec. 2 of the SFL.

investigations by the tax authority (Sw., *Skatteverket*, abbreviated SKV) and the Economic Crime Authority (Sw., *Ekobrottsmyndigheten*, abbreviated EBM) in cases regarding VAT frauds of so-called carrousel type, where a fictitious enterprise exists in a chain of enterprises, whereby such an enterprise is called a missing trader (or goalkeeper company or front enterprise), that is it issues an invoice with a false VAT and the receiver of the invoice tries to exercise right of deduction for the amount by noting it as input tax in a VAT return to the SKV. By the receiver of the invoice in the hypothetical example knowing or should have known that the information of VAT was false, it is a matter of a case of abusive practice that can lead to criminal law responsibility for both the issuer and the receiver of the invoice.[40]

The CJEU considers taken by itself that the right of deduction for input tax cannot be denied anyone for acquisitions made for the purpose of making taxable transactions, only because someone before or after in the chain of delivery has made a with regard of VAT fraudulent transaction which the person in question did not know about and neither could have known about.[41] However, it is so in the present hypothetical example that the receiver of the invoice has not received goods or services and thus he or she knew or should have known that the invoice received was drawn up for the sake of appearances, why he or she gave erroneous information in the VAT return to the SKV, by therein noting the amount in the invoice received as an input tax, which he or she thus is not entitled to deduct. In such a case can responsibility for tax fraud come up or tax surcharge be imposed.[42]

If the receiver of the invoice has booked the false VAT as input tax, he or she can also be responsible for book-keeping crime according to Ch. 11 sec. 5 first para of the BrB due to erroneous information as well in his or her book-keeping, if the other suppositions for such responsibility are fulfilled, that is if the accounting measure is made with intent or by carelessness and means that the balance of the business cannot be judged on the whole.[43]

Although a natural person carrying out an activity under sole proprietorship or as a representative of a limited company cannot be deemed committing tax fraud for the issuing itself of the fictitious invoice with a false VAT, he or she can be responsible for book-keeping

[40] In Forssén 2022, ”Momsbedrägerier av så kallad karuselltyp och NJA 2018 s. 704”, VAT frauds of so-called carrousel type and NJA 2018 p. 704, I state that despite that the Supreme Court of Sweden (Sw., *Högsta domstolen*, abbreviated HD) confirmed the verdict of conviction by the majority of the Svea Court of appeal, it is not clear that abusive practice *in itself* means that criminal law responsibility exists. The senior judge of appeal, who was dissentient and wanted to acquit the defendant, stated inter alia that the Court of Justice of the EU (CJEU) in the case C-255/02 Halifax et al. (ECLI:EU:C:2006:121), item 93, expressed that *the relationship that it is concluded that an abusive practice exists does not need to lead to any measure of sanction, which would demand a clear and unequivocal support in law, but instead reimbursement liability since the deduction has become unjustifiably*. I also noted that the senior judge of appeal moreover stated that the criminal law principle of legality according to Ch. 1 sec. 1 of the BrB functions as a guarantee of legal certainty, by it raising a demand on the legislation meaning that the individual must be able to foresee when he or she can be subject of criminal law intervention. See Forssén 2022, pp. 123–125.

[41] See the Joint cases C-354/03, C-355/03 and C-484/03 Optigen et al. (ECLI:EU:C:2006:16), item 55. See also Forssén 2022 p. 121.

[42] The prosecutor may, however, not prosecute a natural person if the SKV has decided to impose tax surcharge on him or her (sec. 13 b of the SBL). Tax surcharge may not be imposed if the preliminary investigation already is going on against him or her regarding the SBL (Ch. 49 sec. 10 a of the SFL).

[43] See also regarding inter alia the prerequisite false document at *coarse* book-keeping crime in Ch. 11 sec. 5 second para of the BrB.

crime regarding the annual report according to Ch. 11 sec. 5 first para of the BrB.[44] In my opinion, this can be the case if the liability of payment to the State for the false VAT is not mentioned in a note in the enterprise's annual report, as I am stating should be made in the nearest preceding section, that is if the contingent liability that the liability of payment means demands such an information for the balance of the business being possible to judge on the whole. By the way, the circumstances in the present case should typically be like that the prerequisites intent or carelessness are fulfilled.[45]

5 Question about VAT registration due to issued fictitious invoice with false VAT

The sole proprietorship or the limited company are not liable to register to VAT due to the issuing of the fictitious invoice, since the amount therein falsely denoted as VAT is not comprised by tax liability according to the GML. This follows by the liability of registration according to Ch. 7 sec. 1 first para no. 3 of the SFL only applying to *a person tax liable according to the VAT* act. If liability of payment applies for such an amount, it means in itself, as mentioned above, only that the amount shall be accounted for in a special tax return and not in a VAT return. It is only he or she who shall account for real VAT in VAT returns who shall register to VAT. The only consequence of an amount being falsely entered as VAT in an invoice issued is the liability of payment of the amount to the State, and it shall be fulfilled in a special tax return but does not remain if a credit note of the amount is issued.[46]

6 Question about a representative's liability for false VAT in a fictitious invoice

In case the fictitious invoice with a false VAT has been issued by a legal person, like a limited company according to above, I deem furthermore that a representative's liability according to the main rule in Ch. 59 sec. 13 of the SFL cannot apply to the representative who has issued the invoice. The legislator states in the preparatory works to the SFL that tax according to Ch. 59 of the SFL *is tax if the main responsibility regards tax*.[47] However, an amount falsely denoted as VAT is, as mentioned above, not a real VAT, why 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 GML. Since legislation must not be made in the preparatory work itself, it is in my opinion not possible to impose the representative of the legal person a liability of payment according to Ch. 59 sec. 13 of the SFL, if the false VAT is not paid by the legal person. By the way, it would be in conflict with that it in the preparatory works of the reform in 2008 on the introduction in the GML of the liability of payment in question is stated that *a falsely charged VAT shall not lead to something else than a liability of payment for the person*

[44] According to Ch. 6 sec. 1 first para no. 1 of the BFL, limited companies shall always finish the current recording with an annual report, whereas a natural person (sole proprietorship) shall do so only on conditions according to item 6 of the rule.

[45] See also regarding inter alia the prerequisite false document at *coarse* book-keeping crime in Ch. 11 sec. 5 second para of the BrB.

[46] The VAT registration number is important for the SKV's control activity, why I in various contexts has pointed out that the SKV should develop its registration control activity. For example, I mention in my doctor's thesis, *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, p. 76 (Forssén 2013), that the EU had abandoned that as many enterprises as possible should be comprised by the VAT system to instead recommend restraint and a priority of registration control and questions about collection of VAT.

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

having charged the tax,[48] that is for the legal person. In my opinion, this should be regarded in the present context at the interpretation of the scope of the representative's liability according to Ch. 59 sec. 13 of the SFL. Thus, in my opinion it is not of interest to judge the subjective prerequisites in Ch. 59 sec. 13 of the SFL, intent or coarse carelessness, since it still is a matter of responsibility for a *skatt* (tax) regarding the underlying tax errand or case by the company.

However, it is more likely that the representative of a limited company who receives a fictitious invoice might be imposed a personal liability of payment in the form of representative's responsibility according to the special rule on such responsibility in Ch. 59 sec. 14 of the SFL regarding a too high accounting of excess input tax. If the representative has given erroneous information in a VAT return for the company, by accounting for the false VAT of a received fictitious invoice as an input tax, and what has been in effect accounted as input tax exceeds accounted output tax in the VAT return, with the result that a too high excess input tax has been accounted for, can the SKV, in my opinion, sue the representative before the administrative court (Sw., *förvaltningsrätten*) for liability of payment for such an amount, whereby also the subjective prerequisites for responsibility, intent or coarse carelessness, shall be tried.

7 False VAT in a fictitious invoice issued of an enterprise being declared bankrupt

By Ch. 6 sec. 3 of the GML it follows that if a tax liable has been declared bankrupt the bankrupt's estate is tax liable for a transaction in the activity after the decision on bankruptcy. For the time before the decision on bankruptcy the debtor (Sw., *gäldenären*) is tax liable. If that person has issued a fictitious invoice with a false VAT, a liability of payment to the State for the amount in question exists, as mentioned above, but it does not remain, as also mentioned above, if a credit note of the amount has been issued.

The receiver in bankruptcy has the authority to pursue claims concerning the debtor's VAT accounting, and according to the handbook of the Enforcement Authority (Sw., *Kronofogden*) it should be done if it can lead to the bankrupt's estate getting back VAT from the SKV. However, it is noted therein that there is no reason for the receiver in bankruptcy to take measures for the debtor's VAT debt becoming lower, but it can be justified for a representative of a legal person in bankruptcy, because he or she is running a risk of personal liability of payment.[49] If the debtor is for example a limited company, it is thus in line with what I state in the nearest preceding section about that a representative's responsibility for a false VAT cannot be imposed the representative of a receiving company, and that it is in the latterly mentioned representative's interest to act for a representative of the company in bankruptcy, in consultation with the receiver in bankruptcy, issuing a credit note, whereby I repeat that there is no time limit for such a measure.

8 Conclusions

In section 1, I state that the questions I am aiming to answer in this article are what the consequences are by an enterprise issuing an invoice and falsely denote an amount therein as

[48] See prop. 2007/08:25, p. 90.

[49] See *Handbok Konkurstillsyn* (Handbook on supervision in bankruptcy), Edition 6 (2022), section 2.17.5 (www.kronofogden.se).

VAT, since the invoice does not correspond to any real transaction, but it is a matter of a fictitious transaction. I conclude in section 1 that it in 2008, by virtue of article 203 of the VAT Directive, was introduced a special liability of payment to the State in the GML (Ch. 1 sec. 1 third para and sec. 2 e) for such amounts, which I denote false VAT, concerning inter alia falsely charged VAT in invoices for fictitious transaction. In sections 2 and 4–7, I have concluded what the consequences are, besides liability of payment to the State for the false VAT for the enterprise issuing the fictitious invoice, for that enterprise and for the receiver of the invoice, and in section 3 I conclude whether, and if so how, the issuer shall book the false VAT. I account here in summary for these conclusions of mine section by section.

In section 2, I conclude that the consequences *according to the GML* of issuing a fictitious invoice with false VAT is a liability of payment to the State for the amount in question for the enterprise having issued the invoice, and since the issuer is not tax liable like for a real VAT the receiver of the invoice is lacking a right of deduction as for input tax for the amount in question.

In section 3, I state that a fictitious invoice shall not be accounted for in the current recording, since it does not correspond to a real business transaction but conclude that the false VAT should be mentioned by the issuer in a note in the annual report, since the liability of payment to the State only remains until a credit note has been issued. I deem that such a liability constitutes a contingent liability which demands information in a note in the annual report, if the amount is not insignificant, since it affects the liquidity of the enterprise and the enterprise's balance must not be overvalued in the accounting.

In section 4, I make the following conclusions regarding the criminal law consequences which can occur regarding false VAT in a fictitious invoice:

- A natural person carrying out an activity under sole proprietorship or as a representative of a limited company, and who is issuing an invoice with a false VAT, should be considered committing tax fraud according to sec. 2 of the SBL. This because no erroneous information regarding *skatt* (tax) comes up thereby. That false VAT does not constitute tax according to the GML, that is materially, also means that tax surcharge can neither be imposed on the amount in question. The only consequence for the sole proprietorship or the limited company is procedural and means according to the SFL that the liability of payment shall be fulfilled by the false VAT being accounted for in a special tax return and be paid.

- Moreover, I state that tax fraud – and/or tax surcharge – can, however, come up for the receiver of the fictitious invoice, if that person has given an erroneous information in a VAT return by therein entering the false VAT as input tax, which is wrong since right of deduction is lacking regarding the amount due to the issuer not being tax liable for it, but only liable of payment according to the GML. I also state that in such a case can the issuer be imposed criminal law responsibility for complicity in tax fraud.

- Furthermore, I state on the theme of book-keeping crime according to Ch. 11 sec. 5 of the BrB partly that if the receiver of the invoice has booked the false VAT as input tax, he or she can incur a criminal law responsibility due to an erroneous information in the book-keeping, partly that a natural person carrying out activity under sole proprietorship or who is a representative of a limited company can be deemed incurring criminal law responsibility, if the liability of payment for the contingent

liability as 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.

In section 5, I state, concerning the question about VAT registration due to an issued fictitious invoice with false VAT, that such a liability in itself does not exist for someone who shall fulfil liability of payment for the amount to the State in a special tax return. It is only a person who shall account for real VAT in VAT returns who shall register to VAT.

In section 6, I conclude concerning the question on a representative's responsibility regarding false VAT in a fictitious invoice, that such a responsibility, according to the main rule thereof in Ch. 59 sec. 13 of the SFL, cannot apply to the representative of a legal person, for example a limited company, which has issued the invoice, since the main responsibility by the legal person does not regard *skatt* (tax). The legislator states in the preparatory works to the SFL that tax according to Ch. 59 of the SFL *is tax if the main responsibility regards tax*, but an amount falsely denoted as VAT is not a real VAT, why the main responsibility by the legal person issuing the invoice does not regard *skatt* (tax) materially according to the GML. Since legislation must not be made in the preparatory works, it is not possible to impose the representative of the legal person a personal liability of payment in the form of representative's responsibility according to the special rule on such responsibility in Ch. 59 sec. 14 of the SFL regarding a too high accounting of excess input tax, if the representative has given erroneous in a VAT return for the company, by accounting the false VAT in the fictitious invoice received as an input tax. This causes in the case that the debtor is a legal person, for example a limited company, which has been declared bankrupt, that I in section 7 conclude that it is in the interest of the representative of a company receiving a fictitious invoice to act for the company in bankruptcy issuing a credit note.

III. Commercial money laundering in VAT carrousel[50]

In my debate article in *Dagens Juridik* (Today's Law) "*Livsmedelspriserna föranleder lagändringar och planering avseende indirekta skatter*" (Food prices cause alterations of law and planning regarding indirect taxes),[51] I referred to Forssén 2022, "*Momsbedrägerier av så kallad karuselltyp och NJA 2018 s. 704*" (VAT frauds of so-called carrousel type and NJA 2018 p. 704), where I reason starting out from that case in the Supreme Court of Sweden (Sw., *Högsta domstolen*, abbreviated HD), when it is a matter of whether tax fraud can exist in cases of abusive practice in *VAT carrousels* (Sw., "*momskaruseller*". In a completing article by Stig von Bahr, formerly judge in the Supreme Administrative Court (*Högsta förvaltningsdomstolen*, abbreviated HFD) and the Court of Justice of the EU (CJEU), in *Svensk Skattetidning* (Swedish Tax Journal) 2022 (pp. 498-504), "*Mer om missbruk och momsbedrägeri*" (More about abuse and VAT frauds), he dismissed categorically my warning for abusive practice on the theme of criminal law sanctions.

I may, with regard of how the carrousel cases seem to develop, repeat my warning of abusive practice against the VAT system leading to criminal responsibility, although abusive practice, which I still consider, cannot *in itself* (Sw., "*i sig*") lead to responsibility for tax fraud, whereby I add a warning for criminal responsibility for commercial money laundering (Sw., *näringspenningtvätt*).

The Economic Crime Authority (Sw., *Ekobrottsmyndigheten*, abbreviated EBM) not seldom claims responsibility for commercial money laundering together with responsibility for tax fraud, and in that respect I point out that the defence lawyers in such errands and criminal cases should pay attention to how the subjective prerequisites are described and denoted in the deed description.

In section 3 of my mentioned article in the Swedish Tax Journal, I put the senior judge of appeal's perception, meaning that the defendant should have been acquitted with regard of the criminal law principle of legality, in relation to the HD's remark that the question of intent was not comprised by the leave to appeal regarding erroneous information. In my opinion, this means, despite that the HD confirmed the verdict of conviction by the majority of the Svea Court of appeal, it is not clear that abusive practice *in itself* means that criminal law responsibility exists. In that respect, I also stated that in the individual case it shall always be decided if also the risk prerequisite for tax fraud is fulfilled, which I reminded of, since the HD did not especially treat the risk prerequisite within the frame of the given leave to appeal. However, I set the focus this time on the question of intent, and state that in the cases where the EBM concerning one and the same arrangement (Sw., *upplägg*) attacks for example the owners of a limited company (Sw., *aktiebolag*) for commercial money laundering as well as for tax fraud the defence lawyers should call in question whether the same subjective prerequisites are invoked for both crimes.

[50] Article: "*Näringspenningtvätt i momskarusell*" (Commercial money laundering in VAT carrousel), by Björn Forssén, *Dagens Juridik* (Today's Law), under *Debatt* (Debate), published 2023-10-02, at 11.12, on www.dagensjuridik.se. (Forssén 2023b).

[51] See *ANNEX 1*.

The prerequisite intent in the Tax Fraud Act, *skattebrottslagen (1971:69)*, abbreviated SBL, which together with erroneous information and risk constitute the necessary prerequisites for criminal responsibility according to sec. 2 of the Tax Fraud Act, *skattebrottslagen (1971:69)*, abbreviated SBL, does not exist in *lagen (2014:307) om straff för penningtvättsbrott* (the [Swedish] Act on Punishment for Money Laundering). The Act on Punishment for Money Laundering has the following structure concerning the subjective prerequisites for the crimes money laundering and commercial money laundering respectively.

According to sec. 3 first para will he or she who takes certain mentioned measures be sentenced for money laundering crime, if the measure is aiming to conceal money or other property originating from crime or criminal activity or to promote the possibilities for someone to profit by the property or its value. Thus, the subjective prerequisite is *aiming to* (Sw., ”*syftar till*”). In sec. 4 the money laundering crime is extended to comprise also he or she who is taking the mentioned measure without having such an aim as stipulated in sec. 3. According to the statute commentary (Sw., *författningskommentaren*) is the aim connected with the deed and not the perpetrator, which means that the perpetrator himself or herself does not have to have the mentioned aim with his or her acting, but it is sufficient that someone other participating has such an aim and the perpetrator having intent in relation to this. The legislator exemplifies this with that if he or she having earned money on an illegal activity, with the aim to conceal the origin, asks someone else to receive the money on his or her bank account, the receiver of the money makes himself or herself liable for money laundering crime, although he or she does not himself or herself have the aim to conceal the origin of the money. However, there is a demand for him or her being sentenced as responsible, that he or she have the intent to the mandator having such an aim with the deed. His or her own aim can however be another, for example to get a consideration for his or her measure [see prop. 2013/14:121, *En effektivare kriminalisering av penningtvätt* (A more effective criminalization of money laundering) pp. 108-109]. If an aim according to sec. 3 does not exist, a person can be sentenced for money laundering according to sec. 4. Then may an intent of indifference (Sw., *likgiltighetsuppsåt*) exist according to prop. 2013/14:121, p. 112.

By sec. 7 first para follows that the extension of money laundering crime made in sec. 4 to apply also to intent of indifference does not apply to commercial money laundering. Sec. 7 only connects to sec. 3, by sec. 7 stipulating that for commercial money laundering is he or she sentenced who, in a business activity or as a part of an activity carried out habitually or otherwise on a larger scale, takes part in a measure which reasonably can be assumed being taken with such an aim stipulated in sec. 3. According to the statute commentary the criterion that the measure reasonably can be assumed taken with a money laundering aim means that the perpetrator makes himself or herself liable of a blameworthy risk-taking. Whether the property later on is proven legitimate does not acquit from responsibility. The criterion constitutes an objective prerequisite which shall be covered by the perpetrator’s intent, why the words *reasonably can be assumed* (Sw., ”*skäligen kan antas*”) nearest having the function of pointing out that it is the circumstances under which the measure was taken hat should be decisive for whether a blameworthy risk-taking shall be deemed existing. The legislator compares with – in my translation – business-fencing (Sw., *näringshäleri*), according to Ch. 9 sec. 6 second para of the BrB, and states that it should normally exist some qualifying circumstance for a money transaction to be deemed taken with a money laundering aim, since such a transaction normally cannot not be deemed as something suspicious, why the way in which the transactions are carried out is stipulated to possibly constituting such a circumstance. The legislator stipulates that the expression *taking part in a measure* (Sw.,

”*medverka till en åtgärd*”) regards that the perpetrator is taking part in such a measure stipulated in sec. 3 (see prop. 2013/14:121, p. 115).

The structure with a reference in sec. 7 to sec. 3, but not to sec. 4 where the legislator expressly stipulates that intent of indifference can cause responsibility, and the legislator's comparison with business-fencing means in my opinion that commercial money laundering presupposes an activity – a taking part – by the perpetrator, why I deem that the prosecutors should not use expressions like intent in a deed description regarding commercial money laundering according to sec. 7 of the Act on Punishment for Money Laundering. I compare the prerequisites for commercial money laundering with *purpose* (Sw., ”*avsikt*”), which was one of the subjective prerequisites for tax fraud, before that crime was altered to a risk crime on 1 July, 1996, and it nowadays only is stipulated *intent* (Sw., ”*uppsåtligen*”) as subjective prerequisite for tax fraud according to sec. 2 of the SBL, which means that an intent of indifference is sufficient both for erroneous information in a tax return and for no tax return being submitted at all (see p. 11 in prop. 1995/96:170).

With regard of the EBM not seldom claiming responsibility for commercial money laundering together with a charge for tax fraud regarding, where ”VAT carrousels” are concerned, I consider that such a case should be tried by the HD for guidance of the application of law. The development of the application of law concerning VAT frauds of so-called carrousel type has in my opinion taken such a direction, by the addition of commercial money laundering to the context, that NJA 2018 p. 704 is giving a sufficient enough guidance, especially as the question of intent was not comprised by the leave of appeal in that case.

IV. VAT fraud by carousel trading – experiences in Sweden regarding VAT, accounting and criminal law in relation to the EU law[52]

1 Introduction

I give a course with the title *Momsbedrägerier genom karusellhandel* (VAT frauds by carrousel trading),[53] and use that title also in the title of this article. The inspiration to the article comes to some extent from the course material, where inter alia another article of mine on the topic, published in *Svensk Skattetidning* (Swedish Tax Journal) last year (2022)[54] and the lecture I gave on the topic at Svensk Juriststämma (Swedish Law Meeting) more than two decades ago, on 14 November, 2001,[55] are included. For example, I am setting out from an article of mine published 2023-06-13 in *Tidningen Balans* (The Periodical Balans), which is issued by *Föreningen Auktoriserade Revisorer* (the Institute for the Accountancy Profession in Sweden, abbreviated FAR).[56] In this article, I account for my perception about the experiences in Sweden of the phenomenon with frauds regarding VAT by carrousel trading in relation to the EU law – regarding above all the VAT act (Sw., *mervärdesskattelagen*), the civil law accounting law and tax fraud (Sw., *skattebrott*) according to the Tax Fraud Act, *skattebrottslagen (1971:69)*, abbreviated SBL.[57]

There are many different versions of the phenomenon VAT frauds by carrousel trading. However, the common denominator is that frivolous enterprises take measures with their VAT returns so that the State in the end loses money, by the VAT on goods or services in a chain of enterprises will not be passed on to a consumer as tax carrier. This is in conflict with the EU law in the field of VAT, since it follows by article 1(2) of the EU's VAT Directive (2006/112/EC),[58] inter alia that VAT according to the EU law is "a general tax on consumption exactly proportional to the price of the goods and services, however many

[52] Article: *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), by Björn Forssén, *Tidskrift utgiven 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).

[53] The first occasion was in Stockholm (2022-11-30): arranger *Institutet för juridisk utbildning* (the Institute for legal education, abbreviated IFJU (Stockholm).

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

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

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

[57] EU, abbreviation of the European Union or the Union.

[58] Complete title of the EU's VAT Directive (2006/112/EC): COUNCIL DIRECTIVE 2006/112/EC of 28 November 2006 on the common system of value added tax.

transactions take place in the production and distribution process before the stage at which the tax is charged",[59] and that "[t]he common system of VAT shall be applied up to and including the retail trade stage".[60] An often occurring example of VAT frauds of so-called carrousel type is that it in a chain of enterprises exists a fictitious enterprise, which in the investigations by the tax authority (Sw., *Skatteverket*, abbreviated SKV) and the Economic Crime Authority (Sw., *Ekobrottsmyndigheten*, abbreviated EBM) is called a missing trader (or goalkeeper company or front enterprise). Such an enterprise issues an invoice with a false VAT, that is the invoice does not correspond with a real transaction of goods or a service, and the receiver of the invoice tries to exercise right of deduction for the amount denoted as VAT, by accounting the amount as input tax in a VAT return to the SKV. Since the receiver of the invoice knew or should have known that the info on VAT was false, it is a case of abusive practice which can cause a criminal law responsibility for both the issuer and the receiver of the invoice.

VAT frauds by carrousel trading is a big problem for the Swedish state. It is not a new phenomenon and has not arisen due to Sweden's EU-accession in 1995. It existed already in the 1980's, which I mention in a book from 2021.[61] However, the scope of the problem has escalated the last decades, and today can a single errand comprise billions of Swedish crowns of accounted VAT which can be questioned by the SKV and the EBM. In an interview in the SVT during the month of July in 2023 a figure of 5 billion Swedish crowns was mentioned – in claimed deductions for input tax that is not corresponded by payment of output tax – regarding what is usually described as Sweden's and the EU's largest VAT fraud. On the reporter Mikael Grill Pettersson's question, regarding how much was secured by the authorities, the chief prosecutor by the EBM, Jonas Svanfeldt, answered, I would say below 5 per cent (Sw, "*jag skulle säga under 5 procent*"), and the EBM's Director General, Monica Rodrigo, said that it is like a milch cow (Sw., "*det är som en mjölkko*").[62] It has in other words not been helpful that so-called reverse charge has been introduced for further situations after this was done for investment gold on 1 January, 2000, which I come back to with reference to Forssén 2022. Furthermore, legal security has in my opinion been set aside in the context, by the investigations from the SKV and the EBM nowadays are initiated in the first place by trading being carried out between Sweden and other Member States of the EU regarding a certain sort of goods, above all electronical products. This takes place instead of questions about the concept transaction being subject to a thorough judgment, like in the investigations at the time of my lecture at the Swedish Law Meeting in 2001.[63] This is decreasing the legal security, since transaction is mutual in relation to the concept acquisition for which deduction for input tax is claimed, by the right of deduction arising at the time the deductible VAT becomes chargeable (the reciprocity principle).[64] If justified demands on effective

[59] See article 1(2) first para of the VAT Directive.

[60] See article 1(2) third para of the VAT Directive.

[61] See *Skatt i skrattspegeln*, Tax in the distorting mirror (self-published 2021), part 1 pp. 111-114 ["*'Flygande mattor' och 'karuseller'*" ('Flying carpets' and 'carrousels')]. (Forssén 2021a).

[62] See https://www.svt.se/nyheter/inrikes/trots-fallande-domar-miljardbelopp-fran-bedragerier-kan-landa-hos-kriminella (visited 2023-07-25). Published on 14 July, 2023 on the website of the Swedish Television (Sw., *Sveriges Televisions*, abbreviated SVT).

[63] Compare with the title of that lecture: VAT and the transaction concept. The carrousel by the tax and economic crime authorities (abbreviated SKM and EBM).

[64] The reciprocity principle follows by article 1(2) second para and article 167 of the VAT Directive.

investigations by the SKV and the EBM and the legal security for the individual entrepreneur, who becomes subject of investigation in the present respect, shall be upheld, I consider that the focus must continuously be set on questions about the concept transaction. Instead, the legislator has tried since in 2000 to take care of the phenomenon in question by introducing reverse charge , whereby however a necessary reaction from the legislator is lacking, which I come back to and refer to Forssén 2022 and also to Forssén 2023a.

2 The new Swedish VAT act

2.1 The carrying out of the main rules in the VAT Directive for supply of goods and supply of services

In Sweden has a VAT reform been made on 1 July, 2023: *mervärdesskattelagen (1994:200*, the VAT act, abbreviated GML) was replaced on 1 July, 2023 by *mervärdesskattelagen (2023:200*, abbreviated ML). However, this reform does not affect my perception of the questions treated in this article. The ML constitutes an alteration of the GML for the purpose of making the regulation easier to understand and apply. Thus, the ML has in comparison with the GML got a new structure, been modernized regarding language and adapted to to the VAT Directive's concepts, structure and systematics.[65] In a previous article in the JFT, I have written about the proposal to the nowadays introduced ML, which was given in SOU 2020:31, *En ny mervärdesskattelag* (A new VAT act).[66] In the article, I mentioned inter alia that the suggestion to abolish the concept *skattskyldig* (tax liable), and replace it with VAT Directive's concept *betalningsskyldighet* (liability of payment) was a step in the right direction,[67] which was thus carried out on 1 July, 2023 by the introduction of the ML.

Especially interesting in the present context is in my opinion that the VAT reform inter alia means that the for tax liability – nowadays liability of payment – of VAT necessary prerequisite *transaction within the country of goods or services that is taxable* "*omsättning inom landet av varor eller tjänster som är skattepliktig*", which existed in the GML Ch. 1 sec. 1 first para no. 1, has been replaced in the ML with the concepts of delivery and supplies (Sw., *leverans* and *tillhandahållanden*). Thereby is also the terminology regarding the tax object in pursuance of the VAT Directive.[68] Instead of GML Ch. 2 defining what constitutes transaction is the scope of the VAT determined in the ML for the main cases of tax objects, by the necessary prerequisites in that respect being determined with the expressions *delivery of goods for consideration which is made within the country* (Sw., "*leverans av varor mot ersättning som görs inom landet*") and *supplies of services for consideration which are made within the country* (Sw., "*tillhandahållande av tjänster mot ersättning som görs inom landet*") respectively in Ch. 3 sec. 1 no. 1 and no. 3 respectively. Moreover, on the theme of the tax object may be mentioned that no special definition of goods or service, like in GML Ch. 1 sec. 6, is made in the ML. In ML Ch. 5 sec. 7 is with *material assets* (Sw., "*materiella*

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[65] See prop. 2022/23:46, *Ny mervärdesskattelag* (New VAT act), p. 1.

[66] See *Synpunkter på vissa regler i förslaget till en ny mervärdesskattelag i Sverige – SOU 2020:31* (Viewpoints on certain rules in the proposal to a new VAT act – SOU 2020:31). JFT 3/2020, pp. 388-399 (Forssén 2020a).

[67] See Forssén 2020a, pp. 388.

[68] See ML Ch. 5 sec. 3 first para and sec. 26 and prop. 2022/23:46, pp. 361, 362 and 371. See also Forssén 2020a, section 3.4.

tillgångar") meant the same as the term *goods* (Sw., in the singular, "*vara*") in GML Ch. 1 sec. 6 first para first sen. In principle is no alteration meant, but with *material assets* (Sw., "*materiella tillgångar*") instead of *material things* (Sw., "*materiella ting*") the language is modernized and a better correspondence with the VAT Directive is achieved.[69] By ML Ch. 5 sec. 3 first para, and sec. 26 respectively is the articles 14(1) and 24(1) of the VAT Directive respectively implemented, that is the main rules of what constitute taxable transactions regarding supply of goods and regarding supply of services respectively: "'Supply of goods' shall mean the transfer of the right to dispose of tangible property as owner" and "'Supply of services' shall mean any transaction which does not constitute a supply of goods".

Due to the concepts goods and service not given any special definition in the ML, but being included in the determination of taxable transactions, that is in the concepts delivery of goods and supply of services, has my perception of the importance of the determination of the tax object, that is of questions which previously were related to the concept of transaction (Sw., *omsättning*) and nowadays constitute questions about the concepts delivery (of goods) and supply (of services) respectively, been strengthened in the present context – regarding questions about the phenomenon carrousel trading by the VAT reform of 1 July, 2023. However, the need to judge whether an effort regards goods, or a service remains, since the terms even nowadays are used in the ML, by being included in the concepts of delivery of goods and supply of services respectively in ML Ch. 5 sec. 3 first para and sec. 26 respectively, in pursuance of articles 14(1) and 24(1) respectively of the VAT Directive. The difference is that the determination of the tax object is made in one step, instead of as previously in two steps, that is first concerning what constitutes goods and service respective according to GML Ch. 1 sec. 6 and thereafter concerning whether a transaction of goods or service respectively existed according to GML Ch. 2 sec. 1. Other questions about the tax object are the same in the ML as in the GML, that is they concern whether exemption from taxation exists and whether delivery of goods or supply of service – for consideration – is made within the country or abroad.

In connection with investigations about VAT frauds by carrousel trading, it is important to correctly distinguish between goods and services, since carrousel trading is not a precise concept and the effort to judge must be referred to the concept delivery of goods and the concept supply of services respectively, for the existing situation being possible to analyse for purposes of tax law and criminal law. By the reform on 1 July, 2023 the secondary law in the field of VAT has been implemented in the ML inter alia by the concept material assets replacing goods,[70] but support is lacking for what is meant by service, since there is no rule in the VAT Directive giving a direct or assisting guidance to the determination of service. However, there is a primary law support to the meaning of the term service, by article 57 first para of the Treaty on the Functioning of the European Union (abbreviated TFEU), which has the following wording: "Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons".

I consider that article 57 TFEU is corresponding with the main rule of supply of services, that is ML Ch. 5 sec. 26 and article 24(1) of the VAT Directive, by the negative determination of services causing that they are not comprised by efforts falling under the free movement of

[69] See prop. 2022/23:46, pp. 361 and 362.

[70] See ML Ch. 5 sec. 7 and article 15 of the VAT Directive.

goods. However, the correspondence is lacking insofar as also the freedoms which concern persons and capital are excluded from the concept service according to article 57 TFEU. The TFEU stipulates inter alia that the so-called four freedoms of movement between the Member States of goods, services, persons and capital and, which is often mentioned as a fifth freedom, the freedom of establishment for the citizens of the EU and enterprises in the Member States.[71] The hiring out of personnel – that is of natural persons – constitutes an example of a taxable transaction according to the main rule on supply of services in the main rule article 24(1) of the VAT Directive, and a financial transaction would also be a taxable transaction, if exemption from taxation was stipulated for financial transactions, like mediation of payments, in article 135(1)(d)-(f) of the VAT Directive.[72] In both those cases the preliminary judgement of service in article 57 TFEU does not correspond with the secondary law in the form of Ch. 5 sec. 26 and article 24(1) of the VAT Directive, since persons and capital are excluded from what is meant with service according to article 57 TFEU.

Although the terms goods and service respectively are not defined in the EU's legislation on VAT, either in the VAT Directive or in the COUNCIL IMPLEMENTING REGULATION (EU) No 282/2011 on implementing measures for the VAT Directive (the so-called Implementation Regulation),[73] I consider thus that it *can* be of interest in connection with investigations about carrousel trading to broaden the perspective above all on service, so that a distinction against goods can be made based on other fields of law governed by the EU law, like company law (Sw., *bolagsrätt*) and intellectual property law (Sw, *immaterialrätt*) – which constitute examples of fields where rules are important for the four freedoms to function.[74] This proposal of mine is in line with that I in a previous article in the JFT has stated that the research should notice that there is a preliminary law definition of the concept service in article 57 TFEU, and that it applies also in other fields than the filed of tax, if the EU's institutions have been conferred competence in the field in question.[75]

2.2 A certain comparison with Danish and Finnish VAT law

I may in the context give a proposal in a certain respect regarding the Finnish VAT act, *mervärdesskattelagen (1501/1993)*, abbreviated FML. It is stipulated in the FML sec. 1 first para no. 1, the main rule for the liability of payment of VAT to the State, that the liability regards *business activity-like sales of goods and services in Finland* (Sw., "*rörelsemässig*

[71] The four freedoms are to be found in: article 28 TFEU, regarding goods; article 56 TFEU, regarding services; article 45 TFEU, regarding persons; and article 63 TFEU, regarding capital. The principle of the EU-citizens' free establishment within the Union is to be found in article 49 TFEU.

[72] See Björn Forssén, *Momsrullan IV: En handbok för praktiker och forskare* (The VAT roll IV: A handbook for practicians and researchers) self-published 2019, section 12 201 010 (Forssén 2019a).

[73] The complete title of the Implementation Regulation is: COUNCIL IMPLEMENTING REGULATION (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax.

[74] Concerning company law and intellectual property law may be mentioned that 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. EEA, European Economic Area.

[75] See Björn Forssén, *Momsforskningen i Sverige – metodfrågor* (The VAT research in Sweden – method questions). JFT 6/2020, pp. 716-757, 756 (Forssén 2020b).

försäljning av varor och tjänster i Finland"). I note that the FML means that the determination of the tax object shall be made in two steps in the same way as was the case in the GML, by FML sec. 17 stipulating what constitutes goods and service respectively and sec. 18 stipulating what constitutes *sale of goods* (Sw., "*försäljning av vara*") and *sale of service* (Sw., "*försäljning av tjänst*") respectively. Thus, the FML corresponds with the GML in the present respect.

Since the phenomenon of VAT frauds by carrousel trading often concerns at least two Member States at the same time, I consider that the articles 14(1) and 24(1) of the VAT Directive, that is the main rules of what is meant with taxable transactions, should be implemented in the FML in the same way as has been done in the ML by the reform of 1 July, 2023. In my opinion, it is decisive in that respect that harmonisation of the Member States' national legislations in the field is demanded – in pursuance of article 113 TFEU – regarding what makes the taxable event, that is taxable transactions in the form of delivery of goods and supply of services respectively.[76] According to recital 7 of the preamble to the VAT Directive it is stated that the tax rates and exemptions from taxation regarding goods and services which are not completely harmonised.[77] Thus, the FML should in my opinion be altered, so that no definition of goods and service is made and *sale of goods* (Sw., "*försäljning av vara*") and *sale of service* (Sw., "*försäljning av tjänst*") respectively are replaced with the concepts *supply of goods* and *supply of services* respectively according to the main rules in articles 14(1) and 24(1) respectively, like what has been done in the present respect by the ML replacing the GML on 1 July, 2023.

Since I in this context also mention the third Nordic country, Denmark, I may also mention that the determination of the tax object is made in one step in *lov om merværdiafgift* (*momsloven*), i.e. the Danish VAT act. That is, no special definition of goods and service, like in the GML and the FML, is made in *momsloven*, but delivery of goods and supply of service respectively are determined in sec. 4 of the *momsloven*. Thus, the articles 14(1) and 24(1) of the VAT Directive may be implemented in *momsloven*. Therein, it is stipulated in sec. 4 first para second sen. what is meant by *delivery of goods*, Dan., "*levering af en vare*", namely *transfer of the right to as owner decide over material property* (Dan., "*overdragelse af retten til som ejer at råde over et materielt gode*"). In the third sen. of the rule is to be found a correspondence to the determination of supply of services, by it therein is stipulated that delivery of a service comprises every other delivery (Dan., "*levering af en ydelse omfatter enhver anden levering*").[78] Thus, in the main rules of delivery of goods and supply of a service respectively the determination of a service in *momsloven* is made not in two steps, but in one step, like in the corresponding main rules of the directive, why there is no reason for me to give a proposal regarding *momsloven* in the way I am instead doing in this section regarding the FML.

By my proposal regarding the FML would also that legislation become conform with the VAT Directive concerning delivery of goods and supply of services, and the Swedish ML and the Finnish FML would thereby – together with the Danish *momsloven* – be harmonised in

[76] See article 63 of the VAT Directive, which reads: "The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied."

[77] See also Forssén 2020b, p. 726.

[78] See *Danske Love* (Danish laws), https://danskelove.dk/momsloven (visited 2023-07-31).

that respect in pursuance of article 113 TFEU. What I am stating in this article about a determination of the tax object in one step, instead of in two, should thus be of guidance for the reform I am suggesting regarding FML sec:s 17 and 18. Furthermore, where the phenomenon carrousel trading is concerned, the experiences in Sweden I am giving in this article about the VAT, the accounting and the criminal law in relation to the EU law may hopefully inspire authors of jurisprudential literature and eventually the legislators in Sweden and Finland. In the latter respect, I consider that the fact that the phenomenon in question often concerns at least two Member States shows the importance of the legislators in for example Finland, Sweden and Denmark making as much reform work as possible in the field of VAT in co-operation, whereby I include the criminal law in that respect. I may, in that respect emphasize that the importance of such a Nordic co-operation is rather high, since the competence in the field of criminal law still remains on national level.

3 VAT frauds by carrousel trading – a phenomenon and not a legally specified concept

There is no precise determination of what is meant by ”VAT carrousels”, but what is often a typical common denominator for arrangements of so-called carrousel type is, as mentioned, that no final value-added taxation shall take place by the goods or the service reaching the consumer. Instead, the product is sent around in a carrousel of wholesalers, where also retailers can be included, so that the VAT on goods or services in a chain of enterprises will not be passed on to a consumer as tax carrier. Since carrousel trading is not a precise concept legally, I denote the matter, as also mentioned, a phenomenon.

In Forssén 2022, I refer inter alia to literature from Denmark, where the phenomenon in question was described already in the end of the 1990’s. Christian Dresager at the Danish tax authority (*Told- og Skattestyrelse*) wrote an article on the subject already in 1999, *Moms-karruselsvig: en svigsmetode der eskalerer* (VAT-carrousel fraud: a method of fraud escalating).[79] In the above-mentioned lecture in 2001, I mentioned the article by Christian Dresager, and that he (on p. 24) inter alia states the following: *There is no real definition of VAT-carrousel fraud in any place of the legislation or the literature* (Dan., ”*Det findes intet sted i lovgivningen eller litteraturen en egentlig definition på moms-karruselsvig*”). Since this is the case also today, I denote in Forssén 2022 and in this article VAT frauds of carrousel type a phenomenon.

In two Danish theses (*kandidatafhandlinger*) is inter alia the article from 1999 by Christian Dresager mentioned, and I also mention those theses in Forssén 2022. In one of them is inter alia the following stated: *The VAT-carrousels basically function so that one company in the carrousel is reimbursed VAT, while another company builds up a big debt of VAT to thereafter go bankrupt and never pay the VAT* (Dan., ”*Momskarrusellerne fungerer grundlæggende på den måde, at det ene selskab i karrusellen får penge tilbage i moms, mens et andet selskab oparbejder en stor momsgæld for derefter at gå konkurs og aldrig indbetale momsen*”).[80] In the other the following is mentioned as typical for a VAT-carrousel: *The perpetrators’ objective with a VAT-carrousel is to generate big VAT amounts, by not paying*

[79] See *Revision og regnskabsvæsen*, 1999 *årgång* (annual volume) 68, no. 2, pp. 23-28.

[80] See *MOMSKARRUSELLER – REVISORS ROLLE* (VAT carrousels – the auditor’s role), by Anita Holm Thorstensen and Karina Skovgaard Svane, section 2.7 (“*Hvordan opbygges en momskarrusel*”), How a VAT carrousel is built up. Danish *kandidatafhandling* submitted (*afleveret*) on 23 May, 2013 at Copenhagen Business School.

VAT on sales to the tax authority. The fraudulent enterprises give themselves out as lacking the possibility to pay, whereas it is in reality the will to pay that they are lacking (Dan., ”*Svindlernes formål med en momskarrusel er, at få genereret store momsbeløb, ved ikke at betale salgsmoms til SKAT. Svindlervirksomhederne udgiver sig for at mangle en betalingsevne, mens det i virkeligheden er en betalingsvilje de mangler*”.[81]

Thus, it is about the same view on VAT frauds by carrousel trading that exists in the two EU Member State Sweden and Denmark. By the way, Christian Dresager pointed out this phenomenon also concerning services in the beginning of the 2000's, by his article *VAT-carrousel fraud with services – the new method of fraud – what is the authorities doing?*[82]

4 Regarding measures from the legislator to counteract carrousel trading

4.1 Reverse charge – a method used by the legislator in Sweden on several occasions since in 2000 against VAT fraud by carrousel trading

In Forssén 2022, I mention inter alia that reverse tax liability – nowadays reverse liability of payment – exists for intra-Union acquisitions of goods from enterprises in other Member States and for an enterprise's acquisition of services from an enterprise abroad and for certain cases of transaction within the country between enterprises.[83] I mention some of the other cases of reverse liability of payment (reverse charge) which have been introduced in the field of VAR in Sweden since in 2000.

The point with reverse charge is that an enterprise will not get a claim on reimbursement of VAT against the State, but an enterprise purchasing taxable goods or services accounts in its VAT return for a calculated output tax on the expenditure for the acquisition and is entitled to make a deduction for a corresponding amount as input tax in the same return.[84] Concerning the trade of goods between enterprises in various Member States the Customs Department (Sw., *Tullverket*) shall thereby not take out customs for the goods like when imports of goods are made from a third country (place outside the EU). The sale of for example taxable goods is zero-rated by the vendor in one of the Member States, and the purchaser in the other Member State accounts thus a calculated output tax on the acquisition and may deduct the same amount as input tax, but only to the extent that that person has full right of deduction or reimbursement for input tax in the person's activity. Thus, a taxation effect occurs by the purchasing enterprise, if that enterprise is lacking or has a limited right of deduction or reimbursement in its activity. Control of the taxation of taxable goods or services between enterprises in different Member States is made by them giving recapitulative statements to their tax authorities, which then via their *central liaison offices* can check that accounting of reverse charge has been fulfilled in given VAT returns and recapitulative statements.

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[81] See *EFFEKTERNE AF OMVENDT BETALINGSPLIGT*: *THE EFFECT OF REVERSE CHARGE*, by Jeanne Kierulff Nielsen and Yvonne Nygaard, section 5, ”*Momskarruselsvig*” (VAT-carrousel fraud). *Kandidatafhandling* submitted on 7 May, 2015 at Copenhagen Business School.

[82] See *Momskarruselsvig med ydelser – den nye svigstrend – hvad gör myndighederne?* (VAT-carrousel fraud with services – the new method of fraud – what is the authorities doing?) By fuldmægtig, cand.merc.jur. Christian Dresager, Told- og Skattestyrelsens Svigsbekæmpelsekontor. SR-SKAT ONLINE SR 2001-0179.

[83] See Forssén 2022, pp. 118 and 119.

[84] See prop. 1994/95:57, *Mervärdesskatten och EG* (The VAT and the EC), p. 79.

More than two decades ago reverse charge was introduced in the GML for *transactions within the country* between enterprises – regarding goods in the form of fine gold and investment gold.[85] Since more services have come to be supplied from a distance reverse charge was extended on 1 January, 2000 to the main rule in the GML for enterprises' acquisitions of services from enterprises abroad.[86]

In Forssén 2022, I mention that the criminal case regarding VAT in HD, NJA 2018 p. 704, concerned trading with precious metals: gold, platinum and silver. Regarding goods in the form of gold the fineness was to low for it to be a question of fine gold or investment gold, and concerning platinum and silver reverse charge did not exist in the GML (which circumstances are still the same according to the ML). Thus, the general rules on liability of payment of VAT (previously tax liability to VAT) applied to all parts of the case – not rules on reverse charge.[87] Thus, I consider that it is remarkable that the legislator has omitted to make sure introducing reverse charge also for gold of a low fineness, platinum and silver. I may especially emphasize this due to the SKV stating in its investigations *high-risk goods* as a sign of the existence of VAT fraud by carrousel trading. What would motivate that classification is according to the SKV that it is a matter of expensive goods easy to move, and in that respect should in my opinion platinum qualify well to be called high-risk goods. This proves in my opinion an obvious inconsistency on behalf of the legislator when it is a matter of using the institute reverse charge to suppress the phenomenon of VAT frauds by carrousel trading.

4.2 Especially about so-called cross invoicing and the legislator's reasoning about reverse charge for trading with mobile phones etc.

On 1 April, 2021 reverse charge was introduced concerning transactions within the country between taxable persons regarding goods in the form of mobile phones etc., but not for services in the form of IP-telephony (VoIP).[88] Thereby, reverse charge applies for trading within the country between taxable persons regarding goods in the form of mobile phones, integrated circuit devices, gaming consoles, tablets and portable computers. The requirement for reverse charge to apply instead of general VAT rules is that the taxable amount for the transaction of those goods in an invoice that all in all exceeds 100,000 Swedish crowns and that the liability of registration for the purchaser is not only a consequence of the acquisition.

In Forssén 2022, I mention that the government first suggested an introduction of reverse charge for both goods in the form of mobile phones etc. and services in the form of VoIP, but

[85] See Ch. 1 sec. 2 first para no. 4 a, which was introduced on 1 January, 2000, by SFS 1999:640. See also prop. 1998/99:69, *Särskilda mervärdesskatteregler för investeringsguld* (Special VAT rules for investment gold) and Forssén 2022, p. 119.

[86] See SFS 2009:1333 (and SFS 2009:1334) and prop. 2009/10:15, *Nya mervärdesskatteregler om omsättningsland för tjänster, återbetalning till utländska företagare och periodisk sammanställning* (New VAT rules on the country of supply, refund to foreign entrepreneurs and recapitulative statement). See also Forssén 2022, pp. 118 and 119.

[87] See Forssén 2022, p. 120.

[88] See GML Ch. 1 sec. 2 first para no, 4 f and seventh para, its wording according to SFS 2020:1220 (and 1221). See also prop. 2020/21:20, *Omvänd skattskyldighet vid omsättning av vissa varor* (Reverse charge at supply of certain goods).VoIP, Voice over Internet Protocol.

that this was not decided for VoIP, but only for the trading between enterprises regarding mobile phones.[89] Thereby, the government gave up in the bill its proposal of 2020-04-17,[90] which meant that reverse charge also would apply to services in the form of VoIP. In SVT's morning programme 2020-09-18 the then minister of finance, Magdalena Andersson, explained that VoIP was exempted from the reform by referring to *the business community* (Sw., *näringslivet*) having argued that they wanted to avoid difficulties with VoIP. Be that as it may, I, however, note that since 2015 is VoIP mentioned in article 6a(1)(b) of the Implementation Regulation as an example of telecommunications services according to article 24(2) of the VAT Directive.[91] By the way, the Danish parliament adopted on 1 June, 2023 rules on reverse charge (Dan., *omvendt betalingspligt*) regarding telecommunications services (Dan., *teleydelser*), to counteract VAT frauds (Dan., *momssvig*), and in that respect is no exemption for VoIP stipulated.[92] This is in line with my perception meaning that such a special treatment of VoIP compared with other telecommunications services as was suggested by the Swedish government 2020-04-17 is not complying with the Implementation Regulation, which is a legislation directly applicable in each Member State according to article 288 second para TFEU.

Regardless of whether the minister of finance abandoned the suggestion to introduce reverse charge also for VoIP was due to the perception by an anonymous business community about difficulties or by a realization of VoIP being mentioned since 2015 in the Implementation Regulation as an example of telecommunications services according to article 24(2) of the directive, this makes it hard for the SKV to continue asserting that such services constitute *high-risk goods* for VAT fraud of carrousel type. If the suggestion on reverse charge had been introduced for VoIP too, it would have stopped the asserted VAT frauds by so-called *cross invoicing* in the form of invoicing regarding such services. However, *cross invoicing* is not something only connected with what is usually called VAT fraud by carrousel trading. *Cross invoicing* means quite simply that a false charging of VAT is made to an enterprise to set off output tax in the enterprise by accounting falsely charged VAT as input tax. *Cross invoicing* can be a special issue, and not necessarily seen in connection with what is referrable to a "VAT carrousel". The falsely charged VAT regarding for example services in the form of VoIP might be one matter (question) and a carrousel regarding goods another question in the same enterprise.

Thus, I consider that the legislator should have noted in the investigation that led to the reform on 1 April, 2021 that investigations and cases which have been motives to it connects the phenomenon "VAT carrousels" with *cross invoicing* as if they were connected questions normally, when the two phenomena should in the first place be seen as different questions, which *can* occur in the same investigation and case. Such inconsistencies should in my

[89] See Forssén 2022, p. 119.

[90] See the Treasury's memo Fi2020/01855/S2.

[91] See Forssén 2022, p. 119.

[92] See *Vedtaget af Folketinget ved 3. behandling den 1. juni 2023 Forslag til Lov om ændring af momsloven, chokoladeafgiftsloven, skattekontrolloven og forskellige andre love og om ophævelse af lov om ændring af momsloven* (Approval of the Parliament by 3. treatment on 1 June, 2023 Proposal of law on alteration of *momsloven*, act on chocolates fee, the tax control act and various other acts and on cancellation of law on alteration of *momsloven*): https://www.ft.dk/samling/20222/lovforslag/L75/som_vedtaget.htm (visited 2023-08-01).

opinion be avoided for example in the continuing treatment of the EU-criminal law investigation's official report about criminalization of transgressions of EU-regulations, SOU 2020:13, "*Att kriminalisera överträdelser av EU-förordningar*" (To criminalize transgressions of EU-regulations), In Forssén 2022, I also note that the criminal case in the HD, NJA 2018 p. 704, is mentioned on the pages 48 and 54 in the report, but that it is not giving anything further for the interpretation of the case.[93]

5 Especially about missing trader and liability to pay erroneously charged VAT

5.1 In general about fictitious invoice with erroneously charged VAT – false VAT

In connection with the case of VAT frauds by carrousel trading where fictitious enterprises – so-called missing trader (or goalkeeper company or front enterprise) – is used, I may mention something from Forssén 2023a regarding the consequences of an enterprise issuing a fictitious invoice with an amount falsely entered as VAT.

On 1 January, 2008 was introduced in the GML Ch. 1 sec. 1 third para and sec. 2 e, by SFS 2007:1376, a rule about that he or she who falsely has charged VAT in an invoice is *liable of payment* (Sw., *betalningsskyldig*) to the State for the amount, despite that it does not constitute VAT according to the general VAT rules.[94] The rule is based on article 203 of the VAT Directive, which stipulates that "VAT shall be payable by any person who enters the VAT on an invoice". I denote such a falsely charged VAT a false VAT. The amount shall be accounted for in the order applying to the accounting of output tax by the payment liable for the accounting period during which the invoice was issued.[95] The liability to pay to the State such a false VAT remains until the accounting period during which the enterprise has issued a credit note, if the SKV does not waive the demand for a credit note due to special reasons (Sw., *särskilda skäl*).[96] Article 203 is included among the articles in section 1 Chapter 1 of section XI of the VAT Directive which comprises "[p]ersons liable for payment of VAT to the tax authorities",[97] but, for pedagogical reasons, I do not use in this article *liable of payment* (Sw., *betalningsskyldig*) regarding persons who are comprised by ML Ch. 16 sec. 23 and article 203 of the directive, but I am writing that they are liable to pay to the State a false VAT. In this way, I am reserving in this article the concept liable of payment for persons who shall pay a real VAT to the State, that is for whom a liability of payment regards taxable transactions concerning delivery of goods or concerning supply of services. A falsely charged VAT – false VAT – constitutes in other words an amount which is not comprised by the VAT principle in article 1(2) of the VAT Directive.

According to the preparatory works to the reform in 2008 there are various cases of what I denote false VAT, where one example means that a person *committing tax fraud by issuing*

[93] See Forssén 2022, p. 129.

[94] GML Ch. 1 sec. 1 third para and sec. 2 e § corresponded by ML Ch. 16 sec. 23.

[95] See GML Ch. 13 sec. 27, which are corresponded by ML Ch. 7 sec. 49 first para.

[96] See GML Ch. 13 sec. 28 and Ch. 11 sec. 10 respectively, which are corresponded by ML Ch. 7 sec. 50 and Ch. 22 sec. 46 and Ch. 17 sec 22 and sec. 23 no. 3 respectively.

[97] See articles 192a-205 of the VAT Directive.

invoices with VAT which do not correspond to any real transaction (fictitious transactions).[98] Thus, it is a case of a missing trader existing in a chain of enterprises. Since the receiver of the invoice knew or should have known that the information on VAT was false (a fictitious transaction), it is, as I describe in the beginning of this article, a matter of a case of abusive practice which can cause criminal law responsibility for both the issuer and the receiver of the invoice. In Forssén 2023a, I note that the reform on 1 July, 2023 is not changing the problems that I brought up therein,[99] and in this article I mention something about the consequences that fictitious invoicing with a falsely charging of VAT cause concerning the VAT itself, the accounting and criminal law and for the question of registration to VAT. Thereby, those questions form, together with what I write otherwise in this article about VAT frauds of so-called carrousel type, a basis for continuing studies of or legislation about ”VAT carrousels” in Sweden and for example in Finland. The question is whether the legislator in Sweden has taken consistent and effective measures to suppress the phenomenon VAT frauds by carrousel trading, by the introduction of reverse charge and the implementation of the VAT Directive’s article 203.

5.2 Especially about invoice with false VAT and the VAT question itself

The legislator considered that it followed already by GML Ch. 8 sec. 2 first para that a falsely charged VAT does not constitute input tax, since such an amount is not constituting output tax according to the GML, but constitutes, as mentioned, what I call a false VAT.[100] By the liability of payment for such a false VAT being stipulated in a separate rule, GML Ch. 1 sec. 2 e, the legislator emphasized that for the person falsely charging VAT shall the measure not lead to anything else than a liability of payment.[101] Since it is not a matter of liability of payment according to the general VAT rules for the issuer of the invoice, the reciprocity principle is not fulfilled for the receiver, and that enterprise is thus not entitled to deduct the amount as an input tax.[102]

By the way, it may be mentioned concerning the scope of the right of deduction that the reform on 1 July, 2023 means, that the main rule in the (Ch. 13 sec. 6) connects to taxable person (Sw., *beskattningsbar person*) instead of like in the main rule in the GML (Ch. 8 sec. 3 first para) to the concept tax liability (Sw., *skattskyldighet*). Thereby, the main rule in article 168 a of the VAT Directive has been implemented in the ML. I suggested this, as side issue D, in my licentiate’s dissertation,[103] and regarding the main question A therein, that is the main rule for the determination of the tax subject, I suggested that the connection to the income tax law and the concept business activity (Sw., *näringsverksamhet*) would be limited so that a rule competition did not exist between the GML and the main rule of taxable person

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

[99] See also Forssén 2023a, section 1.

[100] GML Ch. 8 sec. 2 first para corresponded by ML Ch. 13 sec. 4 nos. 1 and 2.

[101] See prop. 2007/08:25, p. 90.

[102] See GML Ch. 8 sec. 2 first and second paras and sec. 3 first para and article 167 of the VAT Directive. See also Forssén 2023a, section 2.

[103] See *Skattskyldighet för mervärdesskatt – en analys av 4 kap. 1 § mervärdesskattelagen* (Tax liability for VAT – an analysis of Ch. 4 sec. 1 of the ML). Jure Förlag AB 2011. (Forssén 2011).

in article 9(1) first para of the VAT Directive.[104] The connection to the income tax law in the mentioned respect was abolished on 1 July, 2013, by SFS 2013:368, whereby article 9(1) first para of the VAT Directive was implemented in GML Ch. 4 sec. 1. In my doctor's thesis, which concerned the rule on tax and payment liability in *enkla bolag* (approx. joint ventures) and *partrederier* (shipping partnerships), GML Ch. 6 sec. 2,[105] I repeated the side issue D.[106] In Forssén 2020a, I stated, as mentioned above, that it was a step in the right direction that SOU 2020:31 contained a suggestion to abolish the concept tax liable (Sw., *skattskyldig*) and replace it with liability of payment (Sw., *betalningsskyldighet*),[107] which, as also mentioned above, has been made by the ML. By the reforms on 1 July, 2013 and on 1 July, 2023 have important parts of my suggestions in Forssén 2011 and Forssén 2013 been implemented in the Swedish VAT legislation, and in this article I bring up questions which the legislator and researchers should be working with especially to suppress the phenomenon with VAT frauds of so-called carrousel type. The reforms in 2013 and 2023 are important for the implementation of the VAT Directive, but they do not constitute any solution of the mentioned phenomenon.

Moreover, I have – set out from Forssén 2013 – brought up in a previous article in the JFT the question how legal figures which are not legal entities are treated in the GML and the FML.[108] That *sammanslutningar* and *partrederier* are regarded as tax subjects according to FML sec. 2 first para and sec. 13, whereas *enkla bolag* and *partrederier* are not considered constituting tax subjects according to GML 6 sec. 2 meant that I suggested in Forssén 2013 that Finland and Sweden would jointly make a proposal by the EU on clarifying in article 9(1) first para of the VAT Directive whether a non-legal entity can constitute a taxable person,[109] which I repeated in Forssén 2019b.[110] Also that question should be considered important to treat by the legislator with regard of the problems with VAT frauds by carrousel trading, since that phenomenon, as mentioned, often concerns at least two Member States at the same time.

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[104] See Forssén 2011, pp. 248 and 250 (regarding the main question A) and p. 262 (regarding the side issue D).

[105] See Forssén 2013.

[106] See the so-called coat in Forssén 2013, pp. 26 and 27.

[107] See Forssén 2020a, p. 388.

[108] See *Om rättsliga figurer som inte utgör rättssubjekt – den finska och svenska mervärdesskattelagen i förhållande till EU-rätten* (On legal figures that are not legal entities – the Finnish and Swedish VAT in relationship to the EU law). JFT 1/2019, pp. 61-70 (Forssén 2019b).

[109] See Forssén 2013, pp. 225 and 226.

[110] See Forssén 2019b, pp. 61 and 62. GML Ch. 6 sec. 2 corresponds in the ML by Ch. 4 sec. 16 – see Forssén 2020a, pp. 390, 393 and 395. A special problem that I am bringing up concerning ML Ch.4 sec. 16 is the following. The voluntary rule on appointing a representative for *enkelt bolag* or *partrederi* is getting a further scope in Ch. 4 sec. 16 second para, by the reference to Ch. 5 sec. 2 of the Taxation Procedure Act, *skatteförfarandelagen (2011:1244)*, abbreviated SFL. Therein is the concept activity (Sw., *verksamhet*) used, but in ML Ch. 4 sec. 16, which constitutes the mandatory rule on who is a taxable person concerning the partners themselves, is the closer concept economic activity (Sw., *ekonomisk verksamhet*) used. See Forssén 2020a, p. 395. The concept *verksamhet* (activity) has not been changed in SFL Ch. 5 sec. 2 by the reform on 1 July, 2023: see prop. 2022/23:46, p. 173.

5.3 Especially about invoice with false VAT and the accounting

According to the main rule in the ML the accounting liability occurs when a business transaction, by which the liability of payment has occurred, has been booked or should have been booked according to *god redovisningssed*, Generally Accepted Accounting Principles (GAAP),[111] and the liability of payment presupposes according to the main rules in ML Ch. 3 sec. 1 that delivery of goods or supply of services for consideration has been made within the country by a taxable person acting in this capacity,[112] that is that such transactions have been made within the country (Sweden) in principle by an entrepreneur. According to the main rule on liability of invoicing in the ML shall each taxable person secure that an invoice is issued by the taxable person (or in that person's name and on behalf of that person by the purchaser or a third person) for delivery of goods or supply of services which is made to another taxable person (or to a legal person which is not a taxable person),[113] that is even if liability of payment according to the ML does not occur. The rules on liability of invoicing in the ML are special rules in relationship to the Book-keeping Act, *bokföringslagen (1999:1078)*, abbreviated BFL, as general legislation on accounting liability for a person required to maintain accounting records (Sw., *bokföringsskyldig*) regarding the person's business transactions. By the general rules on definitions of certain concepts in the Annual Accounts Act, *årsredovisningslagen (1995:1554)*, abbreviated ÅRL, it follows by Ch. 1 sec. 3 first para no. 3 that with net sales (Sw., *nettoomsättning*) is meant in the ÅRL: income from sold goods and services made which are included in the enterprise's normal activity with deduction for discount given, *VAT and other tax which is directly connected to the transaction*. I make the same judgment as in Forssén 2023a, namely that without an underlying business transaction no transaction emerges according to the ML, and thus neither any liability of payment, accounting liability or invoicing liability according to the ML. Thus, all in all is my judgment that without an underlying business transaction no transaction according to the GML occurs, and thereby neither any tax liability, accounting liability or invoicing liability according to the GML.[114]

According to Ch. 1 sec. 2 first para no. 7 of the BFL business transaction means *all changes in dimension and composition of an enterprise's wealth which depends on the enterprise's economic relations with the surrounding world, like cash received and paid, claims and debts emerged and own contributions to and withdrawals froms the activity of money, goods or something else*. Thus, a fictitious invoice shall in my opinion not be booked in the current recording, since it is not corresponding to any business transaction that affects the course, economic result or balance of the business. However, the enterprise which has issued the invoice is liable of payment to the State for the false VAT entered therein, and the question is how that amount shall be accounted (besides in a special tax return).

According to Ch. 3 sec. 1 of the ÅRL shall the balance sheet in summary account for the enterprise's total assets, allocations and debts and equity on the balance sheet day. Since the false VAT in question does not constitute VAT, it shall not be accounted for as any tax debt in

[111] See ML Ch. 7 sec. 14 no. 1. See also prop. 1993/94:99, *om ny mervärdesskattelag* (about a new VAT act), p. 234.

[112] See ML Ch. 3 sec. 1 no. 1 and 3.

[113] See ML Ch. 17 sec. 10.

[114] See also Forssén 2023a, section 3.

the balance sheet or as postponed tax in a note in the annual report.[115] The false VAT neither constitutes any contingent liability (Sw., *eventualförpliktelse*) or any commitment which is comprised by the rules in the ÅRL about off-balance sheet items. Although a commitment does not constitute an off-balance sheet item, it can, however, be appropriate according to the preparatory works to the BFL to mention in a note or in the administration report.[116]

I consider that an enterprise which has issued a fictitious invoice with a false VAT therein is liable to account for the amount in question in a note in the annual report, if it is of importance for the judgment of the *balance* of the business. I deem that it is – at least concerning not insignificant suchlike amounts – due to the liability of payment to the State affecting the liquidity of the enterprise and the prudence concept meaning that the enterprise must not be overvalued in the accounting. In Ch. 5 of the ÅRL it is stated what shall be entered in notes in the annual report. Concerning the demand of notes for smaller and bigger enterprises is in my opinion what is stated regarding so-called contingent liabilities (Sw., *eventualförpliktelser*) in Ch. 5 sec. 15 of the ÅRL of interest in the present context. There it is stipulated that if an enterprise has guarantee commitments, economic commitments or contingent liabilities which shall not be entered in the balance sheet (contingent liabilities), it shall inform about the sum of those. Regardless of whether a false VAT has been paid or not to the State, *the liability of payment* remains only until a credit note has been issued by the enterprise (compare above), why I consider that it constitutes a contingent liability. The amount shall not be accounted for in the current recording,[117] but I deem that a remaining liability of payment should be mentioned in a note in the enterprise's annual report.

Although frivolous operators cannot be expected to give information in the annual report about a false VAT for which liability of payment to the State remains over the year-end, it is in my opinion of interest that for example a missing trader is obliged to do so, since it means an element of control to take into consideration in for instance investigations and cases on VAT fraud by carrousel trading. If nothing else, it supports my perception that the book-keeping should be considered constituting decisive evidence also in such cases, when it is a matter of erroneous information being given in VAT returns by enterprises in a chain where the SKV or the EBM asserts that a missing trader is included.

5.4 Especially about invoice with false VAT and criminal law responsibility

The SBL was altered on 1 July, 1996, by SFS 1996:658, so that the effect crime *skattebedrägeri* nowadays constitutes a risk crime, called *skattebrott* (both expressions read tax fraud in English). This means that the criminal cases can be decided without awaiting legally binding decisions in the tax courts. However, what is erroneous information must be decided with guidance of the tax rules, so that the connection between the criminal tax case and the taxation question will not be broken.[118] The tax fraud is described as follows in sec. 2 of the SBL:

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[115] See Ch. 5 sec. 36 of the ÅRL about that a big enterprise shall inform in a note in the annual report regarding postponed tax.

[116] See prop. 1998/99:130, *Ny bokföringslag m.m.* (New book-keeping act etc.) Part 1, p. 303.

[117] Then the result must not be undervalued for income tax purposes, I consider that the amount shall neither be written off.

[118] See prop. 1995/96:170 p. 91.

He or she who in another way than orally 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 being withheld the public or wrongly counted in or reimbursed to himself or herself or someone else, is sentenced for tax fraud to prison for two years at the most.

Thus, it shall be a matter of an *erroneous information* in writing given with *intent* in a tax return etc. and that a *risk* shall emerge for *tax* (Sw., *skatt*) to be withheld from the State or wrongly counted in or reimbursed to the person filing the tax return etc. Thereby, the tax fraud concerns wrongly or omitted accounting of tax, that is it constitutes an accounting crime. Thus, there is no payment crime in itself concerning the tax account system (Sw., *skattekontosystemet*), which was introduced on 1 November, 1997, whereby the so-called collection crime (Sw., *uppbördsbrottet*) was abolished regarding tax deduction at source (Sw., *källskatteavdrag*).[119]

If an enterprise, for example a natural person (sole proprietorship) or a legal person like a limited company (Sw., *aktiebolag*), has issued an invoice wherein an amount falsely is denoted as VAT, the amount shall, as what I denote a false VAT, be accounted for in a special tax return (SFL Ch. 26 sec. 7), unlike a real VAT which is accounted for in a VAT return (SFL Ch. 26 sec. 21). That the as VAT falsely denoted amount constitutes a false VAT may be meaning that the issuer of the invoice has not committed a crime regarding tax (Sw., *skatt*), that is tax fraud according to SBL sec. 2. For that it would take a clarification in the SBL meaning that with *skatt* (tax) is also meant an amount falsely denoted as VAT in an invoice. In SFL Ch. 3 sec. 12 it is stipulated that *what is said about VAT* also applies to amounts falsely denoted as VAT in an invoice and that *what is said about tax liable according to the VAT act also applies to a person who is liable to pay such an* amount. However, it is according to SFL Ch. 3 sec. 1 first para first sen. only a matter of the usage of certain terms and expressions in the SFL itself. An amount which constitutes a false VAT may thereby be deemed as *skatt* (tax) only concerning the procedure for its accounting, not materially.[120]

To determine what is *skatt* (tax) materially by a procedure rule in the SFL is in conflict with the principle of legality for taxation measures in Ch. 8 sec. 2 first para no. 2 of the 1974 Instrument of Government, *regeringsformen (1974:152)*, abbreviated RF. Thus, a natural person who carries out activity under a sole proprietorship or as a representative of a limited company, and who is issuing an invoice with a false VAT, should thereby not be deemed committing tax fraud according to the SBL. This since an erroneous information regarding *skatt* (tax) which shall be accounted for in a VAT return do not come up. Tax surcharge (Sw., *skattetillägg*), which by the way also is considered a criminal charge,[121] can neither be

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

[120] See also Forssén 2023a, section 4.

[121] The Swedish tax surcharge is according to the European Court of Justice comparable with *a criminal charge* according to article 6 of the European Convention. See the European Court of Justice's verdicts on 23 July, 2002: Janosevic v. Sweden, Application no. 34619/97, item 71; and Västberga Taxi Aktiebolag and Vulic v. Sweden, Application no. 36985/97, item 82. Thereby, the legislator confirmed that tax surcharge is to be considered a sanction comparable with a criminal charge according to the European Convention. See prop.

imposed on false VAT, since the sanction tax surcharge is imposed on *skatter* (taxes) which are comprised by the SFL,[122] and an amount in the form of a false VAT is not *skatt* (tax) in a material respect. The only consequence is procedural and regards the liability of payment, that is the sole proprietorship, or the limited company shall account for an amount that constitutes a false VAT in a special tax return and pay it to the State, which demand, as mentioned, applies as long as a credit note has not been issued.

However, tax fraud can come up for an entrepreneur who has received the invoice and tries to exercise right of deduction for the falsely charged VAT in a VAT return, since the enterprise, as mentioned, lacks right of deduction like for input tax regarding the amount in question, according to GML Ch. 8 sec:s 2 and 3. In such a case can criminal law responsibility be of interest also for he or she who has issued the invoice with the false VAT, namely according to BrB Ch. 23 sec. 4 for complicity in the tax fraud that the receiver of the invoice can be deemed to have committed by trying to make a deduction of the amount. That situation can be subject of investigations by the SKV and the EBM in cases regarding VAT frauds by carrousel fraud, where a missing trader exists in a chain of enterprises, whereby it issues an invoice with a false VAT and the receiver of the invoice tries to exercise right of deduction for the amount by noting it as input tax in a VAT return to the SKV. Since the receiver of the invoice in the hypothetical example knew or should have known that the information of VAT was false, it is a matter of a case of abusive practice that *can* lead to criminal law responsibility for both the issuer and the receiver of the invoice.[123]

The CJEU considers taken by itself that the right of deduction for input tax cannot be denied anyone for acquisitions made for the purpose of making taxable transactions, only because someone before or after in the chain of delivery has made a with regard of VAT fraudulent transaction which the person in question did not know about and neither could have known about.[124] However, it is so in the present hypothetical example that the receiver of the invoice has not received goods or services and thus he or she knew or should have known that the invoice received was drawn up for the sake of appearances, why he or she gave erroneous information in the VAT return to the SKV, by therein noting the amount in the invoice

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2002/03:106, *Administrativa avgifter på skatte- och tullområdet, m.m.* (Administrative charges in the fields of tax and customs etc.), p. 245.

[122] See SFL Ch. 49 sec. 2.

[123] In Forssén 2022, ”Momsbedrägerier av så kallad karuselltyp och NJA 2018 s. 704”, VAT frauds of so-called carrousel type and NJA 2018 p. 704, I state that despite that the Supreme Court of Sweden (Sw., *Högsta domstolen*, abbreviated HD) confirmed the verdict of conviction by the majority of the Svea Court of appeal, it is not clear that abusive practice *in itself* means that criminal law responsibility exists. The senior judge of appeal, who was dissentient and wanted to acquit the defendant, stated inter alia that the Court of Justice of the EU (CJEU) in the case C-255/02 Halifax et al. (ECLI:EU:C:2006:121), item 93, expressed that *the relationship that it is concluded that an abusive practice exists does not need to lead to any measure of sanction, which would demand a clear and unequivocal support in law, but instead reimbursement liability since the deduction has become unjustifiably*. I also noted that the senior judge of appeal moreover stated that the criminal law principle of legality according to Ch. 1 sec. 1 of the BrB functions as a guarantee of legal certainty, by it raising a demand on the legislation meaning that the individual must be able to foresee when he or she can be subject of criminal law intervention. See Forssén 2022, pp. 123–125.

[124] See the Joint cases C-354/03, C-355/03 and C-484/03 Optigen et al. (ECLI:EU:C:2006:16), item 55. See also Forssén 2022 p. 121.

received as an input tax, which he or she thus is not entitled to deduct. In such a case can responsibility for tax fraud come up or tax surcharge be imposed.[125]

If the receiver of the invoice has booked the false VAT as input tax, he or she can also be responsible for book-keeping crime according to BrB Ch. 11 sec. 5 first para due to erroneous information as well in his or her book-keeping, if the other suppositions for such responsibility are fulfilled, that is if the accounting measure is made with intent or by carelessness and means that the balance of the business cannot be judged on the whole.[126]

Although a natural person carrying out an activity under sole proprietorship or as a representative of a limited company cannot be deemed committing tax fraud for the issuing itself of the fictitious invoice with a false VAT, he or she can be responsible for book-keeping crime regarding the annual report according to BrB Ch. 11 sec. 5 first para.[127] This can, in pursuance of what I am stating in the nearest preceding section, be the case if the liability to pay to the State the amount which constitutes false VAT is not mentioned in a note in the enterprise's annual report, that is if the contingent liability that the liability of payment means demands such an information for the balance of the business being possible to judge on the whole. By the way, the circumstances in the present case should typically be like that the prerequisites intent or carelessness are fulfilled.[128]

In the hypothetical example of above, I state, as mentioned, that it constitutes a case of abusive practice that *can* lead to criminal law responsibility for both the issuer and the receiver of the invoice. Furthermore, I state, as also mentioned, that despite that the HD confirmed the verdict of conviction by the majority of the Svea Court of appeal, it is not clear that abusive practice *in itself* means that criminal law responsibility exists, but that it in my opinion thus *can* be the case. Stig von Bahr, formerly judge in the Supreme Administrative Court (*Högsta förvaltningsdomstolen*, abbreviated HFD) and the CJEU, has written an article in Swedish Tax Journal 2022 (pp. 498-504), "*Mer om missbruk och momsbedrägeri*" (More about abuse and VAT frauds), as a complement to Forssén 2022, and stated inter alia 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*.[129]

I gave my viewpoints to Swedish Tax Journal on the manuscript to Stig von Bahr's article, and emphasized therein that I in my article states that it *is not clear that abusive practice in itself means the existence of criminal law responsibility*. However, he did not want to consider

[125] The prosecutor may, however, not prosecute a natural person if the SKV has decided to impose tax surcharge on him or her (SBL sec. 13 b). Tax surcharge may not be imposed if the preliminary investigation already is going on against him or her regarding the SBL (SFL Ch. 49 sec. 10 a).

[126] See also regarding inter alia the prerequisite false document at *coarse* book-keeping crime in BrB Ch. 11 sec. 5 second para.

[127] According to BFL Ch. 6 sec. 1 first para no. 1, limited companies shall always finish the current recording with an annual report, whereas a natural person (sole proprietorship) shall do so only on conditions according to item 6 of the rule.

[128] See also regarding inter alia the prerequisite false document at *coarse* book-keeping crime in BrB Ch. 11 sec. 5 second para.

[129] See Stig von Bahr, *Mer om missbruk och momsbedrägeri* (More about abuse and VAT frauds), *Svensk Skattetidning* (Swedish Tax Journal) 2022, pp. 498-504, 499 (von Bahr 2022).

my noticing of the nuance of what my expression *in itself* (Sw., ”*i sig*”) means, why the readers of Swedish Tax Journal gets the impression that Stig von Bahr goes further then I, by him so categorically dismissing my warning for abusive practice on the theme of criminal sanctions. It can exist various criminal law questions in a case of abusive practice, like for example complicity to erroneous exercise of right of deduction for falsely charged VAT. Therefore, I state in a follow-up article in the Internet paper *Dagens Juridik* (Today's Law) that I disagree with Stig von Bahr, but that he should of course be invoked by the defence lawyers for expert evidence in ongoing cases on carrousel trading or in connection with petitions for a new trial regarding a conviction in such a case.[130] However, I may, for the research and to the legislator, emphasize my own viewpoints, and repeat them also here in the JFT, which feels satisfactory for me to know that it makes it clear what my standpoint is in questions about abusive practice and criminal law.

I have in the capacity of practician the experience that the SKV sometimes specifies its assertions on arrangements (Sw., *upplägg*) regarding carrousel trading that the fault concerning the VAT accounting is meant to make possible for the entrepreneur to *unfairly appropriate money from the Swedish State* (Sw., *tillskansa sig pengar från svenska staten*). Then it is also very near for the prosecutor to either complete a suspicion of tax fraud or alter the deed description, by stating that a matter of commercial money laundering exists.[131] This means in the present context that the prosecutor claims that one or more enterprise in a transaction chain appropriates money from a tax authority within the EU, and that an enterprise in Sweden is contributory to this, which according to the Act on Punishment for Money Laundering sec:s 3 and 7 in such a case means that the suspected is *contributory* (Sw., ”*medverkar*”) to concealing that *money or other property originating from crime or criminal activity or to promote the possibilities for someone to profit by the property or its value* (Sw., ”*pengar eller annan egendom härrör från brott eller brottslig verksamhet eller till att främja möjligheterna för någon att tillgodogöra sig egendomen eller dess värde*”). Since there is no payment crime in itself in the Swedish criminal law legislation and a falsely charged VAT only cause a liability of payment of such an amount to the State, can he or she who in the capacity of real or made up vendor of goods or services not be sentenced to responsibility for tax fraud only because he or she not having paid the real or false VAT to the State. It is *in itself* not sufficient for criminal responsibility occurring, but the tax fraud is, as mentioned, an accounting crime, where the concept erroneous information is the prerequisite in SBL sec. 2 which ties together the criminal law with the tax law and the sanction tax surcharge. Commercial money laundering is, unlike the tax fraud, not a risk crime, but an effect crime, but it is in my opinion near at hand to abusive practice concerning VAT, by the suspected *contributing to a measure which is reasonably likely to be taken for the purpose* to conceal

[130] See in *ANNEX 1*: Björn Forssén, *Livsmedelspriserna föranleder lagändringar och planering avseende indirekta skatter* (Food prices cause alterations of law and planning regarding indirect taxes), *Dagens Juridik* (Today's Law) 2023-03-15 (Forssén 2023d). By the way, Forssén 2023a is also published after Forssén 2022 and von Bahr 2022. However, Forssén 2023a was written as a follow-up to Forssén 2022, and I submitted the manuscript to *Tidningen Balans* (The Periodical Balans), to be sure of the application questions being well received – which also proved to be the case. The combination with my longer more theoretical articles in the JFT and my shorter articles – often also more oriented on application questions like the accounting of falsely charged VAT – in *Balans fördjupning* (The Periodical Balans Annex with advanced articles) has been appreciated, when I during the last years thereby has produced material to my – since 2015 – yearly recurrent lectures and seminars on the EU Master programme at Södertörn University (Stockholm).

[131] See *lagen (2014:307) om straff för penningtvättsbrott* (the Act on Punishment for Money Laundering) sec:s 3 and 7.

that for example money originating from crime or criminal activity etc.[132] Thus, I consider – like what I stated in Forssén 2022 – that it is not clear that abusive practice *in itself* means that criminal law responsibility exists. However, I consider that instead of responsibility for tax fraud *can* on the theme commercial money laundering criminal law responsibility exist for abusive practice and not only for frauds.

6 The question whether reverse charge and implementation of article 203 of the VAT Directive can suppress VAT frauds by carrousel trading

In section 1, I account for the phenomenon with VAT frauds by carrousel trading is a big problem for the Swedish State, which is shown by one single errand may comprise billions of Swedish crowns in accounted VAT which is questioned by the SKV and the EBM.

In section 2.1, I state that it was a step in the right direction, to suppress VAT frauds of so-called carrousel type, that the Swedish VAT act was reformed on 1 July, 2023, so that the concepts goods (Sw., in the singular, ”*vara*”) and service (Sw., ”*tjänst*”) respectively no longer are given special definitions therein, but are included in the determination of taxable transactions, that is in the concepts *delivery of goods* (Sw., *leverans av varor*) and *supply of services* (Sw,, *tillhandahållande av tjänster*) respectively. That the national legislation in the field thereby has become conform with the VAT Directive, so that the concept transaction (Sw., *omsättningsbegreppet*) has been abolished and the determination of the tax object nowadays is conform with the directive, means in my opinion that the importance of the determination of the tax object has been strengthened, where investigations of VAT frauds by carrousel trading are concerned.

In the latter respect, I also state in section 2.1 that although the terms goods and service respectively are not defined in either the VAT Directive or the Implementation Regulation *can* it be of interest in connection with investigations about carrousel trading to broaden the perspective above all on service, so that a distinction against goods can be made based on other fields of law governed by the EU law, like company law and intellectual property law. In that respect, I refer to the primary law, where article 57 TFEU contains a definition of service, which applies also in other fields than the field of tax, if the EU’s institutions have been conferred competence in the field in question, like concerning for example the company law and the intellectual property law.

In section 2.2, I am giving a suggestion regarding the FML, whereby I am, concerning sec:s 17 and 18, stating that the definition of *goods* (Sw., in the singular, ”*vara*”) and *service* (Sw., ”*tjänst*”) should be abolished and replaced by the concepts *sale of goods* (Sw., ”*försäljning av vara*”) and *sale of service* (Sw., ”*försäljning av tjänst*”) respectively. Thus, the FML would conform with the determination of the tax object according to the main rules in articles 14(1) and 24(1) respectively of the VAT Directive, like what has been done in the present respect by the ML replacing the GML on 1 July, 2023 corresponds with the GML in the present respect.

[132] See sec. 7 of the Act on Punishment for Money Laundering. Note the expression *for such a purpose* (Sw., ”*i sådant syfte*”) in that rule: *a measure which can be reasonable to assume being taken for such a purpose mentioned in sec. 3* (Sw., ”*en åtgärd som skäligen kan antas vara vidtagen i sådant syfte som anges i 3 §*”). The effect crime commercial money laundering lacks the criterion intent and has thus a narrower scope regarding what constitutes a necessary subjective prerequisite compared with intent (Sw., *uppsåtligen*) for the tax fraud, which is a risk crime and where already eventual intent – intent of indifference (Sw., *eventuellt uppsåt* or *likgiltighetsuppsåt*) – can fulfil the prosecutor’s deed description in a subjective respect.

In section 2.2, I also emphasize that the importance of a Nordic co-operation between the legislators is rather high, where a reform work to suppress VAT frauds by carrousel trading is concerned, since that phenomenon often concerns at least two of the EU Member States at the same time. A Nordic co-operation is especially important due to the competence in the field of criminal law not being conferred to the EU's institutions, but remains at national level with the Member States, for example Sweden, Finland and Denmark.

In section 3, I conclude that view on VAT frauds by carrousel trading in Sweden and Denmark is about the same. Thereby, I mean that there is no precise determination of what is meant by "VAT carrousels". The common denominator for arrangements of so-called carrousel type is at least that no final value-added taxation shall take place by the goods or the service reaching the consumer. Instead, the product is sent around in a carrousel of wholesalers, where also retailers can be included, so that the VAT on goods or services in a chain of enterprises will not be passed on to a consumer as tax carrier. Since carrousel trading is not a precise concept legally, I denote the matter a phenomenon.

A harmonisation of the VAT legislations in the Nordic Member States of the EU is in my opinion necessary for the actual taxation in the field fulfilling the harmonisation demand on the Member States' VAT legislations according to article 113 TFEU. It is a first step towards suppressing VAT frauds by carrousel trading, whereby I as a start of that work suggest the adaptation according to above of the FML to the VAT Directive concerning the determination of the tax object, and in that respect can the VAT reform in Sweden on 1 July, 2023 be of guidance. Thereafter, a co-operation should take place in the field of criminal law, where also Denmark would be included. It is probably rather ineffective, where the ambition to suppress the phenomenon in question is concerned, that the geographically close Nordic countries in question go their own way, since at least two of the EU's Member States often are involved in the present sort of errands and the EU cannot be expected to issue legislation in that field, but the initiative must be taken at national level by Sweden, Finland and Denmark.

In section 4.1, I state that the legislator in Sweden may be deemed failing with suppressing the phenomenon of VAT frauds by carrousel trading, where the introduction of reverse liability of payment (previously reverse tax liability) is concerned in various fields, which has been done since 2000. The failure by the legislator is rather obvious with regard of one single errand likely nowadays to comprise billions of Swedish crowns of accounted VAT being questioned by the SKV and the EBM. The situation was not such over two decades ago, that is at the time for my lecture at Swedish Law Meeting in 2001.[133] Instead, what has happened according to my experience is that the investigation and the judgment of the tax object, that is of the transaction's character and planning, have been replaced by the investigations by the SKV and the EBM nowadays being initiated in the first place by trading carried out between the Member States of the EU regarding a certain sort of goods, above all electronical products, which I mention in section 1. In section 4.2, I also mention that concepts are introduced in connection with investigations and cases on asserted "VAT carrousels", where concepts or expressions are used by the SKV and the EBM without explanation that they not necessarily need to be seen in connection with suchlike carrousels. An often-occurring example of this is so-called cross invoicing, which quite simply means that a false charging of VAT is made to an enterprise to set off output tax in the enterprise by accounting falsely charged VAT as input tax. Such an example is services in the form of so-called VoIP (which

[133] Forssén 2001.

is space for telephony on the Internet). The falsely charged VAT regarding VoIP might be one matter (question) and a carrousel regarding goods another question in the same enterprise, which in my opinion shows that cross invoicing can be a special issue which not necessarily needs to be seen in connection with what is pertaining to a ”VAT carrousel”.

In sections 5.1-5.4, I also show that the introduction by SFS 2007:1376 on 1 January, 2008 in GML Ch. 1 sec. 1 third para and sec. 2 e (nowadays ML Ch. 16 sec. 23) of article 203 of the VAT Directive, which stipulates that ”VAT shall be payable by any person who enters the VAT on an invoice”, cannot be deemed an effective measure by the legislator of cases of so-called missing trader (or goalkeeper company or front enterprise) in connection with ”VAT carrousels”. That such a person is included in a transaction chain and since the reform in 2008 can be made liable to pay to the State a falsely charged VAT, as lon as a credit note is not issued, does not mean that the person in question can be imposed responsibility for tax fraud, only because that liability is nt fulfilled. Instead, such a responsibility can be imposed the receiver of the invoice, if he or she has tried to exercise right of deduction for the amount falsely denoted as VAT according to ML Ch. 13 sec. 4 no. 1 and 2 (previously GML Ch. 8 sec. 2 first para).

In section 7.1, I return to the reform on 1 January, 2008 and that SFS 2007:1376 also meant inter alia that the facultative rule in article 80 of the VAT Directive, about revaluation under certain suppositions of the taxable amount between *closely connected persons* (Sw., *förbundna parter*), was introduced in the Swedish VAT act. In that respect, I mention the criminal law aspects on the questions about the consideration (the pricing question) and when a delivery or supply being made without consideration (free of charge). In section 7.2, I mention the pricing question also in connection with general VAT rules and special rules on goods in certain warehouses.

7 Especially about criminal law responsibility at under-price transactions or supplies free of charge in connection with VAT carrousels

7.1 The pricing question in connection with rules on revaluation of taxable amount for VAT and withdrawal VAT

By the VAT reform on 1 January, 2008 was not only the above-mentioned article 203 of the VAT Directive implemented in the GML about the liability to pay to the State an amount falsely denoted as VAT for the issuer of the invoice, but by SFS 2007:1376 was also on 1 January, 2008 implemented in the GML the facultative rule in article 80 of the VAT Directive. The directive rule means that under certain circumstances shall the taxable amount between a deliverer or a supplier and a purchaser, which I in this section name vendor and purchaser, provided also that they constitute so-called *closely connected persons* (Sw., *förbundna parter*), so that – if the consideration has been set at over- or under-price – the taxable amount by the vendor will be adjusted to market value. At the same time, the main rules in the GML for withdrawal taxation were altered, so that withdrawal VAT only occurs when a delivery of goods or supply of a service is made free of charge, that is without consideration. In this section, I mention those rules set out from criminal law aspects on the pricing question regarding a product that exists in an errand about VAT fraud by carrousel trading.

The rules that I am mentioning in this section were introduced in 2008 due to a Swedish case in the CJEU, namely the verdict C-412/03 (Hotel Scandic Gåsabäck),[134] which was a preliminary ruling by the CJEU in the HFD's advanced ruling RÅ 2005 not. 51, and pronounced by the CJEU on 20 January, 2005. The two changes of rules introduced in the GML on 1 January, 2008, by SFS 2007:1376 meant the following:

- The main rules regarding withdrawal taxation were altered, so that a delivery of goods or supply of a service must be made free of charge for withdrawal taxation to be made.[135]

- The revaluation rules mean that under certain suppositions shall a too low or too high price (consideration) regarding the goods or the sevice cause a revaluation of the taxable amount for VAT by the vendor,[136] so that the taxable amount is determined to market value.[137]

The suppositions for revaluation to be made of the taxable amount, in case consideration has been taken out and no supply free of charge has come up that would cause withdrawal taxation, are the following: the vendor and the purchase shall be closely connected (Sw., *förbundna*); *and* one of them shall have an activity in which full right of deduction or reimbursement of input tax on acquisitions (or imports) does not exist.

The vendor and the purchaser are according to ML Ch. 8 sec. 19 first para *closely connected persons* (Sw., *förbundna parter*), *if there are family ties or other close personal bonds, organizational bonds, bonds of ownership, financial bonds, bonds due to membership, bonds due to employment or other legal bonds*. Concerning bonds due to employment it is stated in ML Ch. 8 sec. 19 second para that with such bonds are also meant *bonds between employer and an employee's family or other persons who are close to the employee*.

According to items 25 and 26 of the "Hotel Scandic Gåsabäck"-case, the Swedish government invoked the Sixth Directive (77/388/EEC) and that payment of VAT would be largely circumvented, if the tax liable or his employees could receive goods or a service for a symbolic amount and be taxed based on such a consideration. However, the CJEU considered that that risk only could lead to the government making a request to the EU according to article 27 f the Sixth Directive nowadays article 395 of the VAT Directive – for a permit to introduce from the general VAT rules differing measures for the purpose of suppressing certain types of tax avoidance or evasion. The government did not do this, but introduced instead on 1 January, 2008 the rules on evaluation of the tax amount, by support of the facultative article 80 of the VAT Directive.

In connection with errands on VAT frauds by carrousel trading, it is to my experience not unusual that the SKV invokes that the pricing of for example electronical products is too low. It is not especially far-fetched to assume that the tax auditors in that respect – consciously or

[134] The EU-case C-412/03 (Hotel Scandic Gåsabäck), ECLI:EU:C:2005:47.

[135] See GML Ch. 2 sec. 2 first para no. 1 and sec. 5 first para no. 1 which are corresponded by ML Ch. 5 sec. 9 first para no. 2 and sec. 29.

[136] See GML Ch. 7 sec:s 3 a-3 d which are corresponded by ML Ch. 8 sec:s 17-19.

[137] See GML Ch. 1 sec. 9 which is corresponded by ML Ch. 2 sec:s 14 and 15.

unconsciously – seek a for VAT purposes withdrawal taxation of the vendor in the rules that would apply for withdrawal according to the Income Tax Act, *inkomstskattelagen (1999:1229)*, abbreviated IL. To my experience, it is nowadays neither unusual that the SKV in the beginning of a tax audit decides to only audit the VAT accounting in an enterprise suspected to be included in a ”VAT carrousel”. The SKV then – according to my perception – reason about VAT as if it would be a matter of an income tax errand, where market value is a general aim for the pricing not causing withdrawal taxation.[138] If the prosecutor uses such a reasoning as support of a deed description, should, in my opinion, the defence lawyer point out in a case on tax fraud regarding VAT, and possibly already in an inquiry, that the SKV's reasoning is irrelevant for the question about taxation measures for VAT purposes.

If a vendor and a purchaser of for example electronical products only have activities with full right of deduction or reimbursement for VAT purposes, is thus taxation measures regarding VAT not occurring other that when the price is 0 Swedish crowns. If the SKV thus cannot take taxation measures for VAT purposes against the vendor or the purchaser by revaluating the consideration (the taxable amount), is neither that for tax fraud necessary objective prerequisite erroneous information fulfilled, regardless of whether the SKV deems the pricing being too high or too low. Although tax fraud, as mentioned, is a risk crime, and cannot be decided without awaiting legally binding decisions in the tax courts, must namely – regardless of the construction otherwise of the tax fraud – still what is an erroneous information be decided with guidance from the tax rules, so that the connection between the tax fraud case and the taxation question is not broken.[139] Thereby, the in this section mentioned rules introduced in the Swedish VAT law in 2008 are ineffective as arguments for the SKV and the prosecutor in errands on VAT frauds by carrousel trading regarding the tax fraud question itself, regardless of whether the vendor and the purchaser are *closely connected persons* – as long as a consideration has been charged so that it is not a matter of a supply free of charge which makes withdrawal VAT coming up.

I summarize the latter conclusion as follows:

If the SKV or the prosecutor states that the pricing of goods or a service are wrong, it is irrelevant *in itself* on the theme of VAT fraud by carrousel trading, if

- it is not a matter of a supply free of charge; *and*
- the price indeed is symbolical, but the parties are not closely connected to each other, *or* the parties are closely connected to each other but neither one of them is lacking or having a limited right of deduction or reimbursement for input tax in the person's activity.

7.2 The pricing question in connection with general VAT rules and special VAT rules about goods in certain warehouses

According to the general VAT rules the taxable amount for output tax constitutes of all cost elements that the enterprise is using to produce the goods or the service added with a mark-up for profit. Thus, the taxable amount corresponds with the price for the goods or the service. Therein is included the value of article of exchange, invoicing fees, freight fee, postage and

[138] See IL Ch. 22sec:s 3 and 4.

[139] See prop. 1995/96:170, p. 91.

similar, compensation for taxes and fees and other additions to the price except interest. See ML Ch. 8 sec. 13 and article 78 first para a and b of the VAT Directive.[140] In an article in *Balans fördjupning* (The Periodical Balans Annex with advanced articles), I mention that the case-law of the HFD concerning the determination of the taxable amount for VAT means – in pursuance of RÅ 1986 ref. 46 and RÅ 1991 ref. 105 – that a hidden interest compensation may not lower the taxable amount, by a from taxation exempted financial service matching the calculated price of the taxable goods or service, whereby the taxable amount is partly set off.[141]

In Forssén 2018, I state that such a lowering of the taxable amount for VAT, which thus is not possible according to the general VAT rules, can instead be carried through by application of the special rules on goods in certain warehouses which were introduced in GML Ch. 9 c on 1 January, 1996, by SFS 1995:1286, which are closest corresponded by articles 154-163 of the VAT Directive and in the ML are to be found in Ch. 11. In pursuance of ML Ch. 11 sec:s 10 and 11 the SKV is trying whether a warehouse keeper is suitable to install a tax warehouse, and thereby able to place in the tax warehouse 27 different sorts of goods – which are stipulated in an exhaustive enumeration in Ch. 11 sec. 3.[142]

In Forssén 2018, I use in an example one of the sorts of goods enumerated in ML Ch. 11 sec. 3, namely copper which is stipulated in item 2 of the rule, and reason about a quantity of copper which is placed in a certain warehouse in the form of tax warehouse.[143] In that respect, I state that there is nothing in the VAT Directive which would disqualify that a lowering of the taxable amount and thereby of the price of the goods is made, by a tax-free transaction of the goods is matched against a tax-free financial service during the time that the goods have been placed in the tax warehouse.[144] In my example, I assume that a limited company (Sw., *aktiebolag*) in Sweden has placed goods – which come from another Member State than

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[140] ML Ch. 8 sec. 13 was corresponded in the GML by Ch. 7 sec. 2 first para second and third sen. By the way, it may be mentioned that the words ”*utom ränta*” (*except interest*) were abolished from the GML Ch. 7 sec. 3 a on 1 January, 2003, by SFS 2002:1004. The government suggested first that the word *utom ränta* would be retained in the then to Ch. 7 sec. 2 transferred text, despite that they lacked an equivalent in the rules on taxable amount in article 11 A.(2)a and b in the Sixth Directive – nowadays article 78 first para a and b and second para of the VAT Directive. However, the government joined the perception of the Council on Legislation (Sw., *lagrådet*) that the words *utom ränta* would be abolished, since a developed national practice and the CJEU’s case-law were considered existing meaning that for example financial interest on postponed time of payment would not be included in the taxable amount, whereas other types of interest, for example interest paid at leasing with purchase option, constitutes a side cost which shall be included in the taxable amount for VAT. See prop. 2002/03:5, *Vissa mervärdesskattefrågor, m.m.* (Certain value-added taxation questions, etc.), p. 108.

[141] See *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 fördjupning* 1/2018 pp. 3-10. (Forssén 2018).

[142] See Forssén 2018, pp. 4-7.

[143] The headline to ML Ch. 11 is *Varor i skatteupplag* (Goods in tax warehouses), whereas the headline to GML Ch. 9 c was *Särskilt om varor i vissa lager* (Especially about goods in certain warehouses). I ML Ch. 11 sec. 4 stipulates the exemptions regarding tax warehouses and inter alia regarding installation for temporary storage, customs warehouse or free zone. In ML Ch. 2 sec. 24 it is stipulated that for those terms and expressions the same is meant as in the Union Customs Code, that is the Regulation (EU) No 952/2013. The Union Customs Code replaced on 1 May, 2016 the Community Customs Code, (EEC) no. 2913/92, which is mentioned in the corresponding rule in the GML, that is Ch. 9 c sec. 2.

[144] See Forssén 2018, p. 3.

Sweden – in a tax warehouse, and that another company wants to purchase the goods. The first company issues an option of the goods to the other company, which calls off the option, and when the goods still are placed in the tax warehouse that company purchases the goods.[145] According to article 9 of the Implementation Regulation the sale of an option falling within the scope of financial services according to article 135(1)(f) of the VAT Directive constitutes a supply of service according to the main rule in article 24(1) of the directive. Since the option does not constitute ownership to the goods before call-off, I consider that the premium constitutes a consideration for a from taxation exempted financial service, why the supply of the option is exempted from taxation according to ML Ch. 10 sec. 33 first para and third para no. 1 and article 135(1)(f) of the directive.[146] The goods – the quantity of copper – are also sold VAT free when they are placed in the tax warehouse according to ML Ch. 11 sec. 4 no. 4 compared with sec. 3 no. 2.[147] By the transactions during the time the goods are placed in the tax warehouse have two VAT free transactions been matched against each other, and the taxable amount for VAT can be lowered with an amount corresponding with the premium of the option, before the company which has purchased the goods sell them further, which thus is a taxable transaction.

Thus, I state in Forssén 2018 that the legislator perhaps should regard that the vendor and the purchaser, concerning 27 different sorts of goods, can circumvent the case-law regarding the general VAT rules which mean that the taxable amount of the goods must not be lowered by a matching of a discount for fast payment. I also state that abusive practice could come up regarding the matching (set-off) that I describe to lower the taxable amount for VAT, if the same goods are subject to several rounds of the described matching procedure.[148] Such a ”VAT carrousel” is of course also of interest for the legislator. In Forssén 2018, I point out that the company in my example which owns the goods placed in the tax warehouse becomes a so-called mixed activity which limits the right of deduction for input tax due to the sale of the option, that is depending on the thereby emerged element of supply of a VAT free financial service in the activity. However, a revaluation of the taxable amount according to what I mention in the nearest preceding section would presuppose that the involved companies constitute so-called *closely connected persons* (Sw., *förbundna parter*) according to the revaluation rules.[149]

In Forssén 2018, I state that the pricing question should be subject to research, whereby the problems regarding matching efforts for VAT purposes should not be seen as an isolated VAT problem, but be set in relation to the so-called correction rule regarding erroneous pricing in IL Ch. 14 sec:s 19 and 20 and *lagen (2009:1289) om prissättningsbesked vid internationella transaktioner* (the Pricing Information at International Transactions). In that respect, I also suggest that the research can be made in connection with the OECD-project of BEPS, which regards income tax and where the main question is the internal pricing between parties in

[145] See Forssén 2018, pp. 5-7.

[146] See Forssén 2018, p. 7. ML Ch. 10 sec. 33 first para and third para no. 1 were corresponded in the GML by Ch. 3 sec. 9 first para and third para.

[147] See Forssén 2018, p. 7. ML Ch. 11 sec. 4 no. 4 compared with sec. 3 no. 2 were corresponded in the GML by Ch. 9 c sec. 1 first para no. 4 compared with sec. 9 no. 2.

[148] See Forssén 2018, p. 9.

[149] See Forssén 2018, p. 7.

alignment of interests (Sw., *intressegemenskap*) with the purpose of taking measures about artificial deviations from prices set between unrelated parties.[150] A broadening of the perspective is in my opinion especially important as *lagen (1995:575) mot skatteflykt* (the Act Against Tax Avoidance) comprises income tax, but not VAT. Of course, in that respect shall also be regarded for the research as well as for the legislation work that the investigations regarding asserted ”VAT carrousels” should comprise also questions on income tax, instead of the SKV and the EBM, as I describe above, only focusing on the VAT and mix it with income tax law aspects of for example questions on withdrawal and pricing. This is something that the defence lawyers should remark as contradictory to the legal certainty in the procedure concerning tax law as well as criminal law.

With respect of legal certainty, I may thus state that it is important that the defence lawyer early points out inconsistencies of the SKV and the EBM for example in errands on ”VAT carrousels”, since it in my opinion is not unusual that a prosecutor asserts that an objection late in the proceedings constitutes a *reconstruction after the event* (Sw., *efterhandskonstruktion*) by the defendant, when an erroneous interpretation or application of the tax rules by the SKV and the EBM constitutes the real reason for the prosecutor altering the deed description, for example so that an assertion of tax fraud is changed to or completed with commercial money laundering. If the SKV’s investigation, on which the tax case and the criminal case are based, from the beginning contains an asserted VAT arrangement which all the involved are supposed to have used, cannot, in my opinion, the prosecutor suddenly change foot, so that those involved are supposed to have used two plans to *unfairly appropriate money from the State* (Sw., *tillskansa sig pengar från staten*).

8 Summary and concluding viewpoints

8.1 Summary

The review in this article may be considered showing that the legislator in Sweden cannot have taken consistent and effective measures to suppress the phenomenon of VAT frauds by carrousel trading.

In the headline to section 6, I raise the question whether the legislator’s measures in the Swedish VAT act, consisting partly of the introduction of reverse charge for various situations, partly of the implementation of the directive rule on liability to pay falsely charged VAT, can be expected to suppress the phenomenon VAT frauds by carrousel trading. The answer is negative, since the phenomenon for more than two decades has come to mean that VAT debts where one single errand can comprise billions of Swedish crowns. The HD-case NJA 2018 p. 704, which I analysed in Forssén 2022, is insidious in that respect as it shows an obvious inconsistency of the legislator, where liability of payment was introduced for investment gold in 2000, but not for example for platinum. If expensive goods which are easy to move are considered constituting *high-risk goods* in connection with ”VAT carrousels”, the question is how the legislator could omit to introduce the institute reverse charge for platinum, and not observing how the problem in question has increased for the public treasury during the years since 2000. For example, platinum should, in my opinion, have been present on the theme ”VAT carrousels” for example in the errand that led to the mentioned HD-case.

[150] See Forssén 2018, p. 9. OECD, Organization for Economic Co-operation and Development. BEPS, base erosion and profit shifting.

Neither has the legislator observed that VoIP – space for telephony on the Internet – is treated in investigations of the SKV and the EBM as if it in connection with *cross invoicing* in itself would indicate the existence of a ”VAT carrousel”, when *cross invoicing* only constitutes an example of a falsely charged VAT being made to an enterprise to set off output tax in the enterprise by accounting of a falsely charged VAT as input tax. Regardless of whether VoIP is used in that respect *cross invoicing* does not necessarily have to be seen in connection with ”VAT carrousels” regarding for example trading of electronical products. This can be an explanation to the legislator – according to what I state in section 4.2 – having reasoned inconsistently concerning VoIP in connection with the reform on 1 April, 2021, when reverse charged was introduced under certain suppositions for trading with electronical products, but not with VoIP, which causes an inconsistency also in relation to Denmark, where *omvendt betalingspligt* (reverse charge) was decided by the parliament on 1 June, 2023 for *teleydelser* (telecommunications services) without any special treatment of VoIP.

In sections 5.1-5.4, I also show that the implementation on 1 January, 2008 into the Swedish VAT act of article 203 of the VAT Directive, on liability to pay to the State an amount falsely denoted as VAT (as long as a credit note is not issued), cannot be deemed having constituted an effective measure by the legislator of cases of so-called *missing trader* (or goalkeeper company or front enterprise) in connection with ”VAT carrousels”. Sonce the reform in 2008 can such a person be made liable to pay to the State a falsely charged VAT, but the person in question cannot be imposed responsibility for tax fraud, only because that liability is not fulfilled. Instead, such a responsibility can be imposed to the receiver of the invoice, if he or she has tried to exercise right of deduction for the amount which has been falsely denoted as VAT, since it does not constitute an input tax according to the ML.

In section 7.1, I return to the reform on 1 January, 2008 and that SFS 2007:1376 also meant inter alia that the facultative rule in article 80 of the VAT Directive, about revaluation under certain suppositions of the taxable amount between *closely connected persons* (Sw., *förbundna parter*), was introduced in the Swedish VAT act. In that respect, I mention the criminal law aspects on the questions about the consideration (the pricing question) and when a delivery or supply being made without consideration (free of charge). In section 7.2, I mention the pricing question also in connection with general VAT rules and special rules on goods in certain warehouses, which were introduced in the Swedish VAT act in 1996. The question is also whether those measures by the legislator can be expected to suppress the phenomenon VAT frauds by carrousel trading.

The answer is negative also in those respects, whereby I conclude the following in section 7.1. If the SKV or the prosecutor states that the pricing of goods or a service are wrong, it is, in my opinion, irrelevant *in itself* on the theme of VAT fraud by carrousel trading, if

- it is not a matter of a supply free of charge; *and*
- the price indeed is symbolical, but the parties are not closely connected to each other, *or* the parties are closely connected to each other but neither one of them is lacking or having a limited right of deduction or reimbursement for input tax in the person’s activity.

About the pricing question and the special VAT rules on goods in certain warehouses that were introduced in 1996, which I mention in section 7.2, I conclude there that the rules in question only open for further versions on the theme of carrousels. This time the phenomenon is supported by the rules, but I am warning for matching procedures which lower the taxable

amount for VAT, by setting off of financial services in the form of options on goods placed in tax warehouses against sale of goods during the time they are placed there, if such procedures are repeated concerning the same goods. It can, in my opinion, constitute abusive practice.

Concerning cases of abusive practice, I consider that they can cause criminal law responsibility for both the issuer and the receiver of an invoice, but based on NJA 2018 p. 704, I state in section 5.4 that abusive practice cannot *in itself* cause criminal responsibility, which I also stated in Forssén 2022. In his complement to Forssén 2022, I consider that Stig von Bahr – in von Bahr 2022 – is going further than I do, by him categorically dismissing my warning for criminal law consequences regarding cases of abusive practice concerning the VAT.

8.2 Concluding viewpoints

In section 7.2, I conclude that a broadening of the perspective on the phenomenon ”VAT carrousels” should be made in the research and by the legislator, so that also income tax questions are regarded in that respect. It is, in my opinion, in conflict with the legal certainty in the procedure concerning the phenomenon in question that the SKV and the EBM only focuse on the VAT in their investigations but mix them with income tax law aspects on for example questions about withdrawal and pricing. Sometimes it is not clearly expressed which Member State’s public treasury is meant, when for example the SKV in the ongoing tax case regarding the same circumstances which are comprised by the prosecutor’s deed description claims that the suspected or the defendant has been aiming to *unfairly appropriate money from the State* (Sw., *tillskansa sig pengar från staten*). If the Swedish State is regarded with such an assertion, would, in my opinion, criminal law responsibility for fraud against the State exist according to the general rule on fraud in BrB Ch. 9 sec. 1, instead of criminal responsibility according to the special legislation on such responsibility, for instance if it is a matter of abusive practice which is not at the same time comprised by the prerequisites for tax fraud or commercial money laundering. This should, in my opinion, be regarded by the legislator for example in connection with the continuing treatment of the EU-criminal law investigation’s official report about criminalization of transgressions of EU-regulations, SOU 2020:13, which I mention in section 4.2.

I finished the lecture that I am mentioning initially – Forssén 2001 – by emphasizing the importance of all participants in proceedings about the phenomenon VAT frauds by carrousel trading regarding current law. Those who are aiming to cheat can adjust their modus operandi after verdicts which taken by themselves mean conviction, but where great lacks exist concerning the bases for sentences of conviction. Then emerge of course great difficulties for the SKV and the EBM to carry through tax cases and criminal cases respectively without regarding previous such verdicts. Then it will be rather easy for a defence lawyer to object that current law must have been present in such verdicts, and state that the prosecutor cannot change foot and claim that now shall the rules be interpreted and applied in another way than in a previous case. The question that a prepared defence lawyer raise is then of course if not the same current law has existed all the time. My perception over two decades ago is if possible more important today, with regard of the review in this article showing that the legislation measures that have been taken since then can hardly be considered meaning any simplification of current law for judgment of ”VAT carrousels”.

Finally, I may to the legislator iterate from my theses the importance of the rules on registration to VAT to be properly developed. In the research seems such questions not be of

interest in Sweden. In the system of handling extensive information (Sw., *masshanteringssystem*) that the tax accounting constitutes, it is, in my opinion, better that problems regarding who shall be registered to VAT being able to fix 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. The VAT system should, in my opinion, be about getting the collection the tax from the enterprises to function without frivolous persons being let into the system to *unfairly appropriate to themselves money from the State*. If not the registration 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 (Sw., *skattekontosystemet*). In Forssén 2023a, I state that it is only a person who shall account for real VAT in VAT returns that shall register to VAT. In that respect, I also bring 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.[151]

That for instance a *missing trader*, who has falsely charged what I denote a false VAT, shall account for such an amount in a special tax return and not register to VAT means taken by itself that such a person cannot exercise right of deduction for input tax in a VAT return. However, it does not, in my opinion, mean that frivolous enterprises are kept outside the VAT system itself. In many cases of VAT frauds there would have been sufficient with a taxation visit (Sw., *skattebesök*) for the SKV being able to establish that an entry of VAT registration was only an invention from a frivolous person. The person in question would have been refused registration and would not have had the opportunity to submit a VAT return with a claim on deduction of input tax. That should, in my opinion, be more effective than the SKV afterwards making audits of a number of enterprises on the theme of VAT cheating, when VAT returns have been submitted to the SKV. The EBM would not even get reports from the SKV on suspected VAT frauds by carrousel trading in the cases where an effective registration control has been made by the SKV and the SKV having sifted the wheat from the chaff.

[151] See 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.

V. Competition advantages with transactions of goods after VAT free transactions of goods in certain warehouses and of financial services[152]

Is it possible to within the frame of the law lower the taxable amount and thereby the price of goods, by a from taxation exempted transaction of goods according to the rules on VAT free transactions of goods in certain warehouses being set off against a from taxation exempted financial service, before the goods are taken out from such a warehouse? That is, without any conflict arising with the rules on the taxable amount of value-added tax (VAT)? In this article is Björn Forssén bringing up this topic.

In this article, I am treating the situation that a purchaser can purchase goods which are taxable according to *mervärdesskattelagen (1994:200)*, the [Swedish] VAT act, abbreviated GML,[153] as well as according to the EU's VAT Directive (2006/112/EC) to a lower price due to the vendor being able to lower the price on his sale of the goods to the purchaser, by preceding measures during the time the goods have been placed in certain warehouses according to the rules in Ch. 9 c of the GML, which are closest corresponded by the rules in articles 154-163 of the VAT Directive. This gives the vendor competition advantages against other suppliers who have their goods in warehouses comprised by the general rules of the GML and the EU's VAT Directive. The rules in Ch. 9 c of the GML is one of the examples in Ch. 1 sec. 2 last para of the GML on *special rules about who in certain cases is tax liable* (Sw., "*särskilda bestämmelser om vem som i vissa fall är skattskyldig*"), and in the way mentioned they can indirectly affect the price of the goods, so that it becomes lower.

I conclude, there is nothing in the VAT Directive which would disqualify that a lowering of the taxable amount and thereby of the price of the goods is made based on a matching/set-off of a tax-free transaction of the goods during the time that the goods have been placed in the tax warehouse against a tax-free financial service. Therefore, the legislator should perhaps regard that the purchaser can circumvent the case-law regarding the general VAT rules which mean that the taxable amount of the goods must not be lowered by a *matching* of a discount for *fast payment*. Abusive practice should neither be present in that respect – at least not if the goods are only comprised by one round of the described matching procedure.

Finally, I also give for the context some proposals on research or law alterations.

The rules on exemption from taxation for transaction of goods

According to Ch. 9 c sec. 1 first para nos. 1, 3 and 4 of the GML the following transactions of goods are exempt from taxation:

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[152] Article: *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), by Björn Forssén, *Tidningen Balans fördjupningsbilaga* (The Periodical Balans Annex with advanced articles) 1/2018 pp. 3–10, published 2018-01-18 on www.tidningenbalans.se. (Forssén 2018).

[153] Note! The GML was replaced on 1 July, 2023 by *mervärdesskattelagen (2023:200)*, abbreviated ML, which, however, does not lead to any alteration of the problems described in this article. By the way, Ch. 9 c of the GML is corresponded by Ch. 11 of the ML.

- a transaction of goods mentioned in sec. 9 of Ch. 9 c, if the goods are intended to be placed in such a tax warehouse within the country (Sweden) mentioned in sec. 3 of Ch. 9 c;
- a transaction of goods mentioned in sec. 9 of Ch. 9 c, if the goods are sold during the time they are placed in a tax warehouse within the country (Sweden) mentioned in sec. 3 of Ch. 9 c; and
- a transaction of non-Union goods made in an installation for temporary storage, a customs warehouse or a free zone within the country (Sweden), if it is made during the time they are placed there.

The tax exemption for a transaction of goods in those cases applies according to Ch. 9 c sec. 1 second para of the GML only on the assumption that it is not aiming to a final usage or consumption, i.e. that the transaction is made to someone who is trading with goods and not to a consumer or someone who shall use it in his or her activity.

Tax warehouse and non-Union goods, installation for temporary storage, customs warehouse and free zone

Tax warehouse means according to Ch. 9 c sec. 3 of the GML:

- for goods in sec. 9, which constitute energy products according to Ch. 1 sec. 3 *lagen (1994:1776) om skatt på energi* (the Swedish Energy Tax Act) and are comprised by the procedure rules mentioned in sec. 3 a of the same chapter, such authorised tax warehouses run by an authorised warehouse keeper according to Ch. 4 sec. 3 of that act;
- for ethyl alcohol, such authorised tax warehouses run by a warehouse keeper authorised according to sec. 9 of *lagen (1994:1564) om alkoholskatt* (the Swedish Alcohol Tax Act); and
- for other goods in sec. 9, such authorised tax warehouses run by a warehouse keeper authorised according to sec. 7.

The goods stated in sec. 9 in Ch. 9 c of the GML are:

goods pertaining to the following numbers of the combined nomenclature (Sw., *kombinerade nomenklaturen*), KN-no., according to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff,
1. tin (KN-no. 8001),
2. copper (KN-no. 7402, 7403, 7405 or 7408),
3. zinc (KN-no. 7901),
4. nickel (KN-no. 7502),
5. aluminium (KN-no. 7601),
6. lead (KN-no. 7801),
7. indium (KN-no. ex 8112 91 or ex 8112 99),
8. corn (KN-no. 1001 to 1005, 1006: only unpolished rice, or 1007 to 1008),
9. oil plants and oily fruits (KN-no. 1201 to 1207), coconut, Brazilian nut and cashew nut (KN-no. 0801), other nuts (KN-no- 0802) or olives (KN-no. 0711 20),
10. corn and seed for sowing, including soya beans (KN-no. 1201 to 1207),
11. coffee, not roasted (KN-no. 0901 11 00 or 0901 12 00),
12. tea (KN-no. 0902),
13. cocoa beans, whole or broken, raw or roasted (KN-no. 1801),
14. raw sugar (KN-no. 1701 11 or 1701 12),
15. rubber, in original forms or as plates, sheets or strips (KN-no. 4001 or 4002),
16. wool (KN-no. 5101),
17. chemicals in bulk (chapters 28 and 29),

18. mineral oils, including hydrogenated vegetable and animal oils and fat, natural gas, biogas, propane and butane; also including crude petroleum oils (KN-no. 2709, 2710, 2711 11 00, 2711 12, 2711 13, 2711 19 00, 2711 21 00 or 2711 29 00),
19. silver (KN-no. 7106),
20. platinum; palladium, rhodium (KN-no. 7110 11 00, 7110 21 00 or 7110 31 00),
21. potatoes (KN-nr 0701),
22. vegetable oils and fat and their fractions, regardless of whether they are refined or not, however not chemically modified (KN-no. 1507 to 1515),
23. wood (KN-no. 4407 10 or 4409 10),
24. ethyl alcohol, E85 and ED95 (KN-no. 2207 or 3823 90 99),
25. fatty acid methyl esters (KN-no. 3823 90 99),
26. pine oil (KN-no. 3803 00 10), and
27. additions in motor fuel (KN-no. 3811 11 10, 3811 11 90, 3811 19 00 or 3811 90 00).

With non-Union goods, installation for temporary storage, customs warehouse and free zone is meant according to Ch. 9 c sec. 2 of the GML the same as in Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (the so-called Union Customs Code).

To lower the taxable amount and thereby the price on taxable goods

General VAT rules

If the vendor makes a from taxation exempted transaction of goods according to Ch. 9 c of the GML in a n economics activity, the person in question has a right of reimbursement for input tax in the activity according to Ch. 10 sec. 11 first para of the GML. The question is whether the taxable amount and thereby the price can be lowered due to measures taken during the time the goods have been placed in a warehouse according to Ch. 9 c of the GML, when the goods are sold after that they have been taken out from such a warehouse and comprised by the rule on generally taxable transactions of goods and services according to Ch. 3 sec. 1 first para of the GML.

In pursuance of Ch. 7 sec. 2 first para of the GML the taxable amount is constituted, for charging of output tax on a taxable transaction of goods or a service, of all cost elements (direct expenses, write-offs etc.) by the enterprise for the production of the goods or the service together with a mark-up for profit. The taxable amount is in other words consisting of the price for the goods or the service, wherein is included the value of article of exchange, invoicing fees, freight fee, postage and similar, compensation for taxes and fees and other additions to the price except interest.

If the vendor makes a from taxation exempted transaction of goods according to Ch. 9 c of the GML in an economic activity, the person in question has a right of reimbursement for input tax in the activity according to Ch. 10 sec. 11 first para of the GML. The question is whether the taxable amount and thereby the price can be lowered due to measures taken during the time the goods have been placed in a warehouse according to Ch. 9 c of the GML, when the goods are sold after that they have been taken out from such a warehouse and comprised by the rule on generally taxable transactions of goods and services according to Ch. 3 sec. 1 first para of the GML.

In pursuance of Ch. 7 sec. 2 first para of the GML the taxable amount is constituted, for charging of output tax on a taxable transaction of goods or a service, of all cost elements (direct expenses, write-offs etc.) by the enterprise for the production of the goods or the service together with a mark-up for profit. The taxable amount is in other words consisting of

the price for the goods or the service, wherein is included the value of article of exchange, invoicing fees, freight fee, postage and similar, compensation for taxes and fees and other additions to the price except interest.

The words ”*utom ränta*” (*except interest*) were abolished from Ch. 7 sec. 3 a of the GML on 1 January, 2003, by SFS 2002:1004. The government suggested first that the words *utom ränta* would be retained in the then to Ch. 7 sec. 2 transferred text, despite that they lacked an equivalent in the rules on taxable amount in article 11 A.(2)a and b of the Sixth Directive (77/388/EEC) – nowadays article 78 first para a and b and second para of the VAT Directive. Thereafter, the government joined the perception of the Council on Legislation (Sw., *lagrådet*) that the words *utom ränta* would be abolished. It was considered that a developed national practice and case-law of the Court of Justice of the EU (CJEU) already existed, meaning that certain interest, for example financial interest based on a special agreement between the parties on postponed time of payment, would not be included in the taxable amount, whereas other types of interest, for example interest paid at leasing with purchase option, can be deemed constituting such a side cost regarded in article 11 A.(2)b of the Sixth Directive – nowadays article 78 first para b and second para of the VAT Directive – and which thereby shall be included in the taxable amount, provided that the interest is not based on a debt to the lessor. The exception for interest in the GML was considered applied in correspondence with the CJEU’s case-law. Furthermore, the government considered that it was not necessary with such special rules in the GML as were stipulated in article 11 A.(2)b last part of the Sixth Directive – and now to be found in article 78 second para of the VAT Directive – and which means that the Member States may view costs which are subject of a separate agreement as side costs.[154]

Thus, it is only real interest (Sw., *verklig ränta*) which is not included in the taxable amount, i.e. what the vendor of taxable goods or a service charge in interest to grant the customer a postponement with the payment, or it shall be a matter of interest on a debt that the purchaser has to the vendor, i.e. on a customer credit which is normally granted. In pursuance of the case-law of the Supreme Administrative Court (*Högsta förvaltningsdomstolen*, abbreviated HFD) must, however, not a hidden interest compensation lower the taxable amount, by a from taxation exempted financial service – compare Ch. 3 sec. 9 of the GML – matching the otherwise calculated price of the taxable goods or service, so that the taxable amount is partly set off. Current law can be illustrated with the following example:

> Assume that it is a matter of a boat builder (deliverer) who has got an order for a sailing-boat and that the orderer (purchaser) takes up a loan in bank to finance the building of the boat. Furthermore, it is assumed that the boat builder according to the credit may withdraw the loan concurrently with the building of the boat making progress. The price of the boat is calculated to SEK 1 million. If the credit is withdrawn in a *normal* pace, the orderer shall pay an interest of SEK 100,000 to the bank. Assume moreover that the loan would cost another SEK 25,000 in interest if the whole of the credit would be allowed to be withdrawn by the boat builder at once, but that the strengthening of liquidity that would follow for him in that case makes it possible to lower the price of the boat with the corresponding amount. If the orderer is lacking right of deduction or reimbursement for input tax, he or she would gain by paying a higher interest to the bank when the boat builder can withdraw the whole of the credit at once and at the same time, by the

[154] See prop. 2002/03:5, *Vissa mervärdesskattefrågor, m.m.* (Certain value-added taxation questions, etc.), p. 108.

strengthening of liquidity, van lower the taxable amount, which gives a lower cost mass than the originally calculated and thereby a lower taxable amount on which the output tax is charged.

Although the price of the boat, with regard of the mentioned assumption, would be set at SEK 975,000, VAT is still calculated on the originally calculated price of SEK 1 million. The difference would only mean that a set-off is made against the financial service matching the strengthening of liquidity by the boat builder, by the boat builder being able to withdraw the whole credit at once, i.e. a certain part of the consideration – the taxable amount – has been received by the boat builder by the set-off. Nor is it a matter of some quantity discount that can lower the taxable amount, but of discount for *fast payment*.[155]

The special rules in Ch. 9 c of the GML in relation to the rules about exemption from taxation for financial services

The review above of the HFD's case-law in relation to the example with the lowering of the taxable amount for the transaction of the sailing-boat concerns the general VAT rules of the GML. The question is whether the special rules in Ch. 9 c of the GML mean that the mentioned case-law can be circumvented if it is a matter of such goods which are comprised by those rules and the measure is taken, during the time the goods are placed in a warehouse according to Ch. 9 c, of a from taxation exempted transaction of goods being matched against a from taxation exempted financial service according to Ch. 3 sec. 9 of the GML.

Now it is assumed that a purchaser acquires from a vendor such goods which are enumerated in Ch. 9 c sec. 9, and which the vendor has placed in an authorised tax warehouse according to Ch. 9 c sec. 3 of the GML situated within the country. In that case, the goods can during the time they have been placed there have been sold without charging of VAT, according to Ch. 9 c sec. 1 first para no. 1 of the GML. Thus, the question is – by comparison with the example with the sailing-boat according to above – what instead applies now concerning the taxable amount in connection with the goods being taken out from the tax warehouse and liability of payment of VAT emerging according to Ch. 9 c sec. 5 of the GML, if the taxable amount and thereby the price are lowered due to an arrangement similar to that based on a discount for *fast payment* but instead based on a matching/set-off of the transaction of the goods against a from taxation exempted financial service.

If a part of the taxable amount for the goods in question is *matched* by a discount for *fast payment*, it shall normally not be lowered according to what is mentioned follows by case-law. However, here is the difference stipulated, compared to the example with the sailing-boat, that an equivalent scenario like concerning the discount for *fast payment* means that a from taxation exempted transaction has been made of goods during the time they have been placed in a tax warehouse and that matching/set-off then has been made against acquisition of a from taxation exempted financial service according to Ch. 3 sec. 9 of the GML. By Ch. 9 c sec. 1 first para no. 2 follows that exemption from taxation exists for *transaction of services*

[155] See the HFD's advance ruling on VAT RÅ 1986 ref. 46 and the HFD's case on VAT RÅ 1991 ref. 105. Those cases are also mentioned in section 12 213 151 of *Momsrullan Andra upplagan* (The VAT roll Second edition), by Björn Forssén, Melker Förlag, Laholm 2016 (Forssén 2016), and on pp. 54 and 214 in *Momshandboken Enligt 2001 års regler* (The VAT handbook According to the rules of 2001), by Björn Forssén, Norstedts Juridik, Stockholm 2001.

which regards such a transaction mentioned in no. 1, i.e. in Ch. 9 c sec. 1 first para no. 1 of the GML.

Thus, it can be questioned whether it at a later taxable withdrawal of goods from the tax warehouse exists motive, based on the VAT Directive, to claim that the taxable amount should be determined without regard of the matching against the financial service, i.e. like according to the HFD's case-law concerning the discount for *fast payment*. I find no such motives, and the problem does not seem to have been addressed yet in theses in the field of VAT,[156] why I suggest that it should be subject of research. The question might be a part of a larger research project where Ch. 9 c of the GML as a whole is treated, e.g. as an element of a project regarding international trade, income tax and indirect taxes.

Thus, I consider, with reservation for abusive practice might existing if the same goods are repeatedly comprised by such measures that I am describing here during the time they are placed in a tax warehouse, that support is lacking against lowering the taxable amount and thereby the price of goods by the following *example* of measures:

- X and Y are assumed to be Swedish entrepreneurs whose activities cause tax liability and thus entitling to deduction for input tax on acquisitions or imports in the activity according to the main rule in Ch. 8 sec. 3 first para of the GML.

  No one of the two is assumed having so-called mixed activity, why they have full right of deduction for input tax. Thus, the rules on revaluation to market value of the pricing between closely connected parties in Ch. 7 sec:s 3 a-3 d of the GML are not coming up.

- Y owns a batch of the base metal copper (goods) and X are interested in purchasing a certain volume of those goods. Y has placed the goods in a tax warehouse in Sweden, and the market value of the volume that X is interested of purchasing from Y is SEK 10,000 excluding VAT, i.e. SEK 12,500 including VAT, whereof VAT SEK 2,500.

- Y has a loan in bank of SEK 1,000,000 and would be able to lower the calculated price on his goods, if Y could get paid faster for the goods from X, so that Y could pay less in interest to the bank due to Y being able to amortize faster on the bank loan. However, X and Y know that the State, based on the HFD's case-law according to the general VAT rules, still would claim that the price is SEK 10,000 excluding VAT, and that the VAT on the sale of the batch of copper shall be SEK 2,500 (25 % x 10,000).

- Instead of the scenario with faster payment X and Y aim to use the special rules for tax warehouses in Ch. 9 c of the GML in relation to the rules on financial services in Ch. 3 sec. 9 of the GML by the following alternative scenario for an improved competition situation against other deliverers of the same sort of goods, by lowering the price including VAT to the customer of X.

- Y issues an option to X to get to purchase the batch of copper.

[156] See e.g. pp. 257-281 regarding Taxable Amount i *Financial Activities in European VAT A Theoretical and Legal Research of the European VAT System and the Actual and Preferred Treatment of Financial Activities*, by Oskar Henkow, and pp. 143-150 and pp. 175-183 regarding *Skattesats och beskattningsunderlag* (Tax rate and taxable amount) and *Beskattningsunderlag och Omvärdering av beskattningsunderlaget* (Taxable amount and Revaluation of the taxable amount) respectively in *Neutral uttagsbeskattning på mervärdesskatteområdet* (Neutral withdrawal taxation in the field of VAT), by Mikaela Sonnerby.

X pays for the option a premium to Y of 5 per cent on the market value of the batch of copper.

Y's issuing, sale of the option is exempt from VAT as a financial service.

X pays 4 per cent on the market value excluding VAT, i.e. SEK 400 (4 % x 10,000).

Y receives from X: SEK 400. Compare below A).

Y receives from X SEK 9,600 (10,000 – 400) for the batch of copper, which is sold by Y without VAT due to the transaction being made when the goods are placed in the tax warehouse. Thus, the option is used by Y's sale of the goods to X, when the goods were placed in the tax warehouse. Compare below B).

Y's income for the batch of copper is SEK 10,000 (400 + 9,600), i.e. Y's result is not lowered due to the alternative scenario.

- X is making a withdrawal of the goods – the batch of copper – from the tax warehouse and accounts for output tax of SEK 2,400 (25 % x 9,600). X may deduct the equivalent amount as input tax. Compare below C).

  The cost for X is SEK 10,000 (400 + 9 600) regarding the acquisition of the batch of copper, i.e. the result for X is not lowered due to the alternative scenario.

- By the alternative scenario with an income for the option of SEK 400, Y can get an improved cash flow and amortize on the bank loan, and thereby lower the calculated price of the sale of goods to X below the level of SEK 9,600, by the bank interest and thereby the cost mass being lower for Y, before the sale of the goods to X is made. Assume that Y can lower the price with another SEK 40 excluding VAT due to the HFD's case-law that disqualifies lowering the tax amount due to faster payment regards the general VAT rules and not the present special rules for goods in a tax warehouse and matching against a financial service. This means the following:

  - Y's result is not affected, since the cost for the bank interest is SEK 40 lower and is equal to the further lowering of the price of the goods of SEK 40 excluding VAT to SEK 9,560 excluding VAT (9,600 – 40).

  - X sets a price to customer for the goods in question of SEK 9,960 excluding VAT (10,000 – 40). X's result is not affected, since the price is equal to the cost for the option of SEK 400 plus the purchase price for the goods of SEK 9,560 (400 + 9,560=9,960).

  - X's customer pays SEK 12,450 including VAT instead of SEK 12,500, i.e. SEK 9,960 plus 25 per cent VAT, SEK 2,490, on top of that is SEK 12,450 (9,960 + 2,490). Compare below D). That gives X a competition advantage against other deliverers of the same sort of goods, by the price becoming SEK 50 including VAT lower for X's customer (12,500 – 12,450), i.e. SEK 40 excluding VAT.

- The State is totally getting SEK 10 less in VAT revenues (2,500 – 2,490). The option of SEK 400 lowers the VAT with SEK 100 on the withdrawal of the goods from SEK 2,500 to SEK 2,400, but it is a zero-sum game since output tax and input tax of SEK 2,400 cancel each other out. Compare below C). It is because Y can lower Y's cost mass by lowering the bank interest that the price to X's customer can be lowered with SEK 40 without this affecting the result either by X or Y. The State's VAT revenues become correspondingly lower, i.e. SEK 10 lower (2,500 – 2,490 or 25 % x 40 or 20 % x 50).

- For the sake of simplicity, above has been assumed that X does not make a mark-up for profit when the goods are sold on to the customer. The procedure with matching of the special rules in Ch. 9 c of the GML against the rules on financial services in Ch. 3 sec. 9 of the GML can be used for a mark-up for profit equal only to a part of the lowering of the price that it is causing, and still mean that the price to customer becomes lower than for deliverers who are not using the procedure. Assume that X makes a mark-up for profit equal to half the lowering of the price of SEK 40 excluding VAT that the procedure in the example is causing. This means that X sets a price of the goods of SEK 9,980 excluding VAT (9,960 + ½ x 40). Thus, the price to consumer is SEK 12,475 including VAT [9,980 + 2,495 (25 % x 9,980)], which is SEK 25 lower than the alternative SEK 12,500 including VAT. In this case the State's VAT revenues becomes SEK 5 less compared to the alternative without a usage of the matching procedure (2,500 – 2,495=5), instead of SEK 10 less which applied when X did not do any mark-up for profit at all.

A) Y's transaction constitutes securities, and the transaction is exempt from taxation according to the rules on financial services - see Ch. 3 sec. 9 of the GML and article 135(1)(f) of the VAT Directive. In the last sentence of the directive rule it is stipulated that from the concept securities etc. are in the present context excluded documents representing ownership to goods and such rights or securities regarded in article 15(2). Article 15(2) is not of interest here, since it concerns rights to immovable property. Of interest is instead article 9 of the Council's implementing regulation (EU) No 282/2011 (the Implementation Regulation), where it is stipulated that the sale of an option in the cases where such a transaction would fall within the scope of article 135(1)(f) of the directive and constitute a taxable transaction according to the main rule for supply of services, article 24(1) of the VAT Directive, shall such a supply of services "be distinct from the underlying transactions to which the services relate". Since the option is not founding right of ownership to the batch of copper (the goods), before it has been called off, should in my opinion the premium that Y receives from X for the issuing, the sale of the option be considered exempt from taxation according to Ch. 3 sec. 9 first para and third para no. 1 and article 135(1)(f) of the VAT Directive. However, see below especially about article 9 of the Implementation Regulation and article 24(1) of the VAT Directive and private law options – regarding a need for precision in article 24(1) of the directive.

B) Y's sale of the batch of copper constitutes a VAT free transaction of goods according to Ch. 9 c sec. 1 first para no. 4 compared to sec. 9 no. 2 of the GML, since the transaction is made during the time the goods are placed in the tax warehouse.

C) If the purchaser of goods – here X – cause the goods to cease to be placed in the tax warehouse, X becomes tax liable, according to Ch. 9 c sec:s 4 and 5 of the GML, but gets to deduct that VAT as input tax, if X has right of deduction or reimbursement of input tax in X's activity, since the output tax which shall be paid to the State in that case also constitutes input tax according to Ch. 8 sec. 2 second para of the GML. Thus, for the State it becomes equal to nil: output tax 2,400 minus input tax 2,400.

D) When the goods are sold by X after they have been taken out from the tax warehouse, the general taxation of transaction of goods and services according to Ch. 3 sec. 1 first para of the GML applies and the normal tax rate of 25 per cent applies to the goods in question – the batch of copper – according to Ch. 7 sec. 1 first para of the GML.

Note that mixed activity can emerge by Y in the example and the revaluation rules in Ch. 7 sec:s 3 a-3 d of the GML become present, whereby the following may be mentioned:

- The element of VAT free financial service by the usage of the option in the example can cause that Y gets a mixed activity that limits the right of deduction for input tax. Then may – in case the parties are so-called closely connected parties according to the rules in Ch. 7 sec:s 3 a-3 d of the GML – revaluation of the pricing of the goods in question to market value be relevant due to those rules (and Ch. 1 sec. 9 of the GML). Therefore, such a VAT free transaction regarding financial services by Y should be lower than five (5) per cent of Y's total turnover (i.e. of VAT free transactions plus taxable transactions) in the activity. Then will Y still have full right of deduction for input tax according to the so-called 95-per cent rule in Ch. 8 sec. 14 first para no. 1 of the GML. Thereby is Y's activity not comprised by the limitation of the right of deduction in mixed activities according to Ch. 8 sec. 13 of the GML, and Y is not comprised by Ch. 7 sec. 3 b no. 2 of the GML of the revaluation rules.

- In the example becomes the relation between VAT free transaction of option and total turnover by Y four (4) per cent (400/10,000). Thus, the revaluation rules will not come up, although X and Y are closely connected parties according to those rules.

I give the following comments to the example:

- The problem in question can – without limitation to goods enumerated in sec. 9 in Ch. 9 c – also concern non-Union goods placed in other forms of certain warehouses than tax warehouses, namely in an installation for temporary storage, a customs warehouse or a free zone within the country. However, in my opinion the problem is not as obvious in such cases, since exemption from taxation for services then are constituted by services made *in* such a warehouse (see Ch. 9 c sec. 1 first para no. 3) and not – like according to Ch. 9 c sec. 1 first para no. ***2*** – by services *which regard* a transaction of goods placed in the tax warehouse.[157] Concerning proceedings may furthermore be mentioned that it is the tax authority, *Skatteverket* (SKV), that has the burden of proof regarding the size of the transaction,[158] i.e. regarding the taxable amount.

- Thus, the described matching procedure to lower the taxable amount for VAT purposes should be applied for goods according to someone of the 27 items in Ch. 9 c sec. 9 of the GML, like copper, which are placed in a tax warehouse. Furthermore should, with regard of the relationship between VAT free transaction of option and total turnover not disqualifying the 95-per cent rule for full deduction of input tax in mixed activities, the procedure be of interest for enterprises with large volumes of such goods.

[157] See Ch. 9 c sec. 1 first para no. 3 of the GML. See also Ch. 9 c sec. 1 first para no. 4, which for goods placed in a tax warehouse according to Ch. 9 c sec. 1 first para no. 1 stipulating exemption from taxation for services made *in* such a warehouse.

[158] See HFD 2014 ref. 40, which taken by itself regarded application of the rules in Ch. 7 sec. 3 a of the GML on revaluation, but where the HFD stated that *a starting-point for the judgment is that the SKV has the burden of proof as far as the size of the transaction is concerned*.

- The special rules on who is tax liable in Ch. 9 c of the GML can also comprise a purchaser who is a consumer, since sec. 5 in Ch. 9 c stipulates that it is *who* (Sw., ”*den som*”) causes the goods to cease to be placed in such a way that is stipulated in Ch. 9 c sec. 1 who becomes liable to pay the VAT that shall be taken out in that respect. However, it may according to the SKV be considered unusual that someone who is not taxable person applies the rules on exemption from taxation in customs warehouses and tax warehouses.[159]

- At signing of agreement should especially attention be given to clearly mention that the described matching procedure concerns two separate transactions, i.e. first is a transaction of the option made and thereafter is a transaction of goods made. The agreement between X and Y can be deemed regarding composite supplies (Sw., *sammansatta transaktioner*).

    - If a composite supply exists and is deemed concerning *two* considerations and thereby *two* supplies (transactions), like in the example above, it is possible with the matching procedure regarding Y’s transactions of the option and of the goods which are placed in the tax warehouse respectively, to accomplish that the taxable amount on X withdrawal of the goods becomes lower for VAT purposes.

        The recently stated provides however that the issuing, the sale of the option is considered exempt from taxation according to Ch. 3 sec. 9 first para and third para no. 1 and article 135(1)(f) of the VAT Directive: Compare above A) and what is stated below about article 9 of the Implementation Regulation and a need for precision in article 24(1) of the VAT Directive regarding private law options. By the way, for the question whether the same agreement causes one or more supplies can a certain comparison be made with the reasoning in *skatterättsnämnden* (SRN), the Swedish Board of Advance Tax Rulings, in the advance ruling RÅ 2005 ref. 11 (which was confirmed by the HFD). The question there concerned applicable VAT rate for golf lessons. The majority in the SRN judged a commitment to supply at a later occasion golf lessons as separate services: the commitment itself was considered constituting one supply and the supply of the golf lessons as another supply. The commitment itself was deemed not constituting a service within the field of sports comprised by the reduced VAT rate of 6 per cent in pursuance of Ch. 3 sec. 11 a first para and Ch. 7 sec. 1 third para no. 10 of the GML. Instead, it was considered constituting a service comprised by the general VAT rate of 25 per cent. The chairman of the SRN was dissentient, and considered that the consideration given at the commitment, i.e. the closing of the agreement, cannot be deemed constituting a supply of service, but that the tax liability is released first if the service is performed (Ch. 2 sec. 1 third para no. 1 of the GML) or advance payment is given for ordered goods or service (Ch. 1 sec. 3 second para of the GML).[160]

    - If a composite supply by Y would be deemed concerning *one* consideration and thereby *one* supply, can the transaction 1) be deemed having different character for VAT purposes with regard of the option and the goods respectively *or* 2) the consideration be deemed given partly as an advance payment, partly as the remaining part of the consideration founding transaction of goods according to Ch. 2 sec. 1 first para no. 1 of the GML, which I denote

[159] See SKV’s standpoint of 2014-02-14, dnr 131 770374-13/111.

[160] See Forssén 2016, p. 191 (section 12 213 153). See also pp. 101 and 102 in the article *Bitcoins och mervärdesskatt* (Bitcoins and value-added tax), by Björn Forssén, *Svensk Skattetidning* (Swedish Tax Journal) 2017 pp. 95-106 (Forssén 2017).

the advance payment case. I consider that a matching procedure by Y cannot be used in any of these two cases to lower the taxable amount for the goods at X's withdrawal of them from the tax warehouse. This provides that it is a matter of two supplies at different points of time by Y, firstly a tax-free transaction of the option and secondly a tax-free transaction of the goods when they are placed in the tax warehouse.

1) In the present case with *one* transaction at *one* occasion by Y shall the transaction in the first mentioned case be divided into two parts of different VAT character, according to the principle of division which is the main rule in such cases according to Ch. 7 sec. 7 of the GML: The part of the transaction that regards the tax-free financial service does not give a right to deduction for input tax in the activity, whereas the part of the transaction that regards the tax-free transaction of goods which are placed in the tax warehouse gives a right of reimbursement for input tax on acquisitions in the activity, which means that a so-called zero-rate taxation is made in that part.

2) In the other case – the advance payment case – may a principle of the principal apply, where the transaction of the goods might be deemed constituting the dominating part of Y's effort, why the supply is comprised by a *zero-rate taxation* for VAT purposes by Y when Y sells the goods to X during the time the goods are still placed in the tax warehouse. The following applies for Y concerning the advance payment.

> An advance payment causes tax liability for the person receiving it, if the transaction of the goods or service is taxable when the advance payment is received (see Ch. 1 sec. 3 second para second sen. of the GML). This means that the advance payment does not cause tax liability for Y, since the goods are placed in the tax warehouse and a transaction of the goods then would be exempt from taxation according to Ch. 9 c sec. 1 first para no. 4 compared with sec. 9 no. 2 of the GML – compare above B). Y sells the goods to X tax-free when the goods are placed in the tax warehouse. This does however not cause any limitation of Y's right to lift input tax on acquisitions in the activity, since transaction exempt from taxation according to Ch. 9 c sec. 1, as mentioned, gives a right of reimbursement for input tax in the activity according to Ch. 10 sec. 11 first para of the GML. In other words, the advance payment is, as mentioned above, included in a taxable amount of SEK 10,000 excluding VAT which cause a *zero-rate taxation* by Y when Y sells the goods to X during the time they are placed in the tax warehouse. Thus, in the advance payment case it is, unlike in case 1), not a matter of Y making a from taxation unqualified exempt transaction of service which would not give either right of deduction or right of reimbursement for input tax in the activity. By the way, it may be mentioned that if X was established in a country outside the EU that service would also be subject of *zero-rate taxation* (see Ch. 10 sec. 11 *second* para no. 1 of the GML, and Y would neither in case 1) have to regard rules on mixed activity or (in the case X and Y are closely connected parties) the revaluation rules. Under the same supposition – i.e. if X would be established outside the EU – applies furthermore the same for Y in the case above with *two* supplies.

Need for precision

Below, I reason especially about article 9 of the Implementation Regulation and article 24(1) of the VAT Directive and private law options – regarding a need of precision in article 24(1) of the directive.[161]

[161] See Forssén 2016, p. 267 (section 12 213 235).

Article 9 of the Implementation Regulation regards, as mentioned, inter alia the main rule concerning supply of services in the VAT Directive, i.e. article 24(1) of the directive. Article 9 of the Implementation Regulation stipulates, as also mentioned, that the sale of an option shall, in cases where such a sale is a transaction within the field of application of article 135(1)(f) of the VAT Directive, constitute such a supply of services regarded in article 24(1) of the directive. Thereby shall the supply of services be deemed as distinct from the underlying transactions to which the services relate.

I consider there is a need for a precision of what is comprised by the main rule in article 24(1) of the directive. It should be made by introducing a special item in article 24, not by article 9 of the Implementation Regulation. I consider that a concept like trading of securities also in the future should be developed by the CJEU's case-law, like what has already been done by the EU-case C-2/95 (SDC) meaning that trading of securities comprises documents which alter the legal and financial situation between the parties. Already by the EU-case C-235/00 (CSC) follows that the exemption in the directive's article 135(1)(f) for supply of securities regards transactions causing legal and economical alterations between the parties, whereby supply of a service which is only material, technical or administrative and which does not cause such alterations between the parties constitute taxable transactions. That especially for options stipulate in article 9 of the Implementation Regulation what already follows by the CJEU's case-law can in my opinion give the perception that it is unclear whether an option constitutes securities for VAT purposes. For example, the stock market is a second-hand market and there is no limitation of it concerning options to buy or sell shares. It should not exist any limitation of what constitutes securities in addition to what already follows by the last sentence in article 135(1)(f) of the VAT Directive (and of article 15(2) of the VAT Directive). However, it can in my opinion exist a need for precision of which sorts of options that are comprised by the exemption from taxation for financial services, whereby I may state the following:

- If such a precision shall be made of the exemption from taxation that I mention above, it should be made in the VAT Directive, instead of in the Implementation Regulation.

- Regardless in which legislation the precision is made, it should concern the fixing of a border between on the one hand securities in the form of shares and options etc. for which there is a market and on the other hand what I denote as private law options. Private law options often regard other property than shares and are given by companies to the employees or the shareholders. If such an option is personal and cannot be sold on, it would in my opinion probably be a matter of a service taxable of VAT. Before Sweden's EU-accession in 1995, I stated that there is no market for a private law option, and therefore the issuing of such an option does not constitute trading of securities.[162] Now there is no such precision of the fixing of a border against private law options, why I consider that issuing of those are comprised by the exemption from taxation according to article 135(1)(f) of the VAT Directive.

[162] See pp. 142 and 143 in *Mervärdesskatt En handbok (2 uppl.)*, Value-added tax A handbook (2 edit.), by Björn Forssén, Publica, Stockholm 1994.

Conclusions and proposals on research or law alterations

Conclusions

I have not found anything in the EU's VAT Directive or in the Implementation Regulation disqualifying a matching/set-off of a VAT free transaction of goods taking place during the time they are placed in a tax warehouse according to Ch. 9 c of the ML against a VAT free financial service according to Ch. 3 sec. 9 of the ML to be able to cause that the taxable amount and thereby the price of a taxable transaction of goods being lowered after they have been taken out from the tax warehouse. Thus, the legislator should in my opinion perhaps regard that the vendor and the purchaser thereby can circumvent the HFD's case-law regarding the general rules of the ML, which mean that the taxable amount of the goods may not be lowered by it being *matched* by a discount for *fast payment*. Abusive practice could however occur, if the goods are comprised by several rounds of the described matching procedure.

Proposals on research or law alterations

The question in this article should in my opinion be subject of research. It could, as mentioned, be a part of a larger research project where Ch. 9 c of the GML as a whole is treated, e.g. as an element of a project regarding international trade, income tax and indirect taxes. Since the special rules in Ch. 9 c concerning goods in certain warehouses not only regard transactions within the country, but also international trade of goods, the research that I am proposing could be carried out in connection with the ongoing OECD-project regarding income tax called BEPS (*base erosion and profit shifting*). A main question there is the transfer pricing between related parties, whereby the aim is to take measures against artificial deviations from prices set between unrelated parties. The pricing problems in this article concerning matching efforts for VAT purposes should with respect of research not be seen as an isolated VAT question, but should be put in relation to the so-called correction rule regarding erroneous pricing in Ch. 4 sec:s 19 and 20 *inkomstskattelagen (1999:1229)*, IL (the income tax act) and *lagen (2009:1289) om prissättningsbesked vid internationella transaktioner* (the act on advance pricing information at international transactions. Those income tax rules can be compared with the questions here about Ch. 9 c of the GML and of Ch. 7 sec:s 3 a-3 d of the GML regarding revaluation to market value of the pricing between closely connected parties, where the vendor or the purchaser has a so-called mixed activity and thereby a limited right of deduction for input tax. Note that the concept market value for application of the revaluation rules has a special definition in Ch. 1 sec. 9 of the GML, which can deviate from the determination of market value according to Ch. 61 sec. 2 of the IL.

For the context and possible research efforts or the legislator's measures, I may also mention that I in another context has suggested that an amendment should be made in Ch. 3 sec. 9 of the GML to suppress that taxable barter can be hidden *behind bitcoins* (Sw., "*bakom bitcoins*").[163] My proposal means that exemption from taxation for bank and financial services or trading of securities should not comprise exchange services regarding virtual currency like bitcoin, if not a *report duty* as financial activity is fulfilled and permit in that respect received from *Finansinspektionen* (the Swedish Financial Supervisory Authority). In consequence thereby should the concept virtual currency also be introduced in Ch. 3 sec. 23 no. 1 of the GML – beside notes and coins – and with the same determination of what is regarded as I suggest for Ch. 3 sec. 9. The concept *legal* means of payment (Sw., "'*lagligt*' *betalningsmedel*") in Ch. 3

[163] See Forssén 2016, p. 193 (section 12 213 153). See also pp. 104 and 105 in Forssén 2017.

sec. 23 no. 1 should thus continuously be reserved for notes and coins. By these measures the problem with it not being possible for VAT purposes to make a distinction between legal and illegal activity with bitcoins gets its solution. It provides however that the legislator brings up with the EU Commission, the European Parliament and the council that corresponding alterations will be made in article 135(1)(b)-(f) of the VAT Directive.

VI. Current official report does not solve the problem with VAT frauds[164]

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.[165]

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.[166]

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*).[167] The report also states that there is no classification of a crime in Swedish law where the crime is classified

[164] Article: *Aktuell utredning löser inte problemet med momsbedrägerier* (Current official report does not solve the problem with VAT frauds), by Björn Forssén, *Tidningen Balans fördjupning* (The Periodical Balans: Advanced articles) 2024 pp. 1–11, published 2024-05-06 on www.tidningenbalans.se. (Forssén 2024a).

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

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

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

as VAT fraud or tax fraud. Crimes denoted as VAT frauds are according to the report usually to be judged as tax fraud according to SBL sec. 2, but the criminality can also comprise other classifications of the crime.[168]

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.[169] 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*”).[170] 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.[171] 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.[172] The new rules are suggested to come into force on 1 July, 2024.[173]

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

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

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

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

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

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

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

comment what the measures against the frauds which are suggested by the report SOU 2023:49 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.[174] 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.[175]

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

[175] 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.[176]

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.[177]

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*).[178] I have commented NJA 2018 p. 704 in an article in *Svensk Skattetidning* during 2022.[179] 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.[180]

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[176] 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.

[177] 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.

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

[179] 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).

[180] 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.[181] 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.[182] 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.[183] SOU 2023:49 contains nothing about either my interpretation in Forssén 2022 or the interpretation in von Bahr 2022 of NJA 2018 p. 704.[184] 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.[185] 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

[181] 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).

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

[183] 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*.

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

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

of 22,500 Swedish crowns in the invoice from B to C. Therefore, I account for in short what I 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.[186] 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.[187] 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.[188] 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

[186] 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).

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

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

committing tax fraud due to the erroneous information, and B as issuer of the fictitious 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.[189]

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.[190]

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.[191] There, I criticize those measures. The

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

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

[191] See Björn Forssén, *Momsbedrägerier genom karusellhandel – erfarenheter i Sverige avseende mervärdesskatt, redovisning och straffrätt i förhållande till EU-rätten* (VAT fraud by carousel trading –

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

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experiences in Sweden regarding VAT, accounting and criminal law in relation to the EU law), *Tidskrift utgiven 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).

Member States. In Forssén 2022, I mention SOU 2020:13, and that the above-mentioned case 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.[192] 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.[193] 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.[194] The criminal law is, however, another example of a field where in principle an exclusive national competence prevails.[195] 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*".[196] In SOU 2023:49 there is no reasoning concerning the principle of conferred competence – which is also named the principle of legality.[197]

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[192] See Forssén 2022, p. 129.

[193] 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.

[194] 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.

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

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

[197] 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,[198] 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.[199] 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.[200] 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’

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

[199] 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.

[200] 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.[201] 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.[202] 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.[203] 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).[204] 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

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

[202] 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.

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

[204] 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.

ANNEX 1 – The prices of foodstuffs cause law alterations and planning regarding indirect taxes[205]

On the Swedish Television's (Sw., *Sveriges Televisions*, abbreviated SVT) **Agenda** 2023-03-12 Camilla Kvartoft was leading a debate between the minister of finance, Elisabeth Svantesson, and the left-wing leader Nooshi Dadgostar, where the theme was pro and con introduction of a price ceiling for foodstuffs. Nooshi Dadgostar stated that the minister of finance should take up the question of a price ceiling for staple commodities.: it should be possible to summon representatives for the ICA-group, Coop and Axfood, which together stand for 90 per cent of the sales of foodstuffs in Sweden, to the Department of Finance for such talks. The minister of finance was against an introduction of a price ceiling, but flagged for certain measures, to come to terms with the rushing prices of foodstuffs, to be awaited within short in the spring budget.

I suggest that an overview of the situation will be made partly by Sweden bringing up on the EU level to change the rules on the taxable amount for VAT, partly by the foodstuffs industry using the possibility of planning taxes regarding the VAT concerning goods which come from abroad and are placed in tax warehouses.

In pursuance of GML Ch. 7 sec. 2 first para second sen. *mervärdesskattelagen (1994:200)*, the VAT act, abbreviated GML,[206] which is nearest corresponded by article 73 of the EU's VAT Directive (2006/112/EC), shall taxes and fees except VAT be included in the taxable amount for VAT. This means that when excise duties are included in the consumer prices, like with fuel, VAT is levied on a price including such a tax. Thus, it emerges a "tax on tax"-effect. The minister of finance will probably not keep up producing a suggestion to alter this in the spring budget, but in the existing suggestion of a new VAT act according to the government's proposition 2022/23:46 should the taxable amount for VAT become clean of excise duties. It is a matter that the minister of finance should bring up with the prime minister to take up on the EU level as soon as possible, so that a mitigation can be achieved for the consumers already in connection with the new VAT act, which is proposed to come into force on 1 July, 2023.

Since it, like the left-wing leader pointed out, exists in principle an oligopoly market within the foodstuffs sector, a discussion should be started between the minister of finance, the SKV and the three big organizations of the industry about a for the prices of foodstuffs mitigating planning of taxes. In that respect, I refer to Forssén 2018, "*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 fördjupning* (The Periodical Balans Annex with advanced articles) 1/2018 pp. 3-10. (Forssén 2018).

In that article I mention whether it is possible to lower within the frames of the law the taxable amount and thereby the price of goods, by a from taxation exempted transaction of

[205] Article: "*Livsmedelspriserna föranleder lagändringar och planering avseende indirekta skatter*" (The prices of foodstuffs cause law alterations and planning regarding indirect taxes), by Björn Forssén, *Dagens Juridik* (*Debatt*), Today's Law (Debate), published 2023-03-15, at 11.51, on www.dagensjuridik.se. (Forssén 2023d).

[206] The GML was replaced on 1 July, 2023 by *mervärdesskattelagen (2023:200)*, the VAT act, abbreviated ML.

goods according to the rules of VAT free transactions of goods in certain warehouses being matched against a from taxation exempted financial service, before the goods are taken out frpm such a warehouse. The question is whether this is possible without a conflict rising with the rules on the determination of the taxable amount for VAT.

According to special rules in GML Ch. 9 c on who is tax liable for goods in certain warehouses, which are nearest corresponded by the articles 154-163 of the VAT Directive, are transactions of certain goods exempted from taxation, if they are sold during the time they are placed in so-called tax warehouses, in an installation for temporary storage, a customs warehouse or a free zone within the country (Sweden). The supposition for tax exemption is that the transaction of the goods is not aiming to a final usage or consumption, that is that the transaction is made to someone who is trading with goods and not to a consumer or someone who shall use it in his or her activity.

From the taxable amount for VAT is real interest exempted. Since 2003, this is not expressly stipulated in the GML, but it is considered following by article 78 second para of the VAT Directive. Thus, it is only real interest that shall not be included in the taxable amount, that is what the vendor of taxable goods or a service charge in interest to grant the customer a postponement with the payment, or it shall be a matter of interest on a debt that the purchaser has to the vendor, that is on a customer credit which is normally granted. In pursuance of the case-law of the Supreme Administrative Court (*Högsta förvaltningsdomstolen*, abbreviated HFD) must, however, not a hidden interest compensation lower the taxable amount, by a from taxation exempted financial service matching the otherwise calculated price of the taxable goods or service, so that the taxable amount is partly set off.

The question in my mentioned article is whether the special rules on goods in certain warehouses can be applied so that the taxable amount and thereby the price of goods that have been placed in such warehouses according to GML Ch. 9 c can be lowered due to measures which have taken place during that time, when the goods are sold after that they have been taken out from the warehouse and comprised by the general taxation of transactions of goods and services according to GML Ch. 3 sec. 1 first para. It would not be possible according to the general VAT rules to set off the taxable amount by selling a VAT free option on the goods during the time they are placed in the warehouse in question, but I deem that it is possible according to the special rules on who is tax liable in GML Ch. 9 c.

If it is possible with such a matching that I mention in the article, the three big players within the foodstuffs industry can in consultation with the Department of Finance and the SKV go through a planning to lower the price on 27 different goods and sorts of goods which are placed in tax warehouses. Those are enumerated in 27 items in GML Ch. 9 c sec. 9, and I mention some of them here: corn and seed for sowing (including soya beans), oil plants and oily fruits, certain nuts and olives, coffee (not roasted), tea, cocoa beans, raw sugar, wool, chemicals in bulk, mineral oils, natural gas, biogas, propane, butane, potatoes, vegetable oils and fat and their fractions (regardless of whether they are refined or not, however not chemically modified, wood, ethyl alcohol, E85, ED95, fatty acid methyl esters, pine oil and additions in motor fuel.

In the mentioned article, I conclude that there is nothing in the VAT Directive that would disqualify a lowering of the taxable amount and thereby of the price on goods based on a matching/set-off of tax-free transaction of the goods during the time they have been placed in

a certain warehouse against a tax-free financial service. Therefore, I state that the legislator perhaps should regard that the vendor and the purchaser thereby can circumvent the case-law regarding the general rules in the GML which mean that the taxable amount for the goods must not be lowered by for example a matching of a discount fr fast payment. Moreover, I state in the article that abusive practice neither should be able to come up – at least not if the same goods only are comprised by one round of the described matching procedure.

On the theme of abusive practice I may mention that I in Forssén 2022, ”*Momsbedrägerier av så kallad karuselltyp och NJA 2018 s. 704*” (VAT frauds of so-called carrousel type and NJA 2018 p. 704), reason based on that case in the Supreme Court (Sw., *Högsta domstolen*, abbreviated HD) on frauds regarding the accounting of VAT, when it is a matter of cases of the mentioned type. In the first place, I am comparing the senior judge of appeal’s perception of the question of coarse tax fraud with the decision by the HD, when it is a matter of abusive practice in relation to criminal law principle of legality. Stig von Bahr, formerly judge in the HFD and the Court of Justice of the EU (CJEU), has written an article in Swedish Tax Journal 2022 (pp. 498-504), ”*Mer om missbruk och momsbedrägeri*” (More about abuse and VAT frauds), von Bahr 2022, as a complement to Forssén 2022, and stated inter alia 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*. I gave my viewpoints to Swedish Tax Journal on the manuscript to Stig von Bahr’s article, and emphasized therein that I in my article states that it *is not clear that abusive practice in itself means the existence of criminal law responsibility*. Since I am not given the same space as others in Swedish Tax Journal, I asked the editor to send to Stig von Bahr my noticing of what the nuance of my expression *in itself* (Sw., ”*i sig*”) means. This was also done, but the answer I received from the editor was that *he chose not to adjust his article, which is his decision as author* (Sw., ”*Han valde att inte justera sin artikel, vilket är hans beslut som författare*”). Since the planning that I am bringing up in *Balans fördjupning* in 2018 would be possible to analyse in connection with questions on carrousel trading, it is of interest that Stig von Bahr so categorically is dismissing my warning for abusive practice on the theme of criminal law sanctions. I disagree with him, but consider that he should be invoked by the defence lawyers as expert witness in ongoing cases on carrousel trading or in connection with petitions for a new trial regarding verdicts of conviction in such cases and be asked for his opinion by the Department of Finance, the SKV and the three foodstuffs enterprises in Sweden in a deepened dialogue (consultation) concerning the possibilities of such a planning that I am mentioning in *Balans fördjupning* in 2018.

ANNEX 2 – Falsely charged VAT causes liability of payment – not tax fraud – the 'carrousel' goes on[207]

In two previous debate articles in *Dagens Juridik* (Today's Law), "*Livsmedelspriserna föranleder lagändringar och planering avseende indirekta skatter*" (The prices of foodstuffs cause law alterations and planning regarding indirect taxes), 2023-03-15, and "*Näringspenningtvätt i momskarusell*" (Commercial money laundering in VAT carrousel), 2023-10-02,[208] I have referred to my article in *Svensk Skattetidning* (Swedish Tax Journal) no. 2/2022 (pp. 118-130), "*Momsbedrägerier av så kallad karuselltyp och NJA 2018 s. 704*" (VAT frauds of so-called carrousel type and NJA 2018 p. 704),[209] where I reason set out from that case in *Högsta domstolen* (HD), the Supreme Court, when it is a matter of whether tax fraud can exist in cases of abusive practice in "VAT carrousels". Due to a verdict of *Svea hovrätt*, the Svea court of appeal, of 2023-11-07 (case no. B 15272-22), I follow up in this article the tax fraud question with the question whether tax fraud can be deemed existing regarding an amount that has been falsely denoted as value-added tax (VAT) in an invoice, i.e. for an amount that does not constitute VAT according to the general rules in the VAT act, but which still causes liability of payment to *Skatteverket* (SKV), the tax authority, for the issuer of the invoice (as long as a credit note is not issued) and which I denote *oäkta moms*, i.e. false VAT.

By the new *mervärdesskattelagen (2023:200)*, the VAT act, which came into force on 1 July, 2023, liability of payment concerns both VAT according to the general rules (*äkta moms* – real VAT) and false VAT, which means that the concepts *skattskyldig* (tax liable) and *skattskyldighet* (tax liability) have been abolished from the Swedish VAT legislation, but since the aims mentioned here regard the time when *mervärdesskattelagen (1994:200)*, GML, the VAT act, applied, I use tax liable and tax liability for what I name real VAT and *betalningsskyldig* (liable to pay) and *betalningsskyldighet* (liability of payment) respectively for false VAT.

In the Svea Court of appeal's verdict of 2023-11-07, case no. B 15272-22, confirmed the verdict of Solna tingsrätt (the district court of Solna) of 2022-12-01 (case no. B 10428-21), where all of the defendants were sentenced for coarse tax fraud (*grovt skattebrott*) and also for coarse book-keeping crime (*grovt bokföringsbrott*) and/or for commercial money laundering, coarse crime (*näringspenningtvätt*, *grovt brott*). All convicted were imposed with trading prohibition (*näringsförbud*) too, and furthermore were three of the limited companies involved imposed a corporate fine (*företagsbot*). Since this article is to be seen as a follow-up to the articles where I brought up NJA 2018 p. 704, which only concerned coarse tax fraud (or *vårdslös skatteuppgift* – negligent tax return), and the Svea Court of appeal referred in the verdict of 2023-11-07 to NJA 2018 p. 704, I focus for the sake of space on the Svea Court of

[207] Article: "*Felaktigt debiterad moms föranleder betalningsskyldighet – inte skattebrott – 'karusellen' går vidare*" (Falsely charged VAT causes liability of payment – not tax fraud – the 'carrousel' goes on), by Björn Forssén, *Dagens Juridik* (*Debatt*), Today's Law (Debate), published 2023-11-27, at 11.44, on www.dagensjuridik.se.

[208] See *ANNEX 1* and Chapter III.

[209] See Chapter I.

appeal's judgment of the tax fraud question, i.e. of sec. 2 of *skattebrottslagen (1971:69)*, SBL, the Tax Fraud Act.

Thus, I set the focus in this article on the Svea Court of appeal allowing in the verdict of 2023-11-07 the prosecutor to adjust the deed descriptions, by the prosecutor stating as a clarification, that it for tax fraud purposes is of no importance if the transactions regarded by the prosecutions constitute taxable transactions for VAT purposes or if it is a matter of rigged legal actions, since a risk for tax avoidance or evasion in both cases. That led to the prosecutor making an addition in the Svea Court of appeal to the deed description meaning that what had been entered as VAT in the present invoices has *at least* ("*i vart fall*") constituted falsely charged VAT according to Ch. 1 sec. 1 third para of the GML, i.e. what I denote false VAT, and which is determined in Ch. 1 sec. 1 first para nos. 1–3 of the GML (see Ch. 1 sec. 8 first para of the GML). In other items of prosecution, the prosecutor stated that when received invoices have been used to account for input tax, it has meant submitting of erroneous information, since there is no right of deduction for falsely charged VAT, i.e. right of deduction does not occur for input tax when it is a matter of an amount in an invoice received that constitutes false VAT.

The prosecutor's attitude concerning the deduction question is complying with the main rule for right of deduction regarding input tax on acquisitions and imports in Ch. 8 sec. 3 first para of the GML and the reciprocity principle in article 167 of the EU's VAT Directive (2006/112/EC). With input tax is meant according to Ch. 1 sec. 8 second para of the GML such tax at acquisitions or imports regarded in Ch. 8 sec. 2 of the GML. Thereby follows that for the purchaser input tax consists of the amount that the counterpart shall account for as output tax to the State, if he is tax liable for his sale to the purchaser. This is complying with article 167 of the VAT Directive meaning that the right of deduction shall arise at the time the deductible tax becomes chargeable. This means that the counterpart's effort must lead to liability for him to account for output tax – a real VAT – to the State, for the purchaser of the goods or the service in question having a right of deduction for input tax according to Ch. 8 sec. 3 first para of the GML and being able to exercise that right according to Ch. 8 sec. 5 of the GML. If the receiver of an invoice accounts a false VAT as input tax in his VAT return to the SKV, he has submitted an erroneous information therein and can be sentenced for tax fraud, provided that also the two other prerequisites for such a crime are fulfilled according to sec. 2 of the SBL, i.e. that the accounting of the information has been made with intent and causing a risk of input tax being wrongly counted in.

However, according to my opinion can he who has erroneously accounted for an amount as value-added tax (VAT) not be deemed guilty of tax fraud according to sec. 2 of the SBL. The measure has namely only as a consequence that issuer of the invoice becomes liable of payment according to Ch. 1 sec. 2 e of the GML compared with the above-mentioned special rule on liability of payment in Ch. 1 sec. 1 third para of the GML. This follows by the preparatory works to the implementation of article 203 of the VAT Directive that was made into the mentioned rules of the GML on 1 January, 2008, by SFS 2007:1376. By those preparatory works follow namely on p. 90 in prop. 2007/08:25 (*Förlängd redovisningsperiod och vissa andra mervärdesskattefrågor* – Extended accounting period and certain other VAT issues), that the only consequence for the issuer of an invoice with a falsely charged VAT is liability of payment, which follows by the legislator expressing: *To further emphasize that a falsely charged VAT shall not lead to anything but a liability of payment for the person falsely charging the tax, it is however suggested that the liability of payment for this erroneous*

amount will be stipulated in a separate section, Ch. 1 sec. 2 e of the GML. (I abbreviate, as mentioned, the act of 1994 GML).

In *Tidningen Balans* (The Periodical Balans), I have developed in an article, *Skenfaktura med momsdebitering – konsekvenser för skatt och redovisning* (Fictitious invoice with charging of VAT – consequences for tax and accounting),[210] which was published on 2023-06-13 under *Fördjupning* (the Annex with advanced articles) on www.tidningenbalans.se, what consequences may occur for issuers and receivers of a fictitious invoice with charging of VAT, i.e. an invoice containing an amount that I denote false VAT. Also there, I state that the receiver can be comprised by tax fraud according to sec. 2 of the SBL, but not the issuer. The issuer shall, according to Ch. 26 sec. 7 of *skatteförfarandelagen (2011:1244)*, SFL, the Taxation Procedure Act, account for the amount in a special tax return to the SKV – not as regarding real VAT in a VAT return (see Ch. 26 sec. 21 of the SFL). That false VAT is not VAT according to the GML means that the issuer of the invoice has not committed a crime regarding *skatt* (tax), i.e. tax fraud according to sec. 2 of the SBL. For that it would take a clarification in the SBL meaning that with *skatt* (tax) is also meant an amount falsely denoted as VAT in an invoice. The prosecutor is making an invalid reasoning when doing the mentioned addition to the deed description. The special rule on liability of payment is not subsidiary to the main rule on tax liability in Ch. 1 sec. 1 first para no. 1 of the GML, why the Svea Court of appeal should have disqualified that the invoices *at least* meant falsely charged VAT according to Ch. 1 sec. 1 third para of the GML. Rigged legal actions is an example of application of the special rule (see prop. 2007/08:25 p. 91), and whether such or real business transactions have occurred constitute a rule competition between the special rule and the main rule. The prosecutor cannot guard with: if not the one applies, *at least* the other do.

If the Svea Court of appeal's verdict of 2023-11-07 is appealed, I deem that the HD should give a leave to appeal, at least concerning the items of prosecution which regard issuers of invoices with of the prosecutor asserted falsely charged VAT or remit the case to re-trial.[211]

[210] See Chapter II.

[211] The verdict of the Svea Court of appeal was appealed. The HD's decision of 2024-01-17: no leave to appeal (case no. B 8498-23).

ANNEX 3 – The right resource on the right place decreases the VAT frauds[212]

I follow up my articles in *Dagens Juridik* (Today's Law, abbreviated DJ) 2019-02-19 and 2019-03-11, where I mention the relationship between the defence lawyer's role and the Economic Crime Authority's (Sw., *Ekobrottsmyndigheten*, abbreviated EBM) in cases on tax fraud. This time, I bring up more about the relationship between the tax authority (Sw., *Skatteverket*, abbreviated SKV), when it is a matter of resources to suppress criminality regarding VAT frauds. This is due to an article in DJ 2021-03-03, where information is presented about that the EBM perhaps must lay off staff, which would be counterproductive for taking legal proceedings against VAT frauds.

I do not go into details on the law in cases about VAT frauds, but emphasize partly that the liquid cheating against the State in the field of VAT cannot be taken care of effectively unless the State uses resources for control regarding the registration t VAT itself, partly that the EU law's role in cases on tax fraud about VAT must be handled with regard of the question on conferring of competence between the Swedish parliament (Sw., *Sveriges riksdag*) and the EU's institutions.

The reform The new Skatteverket (The new Tax authority) was introduced in 2004. What was lacking was, in my opinion, that nothing was said about VAT registration. The idea was that one single authority concerning the whole nation, the SKV, would make it possible for the tax auditors to carry out investigations without any respect of it previously having existed independent tax authorities in the various regions. I have in various contexts emphasized the precarious with only putting efforts into the tax auditors being able to move freely across the borders of the regions, whereas the registration control is not prioritized. He VAT investigations within the tax authority is since the beginning of the 1980's ADP-based. This means that the enterprises and the SKV ever since then are communicating for liquid purposes only after the supposed entrepreneur has been VAT registered by the SKV.

Unless there is a gatekeeper at the registration, the VAT register can become containing persons who do not belong there a all. They shall in their words not be reimbursed an excess input tax (Sw., *överskjutande ingående moms*) by after the registration giving a VAT return to the SKV. If there is no gatekeeper, the investigation problems will quickly grow from little brooks to big rivers. Then it will not be helpful with super auditors moving freely between the regions with their investigation of submitted VAT returns. The gatekeeper does not even have to be an executive official. I have during my years within the tax authority experienced the value of competent assistants. It was often they who brought the investigation objects to executive officials. If a newly registered had submitted a VAT return showing a high excess input tax to become from the tax account, it could be sufficient with somebody from the SKV going to a declared address to control whether it at all exists an office or something else there that could indicate if any economic activity is carried out there at all. I have during my years within the tax authority investigated persons who claimed they were carrying out very resolute activities in Stockholm, when they actually were sailing about in the Pacific Ocean.

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

Nowadays it has also been a matter of frauds in fields like trading with emission rights, but modern phenomena do not alter that the basic element to achieve an effective investigation activity is that the State concentrates on the gatekeeper. No VAT registration and no possibility to unfairly appropriate money from the State via the tax account. However, the State's reaction has been, in a number of fields like trading with investment gold and trading with emission rights, to introduce so-called reverse charge in field after field. This means that the VAT is accounted for as a taxation on acquisition link by link by the entrepreneurs in the field, and it is first in relationship to a consumer that the VAT is charged.

Reverse charge means taken by itself that the flow of liquid between enterprise ans state is replaced with accounting of the VAT as a taxation acquisition in the links before the consumer stage, but it also means that in field after field is the regime of exemption introduced instead of the general VAT rules. This development means that the State is losing pace when it is a matter of collection of the VAT totally in an ennobling chain of enterprises producing goods or a service. Over time do most enterprises normally account more output tax than input tax, and then the State loses the VAT's character of a form of financing of the welfare made in real time. I remind of the reunion of Germany being financed in the first place by raising the general VAT rate there.

I may also mention that the State will have problems the day the interest is increasing, by the State not receiving the VAT link by link from the enterprises which are submitting positive VAT returns, if too many fields are comprised by reverse charge.

I may with this article emphasize the precarious with taking measures against shortcomings of investigation purposes by the State with the State in the first place introducing exemptions from the general VAT rules in the form of reverse charge field after field.

My perception and recommendation are that the State at last concentrates properly on the gatekeeper in the VAT system, that is the registration control. I am mentioning this also in my theses as a question that the EU Commission emphasized by green and white papers already over a decade ago. The ambition was to give up an attitude which meant that as many as possible were allowed into the VAT system to make the collection effective, whereby the registration control would have a key role. Where did it go?

The solution is not for the EBM to lay off staff, but they shall not be unnecessary burdened with investigations which should have stayed on the stage of a brook at the SKV, instead of becoming a river to stop with investigation resources.

If my suggestion is carried out, it leads also to the VAT rules not being unnecessary complicated, by the existence of too many sectors within *the business community* (Sw., *näringslivet*) where exemptions from the general VAT rules exist. The defence lawyer in a tax fraud case has no special resources to use, for analysing a complicated VAT investigation. A question that should be brought up properly is in that perspective that the competence in the field of VAT has been conferred to the EU's institutions by the Swedish parliament, when it is a matter of the contents of the material VAT rules, whereas the competence remains in principle bý the Swedish parliament when it is a matter of the administrative law and the criminal law. The VAT is also regularized by the EU's VAT Directive, where formal rules are concerned, but the administrative law is national law as a main rule and the criminal law also constitutes national law on the whole.

Questions which I consider are set aside in tax fraud cases on VAT in Sweden are therefore: which legislations are the individual in Sweden obliged to know about? Does this apply to the Swedish VAT act and the Taxation Procedure Act as well as the EU's VAT Directive? Is the person in question also obliged to learn about foreign national legislations on VAT and the taxation procedure? Here is the research in the university world a part of the problems, by the procedure rules being set aside in that respect – sometimes is the perspective of the applier missing on the whole in the research within tax law in Sweden.

ANNEX 4 – Excerpt from section 5.2 in Part III of Forssén 2024b

5.2 About that the right of deduction for input tax can be affected by an unclear determination of the tax subject for VAT purposes and a gap in the legislation on customs

[…]

For future research concerning indirect taxes, I may mention that an interpretation problem regarding the determination of the tax subject in *mervärdesskattelagen (1994:200)*, GML,[213] and a gap in *tullagen (2016:253)*, TuL, the Customs Act, can cause that the scope of the right of deduction for input tax becomes far too vast. I treated the interpretation problem thoroughly in an article 2018.[214] I state there that the gap in the TuL can open for an undesired arrangement meaning that for example holding companies, non-profit associations and registered religious communities can get deduction for import-VAT, despite imported goods will not be sold in their turn and leading to liability to account for output tax but used purely for consumption. If the assumed gap in the TuL can be used in that way it is due to the GML since the mentioned reform on 1 July, 2013, by SFS 2013:368, has come to contain two determinations of the concept taxable person (Sw., *beskattningsbar person*), namely the general in Ch. 4 sec. 1 and a special in Ch. 5 sec. 4, which is used in connection with the application of the rules in Ch. 5 of the GML determining if a supply of a service is made within or outside the country.[215] […] Here I mention the interpretation problem in question as an example of the importance to observe that the determination of the tax subject regarding the VAT together with a gap in the TuL may cause undesired effects of for example the mentioned kind. I summarize the interpretation problem in question according to the following.

The TuL replaced on 1 May, 2016 *tullagen (2000:1281)*, GTuL. On 1 January, 2015 *Skatteverket* (the tax authority), SKV, took over the value-added taxation of certain kinds of import from the Swedish Customs (Sw., *Tullverket*). According to SFS 2014:50 and SFS 2014:51 was on 1 January, 2015 the scheme introduced meaning that *import-VAT* (Sw., *importmoms*) is taken out by the SKV in accordance with *skatteförfarandelagen (2011:1244)*, the Taxation Procedure Act, SFL, of those VAT-registered in Sweden, whereas the Customs

[213] Note! The GML was replaced on 1 July, 2023 by *mervärdesskattelagen (2023:200)*, ML, which, however, did not lead to any alteration of the present problem. By the way, Ch. 5 sec. 4 of the GML is corresponded by Ch. 6 sec. 32 of the ML and Ch. 4 sec. 1 of the GML is corresponded by Ch. 4 sec. 2 of the ML.

[214] See Björn Forssén, *Lucka i tullagen öppnar för ej avsett momsavdrag på grund av två olika bestämningar av vem som är beskattningsbar person* (Gap in the customs act opening for unintended VAT deduction due to two different determinations of who is a taxable person). *Tidningen Balans fördjupningsbilaga* (The Periodical Balans Annex with advanced articles) 3/2018, pp. 17–19.

[215] The rule in Ch. 5 sec. 4 of the GML was introduced on 1 January, 2010, by SFS 2009:1333 (and the regulation SFS 2009:1034 on the coming into force of SFS 2009:1333), and then was the concept trader (Sw., *näringsidkare*) used – see also prop. 2009/10:15 (*Nya mervärdesskatteregler om omsättningsland för tjänster, återbetalning till utländska företagare och periodisk sammanställning*), New VAT rules on country of the placement of supply of services, refund to foreign entrepreneurs and periodical statements, p. 19. At the reform on 1 July, 2013, by SFS 2013:368, *näringsidkare* was replaced with *beskattningsbar person* (taxable person) in Ch. 5 sec. 4 of the GML, whereby the motive only was to thereby achieve an increased formal correspondence with the VAT Directive – see prop. 2012/13:124 (*Begreppet beskattningsbar person – en teknisk anpassning av mervärdesskattelagen*), The concept taxable person – a technical adjustment of the VAT act, pp. 1 and 25.

still is the taxation authority for imports in other cases. In an e-mail of 12 December, 2014, I pointed out to the Swedish Treasury the existence of a risk for an undesired arrangement, if not Ch. 5 sec. 11 a first para no. 1 and no. 2 of the GTuL were changed so that no. 2 referred to *beskattningsbar person* (taxable person) according to the GML *except in the special meaning the concept is given in Ch. 5 sec. 4 of the GML* (Sw., *utom i den särskilda betydelse begreppet ges i 5 kap. 4 § GML*). In Ch. 5 sec. 11 a first para no. 2 of the GTuL, its wording according to SFS 2014:51, was stated as one of the conditions for *import-VAT* to be taken out according to the SFL, that the person filing a tax return *acts in the capacity of taxable person according to the GML at the import* (Sw., ”*agerar i egenskap av beskattningsbar person enligt mervärdesskattelagen vid importen eller införseln*”). The word *vid* (at) is conducive to the interpretation problem in question, and the expression *i samband med* (in relation to) should have replaced it, but the problem with two determinations of the concept *beskattningsbar person* (taxable person) would have disappeared by a clarification that no. 2 with the reference to the concept *beskattningsbar person* did not regard its determination in Ch. 5 sec. 4 of the GML. The lack in Ch. 5 sec. 11 a first para no. 2 of the GTuL of the expression *utom i den särskilda betydelse begreppet ges i 5 kap. 4 § GML* (except in the special meaning the concept is given in Ch. 5 sec. 4 of the GML) meant in my opinion there was a gap in the act, that is a gap in the GTuL. The gap could in my opinion give an unjustified right of deduction for input tax on imports according to the main rule on the right of deduction in Ch. 8 sec. 3 first para of the GML. It existed in my opinion an obvious risk for the following undesired arrangement:

- For example, a non-profit association or a holding company acquiring a service from abroad can already because of that be a taxable person according to Ch. 5 sec. 4 of the GML. If the non-profit association or the holding company combines that with import of goods for pure consumption, can right of deduction emerge according to Ch. 8 sec. 3 first para of the GML for input tax corresponding to the import-VAT by those subjects, regardless of whether they in their activities supply taxable goods or services.

- Thus, the interpretation problem concerns the tax subject question and that there were two relevant determinations of the concept *beskattningsbar person* (taxable person) in the GML to which the rule in question in the GTuL could be deemed referring, namely Ch. 4 sec 1 and Ch. 5 sec. 4. In Ch. 5 sec. 4 of the GML is by *beskattningsbar person* meant not only persons carrying out economic activity etc., but also for example holding companies and non-profit associations and registered religious communities that do not have an economic activity according to Ch. 4 sec. 1 of the GML.

- Thus, in the e-mail to the Treasury, I pointed out the presumed gap in the GTuL, and the Treasury answered on 16 December, 2014 (Dnr. Fi2014/4452). What is in my opinion precarious is that the Treasury referred to await the case-law rather than making my suggested alterations of the rule in the GTuL to reduce the risk of undesired arrangements regarding VAT due to the presumed gap in the act. The legislator had the opportunity to easily rectify the gap, when the TuL replaced the GTuL on 1 May, 2016, which however has not happened yet, but the word *vid* (at) is also used in Ch. 2 sec. 2 first para of the TuL, which corresponds to the former Ch. 5 sec. 11 a of the GTuL.

Thus, I may suggest that the interpretation problem in question will be brought up in the research concerning indirect taxes in Sweden, so that the legislator gets another stimulus to

rectify the legislation gap that I consider exists, rather than waiting for an undesired arrangement to be tried in case-law. […]

ANNEX 5 – ’VAT carrousels’ and the alteration of the special intermediation rule by the new VAT act[216]

In *mervärdesskattelagen (1994:200)*, the VAT act, that came into force on 1 July, 1994, the special rule on intermediation in one’s own name (Sw., *i eget namn*) of a principal’s goods or services was introduced by Ch. 6 sec. 7. It caused many tax cases and prosecutions within the business world. The problem was in short that an intermediary was deemed by the tax authority (Sw., *Skatteverket*, abbreviated SKV) doing not only the intermediation service, but also the same transaction of goods or services that the principal made due to the effort made by the intermediary, regardless of whether a commission agreement existed between them. The basis for classing the intermediary in the same category as a salesperson regarding the goods or the services to the consumer was to be found in the preparatory works to *lag (1968:430) om mervärdeskatt* (i.e. the VAT act of 1968) and originated in the third para first sen. of the instructions to sec. 12 of *Kungl. Maj:ts förordning (1959:507) om allmän varuskatt* (i.e. the 1959 general tax on goods). I have made comments on 6:7 in various contexts. For example, references to the preparatory works in question are to be found on page 41 in Forssén 2021b.

By the new *mervärdesskattelagen (2023:200)*, the VAT act, was the act of 1994 replaced on 1 July, 2023, whereby the special intermediation rule was altered, so that it nowadays consists of two rules, sec. 3 second para no. 3 and sec. 27 respectively of Ch. 5 of the new act, which in principle correspond with article 14(2)(c) and article 28 respectively of the EU’s VAT Directive (2006/112/EC). Thus, Ch. 5 sec. 3 second para no. 3 reads (in my translation): *With supply of goods is also meant transfer of goods in accordance with a commission agreement on purchase or sale*. Ch. 5 sec. 27 reads (in my translation): *If a taxable person in his own name but on behalf of someone else participates in a supply of services he shall be deemed having acquired and supplied those services*.

In the official report leading to the new VAT act, SOU 2020:31 (*En ny mervärdesskattelag*), A new VAT act – which came up in June 2020, it was suggested that Ch. 6 sec. 7 would have an exactly corresponding rule in the new VAT act. In the proposal referred to the Council on Legislation for consideration of 17 February, 2022 the legislator refrained from that solution, and emphasized instead *benefits of the directive’s rules in articles 14(2)(c) and 28 about transfer of goods and participation in the supply of services respectively giving clearer correspondences in the new VAT act*. The legislator deemed that to strengthen the adjustment of the act to the structure and wording of the directive, and with respect of this a correspondence to article 14(2)(c) was suggested in Ch. 5 sec. 3 second para no. 3 of the VAT act, whereby it was stated by the wording connecting closer to the directive rule that the rule should *comprise transfer of goods according to a commission agreement on acquisition and* sale and the legislator also emphasized that *regarding services it should also exist a clearer correspondence to article 28*. See the pages 230 and 231 of the proposal referred by the Government to the Council on Legislation on 17 February, 2022 (see www.regeringen.se).

[216] Article: ”*’Momskaruseller’ och ändringen av den särskilda förmedlingsregeln genom nya mervärdesskattelagen*” (’VAT carrousels’ and the alteration of the special intermediation rule by the new VAT act), by Björn Forssén, *Dagens Juridik* (*Debatt*), Today’s Law (Debate), published 2024-05-16, at 11.56, on www.dagensjuridik.se.

I consider that the alteration consisting of the special intermediation rule 6:7 being adjusted to the VAT Directive breaks the perception existing from time to time by the SKV that an intermediary can be deemed tax liable (nowadays liable of payment) of VAT, only because he has received payment from customer and issued invoice in his own name. For the intermediary to be deemed equal to a salesperson and considered liable of payment of VAT regarding the principal's goods (like him), it is nowadays required that a commission agreement exists between them. I consider this following directly by Ch. 5 sec. 3 second para no. 3 of the VAT act and emphasized by the legislator in the proposal referred to the Council on Legislation. Thereby, it is nowadays lacking support for the SKV's often asserted opposite perception, which was based on that it in the preparatory works to the act of 1968 was expressed that "*i eget namn*", i.e. in one's own name, shall mean *agents and comparable representatives* (see prop. 1968:100 p. 121). Any suchlike rubber band does not exist anymore, and since Ch. 6 sec. 7 has been replaced by rules in the VAT Directive for both goods and service this applies also to services.

One of the contexts where I have seen that the SKV and prosecutors have invoked the special intermediation rule 6:7 is in investigations and cases regarding so-called "VAT carrousels", and I am limiting myself to that context in this article.

In the context mentioned, I come back to the lecture that I held at *Svensk Juriststämma* (Swedish Law Meeting) on 14 November, 2001, *Moms och omsättningsbegreppet. Karusellen hos skatte- och ekobrottsmyndigheten (SKM och EBM)*, VAT and the transaction concept. The carrousel by the tax and economic crime authorities (*Stockholmsmässan i Älvsjö* – arranger VJS) – Forssén 2001a. The lecture memo is available on my website (https://www.forssen.com/forskning/f10/f13/). On page 7 of the memo that the participants at my lecture received, I am stating that Ch. 6 sec. 7 of the then ML was a question in connection with the "VAT carrousels" (whereby I inter alia referred to the above-mentioned prop. 1968:100 p. 121).

I have on several occasions brought up the problem with the "VAT carrousels" also in the last few years. Last in *Dagens Juridik* (Today's Law) on 2023-11-27, by the article "*Felaktigt debiterad moms föranleder betalningsskyldighet – inte skattebrott – 'karusellen' går vidare*" (Falsely charged VAT causes liability of payment – not tax fraud – the 'carrousel' goes on), where I also refer inter alia to my previous articles in the DJ on this topic. I have also continued to write about the topic, and here I am just giving some conclusions and judgments in general about it.

It has not been helpful that so-called reverse charge has been introduced against the phenomenon of "VAT carrousels" by the legislator for further situations after this was done for investment gold on 1 January, 2000. Furthermore, legal security has in my opinion been set aside in the context, by the investigations from the SKV and *Ekobrottsmyndigheten* (abbreviated EBM – the Economic Crime Authority) nowadays being initiated in the first place by trading being carried out between Sweden and other Member States of the EU regarding a certain sort of goods, above all electronical products. This takes place instead of questions about the concept *omsättning* [transaction – nowadays *leverans* or *tillhandahållande* (supply)] being subject to a thorough judgment, like in the investigations at the time of my lecture at Swedish Law Meeting in 2001.[217] What is shocking to me is that

[217] See Chapter IV., sections 1 and 6.

dubious investigations hit also serious entrepreneurs – the individual is the sufferer due to the legislator's indolence in the present respect.

I regard that the big enterprises on the mobile phone market are usually not attacked either by the SKV or the EBM in the present context. Before the implementation into the VAT act of new rules on the place of supply of services according to directive 2008/8/EC, a seminar was held on 11 June, 2009 in Stockholm by *Institutet för Mervärdesskatterättslig Forskning* (the Institute for Research on VAT law). I brought up that seminar in 2011 on the pages 222 and 349 in Forssén 2011. On that seminar was also mentioned inter alia that sales of computers do not only concern the goods, but each computer is comprised by an OEM-licence whose supply normally shall be treated in itself for VAT purposes – like a supply of services. The same question should be brought up also for operating systems in mobile phones, instead of the authorities disregarding big international actors in "VAT carrousels" regarding mobile phones.

The question about dividing a mobile phone into goods and service respectively should be especially interesting due to 6:7-cases cannot be invoked by the SKV and prosecutors b y a reference to preparatory works from older Swedish VAT law, since the EU law has been implemented in the present respect by the new VAT act of 2023. I consider that this causes not only alterations of the investigations made by the SKV and the EBM, when it is a matter of cases after the VAT reform of 1 July, 2023, but applications for re-trials should be made by those whose enterprises has been declared bankrupt due to verdicts without support in the EU law in the field of VAT or who has even been sentenced to a punishment.

CONCLUDING WORDS

I finish this book by repeating my concluding words from my lecture at Swedish Law Meeting in 2001 (Forssén 2001a), namely the following.

- If the courts continue to allow the SKV and the EBM to carry through cases against the individuals without regarding the need for a thorough analysis of the rules of interest for carrousel trading, it is to the detriment of the development of current law and thereby of the financing of the welfare by a correct value-added taxation. If those making arrangements adapt to verdicts with incorrect convictions, it will be hard for the SKV and the EBM to invoke the rules of the VAT act in new cases. A defence lawyer asks of course then if not the act itself applied also last time.

- By the way, I would also like to add that the legislator's poor measures for almost a quarter of a century shows that there will probably be relevant for me or someone else to come back and make these reflections also in another 25 years. Furthermore, it is nowadays a matter of commercial money laundering being added to the context.

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